TAB 10

Case Name:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto
Between
The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto,
Applicants, and
Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto,
Respondents

[2008] O.J. No. 2265

43 C.B.R. (5th) 269

2008 CarswellOnt 3523

168 A.C.W.S. (3d) 244

47 B.L.R. (4th) 74

2008 CanLII 27820

Court File No. 08-CL-7440

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: May 12-13 and June 3, 2008.
Judgment: June 5, 2008.

(158 paras.)

Insolvency law -- Proposals -- Court approval -- Effect of proposal -- Voting by creditors -- Application by the investors represented by the Pan-Canadian Investors Committee for approval of a Plan under the Companies Creditors Arrangement Act as filed and voted on by noteholders -- Plan was opposed by a number of corporate and individual noteholders on the basis that the court did not have jurisdiction under the CCAA or, if it did, should decline to exercise discretion to approve third party releases -- Application allowed -- Releases sought as part of the plan, including the language exempting fraud, were permissible under the Companies' Creditors Arrangement Act and were fair and reasonable -- Companies' Creditors Arrangement Act.

Application by the investors represented by the Pan-Canadian Investors Committee for third-party structured asset-backed commercial paper for approval of a plan under the Companies Creditors Arrangement Act as filed and voted on by noteholders. Plan was opposed by a number of corporate and individual noteholders, primarily on the basis that the court did not have jurisdiction under the CCAA or, if it did, should decline to exercise discretion to approve third party releases. Between mid-2007 and the filing of the plan, the applicant Committee had diligently pursued the object of restructuring not just the specific trusts that were part of the plan, but faith in a market structure that had been a significant part of the Canadian financial market. Claims for damages included the face value of notes plus interest and additional penalties and damages that might be allowable at law. Information provided by the potential defendants indicated the likelihood of claims over and against parties such that no entity, institution or party involved in the restructuring plan could be assured being spared from likely involvement in lawsuits by way of third party or other claims over.

HELD: The releases sought as part of the plan, including the language exempting fraud, were permissible under the CCAA and were fair and reasonable. The motion to approve the plan of arrangement sought by the application was allowed on the terms of the draft order. The plan was a business proposal and that included the releases. The plan had received overwhelming creditor support. The situation in this case was a unique one in which it was necessary to look at larger issues than those affecting those who felt strongly that personal redress should predominate.

Statutes, Regulations and Rules Cited:

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

Counsel:

B. Zarnett, F. Myers, B. Empey for the Applicants.

For parties and their counsel see Appendix 1.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- This decision follows a sanction hearing in parts in which applicants sought approval of a Plan under the *Companies Creditors Arrangement Act* ("CCAA.") Approval of the Plan as filed and voted on by Noteholders was opposed by a number of corporate and individual Noteholders, principally on the basis that this Court does not have the jurisdiction under the CCAA or if it does should not exercise discretion to approve third party releases.

History of Proceedings

2 On Monday, March 17, 2008, two Orders were granted. The first, an Initial Order on essentially an *ex parte* basis and in a form that has become familiar to insolvency practitioners, granted a stay of proceedings, a limitation of rights and remedies, the appointment of a Monitor and for service and notice of the Order.

3 The second Order made dated March 17, 2008 provided for a meeting of Noteholders and notice thereof, including the sending of what by then had become the Amended Plan of Compromise and Arrangement. Reasons for Decision were issued on April 8, 2008 elaborating on the basis of the Initial Order.

4 No appeal was taken from either of the Orders of March 17, 2008. Indeed, on the return of a motion made on April 23, 2008 by certain Noteholders (the moving parties) to adjourn the meeting then scheduled for and held on April 25, 2008, no challenge was made to the Initial Order.

5 Information was sought and provided on the issue of classification of Noteholders. The thrust of the Motions was and has been the validity of the releases of various parties provided for in the Plan.

6 The cornerstone to the material filed in support of the Initial Order was the affidavit of Purdy Crawford, O.C., Q.C., Chairman of the Applicant Pan Canadian Investors Committee. There has been no challenge to Mr. Crawford's description of the Asset Backed Commercial Paper ("ABCP") market or in general terms the circumstances that led up to the liquidity crisis that occurred in the week of August 13, 2007, or to the formation of the Plan now before the Court.

7 The unchallenged evidence of Mr. Crawford with respect to the nature of the ABCP market and to the development of the Plan is a necessary part of the consideration of the fairness and indeed the jurisdiction, of the Court to approve the form of releases that are said to be integral to the Plan.

8 As will be noted in more detail below, the meeting of Noteholders (however classified) approved the Plan overwhelmingly at the meeting of April 25, 2008.

Background to the Plan

9 Much of the description of the parties and their relationship to the market are by now well known or referred to in the earlier reasons of March 17 or April 4, 2008.

10 The focus here will be on that portion of the background that is necessary for an understanding of and decision on, the issues raised in opposition to the Plan.

11 Not unlike a sporting event that is unfamiliar to some attending without a program, it is difficult to understand the role of various market participants without a description of it. Attached as Appendix 2 are some of the terms that describe the parties, which are from the Glossary that is part of the Information Statement, attached to various of the Monitor's Reports.

12 A list of these entities that fall into various definitional categories reveals that they comprise Canadian chartered banks, Canadian investment houses and foreign banks and financial institutions that may appear in one or more categories of conduits, dealers, liquidity providers, asset providers, sponsors or agents.

13 The following paragraphs from Mr. Crawford's affidavit succinctly summarize the proximate cause of the liquidity crisis, which since August 2007 has frozen the market for ABCP in Canada:

> [7] Before the week of August 13, 2007, there was an operating market in ABCP. Various corporations (referred to below as "Sponsors") arranged for the Conduits to make ABCP available as an investment vehicle bearing interest at rates slightly higher than might be available on government or bank short-term paper.
>
> [8] The ABCP represents debts owing by the trustees of the Conduits. Most of the ABCP is short-term commercial paper (usually 30 to 90 days). The balance of the ABCP is made up of commercial paper that is extendible for up to 364 days and longer-term floating rate notes. The money paid by investors to acquire ABCP was used to purchase a portfolio of financial assets to be held, directly or through subsidiary trusts, by the trustees of the Conduits. Repayment of each series of ABCP is supported by the assets held for that series, which serves as collateral for the payment obligations. ABCP is therefore said to be "asset-backed."
>
> [9] Some of these supporting assets were mid-term, but most were long-term, such as pools of residential mortgages, credit card receivables or credit default swaps (which are sophisticated derivative products). Because of the generally long-term nature of the assets backing the ABCP, the cash flow they generated did not match the cash flow required to repay maturing ABCP. Before mid-August 2007, this timing mismatch was not a problem because many investors did not require repayment of ABCP on maturity; instead they reinvested or "rolled" their existing ABCP at maturity. As well, new ABCP was continually being sold, generating funds to repay maturing ABCP where investors required payment. Many of the trustees of the Conduits also entered into back-up liquidity arrangements with

third-party lenders ("Liquidity Providers") who agreed to provide funds to repay maturing ABCP in certain circumstances.

[10] In the week of August 13, 2007, the ABCP market froze. The crisis was largely triggered by market sentiment, as news spread of significant defaults on U.S. sub-prime mortgages. In large part, investors in Canadian ABCP lost confidence because they did not know what assets or mix of assets backed their ABCP. Because of this lack of transparency, existing holders and potential new investors feared that the assets backing the ABCP might include sub-prime mortgages or other overvalued assets. Investors stopped buying new ABCP, and holders stopped "rolling" their existing ABCP. As ABCP became due, Conduits were unable to fund repayments through new issuances or replacement notes. Trustees of some Conduits made requests for advances under the back-up arrangements that were intended to provide liquidity; however, most Liquidity Providers took the position that the conditions to funding had not been met. With no new investment, no reinvestment, and no liquidity funding available, and with long-term underlying assets whose cash flows did not match maturing short-term ABCP, payments due on the ABCP could not be made -- and no payments have been made since mid-August.

14 Between mid-August 2007 and the filing of the Plan, Mr. Crawford and the Applicant Committee have diligently pursued the object of restructuring not just the specific trusts that are part of this Plan, but faith in a market structure that has been a significant part of the broader Canadian financial market, which in turn is directly linked to global financial markets that are themselves in uncertain times.

15 The previous reasons of March 17, 2008 that approved for filing the Initial Plan, recognized not just the unique circumstances facing conduits and their sponsors, but the entire market in Canada for ABCP and the impact for financial markets generally of the liquidity crisis.

16 Unlike many CCAA situations, when at the time of the first appearance there is no plan in sight, much less negotiated, this rescue package has been the product of painstaking, complicated and difficult negotiations and eventually agreement.

17 The following five paragraphs from Mr. Crawford's affidavit crystallize the problem that developed in August 2007:

[45] Investors who bought ABCP often did not know the particular assets or mix of assets that backed their ABCP. In part, this was because ABCP was often issued and sold before or at about the same time the assets were acquired. In addition, many of the assets are extremely complex and parties to some underlying contracts took the position that the terms were confi-

dential.

[46] Lack of transparency became a significant problem as general market fears about the credit quality of certain types of investment mounted during the summer of 2007. As long as investors were willing to roll their ABCP or buy new ABCP to replace maturing notes, the ABCP market was stable. However, beginning in the first half of 2007, the economy in the United States was shaken by what is referred to as the "sub-prime" lending crisis.

[47] U.S. sub-prime lending had an impact in Canada because ABCP investors became concerned that the assets underlying their ABCP either included U.S. sub-prime mortgages or were overvalued like the U.S. sub-prime mortgages. The lack of transparency into the pools of assets underlying ABCP made it difficult for investors to know if their ABCP investments included exposure to U.S. sub-prime mortgages or other similar products. In the week of August 13, that concern intensified to the point that investors stopped rolling their maturing ABCP, and instead demanded repayment, and new investors could not be found. Certain trustees of the Conduits then tried to draw on their Liquidity Agreements to repay ABCP. Most of the Liquidity Providers did not agree that the conditions for liquidity funding had occurred and did not provide funding, so the ABCP could not be repaid. Deteriorating conditions in the credit market affected all the ABCP, including ABCP backed by traditional assets not linked to sub-prime lending.

[48] Some of the Asset Providers made margin calls under LSS swaps on certain of the Conduits, requiring them to post additional collateral. Since they could not issue new ABCP, roll over existing ABCP or draw on their Liquidity Agreements, those Conduits were not able to post the additional collateral. Had there been no standstill arrangement, as described below, these Asset Providers could have unwound the swaps and ultimately could have liquidated the collateral posted by the Conduits.

[49] Any liquidation of assets under an LSS swap would likely have further depressed the LSS market, creating a domino effect under the remaining LSS swaps by triggering their "mark-to-market" triggers for additional margin calls, ultimately leading to the sale of more assets, at very depressed prices. The standstill arrangement has, to date, through successive extensions, prevented this from occurring, in anticipation of the restructuring.

18 The "Montreal Accord," as it has been called, brought together various industry representatives, Asset Providers and Liquidity Providers who entered into a "Standstill Agreement," which

committed to the framework for restructuring the ABCP such that (a) all outstanding ABCP would be converted into term floating rate notes maturing at the same time as the corresponding underlying assets. This was intended to correct the mismatch between the long-term nature of the financial assets and the short-term nature of the ABCP; and (b) margin provisions under certain swaps would be changed to create renewed stability, reducing the likelihood of margin calls. This contract was intended to reduce the risk that the Conduits would have to post additional collateral for the swap obligations or be subject to having their assets seized and sold, thereby preserving the value of the assets and of the ABCP.

19 The Investors Committee of which Mr. Crawford is the Chair has been at work since September to develop a Plan that could be implemented to restore viability to the notes that have been frozen and restore liquidity so there can be a market for them.

20 Since the Plan itself is not in issue at this hearing (apart from the issue of the releases), it is not necessary to deal with the particulars of the Plan. Suffice to say I am satisfied that as the Information to Noteholders states at p. 69, "The value of the Notes if the Plan does not go forward is highly uncertain."

The Vote

21 A motion was held on April 25, 2008, brought by various corporate and individual Noteholders seeking:

a) changing classification each in particular circumstances from the one vote per Noteholder regime;
b) provision of information of various kinds;
c) adjourning the vote of April 25, 2008 until issues of classification and information were fully dealt with;
d) amending the Plan to delete various parties from release.

22 By endorsement of April 24, 2008 the issue of releases was in effect adjourned for determination later. The vote was not postponed, as I was satisfied that the Monitor would be able to tally the votes in such a way that any issue of classification could be dealt with at this hearing.

23 I was also satisfied that the Applicants and the Monitor had or would make available any and all information that was in existence and pertinent to the issue of voting. Of understandable concern to those identified as the moving parties are the developments outside the Plan affecting Noteholders holding less than $1 million of Notes. Certain dealers, Canaccord and National Bank being the most prominent, agreed in the first case to buy their customers' ABCP and in the second to extend financing assistance.

24 A logical conclusion from these developments outside the Plan is that they were designed (with apparent success) to obtain votes in favour of the Plan from various Noteholders.

25 On a one vote per Noteholder basis, the vote was overwhelmingly in favour of the Plan -- approximately 96%. At a case conference held on April 29, 2008, the Monitor was asked to tabulate votes that would isolate into Class A all those entities in any way associated with the formulation of the Plan, whether or not they were Noteholders or sold or advised on notes, and into Class B all other Noteholders.

26 The results of the vote on the Restructuring Resolution, tabulated on the basis set out in paragraph 30 of the Monitor's 7th Report and using the Class structure referred to in the preceding paragraph, are summarized below:

	NUMBER		DOLLAR VALUE	
CLASS A				
Votes FOR the Restructuring Resolution	1,572	99.4%	$23,898,232,639	100.0%
Votes AGAINST the Restructuring Resolution	9	0.6%	$ 867,666	0.0%
Class B				
Votes FOR the Restructuring Resolution	289	80.5%	$ 5,046,951,989	81.2%
Votes AGAINST the Restructuring Resolution	70	19.5%	$ 1,168,136,123	18.8%

27 I am satisfied that reclassification would not alter the strong majority supporting the Restructuring. The second request made at the case conference on April 29 was that the moving parties provide the Monitor with information that would permit a summary to be compiled of the claims that would have been made or anticipated to be made against so-called third parties, including Conduits and their trustees.

28 The information compiled by the Monitor reveals that the primary defendants are or are anticipated to be banks, including four Canadian chartered banks and dealers (many associated with Canadian banks). In the case of banks, they and their employees may be sued in more than one capacity.

29 The claims against proposed defendants are for the most part claims in tort, and include negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/adviser, acting in conflict of interest and in a few instances, fraud or potential fraud.

30 Again in general terms, the claims for damages include the face value of notes plus interest and additional penalties and damages that may be allowable at law. It is noteworthy that the moving parties assume that they would be able to mitigate their claim for damages by taking advantage of the Plan offer without the need to provide releases.

31 The information provided by the potential defendants indicates the likelihood of claims over against parties such that no entity, institution or party involved in the Restructuring Plan could be assured being spared from likely involvement in lawsuits by way of third party or other claims over.

32 The chart prepared by the Monitor that is Appendix 3 to these Reasons shows graphically the extent of those entities that would be involved in future litigation. [Editor's note: Appendix 3 was not attached to the copy received from the Court and therefore is not included in the judgment.]

Law and Analysis

33 Some of the moving parties in their written and oral submissions assumed that this Court has the power to amend the Plan to allow for the proposed lawsuits, whether in negligence or fraud. The position of the Applicants and supporting parties is that the Plan is to be accepted on the basis that it satisfies the criteria established under the CCAA, or it will be rejected on the basis that it does not.

34 I am satisfied that the Court does not have the power to amend the Plan. The Plan is that of the Applicants and their supporters. They have made it clear that the Plan is a package that allows only for acceptance or rejection by the Court. The Plan has been amended to address the concerns expressed by the Court in the May 16, 2008 endorsement.

35 I am satisfied and understand that if the Plan is rejected by the Court, either on the basis of fairness (i.e., that claims should be allowed to proceed beyond those provided for in the Plan) or lack of jurisdiction to compel compromise of claims, there is no reliable prospect that the Plan would be revised.

36 I do not consider that the Applicants or those supporting them are bluffing or simply trying to bargain for the best position for themselves possible. The position has been consistent throughout and for what I consider to be good and logical reasons. Those parties described as Asset or Liquidity Providers have a first secured interest in the underlying assets of the Trusts. To say that the value of the underlying assets is uncertain is an understatement after the secured interest of Asset Providers is taken into account.

37 When one looks at the Plan in detail, its intent is to benefit ALL Noteholders. Given the contribution to be made by those supporting the Plan, one can understand why they have said forcefully in effect to the Court, 'We have taken this as far as we can, particularly given the revisions. If it is not accepted by the Court as it has been overwhelmingly by Noteholders, we hold no prospect of another Plan coming forward.'

38 I have carefully considered the submissions of all parties with respect to the issue of releases. I recognize that to a certain extent the issues raised chart new territory. I also recognize that there are legitimate principle-based arguments on both sides.

39 As noted in the Reasons of April 8, 2008 and as reflected in the March 17, 2008 Order and May 16 Endorsement, the Plan represents a highly complex unique situation.

40 The vehicles for the Initial Order are corporations acting in the place of trusts that are insolvent. The trusts and the respondent corporations are not directly related except in the sense that they are all participants in the Canadian market for ABCP. They are each what have been referred to as issuer trustees.

41 There are a great number of other participants in the ABCP market in Canada who are themselves intimately connected with the Plan, either as Sponsors, Asset Providers, Liquidity Providers, participating banks or dealers.

42 I am satisfied that what is sought in this Plan is the restructuring of the ABCP market in Canada and not just the insolvent corporations that are issuer trustees.

43 The impetus for this market restructuring is the Investors Committee chaired by Mr. Crawford. It is important to note that all of the members of the Investors Committee, which comprise 17 financial and investment institutions (see Schedule B, attached), are themselves Noteholders with no other involvement. Three of the members of that Committee act as participants in other capacities.

44 The Initial Order, which no party has appealed or sought to vary or set aside, accepts for the purpose of placing before all Noteholders the revised Plan that is currently before the Court.

45 Those parties who now seek to exclude only some of the Release portions of the Plan do not take issue with the legal or practical basis for the goal of the Plan. Indeed, the statement in the Information to Noteholders, which states that

> ... as of August 31, 2007, of the total amount of Canadian ABCP outstanding of approximately $116.8 billion (excluding medium-term and floating rate notes), approximately $83.8 billion was issued by Canadian Schedule I bank-administered Conduits and approximately $33 billion was issued by non-bank administered conduits)[1]

is unchallenged.

46 The further description of the ABCP market is also not questioned:

> ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling". Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption", ABCP would readily be saleable without the need for extraordinary funding measures. However, to protect investors in case of a market disruption, ABCP programs typically have provided liquidity back-up facilities, usually in amounts that correspond to the amount of the ABCP outstanding. In the event that an ABCP issuer is unable to issue new ABCP, it may be able to draw down on the liquidity facility to ensure that proceeds are available to repay any maturing ABCP. As discussed below, there have been important distinctions between different kinds of liquidity agreements as to the nature and scope of drawing conditions which give rise to an obligation of a liquidity provider to fund[2]

47 The activities of the Investors Committee, most of whom are themselves Noteholders without other involvement, have been lauded as innovative, pioneering and essential to the success of

the Plan. In my view, it is entirely inappropriate to classify the vast majority of the Investors Committee, and indeed other participants who were not directly engaged in the sale of Notes, as third parties.

48 Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

49 In these circumstances, it is unduly technical to classify the Issuer Trustees as debtors and the claims of Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

50 The insolvency is of the ABCP market itself, the restructuring is that of the market for such paper -- restructuring that involves the commitment and participation of all parties. The Latin words *sui generis* are used to mean something that is "one off" or "unique." That is certainly the case with this Plan.

51 The Plan, including all of its constituent parts, has been overwhelmingly accepted by Noteholders no matter how they are classified. In the sense of their involvement I do not think it appropriate to label any of the participants as Third Parties. Indeed, as this matter has progressed, additions to the supporter side have included for the proposed releases the members of the Ad Hoc Investors' Committee. The Ad Hoc group had initially opposed the release provisions. The Committee members account for some two billion dollars' worth of Notes.

52 It is more appropriate to consider all participants part of the market for the restructuring of ABCP and therefore not merely third parties to those Noteholders who may wish to sue some or all of them.

53 The benefit of the restructuring is only available to the debtor corporations with the input, contribution and direct assistance of the Applicant Noteholders and those associated with them who similarly contribute. Restructuring of the ABCP market cannot take place without restructuring of the Notes themselves. Restructuring of the Notes cannot take place without the input and capital to the insolvent corporations that replace the trusts.

54 A hearing was held on May 12 and 13 to hear the objections of various Noteholders to approval of the Plan insofar as it provided for comprehensive releases.

55 On May 16, 2008, by way of endorsement the issue of scope of the proposed releases was addressed. The following paragraphs from the endorsement capsulize the adjournment that was granted on the issue of releases:

> [10] I am not satisfied that the release proposed as part of the Plan, which is broad enough to encompass release from fraud, is in the circumstances of this case at this time properly authorized by the CCAA, or is necessarily fair and reasonable. I simply do not have sufficient facts at this time on which to reach a conclusion one way or another.

> [11] I have also reached the conclusion that in the circumstances of this Plan, at this time, it may well be appropriate to approve releases that would circumscribe claims for negligence. I recognize the different legal positions but am satisfied that this Plan will not proceed unless negligence claims are released.

56 The endorsement went on to elaborate on the particular concerns that I had with releases sought by the Applicants that could in effect exonerate fraud. As well, concern was expressed that the Plan might unduly bring hardship to some Noteholders over others.

57 I am satisfied that based on Mr. Crawford's affidavit and the statements commencing at p. 126 of the Information to Noteholders, a compelling case for the need for comprehensive releases, with the exception of certain fraud claims, has been made out.

> The Released Parties have made comprehensive releases a condition of their participation in the Plan or as parties to the Approved Agreements. Each Released Party is making a necessary contribution to the Plan without which the Plan cannot be implemented. The Asset Providers, in particular, have agreed to amend certain of the existing contracts and/or enter into new contracts that, among other things, will restructure the trigger covenants, thereby increasing their risk of loss and decreasing the risk of losses being borne by Noteholders. In addition, the Asset Providers are making further contributions that materially improve the position of Noteholders generally, including through forbearing from making collateral calls since August 15, 2007, participating in the MAV2 Margin Funding Facility at pricing favourable to the Noteholders, accepting additional collateral at par with respect to the Traditional Assets and disclosing confidential information, none of which they are contractually obligated to do. The ABCP Sponsors have also released confidential information, co-operated with the Investors Committee and its advisors in the development of the Plan, released their claims in respect of certain future fees that would accrue to them in respect of the assets and are assisting in the transition of administration services to the Asset Administrator, should the Plan be implemented. The Original Issuer Trustees, the Issuer Trustees, the Existing Note Indenture Trustees and the Rating Agency have assisted in the restructuring process as needed and have co-operated with the Investors Committee in facilitating an essential aspect of the court proceedings required to complete the restructuring of the ABCP Conduits through the replacement of the Original Issuer Trustees where required.
>
> In many instances, a party had a number of relationships in different capacities with numerous trades or programs of an ABCP Conduit, rendering it difficult or impracticable to identify and/or quantify any individual Released Party's contribution. Certain of the Released Parties may have contributed more to the Plan than others. However, in order for the releases to be comprehensive, the Released Parties (including those Released Parties without which no restructuring could occur) require that all Released Parties be included so that one Person who is not

> released by the Noteholders is unable to make a claim-over for contribution from a Released Party and thereby defeat the effectiveness of the releases. Certain entities represented on the Investors Committee have also participated in the Third-Party ABCP market in a variety of capacities other than as Noteholders and, accordingly, are also expected to benefit from these releases.

The evidence is unchallenged.

58 The questions raised by moving parties are (a) does the Court have jurisdiction to approve a Plan under the CCAA that provides for the releases in question?; and if so, (b) is it fair and reasonable that certain identified dealers and others be released?

59 I am also satisfied that those parties and institutions who were involved in the ABCP market directly at issue and those additional parties who have agreed solely to assist in the restructuring have valid and legitimate reasons for seeking such releases. To exempt some Noteholders from release provisions not only leads to the failure of the Plan, it does likely result in many Noteholders having to pursue fraud or negligence claims to obtain any redress, since the value of the assets underlying the Notes may, after first security interests be negligible.

Restructuring under the CCAA

60 This Application has brought into sharp focus the purpose and scope of the CCAA. It has been accepted for the last 15 years that the issue of releases beyond directors of insolvent corporations dates from the decision in *Canadian Airlines Corp. (Re)*,[3] where Paperny J. said:

> [87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

61 The following paragraphs from that decision are reproduced at some length, since, in the submission principally of Mr. Woods, the releases represent an illegal or improper extension of the wording of the CCAA. Mr. Woods takes issue with the reasoning in the *Canadian Airlines* decision, which has been widely referred to in many cases since. Mme Justice Paperny continued:

> [88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly.
>
> ...
>
> [92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception. [Emphasis added.]
>
> [93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.
>
> [94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by

the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia and York Dev. Ltd. v. Royal Trust Co.*[4] at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction -- although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity -- and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.*, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); *Northland Properties Ltd.* v. *Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;

b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd., supra:*

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

62 The liberal interpretation to be given to the CCAA was and has been accepted in Ontario. In *Canadian Red Cross Society (Re)*[5], Blair J. (as he then was) has been referred to with approval in later cases:

[45] It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.*, [1995] O.J. No. 595, supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpreta-

> tion. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[Emphasis added]

63 In a 2006 decision in *Muscletech Research and Development Inc. (Re)*[6], which adopted the *Canadian Airlines* test, Ground J. said:

> [7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> > "the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis."

64 This decision is also said to be beyond the Court's jurisdiction to follow.

65 In a later decision[7] in the same matter, Ground J. said in 2007:

[18] It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

[19] In the case at bar, all of such considerations, in my view must lead to the conclusion that the Plan is fair and reasonable. On the evidence before this court, the Applicants have no assets and no funds with which to fund a distribution to creditors. Without the Contributed Funds there would be no distribution made and no Plan to be sanctioned by this court. Without the Contributed Funds, the only alternative for the Applicants is bankruptcy and it is clear from the evidence before this court that the unsecured creditors would receive nothing in the event of bankruptcy.

[20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.

[21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third

> Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

66 I recognize that in *Muscletech*, as in other cases such as *Vicwest Corp. (Re)*,[8] there has been no direct opposition to the releases in those cases. The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.[9]

67 The moving parties rely on the decision of the Ontario Court of Appeal in *NBD Bank, Canada v. Dofasco Inc.*[10] for the proposition that compromise of claims in negligence against those associated with a debtor corporation within a CCAA context is not permitted.

68 The claim in that case was by NBD as a creditor of Algoma Steel, then under CCAA protection against its parent Dofasco and an officer of both Algoma and Dofasco. The claim was for negligent misrepresentation by which NBD was induced to advance funds to Algoma shortly before the CCAA filing.

69 In the approved CCAA order only the debtor Algoma was released. The Court of Appeal held that the benefit of the release did not extend to officers of Algoma or to the parent corporation Dofasco or its officers.

70 Rosenberg J.A. writing for the Court said:

> [51] Algoma commenced the process under the CCAA on February 18, 1991. The process was a lengthy one and the Plan of Arrangement was approved by Farley J. in April 1992. The Plan had previously been accepted by the overwhelming majority of creditors and others with an interest in Algoma. The Plan of Arrangement included the following term:
>
> > 6.03 Releases
> >
> > From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors. [Emphasis added.]
>
> ...
>
> [54] In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the

> Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L. W. Houlden and C. H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Reference omitted]

71 In my view, there is little factual similarity in *NBD* to the facts now before the Court. In this case, I am not aware of any claims sought to be advanced against directors of Issuer Trustees. The release of Algoma in the *NBD* case did not on its face extend to Dofasco, the third party. Accordingly, I do not find the decision helpful to the issue now before the Court. The moving parties also rely on decisions involving another steel company, Stelco, in support of the proposition that a CCAA Plan cannot be used to compromise claims as between creditors of the debtor company.

72 In *Stelco Inc. (Re)*,[11] Farley J., dealing with classification, said in November 2005:

> [7] The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. See *Pacific Coastal Airlines Ltd. v. Air Canada,* [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25; *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (S.C.J.) at para. 41, appeal dismissed [2001] O.J. No. 2344 (C.A.); *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549 (Q.B.) at para. 13; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Gen. Div.) at para. 24; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 864 (Gen. Div.) at para. 1.

73 The Ontario Court of Appeal dismissed the appeal from that decision.[12] Blair J.A., quoting Paperny J. in *Re Canadian Airlines Corp., supra*, said:

> [23] In *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:
>
> > In summary, the cases establish the following principles applicable to assessing commonality of interest:
> >
> > 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
> > 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
> > 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
> > 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
> > 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
> > 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.
>
> [24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S.T.D.); *Re Woodward's Ltd.* 1993 CanLII 870 (BC S.C.), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154, (*sub nom. Amoco Acquisition Co. v. Savage*) (Alta. C.A.); *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with

approval, in a subsequent *Canadian Airlines* decision: *Re Canadian Airlines Corp.* 2000 ABCA 149 (CanLII), (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 27.

...

[32] First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada* [2001] B.C.J. No. 2580 (B.C.S.C.) at para. 24 (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

[35] Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well

> defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association -- Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra*, at para. 27; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, supra; Sklar-Peppler, supra; Re Woodwards Ltd., supra.*

> [36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Re Canadian Airlines*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

74 In 2007, in *Stelco Inc. (Re)*[13], the Ontario Court of Appeal dismissed a further appeal and held:

> [44] We note that this approach of delaying the resolution of inter-creditor disputes is not inconsistent with the scheme of the *CCAA*. In a ruling made on November 10, 2005, in the proceedings relating to Stelco reported at 15 C.B.R. (5th) 297, Farley J. expressed this point (at para. 7) as follows:
>
> > The *CCAA* is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors *vis-à-vis* the creditors themselves and not directly involving the company.
>
> [45] Thus, we agree with the motion judge's interpretation of s. 6.01(2). The result of this interpretation is that the Plan extinguished the provisions of the Note Indenture respecting the rights and obligations as between Stelco and the Noteholders on the Effective Date. However, the Turnover Provisions, which relate only to the rights and obligations between the Senior Debt Holders and the Noteholders, were intended to continue to operate.

75 I have quoted from the above decisions at length since they support rather than detract from the basic principle that in my view is operative in this instance.

76 I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

77 This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes. The only contract between creditors in this case relates directly to the Notes.

U.S. Law

78 Issue was taken by some counsel for parties opposing the Plan with the comments of Justice Ground in *Muscletech* [2007][14] at paragraph 26, to the effect that third party creditor releases have been recognized under United States bankruptcy law. I accept the comment of Mr. Woods that the U.S. provisions involve a different statute with different language and therefore different considerations.

79 That does not mean that the U.S. law is to be completely ignored. It is instructive to consideration of the release issue under the CCAA to know that there has been a principled debate within judicial circles in the United States on the issue of releases in a bankruptcy proceeding of those who are not themselves directly parties in bankruptcy.

80 A very comprehensive article authored by Joshua M. Silverstein of Emory University School of Law in 2006, 23 Bank. Dev. J. 13, outlines both the line of U.S. decisions that hold that bankruptcy courts may not use their general equitable powers to modify non-bankruptcy rights, and those that hold that non-bankruptcy law is not an absolute bar to the exercise of equitable powers, particularly with respect to third party releases.

81 The author concludes at paragraph 137 that a decision of the Supreme Court of the United States in *United States v. Energy Resources* 495 US545 (1990) offers crucial support for the pro-release position.

82 I do not take any of the statements to referencing U.S. law on this topic as being directly applicable to the case now before this Court, except to say that in resolving a very legitimate debate, it is appropriate to do so in a purposive way but also very much within a case-specific fact-contextual approach, which seems to be supported by the United States Supreme Court decision above.

***Steinberg* Decision**

83 Against the authorities referred to above, those opposed to the Plan releases rely on the June 16, 1993 decision of the Quebec Court of Appeal in *Michaud v. Steinberg Inc.*[15]

84 Mr. Woods for some of the moving parties urges that the decision, which he asserts makes third party releases illegal, is still good law and binding on this Court, since no other Court of Ap-

peal in Canada has directly considered or derogated from the result. (It appears that the decision has not been reported in English, which may explain some of the absence of comment.)

85 The Applicants not surprisingly take an opposite view. Counsel submits that undoubtedly in direct response to the *Steinberg* decision, Parliament added s. 5.1 (see above paragraph [60]) thereby opening the door for the analysis that has followed with the decisions of *Canadian Airlines, Muscletech* and others. In other words, it is urged the caselaw that has developed in the 15 years since *Steinberg* now provide a basis for recognition of third party releases in appropriate circumstances.

86 The *Steinberg* decision dealt directly with releases proposed for acts of directors. The decision appears to have focused on the nature of the contract created and binding between creditors and the company when the plan is approved. I accept that the effect of a Court-approved CCAA Plan is to impose a contract on creditors.

87 Reliance is placed on the decision of Deschamps J.A. (as she then was) at the following paragraphs of the *Steinberg* decision:

> [54] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> [57] If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corresponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.
>
> [59] Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.
>
> [68] The Act offers the respondent a way to arrive at a compromise with its creditors It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

> [74] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

88 If it were necessary to do so, I would accept the position of the Applicants that the history of judicial interpretation of the CCAA at both the appellate and trial levels in Canada, along with the change to s. 5.1, leaves the decision in *Steinberg* applicable to a prior era only.

89 I do not think it necessary to go that far, however. One must remember that *Steinberg* dealt with release of claims against directors. As Mme. Justice Deschamps said at paragraph 54, "[A] plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement."

90 In this case, all the Noteholders have a common claim, namely to maximize the value obtainable under their notes. The anticipated increase in the value of the notes is directly affected by the risk and contribution that will be made by asset and liquidity providers.

91 In my view, depriving all Noteholders from achieving enhanced value of their notes to permit a few to pursue negligence claims that do not affect note value is quite a different set of circumstances from what was before the Court in *Steinberg.* Different in kind and quality.

92 The sponsoring parties have accepted the policy concern that exempting serious claims such as some frauds could not be regarded as fair and reasonable within the context of the spirit and purpose of the CCAA.

93 The sponsoring parties have worked diligently to respond to that concern and have developed an exemption to the release that in my view fairly balances the rights of Noteholders with serious claims, with the risk to the Plan as a whole.

Statutory Interpretation of the CCAA

94 Reference was made during argument by counsel to some of the moving parties to rules of statutory interpretation that would suggest that the Court should not go beyond the plain and ordinary words used in the statute.

95 Various of the authorities referred to above emphasize the remedial nature of the legislation, which leaves to the greatest extent possible the stakeholders of the debtor corporation to decide what Plan will or will not be accepted with the scope of the statute.

96 The nature and extent of judicial interpretation and innovation in insolvency matters has been the subject of recent academic and judicial comment.

97 Most recently, Madam Justice Georgina R. Jackson and Dr. Janis Sarra in "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[16] wrote:

> The paper advances the thesis that in addressing the problem of under-inclusive or skeletal legislation, there is a hierarchy or appropriate order of utilization of judicial tools. First, the courts should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal the authority. We suggest that it is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial tool box. Examination of the statutory language and framework of the legislation may reveal a discretion, and statutory interpretation may determine the extent of the discretion or statutory interpretation may reveal a gap. The common law may permit the gap to be filled; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority to fill the gap. The exercise of inherent jurisdiction may fill the gap; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority revealed by the discovery of inherent jurisdiction. This paper considers these issues at some length.[17]
>
> Second, we suggest that inherent jurisdiction is a misnomer for much of what has occurred in decision making under the CCAA. Appeal court judgments in cases such as *Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, and *Stelco* discussed below, have begun to articulate this view. As part of this observation, we suggest that for the most part, the exercise of the court's authority is frequently, although not exclusively, made on the basis of statutory interpretation.[18]
>
> Third, in the context of commercial law, a driving principle of the courts is that they are on a quest to do what makes sense commercially in the context of what is the fairest and most equitable in the circumstances. The establishment of specialized commercial lists or rosters in jurisdictions such as Ontario, Quebec, British Columbia, Alberta and Saskatchewan are aimed at the same goal, creating an expeditious and efficient forum for the fair resolution of commercial disputes effectively and on a timely basis. Similarly, the standards of review applied by appellate courts, in the context of commercial matters, have regard to the specialized expertise of the court of first instance and demonstrate a commitment to effective processes for the resolution of commercial disputes.[19] [cites omitted]

98 The case now before the Court does not involve confiscation of any rights in Notes themselves; rather the opposite: the opportunity in the business circumstances to maximize the value of the Notes. The authors go on to say at p. 45:

> Iacobucci J., writing for the Court in *Rizzo Shoes,* [1998] 1 S.C.R. 27, reaffirmed Driedger's Modern Principle as the best approach to interpretation of the legislation and stated that "statutory interpretation cannot be founded on the wording of the legislation alone". He considered the history of the legislation and the benefit-conferring nature of the legislation and examined the purpose and object of the Act, the nature of the legislation and the consequences of a contrary finding, which he labeled an absurd result. Iacobucci J. also relied on s. 10 of the *Interpretation Act,* which provides that every Act "shall be deemed to be remedial" and directs that every Act "shall accordingly receive such fair, large and liberal

construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". The Court held:

> 23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.
>
> ...
>
> 40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction.

Thus, in *Rizzo Shoes* we see the Court extending the legislation or making explicit that which was implicit only, as it were, by reference to the Modern Principle, the purpose and object of the Act and the consequences of a contrary result. No reference is made to filling the legislative gap, but rather, the Court is addressing a fact pattern not explicitly contemplated by the legislation and extending the legislation to that fact pattern.

Professor Cote also sees the issue of legislative gaps as part of the discussion of "legislative purpose", which finds expression in the codification of the mischief rule by the various Canadian interpretation statutes. The ability to extend the meaning of the provision finds particular expression when one considers the question posed by him: "can the purposive method make up for lacunae in the legislation". He points out, as does Professor Sullivan, that the courts have not provided a definitive answer, but that for him there are two schools of thought. One draws on the "literal rule" which favours judicial restraint, whereas the other, the "mischief rule", "posits correction of the text to make up for lacunae." To temper the extent of the literal rule, Professor Cote states:

> First, the judge is not legislating by adding what is already implicit. The issue is not the judge's power to actually add terms to a statute, but rather whether a particular concept is sufficiently implicit in the words of an enactment for the judge to allow it to produce effect, and if so, whether there is any principle preventing the judge from making explicit what is already implicit. Parliament is required to be particularly explicit with some types of legislation such as expropriation statutes, for example.

> Second, the Literal Rule suggests that as soon as the courts play any creative role in settling a dispute rather than merely administering the law, they assume the duties of Parliament. But by their very nature, judicial functions have a certain creative component. If the law is silent or unclear, the judge is still required to arrive at a decision. In doing so, he [she] may quite possibly be required to define rules which go beyond the written expression of the statute, but which in no way violate its spirit.
>
> In certain situations, the courts may refuse to correct lacunae in legislation. This is not necessarily because of a narrow definition of their role, but rather because general principles of interpretation require the judge, in some areas, to insist on explicit indications of legislative intent. It is common, for example, for judges to refuse to fill in the gaps in a tax statute, a retroactive law, or legislation that severely affects property rights. [Emphasis added. Footnotes omitted.][20]

99 The modern purposive approach is now well established in interpreting CCAA provisions, as the authors note. The phrase more than any other with which issue is taken by the moving parties is that of Paperny J. that s. 5 of the CCAA does not preclude releases other than those specified in s. 5.1.

100 In this analysis, I adopt the purposive language of the authors at pp. 55-56:

> It may be that with the increased codification in statutes, courts have lost sight of their general jurisdiction where there is a gap in the statutory language. Where there is a highly codified statute, courts may conclude that there is less room to undertake gap-filling. This is accurate insofar as the Parliament or Legislative Assembly has limited or directed the court's general jurisdiction; there is less likely to be a gap to fill. However, as the Ontario Court of Appeal observed in the above quote, the court has unlimited jurisdiction to decide what is necessary to do justice between the parties except where legislators have provided specifically to the contrary.
>
> The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights-based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations in the context of a dynamic, forward moving process that is seeking an outcome to the debtor's financial distress.

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Quebec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

101 I accept the hierarchy suggested by the authors, namely statutory interpretation (which in the case of the CCAA has inherent in it "gap filling"), judicial discretion and thirdly inherent jurisdiction.

102 It simply does not make either commercial, business or practical common sense to say a CCAA plan must inevitably fail because one creditor cannot sue another for a claim that is over and above entitlement in the security that is the subject of the restructuring, and which becomes significantly greater than the value of the security (in this case the Notes) that would be available in bankruptcy. In CCAA situations, factual context is everything. Here, if the moving parties are correct, some creditors would recover much more than others on their security.

103 There may well be many situations in which compromise of some tort claims as between creditors is not directly related to success of the Plan and therefore should not be released; that is not the case here.

104 I have been satisfied the Plan cannot succeed without the compromise. In my view, given the purpose of the statute and the fact that this Plan is accepted by all appearing parties in principle, it is a reasonable gap-filling function to compromise certain claims necessary to complete restructuring by the parties. Those contributing to the Plan are directly related to the value of the notes themselves within the Plan.

105 I adopt the authors' conclusion at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a

> number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger' s principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretive function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

Fraud Claims

106 I have concluded that claims of fraud do fall into a category distinct from negligence. The concern expressed by the Court in the endorsement of May 16, 2008 resulted in an amendment to the Plan by those supporting it. The Applicants amended the release provisions of the Plan to in effect "carve out" some fraud claims.

107 The concern expressed by those parties opposed to the Plan -- that the fraud exemption from the release was not sufficiently broad -- resulted in a further hearing on the issue on June 3, 2008. Those opposed continue to object to the amended release provisions.

108 The definition of fraud in a corporate context in the common law of Canada starts with the proposition that it must be made (1) knowingly; (2) without belief in its truth; (3) recklessly, careless whether it be true or false.[21]. It is my understanding that while expressed somewhat differently, the above-noted ingredients form the basis of fraud claims in the civil law of Quebec, although there are differences.

109 The more serious nature of a civil fraud allegation, as opposed to a negligence allegation, has an effect on the degree of probability required for the plaintiff to succeed. In *Continental Insurance Co. v. Dalton Cartage Co.*[22], Laskin J. wrote:

> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in Bater v. Bater, *supra*, at p. 459, as follows:
>
> > It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be de-

> grees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

110 The distinction between civil fraud and negligence was further explained by Finch J.A. in *Kripps v. Touche Ross & Co.*:[23]

> [101] Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many cases however, as the authorities point out, it would be reasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving. This is such a case.
>
> [102] The distinction between cases of negligent and fraudulent misrepresentation is that proof of a dishonest or fraudulent frame of mind on the defendant's part is required in actions of deceit. That, too, is an issue of fact and one which may also, of necessity, fall to be resolved by way of inference. There is, however, nothing in that which touches on the issue of the plaintiff's reliance. I can see no reason why the burden of proving reliance by the plaintiff, and the drawing of inferences with respect to the plaintiff's state of mind, should be any different in cases of negligent misrepresentation than it is in cases of fraud.

111 In *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*[24], Winkler J. (as he then was) reviewed the leading common law cases:

> [477] Fraud is the most serious civil tort which can be alleged, and must be both strictly pleaded and strictly proved. The main distinction be-

tween the elements of fraudulent misrepresentation and negligent misrepresentation has been touched upon above, namely the dishonest state of mind of the representor. The state of mind was described in the seminal case *Derry v. Peek (1889)*, 14 App. Cas. 337 (H.L.) which held fraud is proved where it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false. The intention to deceive, or reckless disregard for the truth is critical.

[478] Where fraudulent misrepresentation is alleged against a corporation, the intention to deceive must still be strictly proved. Further, in order to attach liability to a corporation for fraud, the fraudulent intent must have been held by an individual person who is either a directing mind of the corporation, or who is acting in the course of their employment through the principle of *respondeat superior* or vicarious liability. In *B.G. Checo v. B.C. Hydro* (1990), 4 C.C.L.T. (2d) 161 at 223 (Aff'd, [1993] 1 S.C.R. 12), Hinkson J.A., writing for the majority, traced the jurisprudence on corporate responsibility in the context of a claim in fraudulent misrepresentation at 222-223:

> Subsequently, in *H.L. Bolton (Engineering) Co. v. T.J Graham & Sons Ltd.*, [1957] 1 Q.B. 159, [1956] 3 All E.R. 624 (C.A.), Denning L.J. said at p. 172:
>
> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear by Lord Haldane's speech in *Leonard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*
>
> It is apparent that the law in Canada dealing with the responsibility of a corporation for the tort of deceit is still evolving. In view of the English decisions and the decision of the Supreme Court of Canada in the *Dredging* case, [1985] 1 S.C.R. 662, supra, it would appear

> that the concept of vicarious responsibility based upon *respondeat superior* is too narrow a basis to determine the liability of a corporation. The structure and operations of corporations are becoming more complex. However, the fundamental proposition that the plaintiff must establish an intention to deceive on the part of the defendant still applies.
>
> See also: *Standard Investments Ltd. et al. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (C.A.) (Leave to appeal to Supreme Court of Canada refused Feb. 3, 1986, [1986] S.C.C.A. No. 29).

[479] In the case of fraudulent misrepresentation, there are circumstances where silence may attract liability. If a material fact which was true at the time a contract was executed becomes false while the contract remains executory, or if a statement believed to be true at the time it was made is discovered to be false, then the representor has a duty to disclose the change in circumstances. The failure to do so may amount to a fraudulent misrepresentation. See: P. Perell, "False Statements" (1996), 18 Advocates' Quarterly 232 at 242.

[480] In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 54 D.L.R. (4th) 43 (B.C.C.A.) (Aff'd on other grounds [1991] 3 S.C.R. 3), the British Columbia Court of Appeal overturned the trial judge's finding of fraud through non-disclosure on the basis that the defendant did not remain silent as to the changed fact but was simply slow to respond to the change and could only be criticized for its "communications arrangements." In so doing, the court adopted the approach to fraud through silence established by the House of Lords in *Brownlie v. Campbell*, (1880), 5 App. Cas. 925 at 950. Esson J.A. stated at 67-68:

> There is much emphasis in the plaintiffs submissions and in the reasons of the trial judge on the circumstance that this is not a case of fraud "of the usual kind" involving positive representations of fact but is, rather, one concerned only with non-disclosure by a party which has become aware of an altered set of circumstances. It is, I think, potentially misleading to regard these as different categories of fraud rather than as a different factual basis for a finding of fraud. Where the fraud is alleged to arise from failure to disclose, the plaintiff remains subject to all of the stringent requirements which the law imposes upon those who allege fraud. The authority relied upon

> by the trial judge was the speech of Lord Blackburn in *Brownlie v. Campbell*. ... The trial judge quoted this excerpt:
>
> > ... when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time at which it was made, but which he has not now retracted when he has become aware that it can be no long honestly perservered [sic] in.
>
> The relationship between the two bases for fraud appears clearly enough if one reads that passage in the context of the passage which immediately precedes it:
>
> > I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; in plain English, and Scotch also, it is a downright lie told to induce the other party to act upon it, and it should of course be treated as such. I further agree in this: that when a statement or representation ...

[481] Fraud through "active non-disclosure" was considered by the Court of Appeal for Ontario in *Abel v. McDonald*, [1964] 2 O.R. 256 (C.A.) in which the court held at 259: "By active non-disclosure is meant that the defendants, with knowledge that the damage to the premises had occurred actively prevented as far as they could that knowledge from coming to the notice of the appellants."

112 I agree with the comment of Winkler J. in *Toronto Dominion Bank v. Leigh Instruments, supra,* that the law in Canada for corporate responsibility for the tort of deceit is evolving. Hence the concern expressed by counsel for Asset Providers that a finding as a result of fraud (an intentional tort) could give rise to claims under the *Negligence Act* to extend to all who may be said to have contributed to the "fault."[25]

113 I understand the reasoning of the Plan supporters for drawing the fraud "carve out" in a narrow fashion. It is to avoid the potential cascade of litigation that they fear would result if a broader "carve out" were to be allowed. Those opposed urged that quite simply to allow the restrictive fraud claim only would be to deprive them of a right at law.

114 The fraud issue was put in simplistic terms during the oral argument on June 3, 2008. Those parties who oppose the restrictions in the amended Release to deal with only some claims of fraud, argue that the amendments are merely cosmetic and are meaningless and would operate to insulate many individuals and corporations who may have committed fraud.

115 Mr. Woods, whose clients include some corporations resident in Quebec, submitted that the "carve out," as it has been called, falls short of what would be allowable under the civil law of Quebec as claims of fraud. In addition, he pointed out that under Quebec law, security for costs on a full indemnity basis would not be permitted.

116 I accept the submission of Mr. Woods that while there is similarity, there is no precise equivalence between the civil law of Quebec and the common law of Ontario and other provinces as applied to fraud.

117 Indeed, counsel for other opposing parties complain that the fraud carve out is unduly restrictive of claims of fraud that lie at common law, which their clients should be permitted in fairness to pursue.

118 The particular carve out concern, which is applicable to both the civil and common law jurisdictions, would limit causes of actions to authorized representatives of ABCP dealers. "ABCP dealers" is a defined term within the Plan. Those actions would proceed in the home province of the plaintiffs.

119 The thrust of the Plan opponents' arguments is that as drafted, the permitted fraud claims would preclude recovery in circumstances where senior bank officers who had the requisite fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false.

120 That may well be the result of the effect of the Releases as drafted. Assuming that to be the case, I am not satisfied that the Plan should be rejected on the basis that the release covenant for fraud is not as broad as it could be.

121 The Applicants and supporters have responded to the Court's concern that as initially drafted, the initial release provisions would have compromised all fraud claims. I was aware when the further request for release consideration was made that any "carve out" would unlikely be sufficiently broad to include any possibility of all deceit or fraud claims being made in the future.

122 The particular concern was to allow for those claims that might arise from knowingly false representations being made directly to Noteholders, who relied on the fraudulent misrepresentation and suffered damage as a result.

123 The Release as drafted accomplishes that purpose. It does not go as far as to permit all possible fraud claims. I accept the position of the Applicants and supporters that as drafted, the Releases are in the circumstances of this Plan fair and reasonable. I reach this conclusion for the following reasons:

1. I am satisfied that the Applicants and supporters will not bring forward a Plan that is as broad in permitting fraud claims as those opposing urge should be permitted.
2. None of the Plan opponents have brought forward particulars of claims against persons or parties that would fall outside those envisaged within

the carve out. Without at least some particulars, expanded fraud claims can only be regarded as hypothetical or speculative.

3. I understand and accept the position of the Plan supporters that to broaden fraud claim relief does risk extensive complex litigation, the prevention of which is at the heart of the Plan. The likelihood of expanded claims against many parties is most likely if the fraud issue were open-ended.
4. Those who wish to claim fraud within the Plan can do so in addition to the remedies on the Notes that are available to them and to all other Noteholders. In other words, those Noteholders claiming fraud also obtain the other Plan benefits.

124 Mr. Sternberg on behalf of Hy Bloom did refer to the claims of his clients particularized in the Claim commenced in the Superior Court of Quebec. The Claim particularizes statements attributed to various National Bank representatives both before and after the August 2007 freeze of the Notes. Mr. Sternberg asked rhetorically how could the Court countenance the compromise of what in the future might be found to be fraud perpetrated at the highest levels of the Canadian and foreign banks.

125 The response to Mr. Sternberg and others is that for the moment, what is at issue is a liquidity crisis that affects the ABCP market in Canada. The Applicants and supporters have brought forward a Plan to alleviate and attempt to fix that liquidity crisis.

126 The Plan does in my view represent a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud.

127 I leave to others the questions of all the underlying causes of the liquidity crisis that prompted the Note freeze in August 2007. If by some chance there is an organized fraudulent scheme, I leave it to others to deal with. At the moment, the Plan as proposed represents the best contract for recovery for the vast majority of Noteholders and hopefully restoration of the ABCP market in Canada.

Hardship

128 As to the hardship issue, the Court was apprised in the course of submissions that the Plan was said by some to act unfairly in respect of certain Noteholders, in particular those who hold Ironstone Series B notes. It was submitted that unlike other trusts for which underlying assets will be pooled to spread risk, the underlying assets of Ironstone Trust are being "siloed" and will bear the same risk as they currently bear.

129 Unfortunately, this will be the case but the result is not due to any particular directive purpose of the Plan itself, but rather because the assets that underlie the trust have been determined to be totally "Ineligible Assets," which apparently have exposure to the U.S. residential sub-prime mortgage market.

130 I have concluded that within the context of the Plan as a whole it does not unfairly treat the Ironstone Noteholders (although their replacement notes may not be worth as much as others'.) The Ironstone Noteholders have still voted by a wide majority in favour of the Plan.

131 Since the Initial Order of March 17, there have been a number of developments (settlements) by parties outside the Plan itself of which the Court was not fully apprised until recently,

which were intended to address the issue of hardship to certain investors. These efforts are summarized in paragraphs 10 to 33 of the Eighth Report of the Monitor.

132 I have reviewed the efforts made by various parties supporting the Plan to deal with hardship issues. I am satisfied that they represent a fair and reasonable attempt to deal with issues that result in differential impact among Noteholders. The pleas of certain Noteholders to have their individual concerns addressed have through the Monitor been passed on to those necessary for a response.

133 Counsel for one affected Noteholder, the Avrith family, which opposes the Plan, drew the Court's attention to their particular plight. In response, counsel for National Bank noted the steps it had taken to provide at least some hardship redress.

134 No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

135 The information available satisfies me that business judgment by a number of supporting parties has been applied to deal with a number of inequities. The Plan cannot provide complete redress to all Noteholders. The parties have addressed the concerns raised. In my view, the Court can ask nothing more.

Conclusion

136 I noted in the endorsement of May 16, 2008 my acceptance and understanding of why the Plan Applicants and sponsors required comprehensive releases of negligence. I was and am satisfied that there would be the third and fourth claims they anticipated if the Plan fails. If negligence claims were not released, any Noteholder who believed that there was value to a tort claim would be entitled to pursue the same. There is no way to anticipate the impact on those who support the Plan. As a result, I accept the Applicants' position that the Plan would be withdrawn if this were to occur.

137 The CCAA has now been accepted as a statue that allows for judicial flexibility to enable business people by the exercise of majority vote to restructure insolvent entities.

138 It would defeat the purpose of the statute if a single creditor could hold a restructuring Plan hostage by insisting on the ability to sue another creditor whose participation in and contribution to the restructuring was essential to its success. Tyranny by a minority to defeat an otherwise fair and reasonable plan is contrary to the spirit of the CCAA.

139 One can only speculate on what response might be made by any one of the significant corporations that are moving parties and now oppose confirmation of this Plan, if any of those entities were undergoing restructuring and had their Plans in jeopardy because a single creditor sought to sue a financing creditor, which required a release as part of its participation.

140 There are a variety of underlying causes for the liquidity crisis that has given rise to this restructuring.

141 The following quotation from the May 23, 2008 issue of The Economist magazine succinctly describes the problem:

> If the crisis were simply about the creditworthiness of underlying assets, that question would be simpler to answer. The problem has been as much about con-

> fidence as about money. Modern financial systems contain a mass of amplifiers that multiply the impact of both losses and gains, creating huge uncertainty.

142 The above quote is not directly about the ABCP market in Canada, but about the potential crisis to the worldwide banking system at this time. In my view it is applicable to the ABCP situation at this time. Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal.

143 I have as a result addressed a number of questions in order to be satisfied that in the specific context of this case, a Plan that includes third party releases is justified within CCAA jurisdiction. I have concluded that all of the following questions can be answered in the affirmative.

1. Are the parties to be released necessary and essential to the restructuring of the debtor?
2. Are the claims to be released rationally related to the purpose of the Plan and necessary for it?
3. Can the Court be satisfied that without the releases the Plan cannot succeed?
4. Are the parties who will have claims against them released contributing in a tangible and realistic way to the Plan?
5. Is the Plan one that will benefit not only the debtor but creditor Noteholders generally?
6. Have the voting creditors approved the Plan with knowledge of the nature and effect of the releases?
7. Is the Court satisfied that in the circumstances the releases are fair and reasonable in the sense that they are not overly broad and not offensive to public policy?

144 I have concluded on the facts of this Application that the releases sought as part of the Plan, including the language exempting fraud, to be permissible under the CCAA and are fair and reasonable.

145 The motion to approve the Plan of Arrangement sought by the Application is hereby granted on the terms of the draft Order filed and signed.

146 One of the unfortunate aspects of CCAA real time litigation is that it produces a tension between well-represented parties who would not be present if time were not of the essence.

147 Counsel for some of those opposing the Plan complain that they were not consulted by Plan supporters to "negotiate" the release terms. On the other side, Plan supporters note that with the exception of general assertions in the action on behalf of Hy Bloom (who claims negligence as well), there is no articulation by those opposing of against whom claims would be made and the particulars of those claims.

148 It was submitted on behalf of one Plan opponent that the limitation provisions are unduly restrictive and should extend to at least two years from the date a potential plaintiff becomes aware of an Expected Claim.

149 The open-ended claim potential is rejected by the Plan supporters on the basis that what is needed now, since Notes have been frozen for almost one year, is certainty of claims and that those who allege fraud surely have had plenty of opportunity to know the basis of their evidence.

150 Other opponents seek to continue a negotiation with Plan supporters to achieve a resolution with respect to releases satisfactory to each opponent.

151 I recognize that the time for negotiation has been short. The opponents' main opposition to the Plan has been the elimination of negligence claims and the Court has been advised that an appeal on that issue will proceed.

152 I can appreciate the desire for opponents to negotiate for any advantage possible. I can also understand the limitation on the patience of the variety of parties who are Plan supporters, to get on with the Plan or abandon it.

153 I am satisfied that the Plan supporters have listened to some of the concerns of the opponents and have incorporated those concerns to the extent they are willing in the revised release form. I agreed that it is time to move on.

154 I wish to thank all counsel for their cooperation and assistance. There would be no Plan except for the sustained and significant effort of Mr. Crawford and the committee he chairs.

155 This is indeed hopefully a unique situation in which it is necessary to look at larger issues than those affecting those who feel strongly that personal redress should predominate.

156 If I am correct, the CCAA is indeed a vehicle that can adequately balance the issues of all those concerned.

157 The Plan is a business proposal and that includes the releases. The Plan has received overwhelming creditor support. I have concluded that the releases that are part of the Plan are fair and reasonable in all the circumstances.

158 The form of Order that was circulated to the Service List for comment will issue as signed with the release of this decision.

C.L. CAMPBELL J.

* * * * *

SCHEDULE "A"

CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

* * * * *

SCHEDULE "B"

APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

* * * * *

APPENDIX 1
PARTIES AND THEIR COUNSEL

Counsel	Party Represented
Benjamin Zarnett Fred Myers Brian Empey	Applicants: Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper
Donald Milner Graham Phoenix Xeno C. Martis David Lemieux Robert Girard	Respondents: Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp.
Aubrey Kauffman Stuart Brotman	Respondents: 4446372 Canada Inc. and 6932819 Canada Inc., as Issuer Trustees
Craig J. Hill Sam P. Rappos Marc Duchesne	Monitor: Ernst & Young Inc.
Jeffrey Carhart Joseph Marin Jay Hoffman	Ad Hoc Committee and PricewaterhouseCoopers Inc., in its capacity as Financial Advisor
Arthur O. Jacques Thomas McRae	Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
Henry Juroviesky Eliezer Karp	Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
Jay A. Swartz Nathasha MacParland	Administrator of Aria Trust, Encore Trust, Newshore Canadian Trust and Symphony Trust
James A. Woods Mathieu	Air Transat A.T. Inc., Transat Tours Canada Inc., The

Giguere Sébastien Richemont Marie-Anne Paquette	Jean Coutu Group (PJC) Inc., Aéroports de Montreal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., L'Agence Métropolitaine de Transport (AMT), Domtar Inc., Domtar Pulp and Paper Products Inc., Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Services Hypothécaires La Patremoniale Inc. and Jazz Air LLP
Peter F.C. Howard Samaneh Hosseini William Scott	Asset Providers/Liquidity Suppliers: Bank of America, N.A.; Citibank, N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services Inc.; Swiss Re Financial Products Corporation; and UBS AG
George S. Glezos Lisa C. Munro	Becmar Investments Ltd, Dadrex Holdings Inc. and JTI-Macdonald Corp.
Jeremy E. Dacks	Blackrock Financial Management, Inc.
Virginie Gauthier Mario Forte	Caisse de Dépôt et Placement du Québec
Kevin P. McElcheran Malcolm M. Mercer Geoff R. Hall	Canadian Banks: Bank of Montreal, Canadian Imperial Bank of Commerce, Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion Bank
Harvey Chaiton	Canadian Imperial Bank of Commerce
S. Richard Orzy Jeffrey S. Leon	CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Cana-

	da, as Indenture Trustees
Margaret L. Waddell	Cinar Corporation, Cinar Productions (2004) and Cookie Jar Animation Inc., ADR Capital Inc. and GMAC Leaseco Corporation
Robin B. Schwill James Rumball	Coventree Capital Inc. and Nereus Financial Inc.
J. Thomas Curry Usman M. Sheikh	Coventree Capital Inc.
Kenneth Kraft	DBRS Limited
David E. Baird, Q.C. Edmond Lamek Ian D. Collins	Desjardins Group
Allan Sternberg Sam R. Sasso	Hy Bloom Inc. and Cardacian Mortgages Services Inc.
Catherine Francis Phillip Bevans	Individual Noteholder
Howard Shapray, Q.C. Stephen Fitterman	Ivanhoe Mines Inc.
Kenneth T. Rosenberg Lily Harmer Massimo Starnino	Jura Energy Corporation, Redcorp Ventures Ltd. and as agent to Ivanhoe Mines Inc.
Joel Vale	I. Mucher Family

John Salmas	Natcan Trust Company, as Note Indenture Trustee
John B. Laskin Scott Bomhof	National Bank Financial Inc. and National Bank of Canada
Robin D. Walker Clifton Prophet Junior Sirivar	NAV Canada
Timothy Pinos	Northern Orion Canada Pampas Ltd.
Murray E. Stieber	Paquette & Associés Huissiers en Justice, s.e.n.c. and André Perron
Susan Grundy	Public Sector Pension Investment Board
Dan Dowdall	Royal Bank of Canada
Thomas N.T. Sutton	Securitus Capital Corp.
Daniel V. MacDonald Andrew Kent	The Bank of Nova Scotia
James H. Grout	The Goldfarb Corporation
Tamara Brooks	The Investment Dealers Association of Canada and the Investment Industry Regulatory Organization of Canada

Sam R. Sasso	Travelers Transportation Services Inc.
Scott A. Turner	WebTech Wireless Inc. and Wynn Capital Corporation Inc.
Peter T. Linder, Q.C. Edward H. Halt, Q.C.	West Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., UTS Energy Corporation, Nexstar Energy Ltd., Sabre Tooth Energy Ltd., Sabre Energy Ltd., Alliance Pipeline Ltd., Standard Energy Inc. and Power Play Resources Limited
Steven L. Graff	Woods LLP
Gordon Capern Megan E. Shortreed	Xceed Mortgage Corporation

* * * * *

APPENDIX 2

TERMS

"ABCP Conduits" means, collectively, the trusts that are subject to the Plan, namely the following: Apollo Trust, Apsley Trust, Aria Trust, Aurora Trust, Comet Trust, Encore Trust, Gemini Trust, Ironstone Trust, MMAI-I Trust, Newshore Canadian Trust, Opus Trust, Planet Trust, Rocket Trust, SAT, Selkirk Funding Trust, Silverstone Trust, SIT III, Slate Trust, Symphony Trust and Whitehall Trust, and their respective satellite trusts, where applicable.

"ABCP Sponsors" means, collectively, the Sponsors of the ABCP Conduits (and, where applicable, such Sponsors' affiliates) that have issued the Affected ABCP, namely, Coventree Capital Inc., Quanto Financial Corporation, National Bank Financial Inc., Nereus Financial Inc., Newshore Financial Services Inc. and Securitus Capital Corp.

"Ad Hoc Committee" means those Noteholders, represented by the law firm of Miller Thomson LLP, who sought funding from the Investors Committee to retain Miller Thomson and PricewaterhouseCoopers Inc., to assist it in starting to form a view on the restructuring. The Investors Committee agreed to fund up to $1 million in fees and facilitated the entering into of confidentiality agreements among Miller Thomson, PwC, the Asset Providers, the Sponsors, JPMorgan and E&Y so that Miller Thomson and PwC could carry out their mandate. Chairman Crawford met with representatives of Miller Thomson and PwC, and the Committee's advisors answered questions and discussed the proposed restructuring with them.

"Applicants" means, collectively, the 17 member institutions of the Investors Committee in their respective capacities as Noteholders.

"CCAA Parties" means, collectively, the Issuer Trustees in respect of the Affected ABCP, namely 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp. and the ABCP Conduits.

"Conduit" means a special purpose entity, typically in the form of a trust, used in an ABCP program that purchases assets and funds these purchases either through term securitizations or through the issuance of commercial paper.

"Issuer Trustees" means, collectively, the issuer trustees of each of the ABCP Conduits, namely, 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp. and Metcalfe & Mansfield Alternative Investments XII Corp. and **"Issuer Trustee"** means any one of them. The Issuer Trustees, together with the ABCP Conduits, are sometimes referred to, collectively, as the **"CCAA Parties"**.

"Liquidity Provider" means like asset providers, dealer banks, commercial banks and other entities often the same as the asset providers who provide liquidity to ABCP, or a party that agreed to provide liquidity funding upon the terms and subject to the conditions of a liquidity agreement in respect of an ABCP program. The Liquidity Providers in respect of the Affected ABCP include, without limitation: ABN AMRO Bank N.V., Canada Branch; Bank of America N.A., Canada Branch; Canadian Imperial Bank of Commerce; Citibank Canada; Citibank, N.A.; Danske Bank A/S; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA National Association; Merrill Lynch Capital Services, Inc.; Merrill Lynch International; Royal Bank of Canada; Swiss Re Financial Products Corporation; The Bank of Nova Scotia; The Royal Bank of Scotland plc and UBS AG.

"Noteholder" means a holder of Affected ABCP.

"Sponsors" means, generally, the entities that initiate the establishment of an ABCP program in respect of a Conduit. Sponsors are effectively management companies for the ABCP program that arrange deals with Asset Providers and capture the excess spread on these transactions. The Sponsor approves the terms of an ABCP program and serves as administrative agent and/or financial services (or securitization) agent for the ABCP program directly or through its affiliates.

"Traditional Assets" means those assets held by the ABCP Conduits in non-synthetic securitization structures such as trade receivables, credit card receivables, RMBS and CMBS and investments in CDOs entered into by third-parties.

* * * * *

APPENDIX 3

[Editor's note: Appendix 3 was not attached to the copy received from the Court and therefore is not included in the judgment.]

cp/e/ln/qlkxl/qlklb/qlbdp/qltxp/qlesm/qlbrl/qlcas/qlhcs/qlisl

1 Information Statement, p. 18.

2 Information Statement, p. 18.

3 *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334.

4 *Olympia and York Dev. Ltd. v. Royal Trust Co* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

5 *Canadian Red Cross Society (Re),* [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932.

6 *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16, 2006 CarswellOnt 6230.

7 *Muscletech Research and Development Inc. (Re)*, [2007] O.J. No. 695, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029.

8 *Vicwest Corp. (Re)*, [2003] O.J. No. 3772 per Pepall J. at paragraph 23.

9 The Court was provided with copies of 12 Plan approvals under the CCAA in which releases were granted. In various instances these included officers, directors and creditors. The moving parties note that no objection to the nature or extent of release was taken.

10 *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. No. 4749, 46 O.R (3d) 514, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391.

11 *Stelco Inc. (Re)*, [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623, 2005 CarswellOnt 6483.

12 *Stelco Inc. (Re)*, [2005] O.J. No. 4883.

13 *Stelco Inc. (Re)*, [2007] O.J. No. 2533, 2007 ONCA 483, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 158 A.C.W.S. (3d) 877, 2007 CarswellOnt 4108.

14 *Muscletech Research and Development Inc. (Re)*, [2007] O.J. No. 695, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029.

15 *Michaud v. Steinberg Inc.* 1993 CanLII 3991 (Q.C. C.A.).

16 Annual Review of Insolvency Law, 2007 Thomson, Carswell. Janis Sarra edition.

17 Ibid, p. 42.

18 Ibid, pp. 44-45.

19 Ibid, p. 45.

20 Ibid pp. 49-51.

21 *Derry v. Peek*, (1889) 14 A.C. App. Cas., 337 (H.L.).

22 Continental Insurance Co. v. Dalton Cartage Co., [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559.

23 *Kripps v. Touche Ross & Co.*, [1997] 6 W.W.R. 421, 89 B.C.A.C. 288.

24 *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 40 B.L.R. (2d) 1, 63 O.T.C. 1. (S.C.J.).

25 See *Ecolab Ltd. v. Greenpeace Services Ltd.*, [1996] O.J. No. 3528 per Ground J.

TAB 11

Case Name:

Canwest Publishing Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

[2010] O.J. No. 943

2010 ONSC 1328

65 C.B.R. (5th) 152

2010 CarswellOnt 1344

Court File No. CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 5, 2010.

(28 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Appointment -- When required or justified -- Remuneration -- Motion by proposed representatives for appointment as representatives of former salaried employees and retirees of applicant, appointment of law firm and order applicant pay fees allowed -- Applicant granted protection under CCAA without requirement to pay employee and retirement benefit plans -- Former salaried employees and retirees had little means of pursuing claim without representation and could not afford counsel -- While applicant's Support Agreement did not permit payment of legal fees, agreement could not oust jurisdiction of court -- Staged payments starting at $25,000 ordered, to be paid prospectively and not for investigations of or claims against directors.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Motion by proposed representatives for appointment

as representatives of former salaried employees and retirees of applicant, appointment of law firm and order applicant pay fees allowed -- Applicant granted protection under CCAA without requirement to pay employee and retirement benefit plans -- Former salaried employees and retirees had little means of pursuing claim without representation and could not afford counsel -- While applicant's Support Agreement did not permit payment of legal fees, agreement could not oust jurisdiction of court -- Staged payments starting at $25,000 ordered, to be paid prospectively and not for investigations of or claims against directors.

Statutes, Regulations and Rules Cited:

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

Income Tax Act, R.S.O. 1990, c. I.2,

Counsel:

Lyndon Barnes and Alex Cobb for the Canwest LP Entities.

Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Hilary Clarke for the Bank of Nova Scotia,
Administrative Agent for the Senior Secured Lenders'
Syndicate.

Janice Payne and Thomas McRae for the Canwest Salaried Employees and Retirees (CSER) Group.

M.A. Church for the Communications, Energy and Paperworkers' Union.

Anthony F. Dale for CAW-Canada.

Deborah McPhail for the Financial Services Commission of Ontario.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried employees or retirees including beneficiaries and surviving spouses ("the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

2 On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

3 On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

4 There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

5 Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately $14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

6 Since January 8, 2010, the LP Entities have being pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;
(b) current services and special payments in respect of the active registered pension plan; and
(c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

7 The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders,

AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

9 No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

10 Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

> "The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee."

11 The LP Administrative Agent does not consent to the funding request at this time.

12 On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

13 Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?
(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?
(3) If so, should the request for funding be granted?

Positions of Parties

15 In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to

the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

16 The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.

17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

18 The LP Senior Lenders support the position of the LP Entities.

19 In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

20 No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

21 Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

22 The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

23 The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

24 In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

25 The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

26 I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31(i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

27 In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for

Representative Counsel although I acknowledge that the circumstances here are somewhat different. Staged payments commencing with the sum of $25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

28 Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

S.E. PEPALL J.

cp/e/qllqs/qljxr/qlaxw/qlana

TAB 12

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36. As Amended
AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the Other Applicants listed on Schedule "A" [Schedule "A" was not attached to the copy received by LexisNexis Canada and therefore is not included in the judgment.]
Re: Canwest Global Communications Corp.

[2009] O.J. No. 6437

2009 CarswellOnt 9398

Docket: CV-09-8396-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

October 27, 2009.

(23 paras.)

Counsel:

Lyndon Barnes, Shawn Irving, for Applicants.

Alan Merskey, for Special Committee of the Board of Directors.

David Byers, Maria Konyukhova, for Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, for Ad Hoc Committee of Noteholders.

Hilary Clarke, for Bank of Nova Scotia.

Steve Weisz, for CIT Business Credit Canada Inc.

Hugh O'Reilly, Amanda Darrach, for CHCH Retirees.

Douglas Wray, Jesse Kugler, for Communications, Energy and Paperworkers Union of Canada.

Deborah McPhail, for FSCO.

S.E. PEPALL J.:--

Relief Requested

1 The CMI Entities seek an order appointing David Cremasco, Rose Stricker and Lawrence Schnurr as representatives of certain retirees ("Retirees"). The Retirees are all former employees of the CMI Entities (or their predecessors) or their surviving spouses who receive or are entitled to receive a pension from a pension plan sponsored by a CMI Entity or who, prior to October 6, 2009, were entitled to receive non-pension benefits from a CMI Entity. The proposed order would encompass former members of the Communications, Energy and Paper-workers Union of Canada ("CEP") who arc entitled to benefits under the Global Communications Limited Retirement Plan for CH Employees (the "CH Employees Plan") but not otherwise. They are referred to as the CH Employees. Put differently, the proposed representatives do not plan to represent former unionized employees (or their surviving spouses) who were represented by CEP when they were active employees other than those who were entitled to benefits under the CH Employees Plan, namely the CH Employees. The CMI Entities also request an order appointing the law firm of Cavalluzzo Hayes Shilton McIntyre & Cornish LLP as representative counsel for the Retirees. It is proposed that the CMI Entities provide funding for this representation.

2 The CEP seeks an order appointing it and the law firm of CaleyWray to represent current and former members of the CEP who are employed or who were formerly employed by the CMI Entities[1] but not including the aforementioned CH Employees. It also requests funding by the CMI Entities and a charge over their property for this representation. It further requests that the claims bar date established in my order of October 14, 2009 be extended from November 19, 2009.

Brief Outline of Facts

3 Since the date of the Initial Order, the CMI Entities have paid and intend to continue to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;
(b) current service and special payments with respect to the active defined benefit pension plans; and
(c) post-employment and post-retirement benefit payments to former employees who were represented by a union when they were employed by the CMI Entities.

4 That said, certain former employees are affected by the CMI Entities' discontinuance or proposed discontinuance of employee related obligations and it is intended that they be assisted by the granting of the order requested by the CMI Entities. Approximately 81 former non-unionized employees have been advised that the CMI Entities propose to cease making all post-employment and post-retirement benefit payments in relation to claims incurred after November 13, 2009. There are also 2 out of IS beneficiaries of the Canwest Global Communications Corp. and Related Companies Retirement Compensation Arrangement Plan who will not have received the entire present value of their entitlement under that plan.

5 In addition, the CMI Entities purported to terminate the CH Employees Plan when they sold CHCH TV effective August 31, 2009. 120 former employees or spouses received a pension or were

entitled to receive a deferred vested pension under this plan. OSFI has directed CMI to prepare without delay a valuation report for the CH Employees Plan effective as of December 31, 2008 to establish additional amounts to accrue from January 1, 2009 which may need to be funded through special payments. The CMI Entities anticipate that the valuation will identify an unfunded liability. Currently, special payments are not contemplated in the cash flow projections for that unfunded liability and a shortfall is anticipated to exist on the filing of the termination report for the plan.

6 Some former employees of CHCH TV have established a committee representing union and non-unionized former employees. Committee members include the proposed representatives. Rose Stricker is a non-unionized deferred vested member of the CH Plan. David Cremasco is a formerly unionized retiree with entitlement to post-retirement benefits and Lawrence Schnurr is a formerly salaried employee with entitlement to post-retirement benefits. If appointed, they will seek to form a broader committee with a member from each of the major population centres in which the Retirees reside and with at least one additional formerly unionized member.

7 Cavalluzzo LLP acts for about 100 retired participants in the CH Employees Plan, 30 to 40 of whom were not previously represented by a union and 60 to 70 of whom were. Other than those 100, most other Retirees are not represented by counsel in this CCAA proceeding.

8 The CMI Entities request that Cavalluzzo LLP be appointed as representative counsel to assist the Retirees.

9 CEP represents 1000 bargaining unit employees employed by the Applicants. It intends to facilitate and advance the claims of both its current members and its former members (but not including the CH Employees). CEP states that as a result of the current economic crisis, it has had to incur significant costs in representing its current and former members in CCAA proceedings. This is particularly so given the union's strong presence in the forestry and media industries and the degree to which they have been impacted by the state of the economy. CEP states mat the costs have been substantial and have adversely affected its financial position. CEP states that its ability to provide effective representation in these proceedings is dependent on receipt of funding. In the past 6 months, CEP has spent about $250,000 on legal costs in connection with different CCAA proceedings. Furthermore, former members do not pay union dues and their representation, although part of the union's internal mandate, creates costs that are outside CEP's cost structure. In addition, over the past 12 months, CEP has lost approximately 12,000 members due to economic conditions. This obviously has a negative impact on union revenues. Faced with these conditions, CEP seeks funding.

10 CEP requests that CaleyWray be appointed as representative counsel. It also requests a charge or security over the property of the CMI Entities to cover the costs of CEP and its counsel although it did not press this point on learning that no such charge is proposed for the Cavaluzzo representation order.

11 Lastly, CEP requests that the claims bar date be extended to provide it with additional time to identify, value and process claims.

Issues

12 The issues to consider are:

(a) Should the representatives and Cavalluzzo LLP be appointed to represent the interests of the Retirees and should Cavalluzzo LLP be provided with funding for such representation?
(b) Should CEP and Caley Wray be appointed on behalf of CEP's current and former members (not including the CH Employees) and provided with funding and a charge over the property of the CMI Entities for such representation?
(c) Should the claims bar date be extended as requested by CEP?

Discussion

(a) Cavalluzzo LLP

13 No one opposes the motion of the CMI Entities. The Monitor and the Ad Hoc Committee of 8% Noteholders support the request and others are unopposed to the relief requested. CIT has agreed to a variation of the cash flow in this regard as well.

14 Dealing firstly with the representation component of the order, in my view, the order requested should be granted. I have jurisdiction under Rule 10 of the Rules of Civil Procedure and section 11 of the CCAA. The balance of convenience favours the granting of the order and it is in the interests of justice to do so. The Retirees are a particularly vulnerable group and without professional and legal resources, they are likely at risk of being unable to understand and protect their interests in the restructuring. Clearly there is a social benefit associated with them being represented. The appointment of a single representative counsel will facilitate the administration of the proceedings and provide for efficiency. Cavalluzzo LLP is experienced in this area, has a considerable reputation, and is fully qualified to act.

15 As for funding, the CMI Entities propose that, subject to fee arrangements agreed to by the CMI Entities and Cavalluzzo LLP, reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements be paid by the CMI Entities on a monthly basis. Funding for such representation should be provided by the CMI Entities. I am satisfied that the moving parties have established that such an order is beneficial. I accept the evidence before me to the effect that most individual Retirees likely do not have the means to obtain actuarial and/or benefit experts and would benefit from the assistance offered by representative counsel and its pension expert. Absent such an order, there would likely be a multiplicity of lawyers acting for various Retirees, stress and inconvenience for those who could ill afford such representation, no representation for some, and the disorganization and inefficiency associated with multiple representation of substantially similar interests. A single counsel diminishes the likelihood of "overlawyering" and funding of such representation is a recognition of that desirable objective. It is fair and just to grant such an order.

(b) CEP and CaleyWray

16 CEP requests a separate representation order for all current and former CEP members other than the CH Employees and an order that CaleyWray be appointed as representative counsel funded by the CMI Entities.

17 Again, there is no issue that CaleyWray is experienced and well equipped to act for these individuals. Similarly, the union may appropriately represent its members and former members.

18 CEP intends to facilitate and advance the interests of both its members and former members. It is of the view mat it has no conflict of interest as all of the aforementioned may ultimately have unsecured claims. It clearly already represents its current members and plans to represent its former members. In that sense, they are not vulnerable. I do not see the need for a representation order particularly with respect to current members. To the extent, if any, that it is necessary to do so, and given that no one opposes the request, it and CaleyWray are authorized to represent CEP's current and former members (but not including the CH Employees).

19 As for funding, as I indicated in the Fraser Papers case, it should only be provided for the benefit of those former employees who otherwise would have no legal representation. Here, CEP intends to represent its current and former members (except for the CH Employees). But for this desire and subject to the agreement of Cavalluzzo LLP to act, there is no principled reason for separate representation. It arises by choice not out of necessity. Furthermore, this is an insolvency. Absent a clear and compelling reason such as the existence of an obvious conflict of interest, the general rule should be that funding by applicant debtors should only be available for one representative counsel. Even if one disagrees with that proposition, in this case, the CMI Entities have paid and intend to continue to pay, amongst other things, salaries, current service and special payments with respect to the defined benefit pension plans and post-employment and post-retirement benefit payments. Based on the materials before me, there are approximately 9 CEP members who were recently terminated and who have been advised that they will no longer receive salary continuance. In essence, the evidentiary support that might merit a funding request is absent. As noted in the factum of the CMI Entities, if they should change their position with respect to employee related obligations, the need for funding could be addressed at that time. I am also not persuaded that funding should be granted to pay for CEP's costs for outstanding grievances. No one else including the Monitor supports the requested order and I do not believe that it should be granted.

20 As mentioned, no charge is being requested or granted with respect to the Cavalluzzo representation order and none should be given here. In addition, the Term Sheet as described in the materials restricts the granting of a charge absent the agreement of others including the Ad Hoc Committee.

(c) Claims Bar Extension

21 The last issue to consider is whether the claims bar date contained in my order of October 14, 2009, should be extended as requested by CEP. Based on the evidence before me, I am not persuaded that such an extension is necessary at this time.

Conclusion

22 In conclusion, the CMI Entities' motion is granted except that the third and last sentences of paragraph 2 are to be subject to any further or other order. The CEP motion is dismissed although authorization to represent current and former members (excluding the CH Employees) is granted.

S.E. PEPALL J.

23 S.E. PEPALL J.:-- On a last unrelated issue, I would like counsel to give some thought to the following suggestion. For future time sensitive motions brought by the CMI Entities, it would be helpful in situations where interested parties do not have time to file a factum if, before the return date, those opposing filed with the court a 1 to 2 page memo (maximum) outlining their respective

positions. Interested parties are not obliged to do so but the court would consider this to be of assistance.

cp/e/qljel/qlpmg

1 In its materials, CEP uses the term "Applicants" but for consistency, I have used the term "CMI Entities".

TAB 13

Case Name:

Nunes v. Air Transat A.T. Inc.

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Josephine Nunes and Jorge Nunes, plaintiffs, and
Air Transat A.T. Inc., Airbus S.A.S., Airbus of North America Inc., Rolls-Royce PLC and Rolls-Royce Canada Limited and Airbus GIE, defendants

[2005] O.J. No. 2527

20 C.P.C. (6th) 93

140 A.C.W.S. (3d) 25

2005 CarswellOnt 2503

Court File No. 01-CV-217295 CP

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: May 30, 2005.
Judgment: June 20, 2005.

(30 paras.)

Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval.

Motion by the plaintiffs, Nunes and Nunes, for approval of a settlement of the class action against Air Transat, Airbus and Rolls-Royce. The action was for damages suffered by passengers when an Air Transat flight ran out of fuel, lost power and made an emergency landing. The time for opting out had expired and 176 class members would share the settlement. The settlement provided for a $7,650,000 fund plus accrued interest to be distributed to class members after payment of counsel fees, disbursement and expenses. Class members would receive a maximum of $80,000 non-pecuniary damages for post-traumatic stress disorder or $100,000 if accompanied by a significant personal injury. Monetary limits also included $50,000 for loss of income, $5,000 for out-of-pocket expenses and $5,000 for future care expenses. Family Law Act claims would be lim-

ited to $5,000. Class members would make claims to class counsel who would give an assessment. Class members could accept the assessment or request review by an arbitrator. The settlement agreement did not allow class members to opt out. In negotiating the settlement, class counsel had obtained questionnaires from all but a few class members to enable their claims to be reviewed with the assistance of a clinical psychologist and physician. Two class members informed the court that they objected to the settlement.

HELD: Motion allowed in part. Provisional approval was given to the settlement pending the decision on the fees of class counsel. The settlement was fair and reasonable. Class counsel's meticulous investigation concluded that almost all class members would claim to suffer post-traumatic stress disorder or other psychological harm. Given that the Warsaw Convention limited Air Transat's liability to damages for bodily injury, there was a significant risk that claims for post-traumatic stress disorder would not be successful at trial. Class counsel concluded that the case against Rolls-Royce was weak and that Airbus had tenable defences. The monetary limits on damages were carefully considered and determined principally for the purpose of achieving fairness for the class as a whole. The most problematic limit was for loss of income, but there would likely be few claims for loss of income relative to claims for psychological harm. Only one member provided documentation in favour an income loss in excess of the limit. The fairness and reasonableness of the settlement had to be judged in relation to the class as a whole. In choosing to impose monetary limits, class counsel properly considered the nature of damages likely to be claimed, the likely value of the claims, the possibility that one or a few very large claims for income losses would substantially deplete the amount available for other class members and the need to simplify the claims process to avoid delays.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29(2)

Family Law Act,

Negligence Act, R.S.O. 1990, c. 1,

Warsaw Convention,

Counsel:

J.J. Camp Q.C., Glenn Grenier and Allan Dick -- for the Plaintiffs

B. Timothy Trembley -- for the Defendant, Air Transat A.T. Inc.

D. Bruce Garrow -- for the Defendants, Rolls-Royce PLC and Rolls-Royce Canada Limited

John Callaghan and Keith Geurts -- for the Defendants, Airbus of North America Inc., and Airbus GIE

REASONS FOR DECISION

1 **M.C. CULLITY J.**:-- The plaintiffs moved for the court's approval of a settlement of this action pursuant to section 29(2) of the Class Proceedings Act 1992 S.O. 1992, c. 6 ("CPA"). There was also a motion for approval of the fees and disbursements of class counsel.

2 The proceedings involve claims against the defendants for damages suffered by passengers on Air Transat Flight 236 ("Flight 236") when, in August 2001, the aircraft, an Airbus A330, ran out of fuel, lost power in each of its engines and made an emergency landing in the Azores Islands. The defendant, Air Transat A.T. Inc., ("Air Transat") was the operator of the aircraft. Airbus S.A.S. and Airbus North America Inc., (together "Airbus") and Rolls-Royce PLC and Rolls-Royce Canada Limited (together "Rolls-Royce") were sued as responsible for the manufacture of the aircraft, and that of its engines, respectively. Claims were also made on behalf of family members of the passengers.

The Settlement

3 The proceedings were certified by order of this court on July 4, 2003. The time for opting out has expired and it has now been determined that, of the 291 passengers on board Flight 236, 115 have either opted out or entered into individual settlements with Air Transat - leaving 176 class members who would share in the benefits to be provided under the terms of the proposed settlement. These benefits can be summarised as follows:

1. A fund of $7,650,000, plus accrued interest, is to be paid to an administrator in exchange for a release of all claims of class members arising from the events of Flight 236.
2. The administrator is to invest the fund in income-earning accounts and, after payment of class counsel fees and disbursements and expenses of administration, the fund is to be distributed among class members subject to monetary limits for particular kinds of damages and, otherwise, in accordance with a claims procedure contained in the settlement agreement.
3. The monetary limits on different heads of damages claimed by any member are:

    (a) damages for non-pecuniary loss arising from post-traumatic stress disorder or similar psychological injury would not exceed $80,000 unless accompanied by evidence of other significant permanent personal injury - in which case the maximum amount of non-pecuniary damages would not exceed $100,000;
    (b) damages for past and future loss of income would not exceed $50,000;
    (c) damages for out-of-pocket expenses would not exceed $5000; and
    (d) damages in respect of future-care expenses would not exceed $5000.

4. Family member claimants would be limited to their rights of recovery under the Family Law Act (Ontario) and the claims asserted by all such members that are derivative of the claims of a particular passenger would not exceed $5000.

4 The settlement provides for class members to make claims, initially, to class counsel who are to provide the claimants with what counsel consider to be a fair and reasonable assessment of the value. Members then would have the option of accepting the assessment or of requesting a review by an arbitrator to be appointed by the court. In the latter event, the arbitrator would determine the value of the claim. Distributions would be made accordingly.

5 The claims process and the powers and procedures to be followed by class counsel, the administrator, a management committee of counsel - that is to work with the administrator and to make the initial assessment of claims for loss of income - and the arbitrator are set out in some detail in the settlement agreement and in a schedule to it. Caps would be placed on the fees payable to the administrator and to members of the management committee, and on an hourly rate to be charged by the arbitrator. Class counsel would not charge fees for their services in assessing the value of claims in addition to the lump-sum amount that the court is asked to approve in connection with their services to date, and the capped amounts that may be charged by members of the management committee.

The Law

6 The role of the court, and the standards to be applied, in determining whether a settlement should be approved has been discussed in several decisions of this court including Dabbs v. Sun Life Assurance Co of Canada (1998), 40 O.R. (3d) 429 (G.D.), at page 444, affirmed (1998), 41 O.R. (3d) 97 (C.A.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.), at paras. 77-80; Fraser v. Falconbridge Ltd, [2002] O.J. No. 2383 (S.C.J.), at paras. 13-14; and Vitapharm v. F. Hoffman - La Roche Ltd, [2005] O.J. No. 1118 (S.C.J.), at paras. 110-118.

7 In Vitapharm, Cumming J. distilled the following principles from the earlier authorities:

(a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;
(b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
(c) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
(d) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
(e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinise the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation.
(f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to liti-

gate the merits of the action or, on the other hand, to simply rubber-stamp a proposal;

(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval;

(h) in determining whether to approve a settlement, the court takes into account factors such as:

(i) the likelihood of recovery or likelihood of success;
(ii) the amount and nature of discovery, evidence or investigation;
(iii) the proposed settlement terms and conditions;
(iv) the recommendations and experience of counsel;
(v) the future expense and likely duration of litigation;
(vi) the recommendation of neutral parties, if any;
(vii) the number of objectors and nature of objections;
(viii) the presence of arm's-length bargaining and the absence of collusion;
(ix) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and
(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

8 I believe the following statements of Winkler J. in Parsons and in Fraser are particularly apposite to the settlement under consideration in this case:

> It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscience and wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. (Parsons, at paragraph 79)

> Lengthy litigation would not be in the interests of the plaintiffs with its inherent risk and delay. The court must approve or reject the settlement in its entirety. It cannot substitute or alter it. ... The court does not, and cannot, seek perfection in every aspect, nor can it insist that every person be treated equally." (Fraser, at para. 13)

9 I note, however, that, unlike the position in the above cases, other than Fraser, class members who do not approve of the settlement have no right to opt out of the proceedings as the time in which this could be done has expired and, unlike what I think I was the position in Parsons, such a right is not conferred, or contemplated, by the settlement agreement. As notice of the terms of the settlement and of the approval hearing, and the right to object, that I considered to be reasonable and adequate was given to class members, and only two of them have informed the court that they have objections to the settlement, the potential significance of the inability to opt out at this stage might be considered to be limited to these objectors.

Discussion

10 Subject to the specific points made by, or on behalf of, the two objectors, I am satisfied that the factors set out above militate heavily in favour of the settlement. The proceedings were conten-

tiously adversarial from the outset and the litigation risks for the plaintiffs were significant. Article 17 of the Warsaw Convention limits the liability of Air Transat to damages for bodily injury. Class counsel conducted a meticulous investigation and review of the likely claims of class members and concluded that virtually all of them will claim to have suffered post-traumatic stress disorder or other forms of mental or emotional harm. Although I found that, for the purposes of certification, the question whether such harm is to be considered to be bodily injury should be included in the common issues to be tried, counsel's research into the interpretation of Article 17 in this jurisdiction, and internationally, convinced them that there was a highly significant risk that the plaintiffs would not be successful on this issue at trial. After a lengthy examination of the evidence relating to the causes of the events on Flight 236, they concluded also that the case against Rolls-Royce was very weak and that Airbus had tenable defences that not only cast doubts on the prospects for establishing liability against it but made it inevitable that the litigation would be protracted and expensive. I see no reason to question the competence, diligence or judgment of class counsel on the assessment of litigation risks or, indeed, in the manner in which the proceedings were conducted and the settlement negotiated at arm's-length between the parties.

11 When negotiating the terms of the settlement, class counsel had obtained completed questionnaires from all but a few class members to enable their claims to be reviewed with the assistance of a clinical psychologist in Vancouver and a physician in Portugal. This information, and medical reports that were provided by class members, were independently reviewed by each of the firms acting as co-counsel for the purpose of arriving at an estimate of the total value of the claims of class members. All the information was then provided to counsel for Air Transat to enable them to make their own assessment and, after the negotiations that ensued, the settlement amount of $7,650,000 was arrived at. In class counsel's submission, this amount, less counsels' fees, expenses and administration costs should be considered to be fair and reasonable - as well as substantial - compensation for the claims of class members. In their estimate - made on the basis of their assessment of the claims of class members that have already been completed - it should provide each class member with a recovery of at least 70 per cent of the amount likely to be assessed as the value of such member's claim. This is, of course, only an estimate and, to some extent, it is based on assumptions - about, for example, the amounts that will be claimed for loss of income and the number of claims that will be referred to the arbitrator - that might, or might not, turn out to be unduly optimistic.

12 I am satisfied that the caps proposed to be placed on the recovery of particular heads of damages have been carefully considered and determined principally for the purpose of achieving fairness for the class as a whole. It appears likely that the claims for mental and emotional harm will be made by virtually all of the class members and will be far more common than claims for significant physical injuries or loss of income. The cap of $80,000 for psychological harm ($100,000 if accompanied by significant permanent other injury) was chosen after a review of recent awards in this jurisdiction and elsewhere for post-traumatic stress disorder and similar illnesses.

13 I should note at this point that, although the terms of the proposed settlement might be construed as limiting claims for physical injuries to those that are accompanied by claims for psychological harm, I understand the intention to be that claims for physical injuries alone - if there are any - are to be compensated subject to a cap of $100,000.

14 The most problematic of the monetary limits placed on the recovery of particular types of damages is that relating to loss of income. In conducting their preliminary assessment of the value

of the claims of class members, class counsel had less information about the potential loss of income than they had relating to the other heads of damages. However, to the extent that they were able to judge, there would be few claims for loss of income relative to those for psychological harm and only one passenger had provided documentation in support of an income loss in excess of the cap of $50,000. That member, I presume was Mr. Manuel Ribeiro, one of the two members of the class who objected to the settlement. At the hearing, counsel indicated that their attention had been drawn to one other such potential claim that, on the basis of the information available to them, they considered to be of doubtful weight.

15 Through his counsel, Mr. Ribeiro successfully requested an adjournment of the original hearing date appointed for the motion for approval. At the continuation of the hearing, he was represented by Mr. Brian Brock Q.C. who, while disclaiming an intention to object to the settlement agreement in principle, requested that class counsel should be required to revisit it to address a number of issues that he raised in his written and oral submissions. In general terms, these issues relate to (a) whether class counsel gave sufficient significance to the fact that neither Airbus nor Rolls-Royce could claim the protection of Article 17 of the Warsaw Convention and the possibility that, as joint tortfeasors with Air Transat, damages that could not be recovered from it might be recoverable in full from either of them under section 1 of the Negligence Act R.S.O. 1990, c. 1 (as amended) even if only a very small degree of relative fault was apportioned to them; (b) whether the caps placed on non-pecuniary and pecuniary damages are fair and reasonable; and (c) whether the amount of legal fees requested by class counsel, and the manner in which they would be borne by class members, are fair and reasonable.

16 In an affidavit sworn for the purpose of the motion by Mr. Joe Fiorante - a partner of one of the firms acting as class counsel - he indicated that the arguments mentioned by Mr. Brock in connection with the first of the above issues had been considered by them and advanced in the negotiations for the settlement. I see no reason to reject this evidence or to conclude that the considerations to which Mr. Brock referred are sufficient to remove the terms of the settlement from the "zone of reasonableness".

17 Mr. Brock's submission that the caps were unfair was made in the context of his opinion that the value of Mr. Ribeiro's claims for non-pecuniary damages for post-traumatic stress disorder and loss of income will exceed the limits of $80,000 and $50,000 that would be imposed under the settlement.

18 Class counsel's response to the submission with respect to non-pecuniary damages was that already mentioned - namely, that, from their review of damages awarded in recent cases, other than those involving sexual assaults, the $80,000 cap was at the high end of the range and, notwithstanding the evidence that, since the events of Flight 236, Mr. Ribeiro has suffered, and will continue to suffer, psychological difficulties that will require psychiatric support and, probably, adjunct medication, they are not convinced that his claim would fall outside the likely range of damages. Based on their review of damages awards, I do not believe this conclusion is unreasonable although, as an experienced counsel in personal injury cases, Mr. Brock's opinion that a higher award could be obtained merits respect. The fairness and reasonableness of the settlement - including the cap of $80,000 for non-pecuniary damages - must, however, be judged in relation to the class as a whole and is not to be determined in respect of the claims of each member considered separately. The comments of Winkler J. that I have quoted from Parsons and Fraser are in point. On the basis of the record before me, I believe I am justified in deferring to the opinion of class counsel that the cap of

$80,000 on non-pecuniary damages would not operate unfairly in respect of Mr. Ribeiro, let alone in respect of the class as a whole.

19 Mr. Brock's criticism of the existence of the cap on the recovery for different heads of damages was not based exclusively on his opinion that his client's non-pecuniary damages would exceed $80,000. He made a similar objection with respect to the application of a $50,000 limit to Mr. Ribeiro's claim for loss of income. In his submission, such a limit would operate with obvious unfairness to Mr. Ribeiro in that his potential claim - calculated on the basis of a reduction in his income of $54,000 a year - would be approximately $670,000. Mr. Brock informed me that his client was prepared to testify that, since Flight 236, he has lost his motivation to conduct his landscaping business of 25 years, the number of his employees and his customers has diminished and the business is now confined to grass cutting. In support of his estimate of Mr. Ribeiro's loss of income, Mr. Brock provided unaudited income statements of the corporation that operates the business for 1998, 2000, 2002 and 2004. These show that, between April 2001 and April 2004, the gross income of the corporation declined by approximately $48,600. During that period, operating expenses fell by approximately $49,156. Of this amount, approximately $32,000 represented a reduction in wages paid to employees. Two employees were laid off in the period after Flight 236. No personal income tax returns, or other information, were provided that would indicate the wages, or other amounts, received by Mr. Ribeiro from the business in those years.

20 The income statements hardly support Mr. Brock's estimate that his client had suffered an income loss of approximately $54,000 a year and, on the basis of the limited information provided, class counsel concluded that they were unable to determine whether Mr. Ribeiro's total past and future income loss would exceed $50,000. I am in no better position. At the most, I can infer that Mr. Ribeiro claims to have suffered a loss of income that will exceed the cap by a significant amount. The question is whether the existence of this claim is, in itself, sufficient to justify a decision to withhold approval of the settlement. In Mr. Brock's submission it is, because it illustrates not merely that the cap is too low but, as well, the unfairness of placing any caps on heads of damages. As he stated in his brief or memorandum filed in the motion:

> If an individual plaintiff's claim falls within the cap it would appear that such person would make a full recovery. Those whose claims exceed the cap would recover only a proportionate share. No explanation is provided as to why those with serious claims should have their claims compromised in this way at the expense of those whose claims are not as serious.
>
> At a minimum one would expect that the recovery for each plaintiff would be on a pro-rata basis so that the percentage of recovery or loss of recovery would be equal.

21 Although I cannot amend the settlement, I do not think there is any doubt that I would have authority to refer this aspect of it back to the parties for their further consideration. After giving this matter careful thought, I am not disposed to do this.

22 As I have indicated, I do not intend to find that the total amount to be paid by Air Transat is less than that which would fall within a zone, or range, of reasonableness. The question that arises is how the net amount is to be distributed among class members if it is less than the total amount of their claims. The provision of caps is one method. Each of the possibilities suggested by Mr. Brock

is another. In preferring the first method as being in the best interests of the class as a whole, counsel considered:

(a) the nature of the damages likely be claimed by the great majority of class members;
(b) the likely value of such claims;
(c) the possibility that the existence of one, or a few, very large claims for income losses would substantially deplete the amount available for distribution to the other class members; and
(d) the need to simplify the claims process to avoid delays and to reduce expenses.

23 In my judgment each of these considerations was relevant, and properly considered by class counsel. The last of them underlines the necessity to consider the provisions of the settlement as a whole and not to place the focus on particular aspects of it in isolation. The objective of simplifying the claims process is relected in the caps placed on certain types of administrative expenses, the involvement of class counsel without further remuneration and the attempt to devise a process that members will find satisfactory without having recourse to arbitration. Each of these factors presupposes the existence of - and is designed to assist in effecting - an expeditious and economic method of allocating and distributing the net settlement funds among class members.

24 In my judgment, I would not be justified in finding that the existence, or the amounts, of the caps is so evidently unfair and unreasonable that approval of the settlement should be withheld. Nor do I believe that anything of value is likely to be gained by referring the matter back for further consideration by the parties. I am satisfied that the questions have been carefully considered by them. The qualifications and experience of class counsel were reviewed at some length in the carriage motion early in the proceedings. Nothing has occurred since then to dilute my confidence in the competence and diligence with which they would perform their responsibilities under the CPA. Their ability to identify each of the members of the class has enabled them to conduct an unusually thorough investigation and preliminary assessment of the claims of virtually all of them. Their decision that the imposition of the caps would be in the interests of the class as a whole is one which is entitled to be given considerable weight. I do not believe there is sufficient reason for impeding, or delaying, the implementation of the settlement by asking them to reconsider that decision.

25 The third of Mr. Brock's objections concerns the amount of the fees of class counsel and the manner in which they would be borne by class members. The appropriate amount of the fees will be considered in an endorsement that will follow the release of these reasons after Mr. Brock has had an opportunity to review the time dockets of class counsel. The extent to which approval is given to the payment of class counsel's fees before the final distribution - and any consequential changes to the terms of the claims process - will also be considered in the endorsement to follow.

26 The proposal that the fees, as then approved, should come off the top - rather than to be apportioned among class members in accordance with the value of the amounts ultimately distributed to each of them - is, I believe, appropriate in the circumstances of this case where a gross settlement amount would be paid up front by Air Transat and the further services of class counsel - other than those of the management committee - are to be provided for no further charge. Counsel have acted for the class as a whole and have negotiated a settlement on that basis. I see nothing unfair, or unreasonable, in awarding approved fees out of the settlement proceeds without regard to the proportions in which the proceeds will be shared by class members.

27 The other objection I received was made by Mr. Giancarlo Cristiano in an attachment to an email message to class counsel. In the message Mr. Cristiano thanked counsel for their diligence in dealing with the file and, subject to certain questions, concerns and objections to the terms of the settlement, he expressed his pleasure that it had been reached. In the attached letter he objected that the settlement contained no finding of liability for negligence on the part of Air Transat and no award of punitive damages. He also complained of the level of fees payable to class counsel and the administrator.

28 The first two of these objections misapprehend both the nature of the settlement as a compromise between the parties and the powers of the court. The settlement contains no admission of liability, negligence, on the part of Air Transat because it has not agreed to make any such admission. This, of course, is very common in a settlement of litigation and I have no jurisdiction to insert such a provision in the settlement. All I could do would be to refuse approval of the settlement unless it contained an admission of liability. Mr. Cristiano did not ask me to do this and I would not consider such a decision to be in the best interests of class members. Similarly, and contrary to Mr. Cristiano's impression, I have no power to amend the settlement so as to insert a claim for punitive damages.

29 I will consider Mr. Cristiano's objection with respect to legal fees and expenses of administration in the endorsement that is to follow.

Disposition

30 Accordingly, pending the decision on the fees of class counsel, I will give provisional approval to the settlement as fair, reasonable and in the best interests of class members. This approval is subject to the terms of the endorsement that is to follow, any necessary adjustments to the times within which claims are to be made, any other acts to be performed and any other amendments counsel may consider to be required as a result of the delay in the release of these reasons. These changes, counsel's submissions with respect to the fees of independent counsel, a few drafting issues and the terms of any formal order can be considered following the release of the endorsement.

M.C. CULLITY J.

cp/e/qlalc/qlkjg/qlrme/qlmjb

TAB 14

Case Name:

Marcantonio v. TVI Pacific Inc.

Between
Joe Marcantonio, Plaintiff, and
TVI Pacific Inc., Clifford M. James, Robert C. Armstrong, C. Brian Cramm, Jan R. Horejsi, Peter C.G. Richards, and John W. Adkins, Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992

[2009] O.J. No. 3409

82 C.P.C. (6th) 305

2009 CarswellOnt 4850

179 A.C.W.S (3d) 761

Court File No. CV-08-35806100CP

Ontario Superior Court of Justice
Toronto, Ontario

J.L. Lax J.

Heard: June 17, 2009.
Judgment: August 10, 2009.

(38 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Settlements -- Approval -- Costs -- Particular items -- Counsel fees -- Particular circumstances -- After discontinuance of action -- Motion by parties for certification of class proceeding for settlement purposes allowed -- Plaintiff class properly defined as those who purchased securities from defendant over limited period -- Pleadings adequately alleged negligence, misrepresentation and conspiracy on part of company and officers -- Representative plaintiff appropriate -- Settlement of $2.1 million reasonable given statutory limits on recovery at and risks of trial -- Contingency fees of 25 percent of settlement amount reasonable -- Class Proceedings Act, 1992, s. 33.

Legal profession -- Barristers and solicitors -- Compensation -- Contingency agreements -- Fair and reasonable -- Motion by parties for certification of class proceeding for settlement purposes allowed -- Plaintiff class properly defined as those who purchased securities from defendant over limited period -- Pleadings adequately alleged negligence, misrepresentation and conspiracy on part of company and officers -- Representative plaintiff appropriate -- Settlement of $2.1 million reasonable given statutory limits on recovery at and risks of trial -- Contingency fees of 25 percent of settlement amount reasonable.

Professional responsibility -- Self-governing professions -- Remuneration -- Contingency fees -- Professions -- Legal -- Barristers and solicitors -- Motion by parties for certification of class proceeding for settlement purposes allowed -- Plaintiff class properly defined as those who purchased securities from defendant over limited period -- Pleadings adequately alleged negligence, misrepresentation and conspiracy on part of company and officers -- Representative plaintiff appropriate -- Settlement of $2.1 million reasonable given statutory limits on recovery at and risks of trial -- Contingency fees of 25 percent of settlement amount reasonable.

Securities regulation -- Civil liability -- Public statements or release of documents by influential persons -- Motion by parties for certification of class proceeding for settlement purposes allowed -- Plaintiff class properly defined as those who purchased securities from defendant over limited period -- Pleadings adequately alleged negligence, misrepresentation and conspiracy on part of company and officers -- Representative plaintiff appropriate -- Settlement of $2.1 million reasonable given statutory limits on recovery at and risks of trial -- Contingency fees of 25 percent of settlement amount reasonable -- Securities Act, s. 138.

Motion by all parties to certify an action as a class proceeding for settlement purposes. The action was launched against TVI, a publicly-traded mining company, and its directors and officers by shareholders who alleged the defendants conspired to issue materially false or misleading financial statements and otherwise contravening securities law. The action proceeded in Ontario and Quebec. On the eve of the due date for the defendants to file materials in response to the certification record, settlement negotiations were initiated. They resulted in a settlement agreement under which TVI would pay $2.1 million, would try to re-price certain outstanding stock options, and would adopt corporate governance measures to prevent future options manipulation. The parties jointly sought certification for the purposes of settlement, settlement approval and approval of legal fees for the Ontario class of plaintiffs, defined as those who acquired TVI securities during the defined class period and held those securities on August 9, 2007, as well as exempt Quebec class members. The experienced class counsel retained by the representative plaintiff recommended approval of the settlement as it was half of what the plaintiffs were limited to achieve at trial, and would avoid the time and expense of trial which would significantly erode the benefits to the class members of the ultimate award. Litigation would have been complex because of recent changes to securities law. Class counsel sought approval for fees totalling $525,000, or 25 percent of the settlement amount. The retainer agreement provided for this sum.

HELD: Motion allowed. The pleadings disclosed a cause of action in negligence, negligent and fraudulent misrepresentation and conspiracy. There was ain identifiable class of plaintiffs. The claims raised common issues. Individual litigation of each plaintiff's claim would be difficult, time-consuming and expensive. The representative plaintiff had no interests in conflict with those of

the other Ontario class members. The settlement was the product of arm's length bargaining by experienced counsel and presumed fair. In light of the risks faced by the plaintiffs, the range of damages they stood to recover, and the recommendations of class counsel, the court approved the settlement. Legal fees were awarded to class counsel as claimed, because they were fair and reasonable.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 33

Securities Act, R.S.O. 1990, c. S.5, s. 138.3, s. 138.5, s. 138.8(1)

Counsel:

A. Dimitri Lascaris and *Monique L. Radlein*, for the Plaintiff.

Eric R. Hoaken, for the Defendants.

ENDORSEMENT

1 J.L. LAX J.:-- This is a securities class action brought pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") arising from alleged misrepresentations and stock options manipulation. The parties settled the action on April 22, 2009, and brought a motion for, among other things, an order certifying the action as a class proceeding for settlement purposes, approving the settlement and approving class counsel fees. I granted the order with reasons to follow. These are my reasons.

Nature of the Claim

2 TVI Pacific Inc. ("TVI") is a publicly-traded mining company with its shares listed on the Toronto Stock Exchange ("TSX"). The individual defendants were directors of TVI. This action is brought on behalf of an Ontario class of persons and entities who acquired TVI securities on or after March 30, 2006, and held some or all of the securities on August 9, 2007. It is alleged that during the class period the defendants (1) conspired and breached their duty of care to TVI shareholders by issuing materially false and/or inaccurate audited financial statements for years ended 2005 and 2006 and interim unaudited financial statements for the quarter ended March 31, 2007; and (2) granted in-the-money stock options in contravention of TVI's Stock Option Plan, TSX rules and securities legislation in Ontario and Quebec. With respect to the financial statements, TVI subsequently issued two corrective disclosures on August 9, 2007 and December 18, 2007.

3 On March 3, 2008, Siskinds LLP filed a class proceeding against the defendants on behalf of Mr. Florent Audette, a Quebec resident. At that time, no Ontario resident had come forward to represent the interests of the class in Ontario. On April 10, 2008, this action was filed on behalf of Mr. Joe Marcantonio, an Ontario resident, alleging claims similar to those made in the Audette Ontario action. On July 25, 2008, the Quebec affiliate of Siskinds, filed the Petition styled *Audette c. TVI Pacific Inc. et al*, [2009] J.Q. no 4647, in Quebec Superior Court and Mr. Audette gave instructions

to hold the Audette Ontario action in abeyance. After the settlement was reached, Mr. Audette instructed Siskinds to request the discontinuance of the Audette Ontario action.

4 Mr. Marcantonio served his certification record in October 2008. On the eve of the due date for the filing of the defendants' responding materials, the defendants initiated settlement discussions. Following several months of negotiations, the parties concluded a settlement agreement that provides for:

(a) a gross settlement fund of $2.1 million;
(b) TVI's agreement to make efforts to re-price certain outstanding stock options; and
(c) the adoption of corporate governance measures designed to prevent future options manipulation.

5 As a result of the settlement, the parties jointly sought certification for the purposes of settlement, settlement approval and approval of legal fees and disbursements on behalf of an Ontario class defined as:

> All persons and entities, who acquired securities of TVI during the Class Period, and who held some or all of those securities on August 9, 2007, other than Excluded Persons and Quebec Class Members, but specifically including the Exempt Quebec Members.

Certification

6 Numerous cases hold that where certification is sought for the purposes of settlement, the certification requirements must be met, but are not applied as stringently. Perell J. has helpfully gathered the authorities together and they can be found in *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 30 (S.C.J.) (QL).

7 For settlement purposes, I am satisfied that each of the criteria for certification is satisfied. The pleadings disclose a cause of action against the defendants for negligence, negligent and fraudulent misrepresentation, and conspiracy. The pleading asserts that the plaintiff intends to seek leave under s. 138.8(1) of the *Securities Act*, R.S.O. 1990, c. S.5 ("OSA") to amend the Statement of Claim to plead the cause of action in s. 138.3 of the *OSA*. There is an identifiable class defined by objective criteria that (a) identifies persons with a potential claim, (b) describes who is entitled to notice, and (c) defines those who will be bound by the result: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.) (QL).

8 The claims of the class members raise the following common issue:

> Did the defendants, or any of them, breach duties of care owed to the Ontario class, by reason of the alleged acts, omissions, disclosures or non-disclosures relating to the issuance and/or restatement of TVI's audited consolidated financial statements for the years ended December 31, 2005 and 2006, and its interim unaudited consolidated financial statements for the quarter ended March 31, 2007, and or to TVI's stock option practices during or prior to the Class Period?

9 Individual litigation of securities cases can be difficult, time-consuming and expensive. Many claims would never be advanced because they are uneconomic for an individual investor to pursue.

A class action is the optimal method of procuring a remedy for a group of investors who allege they have been harmed in similar ways as a single determination of the defendants' liability eliminates duplication of fact-finding and legal analysis. Further, a class action has the potential to act as an essential and useful supplement to the deterrent effects of regulatory oversight. It enhances the incentive for directors and officers to ensure that their disclosures to the investing public are materially accurate, thereby enhancing investor protection. Consequently, a class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issue, and advances the proceeding in accordance with the goals of access to justice, judicial economy and behaviour modification.

10 Mr. Marcantonio is a member of the proposed Ontario class and would fairly and adequately represent its interests. He does not have, regarding the common issues or any issues arising out of the common issues, any interests in conflict with the interests of other Ontario class members. He has an understanding of the issues and allegations raised in the Ontario action and has actively participated in the litigation and the settlement process.

Settlement Approval

11 To approve a settlement, the court must find that the settlement is fair, reasonable and in the best interests of the class as a whole: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 9 (Gen. Div.) (QL); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 68-69 (S.C.J.) (QL). To be approved, the settlement must fall within a zone or range of reasonableness: *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at para. 89 (S.C.J.), Winkler J. (now C.J.O.).

12 In determining whether to approve a settlement, the court uses the following factors as a guide, although some will have more or less significance than others and some may not be present in a particular case: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the risk, future expense and likely duration of litigation; (f) the recommendation of neutral parties, if any; (g) the number of objectors and nature of objections; (h) the presence of good faith, arm's length bargaining and the absence of collusion; (i) the information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations; and (j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation. See *Parsons v. Canadian Red Cross Society, supra* at paras. 71-72.

13 Before the court is a comprehensive affidavit of Mr. Charles Wright who is a Siskinds' partner and an experienced class action lawyer. He was directly involved in the prosecution and resolution of this action. His evidence points to a number of factors that commend this settlement as fair and reasonable and in the best interests of the class. I review some of these below.

14 Securities class actions are not that common perhaps because there are substantial risks in prosecuting them. Unlike purchasers in the primary market, who are provided a right of action under the *OSA*, until recently, secondary market purchasers had to persuade the court that the defendants owed them a duty of care. In response, defendants have argued, and courts have often held, that secondary market purchasers have to demonstrate that they actually relied upon the defendants' misrepresentations. On December 31, 2005, Bill 198, now embodied in Part XXIII.1 of the *OSA*, came into force. It was a response to the perceived failure of the common law to provide an effec-

tive remedy for secondary market misrepresentation. Part XXIII.1 removes the reliance requirement through the creation of a statutory right of action. However, the right of action is subject to obtaining leave of the court and there has never been a leave decision under the new legislation.

15 In addition to the uncertainty surrounding the ability to advance the statutory cause of action, the plaintiff in this action also faced the risk of not being able to establish (i) that the representations or omissions were materially misleading; (ii) that the class had incurred the damages claimed; and (iii) to the extent necessary for purposes of the common law claims, detrimental reliance.

16 Class counsel's estimate of class damages was $16 million. In the course of settlement discussions, class counsel retained Mr. Paul Mulholland, an expert in the measurement of securities class action damages, to assess actual damages suffered by the class during the class period. It is Mr. Mulholland's opinion that class damages as assessed by a court would not approach this number, but rather would likely fall between the lowest and highest estimates of the statutorily established limits on the defendants' liability, as explained below.

17 The statutory claim under Part XXIII.1 of the *OSA* is subject to liability limits. It caps the issuer's liability at the greater of 5% of the pre-misrepresentation market capitalization of the defendant issuer and $1 million. The statute directs how market capitalization is to be calculated. Class counsel performed this calculation and determined that TVI's liability limit fell within the range of about $2.8 million to $4.2 million.

18 Part XXIII.1 of the *OSA* also sets caps on the liability of directors and officers. Class counsel performed this calculation and determined that these liability limits were $189,500 (rounded to $200,000). The application of the liability limits (absent proof of fraud) would thus limit total recovery from the defendants to a range of approximately $3 million to $4.4 million. As a result, even if the plaintiff and class members were completely successful at trial, they would have had difficulty obtaining damages greater than $4.4 million, and could be limited to damages of as little as $3 million.

19 The caps discussed above do not apply to the common law claims for damages arising from negligence and negligent and fraudulent misrepresentation. However, as I have mentioned, the damages assessment of Mr. Mulholland is that these damages, if proved, would fall within the statutory limits. Moreover, as noted earlier, misrepresentation claims can be difficult to certify as reliance is a necessary element of proof: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 18. As well, the defendants had due diligence and reasonable reliance defences available to them and there was a risk that these defences would succeed.

20 The court requires sufficient evidence in order to exercise an objective, impartial and independent assessment of the fairness of the settlement: *Dabbs, supra* at para. 15. However, it is not necessary for formal discovery to have occurred at the time of settlement, and settlements reached at an early stage of the proceedings can be appropriate. In this case, no discoveries or other examinations were completed, but I am satisfied that class counsel had significant information about the case as a result of their own investigations and the information that was obtained from the defendants in the course of settlement discussions. In particular, the defendants provided to class counsel an expert opinion which they had obtained. The defendants' expert concluded that the damages of the class were negligible as all or virtually all of the share price decreases resulted from news affecting the mining industry as a whole and were unrelated to the erroneous financial statements.

Although class counsel disputed this, it was in light of this opinion that Mr. Mulholland was retained.

21 The settlement amount of $2.1 million represents a substantial portion of the potentially recoverable damages of between $3 million and $4.4 million assessed by Mr. Mulholland. As a percentage of gross recovery, it represents between 48% and 70% of his assessment of loss. On a net recovery basis, taking into account class counsel's requested fees and administration expenses, which together are in the amount of $809,287.17, the class would recover between 29% and 43% of the loss. This recovery is fair and reasonable and compares very favourably with the percentage net recovery in other securities class action settlements, such as *Mondor v. Fisherman*, [2002] O.J. No. 1855 (S.C.J.) (QL), and *Lawrence et al. v. Atlas Cold Storage et al.* (February 12, 2009), Toronto 04-CV-263289CP (S.C.J.) where net recovery was in the range of 20%.

22 With respect to the options-related allegations, the information provided by the defendants made it clear that many of the problems were a result of poor procedures, rather than intentional fault. It also became clear that any benefits to the defendants were negligible due to the decrease in TVI's share price. This resulted in certain options becoming substantially out-of-the-money.

23 Nonetheless, in order to address the allegations concerning the granting of in-the-money stock options, the settlement agreement provides that TVI will make all reasonable efforts to effect the re-pricing of these options. In addition, it provides that TVI will develop and implement corporate governance measures as specified in the agreement to address its stock option granting practices. For the purpose of obtaining advice concerning the recommended corporate governance measures, class counsel retained and relied on advice from Dr. Richard Leblanc, Assistant Professor of Law, Corporate Governance & Ethics at York University. In the opinion of class counsel, these reforms are productive enhancements of significant value to shareholders.

24 Although Ontario class counsel received a number of inquiries about the settlement following publication of the notices approved by the court, there are no objectors. The distribution protocol harmonizes the plaintiff's theory of damages with s. 138.5 of the *OSA*. The result is a formula that takes into account the two corrective disclosures and is designed to fairly and rationally allocate the proceeds of the net settlement amount among authorized claimants based on the relative strength of the class members' claims as the class period progressed and damages were incurred.

25 At the time of settlement, the action was still in the early stages of litigation. Without a settlement, the plaintiff would have faced the expense of a leave motion under the new secondary market liability provisions of the *OSA*, a contested certification motion, discovery, a trial of the common issues, and inevitable appeals at each stage. Absent a settlement, there would have been no payment to class members for a number of years. A settlement brings the significant benefit of finality and an immediate payment to class members.

26 This settlement is the product of arm's length bargaining by very experienced counsel. There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for court approval. As Justice Sharpe (as he then was) stated in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.) (QL) at para. 32:

> ... The recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. ...

27 In light of the risks the plaintiff faced, the possible range of damages recoverable, the substantial benefit available to class members, and the recommendation of class counsel who have extensive experience in litigating class actions and particular expertise in securities class actions and stock options manipulation, I am satisfied that the settlement is fair, reasonable and in the best interests of the class. For these reasons, it was approved.

Class Counsel Fees

28 The fees of class counsel are to be fixed and approved on the basis of whether they are fair and reasonable in all of the circumstances. This is determined in light of the risk undertaken and the degree of success or result achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.). This approach was approved in *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 423 (C.A.).

29 In the context of the *CPA*, a premium on fees is the reward for taking on meritorious but difficult matters. The courts have recognized that the objectives of the *CPA* - judicial economy, access to justice and behaviour modification - are dependent, in part, upon counsel's willingness to take on class proceedings, which in turn depends on the incentives available to counsel to assume the risks and burden of class proceedings: *Gagne, supra*; *Parsons, supra*; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) (QL).

30 The need for a meaningful premium on fees is particularly important in cases involving more modest damage amounts where the maximum potential upside to class counsel is limited. Otherwise, there is a risk that counsel would decline to pursue cases giving rise to modest damages and smaller issuers would effectively become immunized from class litigation. This need is heightened in the context of the evolving practice of securities class actions where notice and administration costs are fixed expenses whether the settlement amount is $20 million or $2 million. As a result, in smaller settlements, costs and legal fees represent a larger percentage of the settlement fund. For example, in this case, these administrative costs (roughly $210,000) together with the requested fees of 25% of the settlement amount represent 39% of gross recovery, whereas in a $20 million settlement, the same costs with the same fee request would represent 27% of gross recovery.

31 Class counsel request fees in accordance with a written fee agreement dated April 10, 2008. It provides that legal fees will be charged on a percentage basis in an amount representing 25% of "all benefits obtained for the class members, including costs, notice and administration," plus disbursements and GST. Ontario class counsel and Quebec class counsel agreed to request legal fees such that their cumulative requests for legal fees do not exceed 25% of the settlement amount plus disbursements and applicable taxes. They estimated that the Ontario class constitutes 90% of the class defined in the settlement agreement, and that the Quebec class constitutes 10% of the class. As a result, Ontario class counsel request legal fees in the amount of $472,500, which represents 25% of the portion of the settlement amount allocated to the Ontario class, plus GST and disbursements in the amount of $42,667.69. Quebec class counsel will request legal fees in the amount of $52,500. The combined legal fee requests total $525,000 or 25% of the monetary settlement benefit of $2.1

million. The amount requested is consistent with the retainer agreement and in line with percentage contingency fees that have been awarded in other class actions.

32 In *VitaPharm, supra* at para. 67, Justice Cumming summarized some of the factors to be considered by the court when fixing class counsel's fees: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c)the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

33 The risks in undertaking this litigation include the following:

(a) that the court would dismiss certain of the claims on a preliminary motion;
(b) that there has never been a leave decision under the new investor protection legislation under Part XXIII.1 of the *OSA*, and the court may not have granted leave to plead causes of action under s. 138.3;
(c) that the court would not certify the action, or would not certify a national class;
(d) that the plaintiff would not be able to establish actionable misrepresentations, or would fail to establish a causal connection between the misrepresentations and some or all of the losses alleged; and
(e) that any judgment in favour of the plaintiff and the class would be appealed, so that the benefits of any such judgment would be significantly delayed.

34 In determining a fee award, the court may consider the manner in which counsel has conducted the proceeding. Whether counsel have agreed to indemnify the representative plaintiff against an adverse costs award, thereby saving the class from having to pay the statutory 10% to the Class Proceedings Fund, is a relevant factor in fixing fees: *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 81 (S.C.J.) (QL). Counsel in this case have done this. The class also benefits from class counsel having requested and reviewed fixed-fee quotations from several Administrators to ensure the most cost-effective administration of the settlement agreement.

35 In assessing the success achieved, I have already noted that the settlement amount of $2.1 million represents recovery of a substantial portion of the damages sustained by the class. The implementation of the corporate governance measures and the re-pricing of stock options also provide a benefit to class members and future TVI shareholders. Counsel are not asking the court to attach value to this aspect of the settlement, even though the retainer agreement provides for legal fees to be calculated as a percentage of "all benefits obtained for the class" and these are benefits obtained for the class. Further, class members benefit from a settlement term that required the defendants to pay the settlement amount into an escrow account which is earning interest. This will increase the net settlement amount available to class members. It will also decrease the fee request as a percentage of the recovery because class counsel do not seek interest on their legal fees and disbursements.

36 The method of determining fees set out in s. 33 of the *CPA* - the 'lodestar' method - has been the subject of judicial and academic criticism. Justice Cullity recently commented on its deficiencies in *Martin v. Barrett*, [2008] O.J. No. 2105 at paras. 38-39 (S.C.J.) (QL); see also, *Endean v.*

Canadian Red Cross Society, [2000] B.C.J. No. 1254 at paras. 15-16, 19 (S.C.) (QL); Benjamin Alarie, "Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions" (2007) 4(1) *Canadian Class Action Review* 15 at 37-38.

37 A multiplier can reward lawyers who accumulate unnecessary time and punish those who are able to do things effectively in less time. I do not have to grapple with these difficulties in this case as the retainer agreement does not provide that fees are to be calculated by applying a multiplier and none is requested. Nonetheless, based on time included in the evidence on the motion, and based on consideration of only the monetary benefits obtained for the class, by the time the litigation is concluded and interest accrues on the settlement amount, counsel estimate the multiplier will be approximately 2.5. This settlement was achieved at an early stage, but if a multiplier were to be applied, I consider a multiplier in this range to be acceptable having regard to the risks assumed and the results obtained for class members in the circumstances of this case.

38 For these reasons, I concluded that the fees requested were fair and reasonable and I awarded legal fees in the amount of $472,500, plus applicable taxes, and disbursements in the amount of $42,667.69 to Ontario class counsel. The settlement that I approved settles the claims asserted in this action and the Audette Ontario action. As the classes are identical, the interests of the class proposed in the Audette Ontario action are resolved by the settlement of the Ontario action. Accordingly, the discontinuance of the Audette Ontario action does not prejudice the putative class in that action and an order was granted discontinuing that action.

J.L. LAX J.

cp/e/qllxr/qljxr/qlaxw/qlced/qljyw/qlcal

TAB 15

Indexed as:

Parsons v. Canadian Red Cross Society

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Dianna Louise Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, deceased and Elsie Kotyk, personally, plaintiffs, and
The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario and the Attorney General of Canada, defendants
And between
James Kreppner, Barry Isaac, Norman Landry, as Executor of the Estate of the late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the late Pierre Fournier, plaintiffs, and
The Canadian Red Cross Society, the Attorney General of Canada and Her Majesty the Queen in Right of Ontario, defendants

[1999] O.J. No. 3572

103 O.T.C. 161

40 C.P.C. (4th) 151

91 A.C.W.S. (3d) 351

1999 CarswellOnt 2932

Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice

Winkler J.

Heard: August 19-21, 1999.
Judgment: September 22, 1999.

(133 paras.)

Practice -- Class proceedings -- Settlements -- Court approval.

Motion by various parties for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act. One plaintiff class was persons who were infected with hepatitis C from blood transfusions between January 1, 1986 and July 1, 1990. The other plaintiff class was persons infected with hepatitis C from the taking of blood or blood products during the same time period. In both proceedings, there was also a family class consisting of family members of persons in the other main classes. The defendants in the two actions were the Canadian Red Cross Society, the Queen in Right of Ontario, and the Attorney General of Canada. The plaintiff classes were national in scope. As such, the other provincial and territorial governments except Quebec and British Columbia also moved to be included in the two actions as defendants, but only if the settlement was approved. The claims in these actions were founded on the decision by the CRCS and its government's overseers not to conduct testing of blood donations to the Canadian blood supply after a test for the hepatitis C virus became available and had been put into widespread use in the U.S. On this motion, the parties presented a comprehensive settlement package to the court. It consisted of a settlement agreement, a funding agreement, and plans for distribution of the settlement funds in the two actions. However, there were over 80 written objections to the settlement proposal from individuals afflicted with hepatitis C. The objections related to a number of issues, specifically, the adequacy of the total value of the settlement amount, the extent of compensation provided through the settlement, the sufficiency of the settlement fund to provide the proposed compensation, the reversion of any surplus, and the costs of administering the plans.

HELD: Motion dismissed. The settlement proposal was within the range of reasonableness having regard to the risks inherent in carrying the matter through to trial. The level of benefits ascribed within the settlement were acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighed any deficiencies which might have existed in the levels of benefits. However, there were two areas which required modification in order for the settlement to receive court approval. The first area related to access to the fund by opt-out claimants, specifically, the benefits provided from the fund for an opt-out claimant could not exceed those available to a similarly injured class member who remained in the class. The second area related to the surplus provisions of the settlement proposal.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, ss. 5(2), 8(3), 29(2).

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

Counsel:

Harvey Strosberg, Q.C., Heather Rumble Peterson and Patricia Speight, for the plaintiffs.
Wendy Matheson and Jane Bailey, for the Canadian Red Cross Society.
Michèle Smith and R.F. Horak, for Her Majesty the Queen in Right of Ontario.
Ivan G. Whitehall, Q.C., Catherine Moore and J.C. Spencer, for the Attorney General of Canada.
Wilson McTavish, Q.C., Linda Waxman and Marian Jacko, for the Office of the Children's Lawyer.
Laurie Redden, for the Office of the Public Guardian and Trustee.

Beth Symes, for the Thalassemia Foundation of Canada, Friend of the Court.
William P. Dermody, for the Intervenors, Hubert Fullarton and Tracey Goegan.
L. Craig Brown, for the Hepatitis C Society of Canada, Friend of the Court.
Pierre R. Lavigne, for Dominique Honhon, Friend of the Court.
Bruce Lemer, for Anita Endean, Friend of the Court.
Elizabeth M. Stewart, for the Provinces and Territories other than British Columbia and Quebec.
Bonnie A. Tough and David Robins, for the plaintiffs.
Janice E. Blackburn and James P. Thomson, for the Canadian Hemophilia Society, Friend of the Court.

WINKLER J.:--

Nature of the Motion

1 This is a motion for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act 1992, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action", brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

2 The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

3 The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

4 The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

5 Pursuant to an order of this court, Pricewaterhouse Coopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

7 Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

8 The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

10 The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

11 Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the

effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

13 As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

14 During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

15 This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

(a) transmission through the blood supply if HCV infected donors are unaware of their infected condition and if there is no, or no effective, donor screening;
(b) an incubation period of 15 to 150 days;
(c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and
(d) no known cure.

16 The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

17 In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

18 The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

19 The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher rates of seroprevalence were believed to be similar.

20 The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

21 This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

23 The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

24 This decision was criticized by Dr. Alter. In an article published in the Medical Post in February 1988, Dr. Alter was quoted as stating that:

> "while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential."

25 The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf

of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

27 The Ontario Transfused Class is described as:

(a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;
(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;
(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;
(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and
(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

28 The Ontario Hemophiliac Class is described as:

(a) all persons who have or, had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;
(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;

(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec and who are or were infected with HCV;
(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and
(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

29 In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;
(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;
(c) a former Spouse of an Ontario Transfused Class Member;
(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;
(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;
(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and
(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

30 The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

31 The Settlement Agreement creates the following two Plans:

(1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and

(2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

32 To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

33 The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and

(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

34 The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

35 The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;

(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

36 Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

37 The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

38 The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV antibody is present in the blood of a class member.	A lump sum payment of $10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation

A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 - $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 - $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of income or loss of services in the home, subject to a threshold qualification.
	In addition, at this level, the class member is entitled to an additional $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the

	claimant is entitled to compensation for loss of income or loss of services in the home, $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,0000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is al-

	so entitled to reiumbursement for costs of care up to $50,000 per year.

39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01(1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

40 There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

41 Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

42 If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

(a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved dependants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

43 Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

44 Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

45 The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV.

47 Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

48 Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

49 Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

50 Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of	

death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

51 If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by, his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any, services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

52 The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;
(b) compensation payments will be indexed annually to protect against inflation;
(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;
(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and
(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

53 Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

54 Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p. 3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the probabilities were supplied by Dr.

Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

55 The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

56 In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

(a) the Hemophiliac cohort size is approximately 1645 persons
(b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.
(c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;
(d) 990 singularly infected hemophiliacs are alive at January 1, 1999
(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 coinfected claimants will not have any losses in respect of income.

57 Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation. Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate".

58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income". Then an assumption is made that the class members claiming income compensation will have other earnings post-claim

that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income] ... we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and our intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time. There are other assumptions and estimates which will be dealt with in greater detail below.

59 The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

60 Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

61 Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

62 The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

63 Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

64 Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

65 The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

66 This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the CPA and the power to amend the certification order is contained in s. 8(3) of the Act. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan mutatis mutandis to the Thalassemia sub-class.

Law and Analysis

67 Section 29(2) of the CPA provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

68 While the approval of the court is required to effect a settlement, there is no explicit provision in the CPA dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in Dabbs v. Sun Life Assurance, [1998] O.J. No. 1598 (Gen. Div.) (Dabbs No. 1) at para. 9:

> ... the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in Ontario New Home Warranty Program v. Chevron Chemical Co., [1999] O.J. No. 2245 (Sup. Ct.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

70 Sharpe J. stated in Dabbs v. Sun Life Assurance (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd 41 O.R. (3d) 97 (C.A.). leave to appeal to S.C.C. dismissed October 22, 1998, (Dabbs No. 2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is

not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

71 Generally. in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole", courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;
2. Amount and nature of discovery evidence;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties if any;
7. Number of objectors and nature of objections; and
8. The presence of good faith and the absence of collusion.

See Dabbs No. 1 at para. 13, Haney Iron Works Ltd v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at 571, See also Conte, Newberg on Class Actions, (3rd ed) (West Publishing) at para. 11.43.

72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

73 However, the settlement approval exercise is not merely a mechanical seriatim application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

74 Moreover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in Dabbs No. 2 at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of com-

> promise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

75 The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

76 Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the Manual for Complex Litigation, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties - even those with the best intentions - to give insufficient weight to the interests of at least some class members. The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants. (Emphasis added.)

77 The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

78 However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;
(b) the extent of compensation provided through the settlement;
(c) the sufficiency of the settlement Fund to provide the proposed compensation;
(d) the reversion of any surplus;
(e) the costs of administering the Plans; and
(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

79 It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the, class.

80 This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

81 Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my view, this approach is flawed in the present case.

82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical Conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

83 The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection. He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
>
> Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the vi-

rus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.

HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.

...

Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients .... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0. 133 units per year.

...

Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may, still be normal even though there is fibrosis since there may, be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.

A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.

Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will

> generally die within approximately 2-3 years unless he or she receives a liver transplant.
>
> Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
>
> ...
>
> The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety ...
>
> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess .... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

84 It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

85 This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J, in Andrews v. Grand & Toy Alberta Ltd, [1978] 2 S.C.R. 229 at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extin-

> guished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum of money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

87 The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

88 This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

90 The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers

all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

91 Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity that this creates in the settlement distribution. The Manual for Complex Litigation states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a

factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness ...".

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the CPA provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in Sawatzky v. Societe Chirurgiale Instrumentarium Inc. [1999] B.C.J. No. 1814 (S.C.), adopted by this court in Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

97 However, given that the settlement must be "fair, reasonable and in the best interests of the class", the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

101 Accordingly, the opt out provision of the settlement would not bean impediment to court approval with the modifications set out above.

102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

103 In any, event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory, benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.

105 Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $334,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they, have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear - e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example. the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement ...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially, in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

110 The report of the CASL study states at. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key, limitations are lack of applicability of these projections to children and special groups.

111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on

the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Div. Ct.), to support a conclusion that the Fund is sufficient. In Nantais, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two percent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

113 Although I cannot accept the Nantais experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically, revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000.000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision simpliciter is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels per se. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the CPA which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members ...". On the other hand, in the

proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in Dabbs No. 1 at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3.

127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and if such approvals are not granted without any material differences therein, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is de minimis in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally de minimis. I am prepared to approve the settlement with these changes.

132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in Dabbs No. 1 at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement ...

133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

133a I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings. [The Court did not number this paragraph. QL has assigned the number 133a.] WINKLER J.

cp/s/jjy/qljyw

TAB 16

1998 CarswellBC 543, 38 B.L.R. (2d) 251, 78 A.C.W.S. (3d) 256

1998 CarswellBC 543, 38 B.L.R. (2d) 251, 78 A.C.W.S. (3d) 256

Fotinis Restaurant Corp. v. White Spot Ltd.

Fotini's Restaurant Corp., Plaintiff, and White Spot Limited, Defendant

British Columbia Supreme Court [In Chambers]

Paris J.

Heard: March 5, 1998
Judgment: March 17, 1998
Docket: Vancouver C963451

Counsel: *Christopher Sabean*, for the Plaintiff.

Mark D. Andrews and *Ward K. Branch*, for the Defendant.

Subject: Property; Contracts; Civil Practice and Procedure; Corporate and Commercial

Cases considered by *Paris J.*:

Bank of Montreal v. Irwin (1995), 6 B.C.L.R. (3d) 239, 124 D.L.R. (4th) 73, 59 B.C.A.C. 11, 98 W.A.C. 11 (B.C. C.A.) — considered

British Columbia Electric Railway v. Turner (1914), 49 S.C.R. 470, 6 W.W.R. 288, 18 C.R.C. 193, 18 D.L.R. 430 (S.C.C.) — distinguished

White v. Central Trust Co. (1984), 7 D.L.R. (4th) 236, 54 N.B.R. (2d) 293, 17 E.T.R. 78, 140 A.P.R. 293 (N.B. C.A.) — applied

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 18A — pursuant to

APPLICATION by defendant for judgment dismissing plaintiff's action.

1998 CarswellBC 543, 38 B.L.R. (2d) 251, 78 A.C.W.S. (3d) 256

***Paris J.* [In Chambers]:**

1 This is an application pursuant to Rule 18A by the defendant for judgment dismissing the plaintiff's action.

2 The plaintiff's claim is for damages arising out of the purchase by it from the defendant of a restaurant and restaurant franchise. It is alleged that the defendant's agents during the course of the negotiations between the parties made fraudulent and/or negligent representations to the plaintiff's agents, Fotini and Demetrious Papafilis, regarding the profitability of the restaurant business being purchased. Mrs. Papafilis appears to have been the principal operator of the business. It did not generate the income anticipated by Mr. & Mrs. Papafilis and, it would appear that because of their financing costs they sustained significant losses. On December 1, 1995, with the consent of the defendant, the franchise and restaurant business were sold to a third party. The defendant denies that its agents made any such misrepresentations.

3 The specifics of the transactions are as follows. In September 1994, a company called Dimella Restaurants Ltd. entered into a franchise agreement with the defendant for the operation of a restaurant. Subsequently, Dimella assigned its rights and obligations under the agreement to the plaintiff with the defendant's consent. The plaintiff was required to pay a franchise fee of $75,000.00. On November 28, 1994, the plaintiff and the defendant executed an asset purchase agreement conveying the assets of the restaurant to which the franchise related. The purchase price of the restaurant was $525,000.00.

4 As mentioned above, Mr. & Mrs. Papafilis soon sought to sell the business and in August 1995 accepted an offer to purchase the restaurant and franchise from TG Sparkie Holding Corp. for $700,000.00. The closing date was December 1, 1995. As required by the original agreements the consent of the defendant was obtained. It agreed to the termination of the franchise agreement between the plaintiff and the defendant and also agreed to release the plaintiff from its obligations under a sublease of the restaurant premises which it had granted to the plaintiff. In return the plaintiff executed a general release in favour of the defendant. The release and termination agreement were authorized by a directors' resolution of the plaintiff. The plaintiff was represented in all these transactions by counsel and in fact the execution and delivery of all documentation, including relevant financial statements, was conducted through counsel for the parties.

5 This application for judgment by the defendant is based solely on the release. The text of the release is as follows:

> **Release**
>
> KNOW ALL MEN BY THESE PRESENTS that FOTINI'S RESTAURANT CORP. (the "Releasor") for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Releasor, DOES HEREBY RELEASE, REMISE AND FOREVER DISCHARGE, and by these presents does for itself and its successors and assigns, release, remise and forever discharge WHITE SPOT LIMITED (the "Releasee") and each of its affiliates, successors, assigns, directors, officers, employees and agents of and from any and all actions, causes of action, claims, demands and suits which the Releasor or its successors and assigns have or may have, whether at law or in equity and whether known or unknown, suspected or unsuspected, arising on or before the date of this release, or hereafter, including but not limited to those relating to any agreement or arrangement which the Releasor may have entered into or had with the Releasee or the termination of any of the foregoing.
>
> AND THE RELEASOR COVENANTS AND AGREES that it will not cause or attempt to cause any corporation, partnership, entity or person to commence any action, claim or demand of any nature or kind in law or in equity, against the Releasee or its affiliates, successors, assigns, directors, officers, employees or agents.

THE TERMS of this Release are contractual and not a mere recital.

The Releasor states that it has carefully read the foregoing release and knows the contents thereof and signs of its own free act.

DATED as of the 1st day of December, 1995.

FOTINI'S RESTAURANT CORP.

by: _____

Mr. & Mrs. Papafilis also signed individual releases on their own behalves.

6 The issue on this application is whether the releases are effective to avoid liability for any possible negligent or even fraudulent misrepresentations (which, as mentioned, are denied) which may have induced the plaintiff to enter into the franchise and asset purchase agreements.

7 In *White v. Central Trust Co.* (1984), 54 N.B.R. (2d) 293 (N.B. C.A.) at p. 310, the New Brunswick Court of Appeal (LaForest J.A.) set out the proper approach to the construction of releases as follows:

> .... Like other written documents, one must seek the meaning of a release from the words used by the parties. Though the context in which it was executed may be useful in interpreting the words, it must be remembered that the words used govern. As in other cases, too, the document must be read as a whole. This is particularly important to bear in mind in construing releases, the operative parts of which are often written in the broadest of terms. Thus reference is frequently made to recitals to determine the specific matters upon which the parties have obviously focused to confine the operation of general words. As Lord Westbury stated in the House of the Lord's case of ***London and South Western Railway Co. v. Blackmore*** (1870), L.R. 4 H.L. 610, at p. 623: "The general words in a release are limited always to that thing or those things which were specifically in the contemplation of the parties at the time when the release was given". [Emphasis Added]

8 Thus the efficacy of a release is to be judged in the same way as other written agreements entered into for consideration, that is, on the basis of ordinary contractual principles. Absent any infirmities going to the root of the contract such as mistake, undue influence, fraud, etc. and the importance of the "context" in appropriate cases to determine the intention of the parties, the words of the contract will govern the relationship of the parties. The language of the release in this case is, of course, very broad.

9 The principle enunciated in *White* (supra) applies even where an antecedent fraud is alleged. In *Bank of Montreal v. Irwin* (1995), 6 B.C.L.R. (3d) 239 (B.C. C.A.), a release was enforced even though the plaintiff alleged a fraudulent conveyance. At p. 248, the court said:

> The Release in the present case included actions, causes of actions, claims, etc. "whether known or unknown, suspected or unsuspected." As the learned chambers judge found, the gravamen of this action is the allegation that Mrs. Irwin is shielding an asset of her husband. The arrangement concerning the mortgage and taxes on the Eagle Island property had been in place for five years prior to the Release and were readily ascertainable by the Bank through the administration of the proposal and the negotiations with Mrs. Irwin for the Release. If this was a preference scheme between husband and wife, it was in place long before the Release was signed. The Bank could have taken the position in July 1991, that Mr. Irwin's conduct in relation to the home violated the proposal and was actionable.

10 Of course, if when a release is executed the releasor is unaware of the previous fraud then it could not be said to be "in the contemplation of the parties at the time when the release was given". However, I have concluded that the evidence in this case demonstrates that the plaintiff's agent, Mrs. Papafilis, was aware of all the facts which she says constitute the basis for the plaintiff's claim for negligent and fraudulent misrepresentation. That is so not only on the basis of the defendant's evidence but also that of Mrs. Papafilis' evidence given both upon her examination for discovery and in her affidavits filed with respect to this application.

11 Mrs. Papafilis is reasonably well educated and she and her husband are experienced restaurateurs. She testified that within a relatively short time after commencing the operation of the business she realized that it was not making the profits she had expected. She calculated the food and labour expenses and determined that they were higher than she had anticipated. She discussed these things with employees of the defendant. She testified that in the Spring of 1995 she suspected that the financial statements originally given to her by the defendant were not true and she discussed that with her accountant. However she testified that she did not take that concern up with the defendant because "I didn't want to talk to them anymore. I was very disappointed, I was very upset and I didn't want to have anything to do with them." She further testified, "We decided to get out of this and we had enough. We didn't need this stress in her life". Finally, although in her first two affidavits in response to this application she asserted that she was unaware of having been defrauded when she executed the releases, in her affidavit dated June 16, 1997, she states in paragraph 4:

> I also advised (my lawyers) that my husband and I felt lied to and bullied by the Defendant in connection with the Plaintiff's purchase of the restaurant and that we sold the business so promptly after purchase because we totally distrusted the Defendant and anticipated it would continue to cheat us. [Emphasis Added]

12 It seems evident therefore that in the Spring and Summer of 1995 when she and her husband decided to sell the business she was well aware of the circumstances which she now puts forward as being the basis for her claim against the defendant. As a result thereof, according to her own testimony, she felt that they had been "cheated". With that alleged knowledge in mind they later signed the release of the defendant "from any and all actions, causes of action, claims, demands and suits". That broad language would appear to preclude the bringing of this action as any liability for any antecedent negligent or fraudulent misrepresentations must have been "in the contemplation of the parties at the time when the release was given".

13 However certain further assertions on behalf of the plaintiff must be considered. In December 1996, in an affidavit in response to this application when it was first heard (and adjourned by the court to permit cross examination on the plaintiff's affidavits) Mrs. Papafilis stated that after the execution of the releases she noticed certain information in old financial records of the business which were still in her possession which provided evidence in support of her claims of misrepresentation. However, at her examination for discovery which took place since the first hearing of this application and the swearing of the aforementioned affidavit, the two boxes of financial records were produced to her and she was asked to point out the "new information". She was unable to point to anything.

14 She had also asserted in the affidavit and repeated at her examination for discovery that her accountant had advised her that a forensic analysis of the material should be conducted to demonstrate the evidence of the alleged misrepresentations. However, notwithstanding that this action was started in June 1996, to the date of the hearing before me no such evidence had been prepared or presented to the court.

15 Those circumstances tend to indicate that in fact there is no evidence of material misrepresentations by the defendant as alleged. But that is not directly germane to the defendant's argument on this application which, as I have said, is based entirely on the releases. However, it is relevant to this extent, that it confirms that no information came to her attention after the execution of the releases which could possibly affect them.

16 In an affidavit sworn a few days before this hearing Mrs. Papafilis states that she had just discovered that certain financial statements of the business ("Schedule F") for the seven month period prior to the purchase of the

plaintiff demonstrated a significant loss. She states that she had never seen Schedule F and it must not have been included in the material sent to her prior to the purchase. However, evidence since submitted on behalf of the defendant shows that Schedule F was included in the material forwarded by the defendant's solicitor to the plaintiff's solicitor at the time of the purchase. Even if it were true that her solicitor had somehow not provided Mrs. Papafilis with Schedule F any resulting misapprehension as to the financial affairs of the business could not be said to have been in any way the result of a misrepresentation by the defendant.

17 In any event, the fact that more evidence of the cause of action released may have come to a party's attention after the execution of a release does not invalidate the release if the cause of action in question was in the contemplation of the parties at the time of its execution (just as a release of liability for damages will remain valid even though the full extent of the damages may not be known to the injured party). Here the evidence is clear that the major circumstances relating to the allegations of misrepresentation were known to Mrs. Papafilis at the time of execution of the release and indeed, as set above, her own evidence on at least one occasion, is that she knew at that time that she had been "cheated". The alleged discovery of further evidence of the cause of action does not change the efficacy of the prior release thereof.

18 Counsel for the plaintiff cited authority (*British Columbia Electric Railway v. Turner* (1914), 49 S.C.R. 470 (S.C.C.)) holding that a release tainted by fraud is invalid. However the principle expressed there relates to releases which themselves are procured by fraud, as opposed to releases of antecedent fraud. There is no evidence in this case of the release in question being so procured.

19 Finally it should be noted that in its Reply to the statement of defence the plaintiff makes, it seems virtually as an afterthought, allegations of "economic duress" and "a pattern of harsh and unconscionable business practices as a result of which it would be inequitable to give effect to the release". It is not clear if that pleading was intended to raise a discrete cause of action or actions, and if so, which action. However, suffice it to say that there is no evidence which could serve as the basis for any such claim of "duress" or "unconscionability".

20 The application is allowed and the action is dismissed. There was an application by the plaintiff brought at the same time to amend the statement of claim to withdraw a supposed admission of fact. That, of course, is now academic.

21 Costs will follow the event on the ordinary scale.

Application allowed and action dismissed.

END OF DOCUMENT

TAB 17

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

Between
Paul Dabbs, plaintiff, and
Sun Life Assurance Company of Canada, defendant

[1998] O.J. No. 1598

Court File No. 96-CT-022862

Ontario Court of Justice (General Division)

Sharpe J.

Heard: February 5, 1998.
Judgment: February 24, 1998.

(14 pp.)

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class or representative actions, for damages -- Settlements -- Court approval.

Ruling as to procedural issues with respect to a motion for settlement approval of a class action suit involving a claim for damages against an insurer for breach of contract. The claim was settled by an agreement. Fourteen members of the proposed class filed objections to the settlement. The issues were the onus for approval of the agreement, the role of the court and factors to be considered in the approval of the agreement, procedures for and scope of the objection to the agreement and costs.

HELD: The parties proposing the settlement had the onus of showing that it should be approved. The role of the court was to find that the settlement was fair, reasonable and in the best interests of all those affected by it. The factors to be considered were the likelihood of recovery, the amount and nature of discovery evidence, the settlement terms, counsel's recommendations, the future expense of litigation, the number of objectors, the nature of objections and the presence of good faith. The objectors had the right to adduce evidence by way of affidavit but had no right to oral discovery or production of documents. They were subject to the discretion of the court to impose appropriate terms as to costs.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 242(2).

Class Proceedings Act, 1992, ss. 12, 14, 29, 32(1).

Ontario Rules of Civil Procedure, Rule 7.08(1).

Counsel:

Michael A. Elzenga and Charles M. Wright, for the plaintiff.
H. Lorne Morphy and Patricia D.S. Jackson, for the defendant.
Michael Deverett, for 3 objectors.
Gary R. Will and J. Douglas Barnett, for 11 objectors.

SHARPE J.:--

1. NATURE OF PROCEEDINGS

1 In this action, commenced pursuant to the Class Proceedings Act 1992, the plaintiff asserts claims for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. Similar actions were commenced in Quebec and in British Columbia. Before the defendant filed a statement of defence and before certification as a class proceeding, this action, together with the Quebec and British Columbia actions, was settled by written agreement, dated June 16, 1997, setting out detailed and complex terms. The settlement is subject to and conditional upon court approval in all three provinces.

2 Winkler J. approved a form of notice of motion for a certification/authorization and agreement approval to be sent to members of the proposed Ontario class. Similar orders were made in Quebec and British Columbia. The notice stated that members of the class who wished to participate in the hearing for approval of the settlement were required to file a written statement of objection and notice of appearance by a specified date. Fourteen members of the proposed Ontario class filed objections. Three are represented by Mr. Deverett and eleven by Messrs. Will and Barnett. At the opening of this hearing, Mr. Deverett indicated that one of the objectors he represents wished to withdraw from further participation.

3 On August 28, 1997 Winkler J. directed that there be a hearing to determine certain procedural issues, namely:

(a) Standing to object;
(b) Procedures for and scope of objection;
(c) The role of the court in approval of the agreement;
(d) Onus for approval of the agreement;
(e) Factors to be considered by the court for approval of the agreement;
(f) Cost consequences.

4 The issue of standing was determined by Winkler J. and it was contemplated that the motion to determine the remaining procedural issues would be heard on September 4, 1997. It did not proceed on that date as the Deverett objectors requested an adjournment. The Deverett objectors then

brought a motion to set aside Winkler J.'s earlier order regarding the notice of motion for certification/authorization, to declare the plaintiff's counsel to be in a conflict of interest, and for other relief, including an order that those objectors be given immunity from costs and be awarded interim costs. While the costs issue remains outstanding, other aspects of the motion were dismissed by Winkler J. An application for leave to appeal from that order was dismissed by O'Driscoll J. on January 22, 1998.

5 I have now heard full argument on the outstanding procedural issues specified by Winkler J.'s August 29, 1997 direction. For convenience of analysis, I propose to deal with them in the following order:

(a) Onus for approval of the agreement;
(b) The role of the court in approval of the agreement;
(c) Factors to be considered by the court for approval of the agreement;
(d) Procedures for and scope of objection;
(e) Cost consequences

6 I wish to emphasize at the outset that what follows is intended only to provide a procedural framework for the hearing of this motion. It would be entirely inappropriate to attempt to determine in the context of one case a process appropriate for all cases. My ruling has been determined on the basis of the submissions I have heard and is intended to do no more than provide guidance to the parties and objectors in the present case.

2. ANALYSIS

(a) Onus for approval of the agreement

7 It is common ground that the parties proposing the settlement bear the onus of satisfying the court that it ought to be approved.

(b) The role of the court in approval of the agreement

8 There are two matters to be determined by the court: (1) should the action be certified as a class proceeding and, if the answer is yes, (2) should the settlement be approved. While the role of the court with respect to certification is well defined by the Class Proceedings Act, 1992, the same cannot be said of the approval of settlements. Section 29 provides that "[a] settlement of a class proceeding is not binding unless approved by the court" but the Act provides no statutory guidelines that are to be followed.

9 Experience from other situations in which the court is required to approve settlements does, however, provide guidance. Court approval is required in situations where there are parties under disability (see Rule 7.08(1)). Court approval is also required in other circumstances where there are affected parties not before the court (see Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 242(2) dealing with derivative actions). The standard in these situations is essentially the same and is equally applicable here: the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

10 It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3. As a practical matter, it is within the power of the court to indicate areas of concern and af-

ford the parties the opportunity to answer and address those concerns with changes to the settlement; see eg Bowling v. Pfizer Inc. 143 F.R.D. 141 (1992), I would observe, however, that the fact that the settlement has already been approved in Quebec and British Columbia would have to be considered as a factor making changes unlikely in this case.

11 With respect to specific objections raised by the objectors, there is an additional factor to be kept in mind. The role of the court is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. As approval is sought at the same time as certification, even if the settlement is approved, class members will be afforded the right to opt out. There is, accordingly an element control that may be exercised to alleviate matters of particular concern to individual class members.

12 Various definitions of "reasonableness" were offered in argument. The word suggests that there is a range within which the settlement must fall that makes some allowance for differences of view, as an American court put it "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion". (Newman v. Stein 464 F. (2d) 689 (1972) at 693).

(c) Factors to be considered by the court for approval of the agreement

13 A leading American text, Newberg on Class Actions, (3rd ed), para. 11.43 offers the following useful list of criteria:

1. Likelihood of recovery, or likelihood of success
2. Amount and nature of discovery evidence
3. Settlement terms and conditions
4. Recommendation and experience of counsel
5. Future expense and likely duration of litigation
6. Recommendation of neutral parties if any
7. Number of objectors and nature of objections
8. The presence of good faith and the absence of collusion

14 I also find the following passage from the judgment of Callaghan A.C.J.H.C. in Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 at 230-1 to be most helpful. Callaghan A.C.J.H.C. was considering approval of a settlement in a derivative action, but his comments are equally applicable to the approval of settlements of class action:

> In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, t here is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
>
> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not

satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.

In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court as simply rubber-stamp the proposal.

The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.

...

The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in Yonge v. Katz, 447 F. (2d) 431 (1971), it is stated:

> It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedures would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

In another case cited by all parties in these proceedings, Greenspun v. Bogan, 492 F. (2d) 375 at p. 381 (1974), it is stated:

> ... any settlement is the result of a compromise - each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See United Founders Life Ins. Co. v. Consumer's National Life Inc. Co., 447 F. (2d) 647 (7th Cir. 1971); Florida Trailer & Equipment Co. v. Deal, 284 F. (2d) 567, 571 (5th Cir. 1960). It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise in the extent of the settlement, that to approve the settlement would be an abuse of discretion. (Emphasis added)

15 It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.

16 In the arguments presented by the proponents of the settlement, considerable emphasis is placed on the opinion of senior counsel that the settlement is fair and reasonable as an important

factor. While I agree that the opinion of counsel is evidence worthy of consideration, it is only one factor to be considered. It does not relieve the parties proposing the settlement of the obligation to provide sufficient information to permit the court to exercise its function of independent approval. On the other hand, the court must be mindful of the fact that as the consequence of not approving the settlement is that the litigation may well continue, there are inherent constraints on the extent to which the parties can be expected to make complete disclosure of the strengths and weaknesses of their case.

(d) Procedures for and scope of objection

17 The Class Proceedings Act, 1992, s. 12 confers a general discretion on the court with respect to the conduct of class proceedings:

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

18 Section 14 provides for the participation of class members in the following terms:

> 14(1) In order to ensure the fair and adequate representation of the interests of the claims or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

19 As already noted, the order of Winkler J. required class members who wished to object to the settlement to file written objections. It remains to determine the procedural and other rights objectors have in relation to the approval process.

20 In general, the procedural rights of all participate in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

21 In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

(i) Objectors' right to adduce evidence

22 I can see no reason why the objectors should not have the right to adduce evidence. However, given the interests of the objectors and the nature of the process, the right to adduce evidence is not at large. Any evidence adduced by the objectors must be relevant to the points they have raised

by way of objection. It must also be adduced in a timely fashion. I direct that any evidence be adduced by way of affidavit filed at least 30 days prior to the date set for the hearing of this motion.

(ii) Objectors' right to discovery

23 Under the Rules of Court, the right to oral discovery and production of documents is restricted to parties to an action. The objectors are not parties to the action, and accordingly have no right to oral discovery or production of documents.

24 On the other hand, s. 14(2) of the Act does provide that participation "shall be in whatever manner and on whatever terms ... the court considers appropriate." On behalf of the objectors he represents, Mr. Deverett sought the right to conduct essentially a "no holds barred" discovery of the parties to the action. He submitted that as no discovery had been conducted, it was impossible to assess the merits of the case and the settlement without one. In my view, this submission misses the whole point of the settlement approval exercise. The very purpose of the settlement at an early stage of the proceedings is to avoid the cost and delay involved in discovery and other pre-trial procedures. If Mr. Deverett is right, then a class action could almost never be settled without discovery, for if the parties did not conduct one, an objector could insist upon doing so as a precondition of settlement. This would create a powerful disincentive to early settlements by the parties and would run counter to the general policy of the law which strongly favours early resolution of disputes. On the other hand, the lack of discovery is a factor the court may take into account in assessing the fairness of the settlement. However, the remedy in a case where the court concludes that the settlement cannot be approved without a discovery is to refuse to approve the settlement and not to have one conducted by an objector. Given the very different in approach to discovery in the United States, I do not find the American authorities cited by the objectors on this point to be persuasive.

25 The objectors represented by Mr. Will seek production of certain specific documents relevant to their claims. This request has to be assessed in the light of the settlement agreement itself. An important element of the settlement agreement is a process to resolve individual claims. One aspect of that process will entitled these objectors to production of documents. The process will also permit them to opt out of the settlement after they receive production. In my view, in light of the process contemplated by the settlement agreement, these objectors are not entitled to insist upon production of documents at this stage. The point of the approval process is to determine whether the settlement is fair, reasonable and in the best interests of those affected by it. The issue for the court, then, is to assess whether the process contemplated by the settlement agreement is a fair one. I fail to see what relevance documents pertaining to the claims of these objections have at this stage or how they would assist the court in determining whether the settlement and the process it specifies is a fair one.

26 Accordingly, in the circumstances of this case, I find that it is not appropriate to grant the objectors the right to oral or documentary discovery.

(iii) Right to cross-examine

27 The objectors also seek a general right to cross-examine on the affidavits filed in support of approval of the settlement. There is not inherent right to cross-examine: see eg. Kevork v. The Queen, [1984] 2 F.C. 753. On the other hand, it is important that there be some way for the court to ensure that evidence on contentious points can be probed and tested. As I have already stated, I view the approval process as one which the court must control and in which the court must take an

active role. In keeping with that principle, and in view of the extremely open-ended request made by the Deverett objectors, I direct as follows:

(1) that any cross-examination of deponents shall take place viva voce before the court on the dates set for the hearing of the certification/approval motion;
(2) that any party or objector who wishes to cross-examine a deponent serve and file at least 10 days prior to the motion a written outline of the matters upon which cross-examination is requested;
(3) that the nature and extent of cross-examination shall, subject to the discretion of the court, only be in an area indicated by the written outline and shall be subject to the discretion of the court to exclude such cross-examination which may be exercised either before or during the hearing of the motion;
(4) that any deponent for which cross-examination is requested shall be available to attend court on the days the motion is to be heard as if under summons;
(5) that in any event, Mr. Ritchie be in attendance for the motion;
(6) that the right of the court to question witnesses shall remain within the sole discretion of the court and shall not be in any way affected by para (2).

(e) Costs consequences

28 The Deverett objectors seek an order that they not be subject to any order as to costs and that they be awarded interim costs. It was suggested, in the alternative, by Mr. Will that I specify in advance the circumstances which would or would not lead to an adverse costs order.

29 In my view, no such orders or directives should be made. Nothing has been shown that would bring this case within the category of "very exceptional cases" contemplated by Organ v. Barnett (1992), 11 O.R. (3d) 210 as justifying an award of interim costs to ensure that the objectors are able to continue their participation. Section 32(1) of the Act, which provides that class members are not liable for costs except with respect to the determination of their own claims, does not apply. That provision contemplates the usual situation where a class member takes no active step in the proceedings. The objectors are subject to the discretion conferred by s. 14(2), which expressly preserves the right of the court to impose appropriate terms as to costs.

30 It is important that, as one means of controlling the process, the court retain its discretion with respect to the costs of this process. I hardly need add that my discretion is to be exercised in accordance with an established body of law dealing with cost orders. That body of law recognizes the right of the court to award costs to compensate for or sanction inappropriate behaviour by a litigant. It also recognizes that in certain cases, departure from the ordinary rule that an unsuccessful pay the costs of the winner may be appropriate: see eg. Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690.

CONCLUSION

31 If there are further procedural issues which arise prior to the hearing of the motion, I may be spoken to.

SHARPE J.

qp/mii

TAB 18

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

Between
Paul Dabbs, plaintiff, and
Sun Life Assurance Company of Canada, defendant

[1998] O.J. No. 2811

40 O.R. (3d) 429

5 C.C.L.I. (3d) 18

22 C.P.C. (4th) 381

[1998] I.L.R. I-3575

80 A.C.W.S. (3d) 956

Court File No. 96-CT-022862

Ontario Court of Justice (General Division)

Sharpe J.

Heard: May 4, 5 and June 5, 1998.
Judgment: July 3, 1998.

(21 pp.)

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

This was a motion for certification of the action as a class proceeding, and approval of a settlement. The plaintiffs alleged that in marketing certain vanishing premium life insurance policies, the defendant insurance company made misrepresentations which induced the plaintiffs to enter into their agreements. Together with similar Quebec and British Columbia actions, this action was settled by written agreement, subject to court approval in all three provinces. The settlement had been approved in Quebec and British Columbia.

HELD: The proceeding was certified as a class proceeding, and the settlement was approved. This was an appropriate case for certification. The statement of claim disclosed a tenable cause of action. The proposed definition of the class represented an identifiable class of two or more persons that would be represented by the representative plaintiff. The statement of claim raised a common issue. A class proceeding was the preferable and most efficient procedure for the resolution of the common issue. The representative plaintiff had made a sincere and genuine effort to represent the interests of the proposed class, and had produced a proper plan for resolution of the proceeding. The settlement was fair, reasonable and in the best interests of those affected by it. The fact that the settlement was strongly recommended by experienced class counsel was a factor in its favour. The class would incur risks if the case proceeded to trial. The Alternative Claims Resolution Process provided for in the settlement agreement offered a fair and reasonable resolution of claims. Another factor favouring approval was that the same agreement had been approved by courts in British Columbia and Quebec. The fact that settlement was reached at a very early stage of the proceedings, before a statement of defence had been filed or discovery had been held, was not a reason for refusing approval.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, s. 5(1)(a), 5(1) (b), 5(1)(c), 5(1)(d), 5(1)(e)(i), 5(1)(e)(ii), 5(1)(e) (iii).

Counsel:

Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, for the plaintiff.
H. Lorne Morphy and Patricia D.S. Jackson, for the defendant.
Michael Deverett, for 3 objectors.
Gary R. Will and J. Douglas Barnett, for 11 objectors.

SHARPE J.:--

1. NATURE OF PROCEEDINGS

1 This action is a proposed class proceeding pursuant to the Class Proceedings Act 1992, S.O. 1992, c. 6. The claim arises from the sale of so-called "vanishing premium" life insurance policies. The plaintiff alleges that in marketing these policies, the defendant Sun Life Assurance Company of Canada ("Sun Life") and its agents represented to purchasers that dividends to policy holders would pay the required premiums within a specified number of years. Sales illustrations projected a "premium offset date" after which no further premiums would be required. In fact, in the plaintiff's case and in a large number of similar cases, dividends have been lower than projected and policy holders have been or will be required to pay premiums for a longer period than the projected premium offset date. The defendant Sun Life has made it clear that it denies the allegations of misrepresentation.

2 Together with similar Quebec and British Columbia actions, this action was settled by written agreement, dated June 16, 1997. The settlement is subject to and conditional upon court approval in all three provinces. The settlement has been approved in Quebec and British Columbia. On this mo-

tion, the plaintiff and defendant seek certification of the action as a class proceeding and approval of the settlement.

3 Following my earlier ruling on the procedure to be followed on this motion, released February 24, 1998, further material was filed by the plaintiff and by certain of the objectors. The motion was then heard over three days in accordance with the terms set out in my procedural ruling. I am now in a position to rule on certification and the request for approval of the settlement.

2. CERTIFICATION

4 The test for certification is set out in the following terms in the Class Proceedings Act, s. 5:

> 5 (1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
>
> (a) the pleadings or the notice of action discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

5 The defendant supports the motion for certification, but only on the condition that the settlement be approved at the same time. Subject to certain submissions relating to the subclass issue discussed below, the objectors focused their attention on the settlement and did not seriously contend that this was not a case for certification.

(a) Cause of Action

6 I am satisfied that the statement of claim discloses a cause of action. The plaintiff asserts claims on his own behalf and on behalf of a proposed class for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. The allegations in the action primarily concern the use of sales illustrations, combined with oral and written representations made by the defendant and its agents with respect to the date upon which dividends would be sufficient to fully pay up the policies. While it is clear from the position it has taken on this motion that the defendant would deny these allegations if the action were to proceed, the plaintiff does plead a tenable cause of action.

(b) Identifiable Class

7 The plaintiff proposes that the class be defined as follows:

> all owners of Class Policies purchased in Ontario, or who are resident in Ontario on April 30, 1997 and whose Class Policy(ies) were purchased outside Quebec or British Columbia.
>
> "Class Policy" is defined as
>
> any participating whole life policy issued by Sun Life in Canada between January 1, 1980 and December 31, 1995 which is in force as of April 30, 1997 (a "Current Class Policy") or which has become a Lapsed Policy between January 1, 1990 and April 30, 1997 (a "Lapsed Class Policy"), except those policies in respect of which the owners have released Sun Life from claims related to premium offset or to the sale of the policies.

8 The proposed definition of the class does, I find, represent an identifiable class of two or more persons that would be represented by the representative plaintiff. It is common ground that there are approximately 141,000 members of the proposed class in Ontario and approximately 400,000 class members in Canada.

(c) Common Issue

9 I also find that the statement of claim does raise a common issue, namely the following:

> Did the use of illustrations and/or any representations, in writing or verbal, create an obligation on the part of Sun Life with respect to a specified offset date despite the terms of the policy itself and the terms of any illustration?

(d) Preferable Procedure

10 I find that a class proceeding is the preferable procedure for the resolution of the common issue. As already noted, there are approximately 141,000 class members in Ontario and approximately 400,000 class members in Canada. The litigation of these claims on an individual basis would be costly and time consuming. Indeed, if these claims had to be litigated on an individual basis, few members of the class would be able to present their claims because of the costs, risks and delays involved. I have no doubt that a class proceeding is the most efficient manner to deal with these claims from the perspective of both the litigants and the court, and that a class proceeding will result in increased access to justice.

(e) Representative Plaintiff

11 Mr. Dabbs filed an affidavit on this motion and was cross-examined before me. Mr. Dabbs impressed me as being an honest and informed lay person with a genuine perception of having been mislead by an agent as to the number of premiums he would have to pay. I am satisfied on the basis of all the evidence that he has made a sincere and genuine effort to represent the interests of the proposed class and that he has no conflict of interest with other members of the class. I find as well that the representative plaintiff has produced a proper plan for the resolution of this proceeding.

(f) Subclass

12 Mr. Deverett submitted that certification should be denied on the ground that the agreement failed to provide for a subclass for those who have claims for "twisting", a practice whereby a policy holder is improperly induced by an agent to replace an existing policy with a new policy of less value to the policy holder. In my view, there is no evidence that would indicate that there has been a significant problem with "twisting" among Sun Life policy holders. Class counsel did not ignore the issue. The statement of claim contains an allegation that would deal with twisting. However, Mr. Ritchie testified that from class counsel's interviews with over 200 policy holders, there emerged no evidence of a systemic problem. In my view, in the absence of any evidence or reasonably supported belief that twisting may be a wide-spread problem among class members, there is no basis for denying certification on the ground that there is no subclass for "twisting". The right to opt out provides adequate protection to any class member who wishes to pursue a claim for "twisting".

3. TERMS OF THE SETTLEMENT

13 The settlement agreement is a document of some considerable complexity, but it will facilitate analysis to provide a simplified explanation of it main features.

(a) Right to Opt Out

14 Under the terms of the settlement, all class members retain the right to opt out of the settlement and sue on their own behalf for whatever claim they wish to assert. The right to opt out arises at two stages. A class member may opt out immediately and have nothing to do with the settlement. There is also a right to opt out that arises in one area of the alternative claim resolution process, discussed in greater detail below.

(b) Global Benefits

15 The proposed settlement contains two types of benefits for class members. First are Global Benefits. These might be described as "no-proof" benefits. They are available to all class members without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. All members of the class are automatically entitled to an annual dividend improvement of 50 basis points (1/2 %) higher than would otherwise apply for a period of three years. For a special category of policies known as "enhanced policies", there is a further benefit of a 25% reduction in the cost of term insurance for the enhanced term of such policy.

16 A member of the class may also elect the Optional Dividend Benefit. This is also a "no-proof" benefit, available without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. This benefit entitles the policy holder to an annual dividend interest rate that is 75 basis points (3/4 %) higher than would otherwise apply for the term of the policy. However, to obtain this benefit, the policy holder must waive the Special Maturity Dividend. The Special Maturity Dividend is not a right secured by any policy, but an enhancement the defendant has voluntarily provided to its policy holders. It represents an enhanced cash value or payment on death determined by the length of time the member has held the policy. To determine the relative values of the Optional Dividend Benefit and the Special Maturity Dividend the policy holder must give up, it is necessary to examine the policy holder's individual circumstances. The plaintiff and the defendant submit that in most cases, the value of the Optional

Dividend Benefit will greatly exceed the value of the Special Maturity Dividend. I will return to the question of the value of the Optional Dividend Benefit below.

(c) Alternative Claims Resolution Process

17 The second type of benefit is that available through the Alternative Claims Resolution Process ("ACRP"). The ACRP provides a mechanism whereby a policy holder presents evidence of the nature of the actual misrepresentation made at the time of sale of the policy. A class member who elects to submit an ACRP claim is, subject to an exception described below, not entitled to receive the "no-proof" benefits just described. The ACRP provides for submission of a claim on the basis of affidavit from the policy holder and certain documentary evidence.

18 The settlement agreement contemplates that a policy holder who submits an ACRP claim will be placed in one of five categories. These are described in greater detail and with more precision in the agreement, but for present purposes, the following simplified definitions will suffice:

> Category 1: the member provides evidence showing that the defendant or its agent made a written representation that the policy would be fully paid-up after a specified number of premiums had been paid.
>
> Category 2: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and the agent confirms that such representation was made.
>
> Category 3: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent neither confirms nor denies that such representation was made.
>
> Category 4: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent provides an affidavit denying that such representation was made.
>
> Category 5: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and there is evidence that a written statement was provided at the time of sale
>
> which contradicts the member's version of the misrepresentation.

19 The rights and benefits attaching to these classifications is as follows. Category 1 and 2 claimants are entitled to the same premium offset entitlement that was represented to them. Category 3 claimants are entitled to a premium offset date which is half way from the premium offset date represented at the time of sale to the premium offset date shown as applicable on the first policy anniversary date after March 1, 1997. Category 4 and 5 claimants are entitled to no relief. However, Category 4 claimants have two options available after their claims have been classified as falling

into Category 4. First, they have the right to opt out of the settlement entirely, thereby preserving any common law action right they may have. Second, Category 4 claimants have the right to re-elect and take either of the "no-proof" benefits described above.

20 The settlement agreement provides for a summary and mechanical process whereby claims are to be assessed and classified. The ACRP does not allow for viva voce evidence, nor does it permit a right to cross-examine and or include any right to make oral representations. The defendant Sun Life is required to establish a Claims Administration Facility which bears primary responsibility for determining the claims. The Claims Administration Facility is, however, subject to audit by class counsel and rejected claims are subject to review by a Review Panel consisting of a lawyer designated by Sun Life and a designated member of settlement class counsel. In the event of disagreement between the members of the review panel, there is further review by the "Designate", defined as a retired judge or comparable individual.

21 The agreement requires the parties to provide to the court for approval a list of statements which are to be considered to constitute clear and unqualified guarantees as contemplated for Category 1 and 2 claims. To protect the integrity of the ACRP, the lists are filed with the court under seal, but I have reviewed them. I find that they represent a useful, fair and reasonable collection of the sort of statement that would meet the standard required under the agreement.

22 Sun Life is also required to provide a toll free telephone information line on which class members may make inquiries and obtain policy status information. Class counsel are required to monitor that "hot line" to ensure that appropriate information is given to class members. I note as well that class members who opt for the ACRP are entitled to access to the Sun Life file. Counsel for Sun Life stated to the court that before having to decide whether to accept the Global Benefits, elect the Optional Dividend Benefit or pursue a claim under the Alternative Resolution Process, a class member would be able to obtain from Sun Life a print-out setting out information as to the class member's policy that would include the value of the Special Maturity Benefit.

(d) Value of the Optional Dividend Benefit

23 The value of the "Optional Dividend Benefit" is of considerable significance. It is available to all policy holders on a "no-proof" basis and as it provides the fall-back position available to those policy holders who swear that a misrepresentation was made but who are denied any relief under the ACRP when met with a sworn denial by the agent.

24 I asked for further evidence of the value of this benefit. The plaintiff answered this request with a further affidavit from an actuary who had been retained to provide an expert opinion on the overall worth of the settlement. It is apparent that the actuary's opinion is based upon background information with respect to policies, dividends and benefits provided by the defendant. While neither of the groups of objectors showed any concern about the value of the Optional Dividend Benefit until I raised the point, both counsel submitted that there should be a more searching inquiry into the background information that had been provided to Mr. Huff. The defendant takes the position that this information is of a confidential nature and that if it were to be made a matter of public record, the defendant would suffer thereby. Upon Mr. Huff depositing with the Registrar of the Court copies of the material and information he had been provided by the defendant, I reserved my decision on the appropriate course to follow.

25 My ruling on this point is that the question I asked has been answered by Mr. Huff's evidence and that without looking at the material provided by the defendant to Mr. Huff, I have been provided sufficient information to permit me to assess the fairness of this settlement. I reach this conclusion for the following reasons. First, Mr. Huff impressed me as a reliable witness who took his role as an independent expert seriously. He did not exaggerate or use the witness stand as a platform to advocate the cause of the party that retained him. His evidence was measured and balanced. He indicated that by its very nature, virtually all of the information he needed to formulate his opinion had to come from the defendant. There is simply no independent source for the number and types of policies, the rights attached to those policies and the formulae for calculation of benefits. To the extent possible, he was able to verify that the information provided by the defendant was internally consistent and the necessary actuarial calculations were tested.

26 I was urged by the objectors represented by Mr. Deverett to question the reliability of data supplied by the defendant because of an adverse credibility finding made against a senior officer of the defendant by another judge of this court in another action. In my view, it would be entirely inappropriate to accept such a submission. Each case falls to be decided on its own merits and on the evidence presented and the information at issue here is not the same as the evidence rejected in that other proceeding.

27 I am satisfied that an honest and significant effort has been made to respond to the question I asked. Mr. Huff and his associates devoted over 100 hours of professional time, 50 hours of paraprofessional time and 30 hours of clerical time, the greater part of which was related to the verification of offset dates. No further review is required. I would add that inherent in the approval of a settlement is the need to assess issues on a less than complete factual record. To require proof of all relevant facts to the standard required at trial would defeat the very notion of a settlement where the parties ask the court to approve an arrangement reached on a less than perfect record.

28 Mr. Huff's evidence is that over 90% of policy holders would achieve offset reductions of between 30% and 70% through the Optional Dividend Benefit. The weighted average reduction for policies he tested with meaningful offset reductions (ie. excluding those where the current offset was the same as that indicated at the time of issue) was 56%. It is apparent that these are averages and that to assess the situation of any individual policy holder, it would be necessary to consider the particulars of that individuals situation. Mr. Huff confirmed that the examples provided by Sun Life in the Question and Answer booklet provided to Class members are accurate.

(e) Lapsed Policies

29 The agreement also makes provision for lapsed policies. The holder of a lapsed policy who is able to provide evidence of insurability is entitled to a new policy similar to the lapsed policy with a 50% reduction in the first annual premium. The holder of a lapsed policy may also apply under the ACRP. If the member's claim is classified as Category 1,2 or 3, the policy may be reinstated without evidence of insurability upon payment of past due premiums, loans and interest.

4. ANALYSIS OF THE PROPOSED SETTLEMENT

(a) The standard for approval

30 In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best

interests of those affected by it. A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October, 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

31 I have had the benefit of three full days of cross-examination of deponents on affidavits filed in support of the settlement and submissions by counsel representing the parties and the objectors. I have received answers to certain questions I posed to the parties. After considerations of the points that have been made both in favour of and against approval of the settlement, for the reasons that follow, I have reached the conclusion that this settlement should be approved.

(b) Recommendation of Class Counsel

32 The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. Moreover, in the case at bar, the settlement was not the result of a solo effort. As there were proceedings brought in British Columbia and Quebec as well, there was a team of class counsel from three different provinces. Moreover, class counsel also sought and obtained the advise of counsel from the United States who have experience in "vanishing premium" litigation.

(c) Risks of Proceeding to Trial

33 While the plaintiff presents an arguable case, there is no doubt that there is a risk that if the case went to trial, the common issue would be resolved against the class. Misrepresentation is often difficult to prove. Here, the standard sales illustration which forms the basis of most claims contains an explicit waiver which the members of the class would have to overcome. While the specific terms vary, typical language is: "This illustration assumes a continuation of the current scale of dividends and Special Maturity Dividends (SMD). Dividends may be higher or lower; they will be based on Sun Life's interest, expense, and mortality experience." The policies themselves typically contain language indicating that the premium is payable throughout the term of the policy: "Total Premiums payable by owner due [Month, Day and Year] and yearly thereafter while life insured lives." It is certainly possible that the defendant might persuade a court that such language provided class members with a clear statement that the dividends might or might not be sufficient to fulfil the hoped for result of the illustration. In addition to the legal and factual risks are certain practical concerns. The case would be factually, legally and procedurally complex. It would almost certainly take several years to get to trial and to then exhaust appeals.

(d) Fairness of the ACRP

34 The ACRP is at the core of this agreement. It plainly does not offer the procedural guarantees of a trial as there is no right to cross-examine, present oral evidence or to make oral submissions. On the other hand, there would be no point to the settlement if it did not provide for some form of summary resolution of claims. The provision of a cost-free process to claimants who would otherwise be forced to abandon their claims or bear the costs of litigation represents a significant benefit.

35 In my view, there can be little doubt that the ACRP offers a fair and reasonable resolution of claims falling in Categories 1 and 2 which afford the claimant precisely the off-set date that was represented. I would also find it difficult to question the fairness of the result of a Category 3 claim where the claimant is given half-way relief on the basis of nothing more that the claimants own sworn statement that an oral representation was made. Similarly, I see no reason to question the fairness of a Category 5 claim where there is evidence that a written statement was provided at the time of sale which contradicts the claimant's version of the misrepresentation. It is only fair that there be some control on the extent to which a class member can secure a benefit in the strength of his or her own affidavit. I note here that in answer to a question I posed, it was stated to the court that it was not intended that language of the explicit waiver in the standard sales illustration quoted above would be sufficient to bring the claim within Category 5.

36 The contentious issue is the fairness of Category 4. Mr. Will focused his attention on this point and submitted that, in effect, the agent was given a veto over the rights of the policy holder. It was his submission that there should be some control or constraint on the extent to which agents could defeat a claim by simple denial. The right to confront and cross-examine the agent could be granted, or there could be a points system that would discount agent denials where the same agent denied more than one claim.

37 In my view, there are a number of factors which have to be considered here. First is the fact that the agent must make the denial on oath. This means that the agent who lies is subject to the threat of perjury. Second, it is not apparent that all agents will perceive it to be in their interest to favour the interests of Sun Life over their clients. Third are the very significant options that remain to a class member whose claim is denied by the agent. The class member has, at that point, the right to opt out and sue the defendant with full knowledge of the case he or she will have to meet. In that sense, the class member loses nothing because of the settlement but gains advance discovery of the case to be met. The class member also has the very significant right to abandon the ACRP and elect the "no-proof" benefits which, as noted, will frequently result in achieving half-way relief. In my view, when considered in light of the balance of the settlement, it cannot be said that the situation of the Category 4 claimants renders this settlement unfair.

38 It is my view, that considered as a whole, the ACRP does provide for an efficient and fair process.

(e) Approval in British Columbia and Quebec

39 Another factor which favours approval of the settlement is that the same agreement has been approved by the courts of British Columbia and Quebec. In the companion case in British Columbia, Romanchuck v. Sun Life Assurance Company of Canada, Nov. 28, 1997, Brenner J. found that:

> ... the settlement is reasonable, fair and adequate. A considerable degree of creativity has been demonstrated by the parties in putting in place, among other

> things, a form of alternative dispute resolution to allow a cost effective method of resolving the claims in this case ...

In the Quebec case, Podmore v. Sun Life Assurance Company of Canada, January 16, 1998, Tannenbaum J. of the Quebec Superior Court found that the agreement was "raisonnable, équitable, approprié et dans le meilleur intérêt du groupe visé."

(f) Absence of Statement of Defence and Discovery

40 This settlement was reached at a very early stage of the proceedings. No statement of defence was filed and there has been no discovery. The position of the defendant has not been put formally on the record and has been known to class counsel only through the settlement process. In my view, this is not a reason for refusing approval. It is clearly not the law that a settlement requiring court approval cannot be made at such an early stage of the proceedings. Moreover, I am satisfied that class counsel did adequately consider the position of the defendant. There is evidence before me that before recommending the settlement, class counsel interviewed hundreds of potential class members and a number of Sun Life agents. I am satisfied that a serious and diligent effort has been made to determine the facts. This is by no means the first "vanishing premium" case litigated in North America and class counsel took advice from others with experience in the area.

(g) Exclusion of Other Possible Claims

41 I have already dealt with the matter of "twisting" in relation to certification. It is unnecessary to add anything here except that the settlement preserves the right of any class member to opt out and pursue any such claim.

42 Mr. Deverett also suggested that the failure of the Sun Life policies to perform as indicated in the standard sales illustration might be the fault of Sun Life itself as it has the unfettered right to determine the dividends that are to be paid. Again, I find that the evidence before me fails to show that there is any serious prospect that this is a potentially valid source for a claim by class members. Sun Life does business in a competitive market. The failure of life insurance policies of the kind at issue here to perform was not restricted to Sun Life. There was an industry wide problem which has been linked to collapse of unusually high interest rates of the 1980's and which produced a number of actions in North America against a long list of insurance companies.

43 A related issue concerns the question of how Sun Life, a mutual insurance company, would pay for the benefits to be conferred upon the policy holders. While that issue was not dealt with in the agreement itself, Mr. Ritchie testified that an understanding was reached during the negotiation of the settlement that future dividend scales would not be affected. That understanding was confirmed by a letter to Mr. Ritchie dated August 29, 1997 from counsel for Sun Life stating:

> I confirm the information provided during the negotiation process.
>
> Sun Life has specified that future dividend scales will be determined as if the settlement had never taken place. No attempt to recoup the costs of the settlement will be made in any manner affecting the existing participating policy holders (including Class Members).

44 That undertaking was confirmed by counsel for Sun Life before me at this hearing. In light of possible demutualization by Sun Life, a further letter from Sun Life's counsel to Mr. Ritchie dated May 1, 1998 repeats the above undertaking and states:

> Given the possibility of demutualization, Sun Life has instructed us to advise that the statements made earlier are still true, with the (obvious) clarification that the costs of the agreement may have an impact on the value of the company, which value will be distributed to all eligible policyholders in the event that demutualization proceeds.

45 Another point made in relation to the prospect of other potential claims is that the terms of the release to be given to Sun Life under the agreement are broad. Sun Life and its agents are to be released "from any liability or damages for representations, omissions or other conduct ... that occurred during the purchase or sale of any Settled Class Policy, or in connection with the offering of Global Benefits, the Optional Dividend Benefit, or other benefits or resolutions pursuant to the Agreement." A release in these terms consequent upon a settlement is not unusual or unexpected, and in any event, is subject to being interpreted in accordance with recognized legal principles. It is well established that a release must be interpreted with reference to the context in which it was drafted and that a release will not be construed as applying to facts not known to the claimant at the time the release was drafted: London and South Western Rail Co. v. Blackmore (1870), L.R. 4 H.L. 610. These principles, together with the right of any policy holder who now believes he or she has a claim against Sun Life that is not embraced by the settlement to opt out, provide an adequate answer to this objection.

(h) Analysis of the Proposed Settlement - Conclusion

46 I find that the plaintiff and the defendant have satisfied the burden of demonstrating that the proposed settlement is fair, reasonable and in the best interests of those affected by it. The Global Benefits afford significant relief to class members on a "no-proof" basis. The ACRP provides for a summary but fair disposition of claims advanced on the basis of representations that were made.

4. CONCLUSION

47 For these reasons, there shall be an order for the relief requested in paragraphs (a) to (i) of the Notice of Motion appointing Paul Dabbs as a representative plaintiff, certifying this action as class proceeding, approving the proposed settlement and for the further related orders requested.

48 In my February 24, 1998 ruling, I made reference to the issue of costs. Any party who wishes to claim costs shall serve and file a concise written brief within 20 days of the release of these reasons outlining the claim that is made and the basis for the claim. Reply submissions are to be made 10 days thereafter. A date for a hearing of any such claims will be arranged. Failing any such submissions, there shall be no order as to costs of this motion.

49 I will remain seized of this matter for the purpose of any further approvals that are required, including the approval of the arbitration award relating to the fees and disbursements of class counsel.

SHARPE J.

qp/d/bbd/DRS

---- End of Request ----
Download Request: Current Document: 1
Time Of Request: Wednesday, January 30, 2013 13:35:47

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

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

[1998] O.J. No. 3622

41 O.R. (3d) 97

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

113 O.A.C. 307

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

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

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

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

Docket Nos. C30326, M22971 and M23028

Ontario Court of Appeal
Toronto, Ontario

Laskin, Charron and O'Connor JJ.A.

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

(9 pp.)

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, members of class -- Status to appeal from approval of settlement -- Statutes -- Opera-

tion and effect -- Effect on earlier statutes -- Contrariety or conflict between statutes -- General and special statutes.

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

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

Statutes, Regulations and Rules Cited:

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

Counsel:

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

The judgment of the Court was delivered by

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

THE MOTION TO QUASH

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

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

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

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

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

7 The Act makes a clear distinction between the role of a party and that of a class member.[1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree with that statement.

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

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

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

MACLEAN'S MOTION

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

19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside

the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

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

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

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

cp/d/ln/mii/DRS

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

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

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

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

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

Case Name:

Dabbs v. Sun Life Assurance Co. of Canada

Jack Maclean
v.
Paul Dabbs and Sun Life Assurance Company of Canada

[1998] S.C.C.A. No. 372

File No.: 26855

Supreme Court of Canada

Record created: September 23, 1998.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Status:

Application for leave to appeal dismissed with costs (without reasons) October 22, 1998.

Catchwords:

Procedural law -- Actions -- Appeals -- Class proceedings -- The proper interpretation of the provisions of the Class Proceedings Act, 1992, concerning settlement approvals -- Right of appeal.

Chronology:

1. Application for leave to appeal:

FILED: September 23, 1998.

2. Motion by the respondent Sun Life Assurance Company of Canada to expedite the decision on the application for leave to appeal granted October 6, 1998. Before: Binnie J. S.C.C. Bulletin, 1998, p. 1573.
3. Application for leave to appeal:

SUBMITTED TO THE COURT: October 9, 1998. S.C.C. Bulletin, 1998, p. 1555.
DISMISSED WITH COSTS: October 22, 1998 (without reasons). S.C.C. Bulletin, 1998, p. 1565.
Before: Cory, Major and Binnie JJ.

Procedural History:

Judgment at first instance: Order that Respondent Paul Dabbs be appointed as a representative plaintiff; that proceedings certified as a class action; that settlement is approved.
Ontario Court (General Division), Sharpe J., July 3, 1998.
[1998] O.J. No. 2811.

Judgment on appeal: Appeal quashed.
Ontario Court of Appeal, Laskin, Charron and O'Connor JJ.A., September 14, 1998.
[1998] O.J. No. 3622.

ver/rpl

TAB 19

Case Name:

Semple v. Canada (Attorney General)

Between

Christine Semple, Jane McCallum, Stanley Thomas Nepetaypo, Peggy Good, Adrian Yellowknee, Kenneth Sparvier, Denis Smokeday, Rhonda Buffalo, Marie Gagnon, Simon Scipio, as representatives and claimants on behalf of themselves and all other individuals who attended residential schools in Canada, including but not limited to all residential schools' clients of the proposed class counsel, Merchant Law Group, as listed in part Schedule 1 to this claim and the John and Jane Does named herein, and such further John and Jane Does and other individuals belonging to the proposed class, including John Doe I, Jane Doe I, John Doe II, Jane Doe II, John Doe III, Jane Doe III, John Doe IV, Jane Doe IV, John Doe V, Jane Doe V, John Doe VI, Jane Doe VI, John Doe VII, Jane Doe VII, John Doe VIII, Jane Doe VIII, John Doe IX, Jane Doe IX, John Doe X, Jane Doe X, John Doe XI, Jane Doe XI, John Doe XII, Jane Doe XII, John Doe XIII, Jane Doe XIII being a Jane and John Doe for each Canadian Province and Territory, and other John and Jane Does, individual, estates next-of-kin and entities to be added, Plaintiffs, and

The Attorney General of Canada, the Presbyterian Church in Canada, the General Synod of the Anglican Church of Canada, the United Church of Canada, the Board of Home Missions in the United Church of Canada, the Women's Missionary Society of the Presbyterian Church, the Baptist Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Bay, the Canada Impact North Ministries, the Company for the Propagation of the Gospel in New England (also known as the New England Company), the Diocese of Saskatchewan, the Diocese of the Synod of Cariboo, the Foreign Mission of the Presbyterian Church in Canada, the Incorporated Synod of the Diocese of Huron, the Methodist

Church of Canada, the Missionary Society of the Anglican Church of Canada, the Missionary Society of the Methodist Church of Canada (also known as the Methodist Missionary Society of Canada), the Incorporated Synod of the Diocese of Algoma, the Synod of the Anglican Church of the Diocese of Quebec, the Synod of the Diocese of Athabasca, the Synod of the Anglican Church of the Diocese of Brandon, the Anglican Synod of the Diocese of British Columbia, the Synod of the Diocese of Calgary, the Synod of the Diocese of Keewatin, the Synod of the Diocese of Qu'appelle, the Synod of the Diocese of New Westminster, the Synod of the Diocese of Yukon, the Trustee Board of the Presbyterian Church in Canada, the Board of Home Missions and Social Service of the Presbyterian Church of Canada, the Women's Missionary Society of the United Church of Canada, Sisters of Charity, a body corporate also known as Sisters of Charity of St. Vincent de Paul, Halifax, also known known as Sisters of Charity Halifax, Roman Catholic Episcopal Episcopal Corporation of Halifax, Les Soeurs de Notre Dame-Auxiliatrice, les Soeurs de St. Francois d'Assise, Institut des Soeurs du Bon Conseil, les Soeurs de Saint-Joseph de Saint-Hyacinthe, les Oeuvres de Jesus-Marie, les Soeurs de l'Assomption de la Sainte Vierge, les Soeurs de l'Assomption de la Saint Vierge de l'Alberta, les Soeurs de la Charite de St.-Hyacinthe, les Soeurs Oblates de l'Ontario, les Residences Oblates du Quebec, la Corporation Episcopale Catholique Romaine de la Baie James (the Roman Catholic Episcopal Corporation of James Bay) the Catholic Diocese of Moosonee, Soeurs Grises de Montreal/Grey Nuns of Montreal, Sisters of Charity (Grey Nuns) of Alberta, les Soeurs de la Charite des T.N.O. Hotel-Dieu de Nicolet, the Grey Nuns of Manitoba Inc. - les Soeurs Grises du Manitoba Inc., la Corporation Episcopale Catholique Romaine de la Baie d'Hudson-the Roman Catholic Episcopal Corporation of Hudson's Bay, Missionary Oblates-Grandin, les Oblats de Marie Immaculee du Manitoba, the Archiepiscopal Corporation of Regina, the Sisters of the Presentation, the Sisters of St. Joseph of Sault St. Marie, Sisters of Charity of Ottawa, Oblates of Mary Immaculate-St. Peter's Province, the Sisters of Saint Ann, Sisters

of Instruction of the Child Jesus, the Benedictine Sisters of Mt. Angel Oregon, les Peres Montfortains, the Roman Catholic Bishop of Kamloops Corporation Sole, the Bishop of Victoria, Corporation Sole, the Roman Catholic Bishop of Nelson Corporation Sole, order of the Oblates of Mary Immaculate in the Province of British Columbia, the Sisters of Charity of Providence of Western Canada, la Corporation Episcopale Catholique Romaine de Grouard, Roman Catholic Episcopal Corporation of Keewatin, la Corporation Archiepiscopale Catholique Romaine de St. Boniface, les Missionaires Oblates Sisters de St. Boniface - the Missionary Oblates Sisters of St. Boniface, Roman Catholic Archiepiscopal Corporation of Winnipeg, la Corporation Episcopale Catholique Romaine de Prince Albert, the Roman Catholic Bishop of Thunder Bay, Immaculate Heart Community of Los Angeles CA, Archdiocese of Vancouver-the Roman Catholic Archbishop of Vancouver, Roman Catholic Diocese of Whitehorse, the Catholic Episcopale Corporation of Mackenzie-Fort Smith, the Roman Catholic Episcopal Corporation of Prince Rupert, Episcopal Corporation of Saskatoon, OMI Lacombe Canada Inc., Defendants

[2006] M.J. No. 498

2006 MBQB 285

40 C.P.C. (6th) 314

213 Man.R. (2d) 220

156 A.C.W.S. (3d) 751

2006 CarswellMan 482

Docket: CI 05-01-43585

Manitoba Court of Queen's Bench
Winnipeg Centre

Schulman J.

Judgment: December 15, 2006.

(34 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Motion for certification of class action and approving settlement of residential school litigation -- Plaintiff Aboriginal people were former residential school residents and sued for damages for sexual, physical and emotional abuse -- There were 78,000 Aboriginal persons alive who attended residential schools -- Motion allowed -- Class proceeding was preferable proceeding to alternative which faced 78,000 claimant.

Civil procedure -- Settlements -- Approval of -- Motion for certification of class action and approving settlement of residential school litigation -- Plaintiff Aboriginal people were former residential school residents and sued for damages for sexual, physical and emotional abuse -- Proposed settlement provided for payment by Canada with participation by several church defendants of six kinds of payments and for payment of legal costs from separate fund -- Motion allowed -- Settlement approved unconditionally -- Settlement negotiated with legal counsel and consented to by all parties -- Expectation had been created on part of class members that they would receive payments and many had received interim payments.

Motion for certification of class action and approving settlement of residential school litigation -- Plaintiff Aboriginal people were former residential school residents and sued for damages for sexual, physical and emotional abuse -- There were 78,000 Aboriginal persons alive who attended residential schools -- Numerous actions had been commenced -- Proposed settlement provided for payment by Canada with participation by several church defendants of six kinds of payments, two of which were to residential students directly -- Rest addressed broad social implications of the residential school legacy -- Canada established fund of $1.9 billion dollars to fund payments to every student -- Canada bore risk of any insufficiency in fund -- Any surplus to be paid according to formula -- Settlement provided for initial payment of $8,000 -- Class members entitled to seek additional payments for serious physical abuse, sexual abuse and specified wrongful acts through Independent Assessment Process -- Settlement provided for Canada to fund setting up of Truth and Reconciliation process and for commemorative initiatives at national and community levels and to fund Aboriginal healing programs -- Canada to be paying from separate fund legal fees for conduct of various Court actions and for negotiation of settlement agreement -- All parties consented to settlement -- HELD: Motion allowed -- All criteria met for certification of action as class action -- Action certified as class action -- Settlement approved unconditionally -- Class action preferable proceeding to alternative which faced 78,000 claimants -- Proposed settlement was reasonable and in best interest of parties -- Settlement negotiated with help of experienced counsel -- Settlement was historic and, once implemented, Canadians would look back with pride on way parties agreed to put to rest issues arising from residential school legacy -- Expectation had been created on part of class members that they would receive payments and many had received interim payments.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, C.C.S.M. c. C130, s. 4(a), s. 4(b), s. 4(c), s. 4(d), s. 4(e), s. 35(1), s. 35(2), s. 35(3)

Legal Profession Act, S.M. 2002 c. 44, s. 55

Limitation of Actions Act, C.C.S.M. c. L 150,

Counsel:

Plaintiffs:

National Certification Committee: Mr. K. Baert, Ms. C. Poltak, Mr. W. Percy and Mr. J. Horyski.

Assembly of First Nations and National Chief Phil Fontaine: Mr. J.K. Phillips.

Merchant Law Group: Mr. N. Rosenbaum.

Defendants:

The Attorney General of Canada: Ms. K. Coughlan, Ms. J. Oltean and Ms. A. Kenshaw.

United Church of Canada, Anglican Church in Canada, Presbyterian Church in Canada: Mr. A. Pettingill.

All Catholic entities: Mr. R. Donlevy and Mr. P. Baribeau.

---

1 **SCHULMAN J.**:-- It is rare for this Court to have an opportunity to determine an issue of national and historic importance. This motion for an order certifying a class action and approving settlement of Residential School Litigation presents this Court with such an opportunity.

2 The motion has been brought with the consent of all parties. For more than a century the Government of Canada, hereafter referred to as Canada, implemented a policy under which it compelled Aboriginal children to leave their homes and attend Indian Residential Schools, hereafter referred to as IRS, that were supervised by Canada and run by various churches. This policy was designed to reengineer Aboriginal people into a European model by educating them to abandon their language, culture and way of life and adopt the language, culture and religions of other Canadians. Looking back on the policy in 2006, it is an understatement to say that it is well below standards by which we like to think we treat other people and created problems for the Aboriginal people which require being addressed on a pan Canadian basis. There were 130 schools and they were located in all the provinces and territories of Canada except Newfoundland, New Brunswick and Prince Edward Island. While attending the schools many of the children were abused physically, sexually and emotionally and they suffered damage that in turn has adversely affected generations of Aboriginal people. The proposed settlement, which the parties are anxious to have concluded, provides for and creates unique and comprehensive remedies to solve a serious problem that has confronted this country for decades. The agreement provides that it must be approved by judges in nine provinces and territorial courts and the settlement will fail unless all nine judges approve the settlement on substantially the same terms and conditions as provided in the settlement agreement.

3 As in all cases where a Court is asked to approve a settlement involving vulnerable plaintiffs, this Court must ask itself before considering a rejection of the settlement, whether it can guarantee a better result. Before granting approval subject to conditions which call for significant changes to the agreement, a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed.

4 As I understand it one or more of the judgments released by my colleagues in other provinces attach at least four conditions to their approval of the settlement. One of the conditions relates to the question of who is going to supervise the administration of the settlement. The agreement provides that the administration is to be supervised by the defendant, the Attorney General of Canada, whom I refer to as Canada. The condition of the judgments is that there be independent supervision subject to reporting to the Court. The judgment suggests that this may not be a material change in the agreement. I will discuss the risks that are created by the attaching of that and other conditions, in para. 33 of this judgment.

5 In addressing the issues presented, I deal with the following matters;

a) the present plight of litigants and other persons who may wish to make a claim;
b) an outline of the proposed settlement;
c) the principles applicable to a motion for certification and how they relate to this case;
d) the principles relating to Court approval and how they relate to this case;
e) the recommendation of counsel for the represented parties;
f) the positions advanced by persons not represented by counsel either in writing or in person;
g) improvements suggested by Winkler J. in the Baxter case;
h) the risks of a conditional approval; and
i) conclusion.

a) The present plight of litigants and other injured persons;

6 There are approximately 78,000 Aboriginal persons alive who attended and resided in Indian Residential Schools. Most of them live in Canada, although some live in the United States. Their numbers reduce weekly as 25 of them die. Ten thousand of them have sued the federal government and churches and perpetrators of abuse. Of them, 11 per cent or 1100 have sued in Manitoba in one or another of 289 actions. If these 78,000 people were to pursue the remedies to which they may be entitled, through the court process, it would present our court system and all those people with a daunting challenge. As a result of pre-trial procedures including Judicially Assisted Dispute Resolution Conferences the vast majority of civil actions in Manitoba are settled before trial. In our Court fewer than 100 civil cases each year are brought to trial. These abuse claims are claims which are least likely to settle before trial. It is hard to imagine, in the event of claims being commenced for 11 percent of 78,000 or 8500 persons, when we would next take on any other civil trial if all the Manitoba claims were readied for trial. What would happen to the workload of the other Courts in Canada if the rest of the claims were sued and set down for trial?

7 Now let us look at the situation confronting Aboriginal people who were devastated over the years by the events referred to in the pleadings. Many of them are impoverished. Many of them are illiterate. Culturally many of them are shy, reserved and reluctant to give evidence in Court. Relatively few of their claims have been tried to date. At the trials held to date, the plaintiffs have suffered the embarrassment of being required to give evidence publicly about the abuse they suffered many years before. In many of the cases they were required to recount their painful experience on prolonged examinations for discovery. One case took 16 years to wend its way to trial, appeal and the Supreme Court. The trial lasted 60 days. Another claim by 26 plaintiffs lasted six years. The trial was conducted in three segments a total of 108 days. Other cases have taken between two and six

years from start to finish. Many of the plaintiffs are of very modest means and the cost of engaging experts, conducting assessments and leading the evidence at trial is very great.

8 In the context of this litigation, every plaintiff must overcome enormous hurdles in order to succeed in an action and realize on any judgment obtained. Starting with the question of realizing a judgment, it is in most cases of abuse, not good enough to obtain judgment against the perpetrator of abuse, because he or she may not have sufficient assets to pay the judgment. Consequently, it is necessary for each and every plaintiff to find a legal basis for holding Canada or a church liable, and in the case of the churches there is a real question of their ability to pay one or more of the judgments.

9 While we live in an era where unrepresented litigants are filing their own claims in unprecedented numbers, making a claim in these circumstances requires the preparation of a written pleading which will test the skills of an experienced pleader. Pleadings prepared below the minimum standard run the risk of being struck out or dismissed fairly early in a proceeding. Legal representation is pretty well a must in these claims.

10 If the Aboriginal plaintiffs find lawyers who will represent them and have the required expertise, one of the first problems to be addressed is whether the claim can be brought on a timely basis or whether it will be barred by the **Limitation of Actions Act** C.C.S.M. c. L 150 and like legislation in other provinces. In Manitoba the legislature attempted in 2002 to amend the statute and relieve plaintiffs from the harshness of a 30 year ultimate limitation period (S.M. 2002, c. 5, s. 4) but the amendment is unlikely to help many of this class of plaintiff because it is a principle of law that a defendant acquires a vested right to have the benefit of any limitation period in place at the time a wrong is committed even if the limitation provision is later repealed.

11 If a member of this class of plaintiffs is able to overcome the limitation problem which is inherent in these decades old claims, the claims may be met with attempts by the defendants to defeat the claims on a long list of grounds, a few of which I will describe briefly, many of which have not been tested in Court. Firstly, it may be argued that loss of language, culture and identity is not an item of damage for which Courts are able to award compensation. Secondly, the only legal basis for imposing liability against the federal government is by proof that a servant of Canada would be personally liable, if sued and that Canada is vicariously liable. In the case of claims pre-dating 1953, one would have to base the claim in negligence and show that the acts in question took place in the course of the wrong-doers employment. It was only by means of a legislative change in 1953 that Canada became liable for intentional torts of its servants. However, it may be argued that Canada is not liable for the tortious acts of all its employees. In one case the Supreme Court held that in order to support a finding of vicarious liability there had to be a strong connection between what the employer was asking the employee to do and the wrongful conduct. The Court rejected a claim against a school where a man who was employed as a baker, driver and odd-job man assaulted a student in his living quarters. In negligence claims defendants might try to justify the actions of their servants by establishing that the operation of the schools and treatment of students met the standards of the times or contemporary standards. When one makes a claim in a civil action against another based on conduct that amounts to a crime, the burden of proof to be satisfied is proof on a balance of probabilities commensurate with the seriousness of the allegation. This is higher than the usual burden of proof in a civil trial.

12 In November 2003 Canada created an ADR system as an alternative to litigation. Under the ADR program victims of IRS are permitted to make claims for damages for acts of physical and

sexual abuse by school employees. The amount of the award is set by one of 32 full time adjudicators based on a grid consisting of several categories for which an adjudicator is able to make an award to a limit of $245,000.00. The amounts awarded vary from province to province. The adjudicators do not have the authority to award damages for lost earnings. Canada pays 70 percent of the amount of the award leaving it to the claimant to collect the other 30 percent from the church sponsor of the IRS in question. Since inception 5000 claims have been filed and 4000 of them are outstanding.

b) An outline of the proposed settlement;

13 The settlement makes provision for payment by Canada with participation by several church defendants, of six kinds of payments, two of which are to residential students directly provided they were alive on May 30, 2005, and the rest of which address the broad social implications of the IRS legacy. Firstly, all former students alive at the above date will receive the sum of $10,000.00 for the first year of attendance in an IRS and a further sum of $3,000.00 for each year of attendance thereafter. An IRS student who attended one or more schools for say 12 years will receive $10,000.00 plus 11 times $3,000.00 or $43,000.00 without proof of legal liability on the part of anyone else and without proof of physical or sexual abuse. This category of payment is described as a Common Experience Payment (C.E.P.). It recognizes the common experience of all former students and arguably recognizes the loss of their culture, family ties and identity. Unless the student intends to make a claim for serious physical or sexual abuse or wrongful acts which are defined, the recipient must sign a release of all claims in exchange for payment. Canada has established a fund of $1.9 billion dollars to fund payments to every student. Canada bears the risk of any insufficiency in the fund. If there is a surplus it is not repaid to Canada but is to be paid according to a formula. The first sum up to $40 million goes to the National Indian Brotherhood Trust Fund and the Inuvialuit Education Foundation to be used for educational programs for all class members. If the surplus exceeds that amount, each C.E.P. recipient receives a pro rata share in the form of personal credits for personal or group education up to $3,000.00. Canada also pays the cost of verifying the claims and the administrative cost of distribution.

14 Under the terms of the proposed settlement, Canada has instituted a process under which it pays, pending finalization of the settlement, the sum of $8,000.00 as an interim payment to all persons otherwise entitled to a C.E.P. who were on May 30, 2005 over the age of 65.

15 Secondly, class members have the right to seek and obtain payment of additional compensation for serious physical abuse, sexual abuse and specified wrongful acts through an Independent Assessment Process known as IAP. The parties, having observed the ADR process in action for more than a year, conducted studies, noted the shortcomings and proposed a series of significant improvements that have been incorporated into the settlement agreement. The awards under IAP consist not only of the damage award of the ADR process with a limit increasing to $275,000.00 but also compensation for lost earnings of up to $250,000.00. Compensation is paid in full by Canada not only for acts of employees but also for acts of any adult lawfully on the IRS premises. Where the claim is for abuse by fellow students the onus shifts to Canada and the Churches to show that it had reasonable supervision in place at the time. Unlike the Court process, the IAP process follows the inquisitorial mode. The adjudicator questions the witnesses at a closed or private hearing. Canada has committed itself to provide resources to ensure that at least 2500 IAP hearings will be conducted each year and that all claims described as continuing claims be resolved within 6 years. There is provision for claims being referred to the courts in some circumstances, for example where

the amount that a court might award exceeds the limit that the adjudicator might award. Any major changes to the IAP requires Court approval.

16 In addition to the fact that the IAP process is an improvement over the former ADR system as described in para. 15, there are eight additional improvements as follows: an expanded list of compensable acts; a decreased threshold for proof of abuse; for claims resolved prior to the IAP without church contribution, a 30 per cent top up where less than 100 per cent was received; for claims processed under IAP payment on a scale that is uniform across the country; for claims referred to the Courts, a waiver of all limitation defences; a means to compensate non student invitees for abuse suffered up to the age of 21; an independent screening process for IAP claims; and a means for claimants to give evidence by video conference in cases of failing health.

17 Thirdly, the settlement provides for Canada to fund to the extent of $60 million for five years, the setting up of a Truth and Reconciliation process, directed by a Commission consisting of nominees of former students, Aboriginal organizations, Churches and Canada. The goals of the Commission are to acknowledge the IRS experience; provide a safe setting for individuals to address the Commission; witness, promote and facilitate truth and reconciliation events at both national and community levels; educate the Canadian public about the IRS system and its impacts; create and make public a record for future study; prepare a report on the legacy of the IRS; and support commemorative events.

18 Fourthly, the settlement provides for a number of commemorative initiatives at national and community levels with a budget of $20 million and for the establishment of a $125 million dollar endowment over five years to fund Aboriginal healing programs.

19 In addition, Canada has made the following commitment:

> Health Canada will expand its current Indian Residential Schools Mental Health Support Program to be available to individuals who are eligible to receive compensation through the Independent Assessment Process, as well as to Common Experience Payment Recipients, and to those participating in Truth and Reconciliation and Commemoration activities. It will offer mental health counselling, transportation to access counselling and/or Elder/Traditional Healer services and emotional support services, which include Elder support. Health Canada will offer these services through its regional offices, including the Northern Secretariat which has an office located in Whitehorse, Yukon.

20 In addition, the Church organizations have agreed as part of the settlement to provide cash and in-kind services to a maximum of $102.8 million to develop new programs for class members and their families.

21 Importantly, Canada will be paying from a separate fund legal fees for the conduct of the various Court actions, for negotiation of the settlement agreement, for conduct of the C.E.P. claims and a contribution toward legal fees to be earned on the IAP claims to the extent of 15 percent of the awards. I will say more about this in para. 30 and 31.

22 The settlement agreement does not bind any member of the class to seek or accept the benefits provided in the agreement. It makes provision for class members to opt out of making a claim for C.E.P. and proceeding with a court claim. Para. 4.14 creates a threshold that if 5,000 persons opt

out the agreement is invalidated and court approval set aside unless Canada chooses to waive compliance within a prescribed period.

c) The principles applicable to a motion for certification of a class action;

23 This motion for certification has been brought pursuant to **The Class Proceedings Act** C.C.S.M. c. C130. Section 4 provides:

> **Certification of class proceeding**
>
> 4. The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of two or more persons;
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
> (e) there is a person who is prepared to act as the representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class of notifying class members of the class proceeding, and
> (iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

All parties consent to the order being made. However the consent of the defendants is conditional on the settlement being confirmed by this Court and the Courts in eight other jurisdictions. The statute provides with regard to settlements:

> **Settlement, discontinuance and abandonment**
>
> 35(1) A class proceeding may be settled, discontinued or abandoned only
>
> (a) with the approval of the court; and
> (b) on the terms the court considers appropriate.
>
> **Court approval of settlement**
>
> 35(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court; and
(b) on the terms the court considers appropriate.

Settlement not binding unless approved

35(3) A settlement is not binding unless approved by the court.

It does not specify the matters to be considered in deciding whether to approve a settlement.

24 In my view it is clear that all of the criteria have been met for certification of the action as a class action. I wish to discuss briefly the requirement of s. 4(d) that a class proceeding be "the preferable procedure for the fair and efficient resolution of the common issues."

25 For the purpose of this section the class proceeding is the class proceeding sought by the parties including the implementation of the settlement with the C.E.P. payments (para. 13), IAP payments (para. 15), national and community based programs (paras. 17 to 20) and regime for payment of legal fees (paras. 30 and 31). That this procedure is preferable to the alternative which faces 78,000 claimants, our court systems and our community is self evident. I agree with the submissions of counsel that without rubber stamping a consent order a Court may properly be flexible and relax the standards that might be expected of a moving party in a contested motion. In the case of **Gariepy v. Shell Oil Co.** [2002] O.J. No. 4022, Nordheimer J. stated at para. 27:

> [paragraph]27 The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

In my view that means that the preferable procedure requirement has been satisfied in the circumstances of this case leaving any question of manageability or administration of the carrying out of the settlement agreement as a matter to be considered along with all other aspects of the settlement in deciding whether to approve it.

d) Principles relating to approval of a settlement;

26 The minimum standards for obtaining court approval of a settlement have been described by the author in Class Actions in Canada by Ward K. Branch 2006 Canada Law Book Aurora, as follows:

> **16.30** While the Acts do not specify the test for approval, courts have held that the court must find that in all the circumstances the settlement is fair, reasonable and in the best interest of those affected by it. The settlement must be in the best interests of the class as a whole, not any particular member. Settlement approval should not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. In *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No.

1598, the court stated that the following factors were a useful list of criteria for assessing the reasonableness of a proposed settlement:

(1) likelihood of recovery, or likelihood of success;
(2) amount and nature of discovery evidence;
(3) settlement terms and conditions;
(4) recommendation and experience of counsel;
(5) future expense and likely duration of litigation;
(6) recommendation of neutral parties if any;
(7) number of objectors and nature of objections;
(8) the presence of good faith and the absence of collusion.

These factors have been adopted in many other cases both inside and outside Ontario. It is not necessary that all of the enumerated factors be present in each case, nor is it necessary that each factor be given equal weight in the consideration of any particular settlement.

To these factors I would add that the court should also consider whether the refusal of approval or attaching of conditions to approval, puts the settlement in jeopardy of being unravelled. It should be remembered that there is no obligation on parties to resume negotiations, that sometimes parties who have reached their limit in negotiation, resile from their positions or abandon the effort. The reality is that based on the assertions made at our hearing, many unrepresented Aboriginal people want the agreement affirmed, want the process expedited and not delayed, and the fact is that expectations have been created by announcement of the settlement and by the making of interim payments referred to in para. 14.

27 While the proposed settlement may not be perfect, it certainly is within a zone of reasonableness. In my view it is fair, reasonable and in the best interest of the parties. In a companion proceeding, the motion for certification and approval in Ontario in the case of **Charles Baxter, Sr. and others v. The Attorney General of Canada** [2006] O.J. No. 4968, 00-CV-192059CP Winkler J. raises a concern about the manageability of the settlement of the action. That is certainly a matter to be considered on a motion for approval of a settlement. If, for example, a settlement were made with a party whose financial stability was in doubt the question might be more significant than in a case like this where the principal payer is the Government of Canada. I will say more about my view of this question in para. 32 when I address the question of whether the issue is one which makes the settlement less than perfect but reasonable and whether Winkler J.'s proposal should be left as a suggestion for the parties to consider without making it a condition of approval.

*e) **Recommendation of counsel;***

28 The settlement agreement was negotiated by all parties with the benefit of experienced counsel. Counsel have not only signed the agreement but they have jointly recommended to the Court that the settlement be approved. Moreover a number of them have provided affidavits in support of the motion.

*f) **Position of the parties who are not represented by counsel;***

29 Fourteen persons filed written objections or comments in advance of the hearing. Several hundred persons, many of them members of the class, attended the hearing. Nineteen persons made oral presentations at the hearing touching on a number of subjects. Several of them supplemented the written presentations that they had filed in advance. Of those who complained about the settlement, more often it was because it was felt that payment should be made sooner rather than later. No substantive reason was offered for rejecting the settlement. Mr. Baert, counsel for the National Consortium responded to some of the points raised, providing clarification of the terms of the settlement. For my part I found the presentations moving and persuasive evidence as to how pervasive the damage caused to the Aboriginal community by the IRS policy and as to why it is in everyone's interest that the settlement be implemented without delay.

g) The feature of the settlement relating to payment of legal fees;

30 The judges in the companion judgments have analyzed the provisions of the settlement agreement relating to payment of legal fees. The claims to fees are large, multiples of ten million, but many years work have gone into the various proceedings by experienced counsel. The fees in question are being paid by Canada from a fund which is separate from the source of payment to the members of the class. Most of the legal bills have been reviewed by or by persons employed by Canada's representative and he has recommended payment of them. There is an issue relating to the claim for fees of one law firm but the settlement agreement sets out a reasonable formula for determination of the firm's fees. The area of concern for me is the question of the absence of express provision in the agreement for review of legal fees on IAP claims. Under the settlement agreement Canada will on the making of an award, pay to each claimant's counsel an additional 15 percent of the award on account of legal fees. It appears that many of the lawyers who will be conducting the proceedings in the IAP claims are acting on contingency agreements entered into before the settlement agreement was made. None of the agreements are before the court but it appears that prior to the making of the settlement agreement many contingency agreements were entered into under which law firms may be entitled to claim 30 per cent or more of the recovery in a court action. One firm that claims to represent several thousand claimants has undertaken not to charge any IAP claimant more than 15 percent of the recovery in addition to the amount received from Canada. That is, the firm has agreed to limit its claim to fees to 30 percent of the amount of the recovery. Even if every law firm in Canada were to agree to do the same, there is a risk that IAP claimants may be called on to pay unreasonably large amounts. On the IAP claims, liability is not in issue as the parties must have contemplated in composing the contingency agreements. There may be settlements short of hearing in some cases. It is easy to visualize circumstances in which no or relative small fee might be justified in addition to the contribution made by Canada.

31 Under section 55 of the **Legal Profession Act** S.M. 2002 c. 44, lawyers practicing in Manitoba must give clients a copy of the contingency agreement on execution of it, failing which it will be unenforceable. Further, along with a copy of the agreement they must give the client a copy of the section that articulates their right to apply for a declaration that the agreement is unfair and unreasonable. However, the evidence shows that many members of the class are illiterate and likely not aware of their rights to have their legal bills reviewed. While no evidence was led on the point one presenter did tell us that she put her name on a list provided by a law firm which she believed related to an offer of information about making an IRS claim. She later was told that she had signed a contingency agreement and when she tried to terminate the services of the law firm she was told that she could not do so. Winkler J. has made a very practical suggestion in the *Baxter* case for im-

plementing a procedure for review of legal fees in the IAP claim. I recommend that the parties give serious consideration to implementing his suggestion. Members of the class made negative comments at the hearing before me about the amounts paid to lawyers and about the conduct of lawyers who persuaded them to sign contingency agreements. In this paragraph I have approved the settlement as it relates to payment for work done to this time. This settlement is historic and I feel sure that once implemented, Canadians will look back with pride on the way the parties have agreed to put to rest the issues arising from the IRS legacy. An effective review of the legal fees would ensure that the IRS legacy would not be viewed as a windfall to the legal profession.

Critique of the settlement

32 In the *Baxter* case Winkler J. has identified four deficiencies in the settlement agreement. The deficiencies have been summarized by Ball J. in para. 19 of his judgment in the companion case of **Sparvier v. The Attorney General of Canada** [2006] S.J. No. 752, SKQB (see his draft) as follows:

> (a) Financial information sufficient to enable the courts to make an informed decision regarding the anticipated cost of administration of the IAP will be provided for the purposes of approval and thereafter on a periodic basis (para. 52);
> (b) An autonomous supervisor or supervisory board will oversee the administration of the IAP, reporting ultimately to the court (para. 52);
> (c) The adjudicator hearing each case under the IAP will regulate counsel fees to be charged having regard to the complexity of the case, the result achieved, the intention to provide claimants with a reasonable settlement, and the fact that an additional 15% of the compensation award will be paid as fees by Canada (para. 78); and
> (d) The parties will establish a protocol for determining the manner in which issues relating to the ongoing administration of the settlement will be submitted to the courts in each jurisdiction for determination. This will ensure that the requirement for unanimous approval of all courts of any material amendment will not unduly hinder or delay the ability of the courts to make timely decisions (para. 81).

While I agree that the settlement might be better if the four changes were made, it might still be regarded imperfect for a variety of reasons. In para. 31 of my judgment I have articulated my concerns about the desirability of making provisions for review of counsel fees on IAP claims. However, I would not make such a provision a condition of approval. Of the remaining conditions the ones that raise a red flag are (a) and (b) relating to production of financial information and supervision of the administration of the CEP and IAP. Of this, Winkler J. has made the following findings in *Baxter*:

> [38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the po-

tential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

[39] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[40] The foregoing are organizational issues that relate to what may be called the "executive oversight" role in the administration. There are other issues in relation to the operational framework for delivery of the benefits under the settlement, particularly with respect to the costs of administration.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer as was suggested in argument that since Canada, as defendant, has committed to funding the administrative costs separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for two reasons. First, it ignores the court's supervisory role in class actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members while at the same

time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.

[44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in *McCarthy* [2001] O.J. No. 2474 at para. 21:

> ... a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

It strikes me that an issue is being raised as to who, as between the courts and Canada, is to have ultimate control over the administration of the settlement. The settlement of this case is too important to the parties affected and is so fair and reasonable, that it is inappropriate to engage in that debate in this case. Canada has shown its good intentions in so many ways and the parties, after a lengthy and complex series of negotiations, have accepted that Canada will have the supervisory role. Issues like this one can well be left for other settings.

i) Risks of not unconditionally approving the settlement;

33 The settlement agreement provides:

16.01 Agreement is Conditional

> This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder, except that the fees and disbursements of the members of the NCC will be paid in any event.

This provision largely mirrors the condition set out in the settlement agreement referred to in **Parsons v. Canadian Red Cross Society** [1999] O.J. No. 3572 at para. 127. However, one could argue that the four conditions referred to in Winkler J.'s judgment in the *Baxter* case are much more substantial than the two conditions imposed in *Parsons*. Winkler J. has stated in para. 36 of *Baxter*:

> [36] I turn now to the specific deficiencies that must be addressed in the proposed administrative scheme. In my view they are neither insurmountable nor do they require any material change to the settlement agreement itself.

In para. 85 of *Baxter* he also stated, "The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity." There is another view that is reasonably arguable, that the conditions are not "substantially the same as" the terms of the settlement agreement. If the alternative interpretation is adopted it will be open to Canada to treat the settlement agreement as terminated and 78000 Aboriginal claimants will be returned to their pre-settlement plight. Also there will be nothing to compel the parties to resume negotiation and if they do, there is a risk that they will resile from positions agreed to. In other words there is a risk that the settlement will unravel although it is in its present form well within a zone of reasonableness.

j) Conclusion.

34 Having reviewed the material that has been placed before this court I have reached the conclusion that the order of certification of a class action should be granted and the settlement should be approved unconditionally. An expectation has been created on the part of class members that they would receive payments and many have received interim payments. It would be unfortunate if this creative effort by all parties were brought to a halt and the whole settlement unravelled because of the imposition of conditions which may well have been rejected in the course of negotiations of the agreement. Negotiation involves give and take on the part of negotiating parties and the negotiation concluded with a settlement which cries out for confirmation.

SCHULMAN J.

cp/e/qlrds/qlbrl/qlcas

TAB 20

Indexed as:

Olympia & York Developments Ltd. (Re)

Re Olympia & York Developments Ltd. and 23 other Companies set out in Schedule "A"

[1993] O.J. No. 545

12 O.R. (3d) 500

17 C.B.R. (3d) 1

38 A.C.W.S. (3d) 1149

Action No. B125/92

Ontario Court (General Division),

R.A. Blair J.

February 5, 1993

---

1 **R.A. BLAIR J.** (orally):--On May 14, 1992, Olympia & York Developments Limited and 23 affiliated corporations (the "applicants") sought, and obtained, an order granting them the protection of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a period of time while they attempted to negotiate a plan of arrangement with their creditors and to restructure their corporate affairs. The Olympia & York group of companies constitute one of the largest and most respected commercial real estate empires in the world, with prime holdings in the main commercial centres in Canada, the U.S.A., England and Europe. This empire was built by the Reichmann family of Toronto. Unfortunately, it has fallen on hard times, and, indeed, it seems, it has fallen apart.

2 A Final Plan of compromise or arrangements has now been negotiated and voted on by the numerous classes of creditors. Twenty-seven of the 35 classes have voted in favour of the Final Plan; eight have voted against it. The applicants now bring the Final Plan before the court for sanctioning, pursuant to s. 6 of the Companies' Creditors Arrangement Act.

THE PLAN

3 The Plan is described in the motion materials as "The Revised Plans of Compromise and Arrangement dated December 16, 1992, as further amended to January 25, 1993". I shall refer to it as the "Plan" or the "Final Plan". Its final purpose, as stated in art. 1.2,

> . . . is to effect the reorganization of the businesses and affairs of the Applicants in order to bring stability to the Applicants for a period of not less than five years, in the expectation that all persons with an interest in the Applicants will derive a greater benefit from the continued operation of the businesses and affairs of the Applicants on such a basis than would result from the immediate forced liquidation of the Applicants' assets.

4 The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual proposals -- with some common themes -- for the treatment of the claims of the various classes of creditors which have been established in the course of the proceedings.

5 The contemplated O & Y restructuring has three principal components, namely:

1. The organization of O & Y Properties, a company to be owned as to 90 per cent by OYDL and as to 10 per cent by the Reichmann family, and which is to become OYDL's Canadian real estate management arm;
2. Subject to certain approvals and conditions, and provided the secured creditors do not exercise their remedies against their security , the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y Properties, in exchange for shares; and,
3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.

6 There are 35 classes of creditors for purposes of voting on the Final Plan and for its implementation. The classes are grouped into four different categories of classes, namely, by claims of project lenders, by claims of joint venture lenders, by claims of joint venture co-participants, and by claims of "other classes".

7 Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class-by-class basis, for dealing with the outstanding debt in question during the five-year Plan period.

8 In general, these schemes call for interest to accrue at the contract or some other negotiated rate, and for interest (and, in some cases, principal) to be paid from time to time during the Plan period if O & Y's cash flow permits. At the same time, O & Y (with, I think, one exception) will continue to manage the properties that it has been managing to date, and will receive revenue in the form of management fees for performing that service. In many, but not all, of the project lender situations, the Final Plan envisages the transfer of title to the newly formed O & Y Properties. Special arrangements have been negotiated with respect to lenders whose claims are against marketable securities, including the Marketable Securities Lenders, the GW Marketable Security and Other Lenders, the Carena Lenders and the Gulf and Abitibi Lenders.

9 It is an important feature of the Final Plan that secured creditors are ceded the right, if they so choose, to exercise their realization remedies at any time (subject to certain strictures regarding timing and notice). In effect, they can "drop out" of the Plan if they desire.

10 The unsecured creditors, of course, are heirs to what may be left. Interest is to accrue on the unsecured loans at the contract rate during the Plan period. The Final Plan calls for the administrator to calculate, at least annually, an amount that may be paid on the O & Y unsecured indebtedness out of OYDL's cash on hand, and such amount, if indeed such an amount is available, may be paid out on court approval of the payment. The unsecured creditors are entitled to object to the transfer of assets to O & Y Properties if they are not reasonably satisfied that O & Y Properties "will be a viable, self- financing entity". At the end of the Plan period, the members of this class are given the option of converting their remaining debt into stock.

11 The Final Plan contemplates the eventuality that one or more of the secured classes may reject it. Section 6.2 provides:

> a) that if the Plan is not approved by the requisite majority of holders of any Class of Secured Claims before January 16, 1993, the stay of proceedings imposed by the initial CCAA order of May 14, 1992, as amended, shall be automatically lifted; and,
>
> b) that in the event that Creditors (other than the unsecured creditors and one Class of Bondholders' Claims) do not agree to the Plan, any such Class shall be deemed not to have agreed to the Plan and to be a Class of Creditors not affected by the Plan, and that the Applicants shall apply to the court for a Sanction Order which sanctions the Plan only insofar as it affects the Classes which have agreed to the Plan .

12 Finally, I note that art. 1.3 of the Final Plan stipulates that the Plan document "constitutes a separate and severable plan of compromise and arrangement with respect to each of the Applicants".

THE PRINCIPLES TO BE APPLIED ON SANCTIONING

13 In Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 sub nom. Nova Metal Products Inc. v. Comiskey (Trustee of) (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the Companies' Creditors Arrangement Act, with this overview, at pp. 308-09 O.R., pp. 122-23 C.B.R.:

> Viewed in its totality, the Act gives the court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company, and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (No. 1) (1989), 102 A.R. 161 (Q.B.), at p. 165.

14 Mr. Justice Doherty's summary, I think, provides a very useful focus for approaching the task of sanctioning a plan.

15 Section 6 of the CCAA reads as follows:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy Act or is in the course of being wound up under the Winding-up Act , on the trustee in bankruptcy or liquidator and contributories of the company.

(Emphasis added)

16 Thus, the final step in the CCAA process is court sanctioning of the Plan, after which the Plan becomes binding on the creditors and the company. The exercise of this statutory obligation imposed upon the court is a matter of discretion.

17 The general principles to be applied in the exercise of the court's discretion have been developed in a number of authorities. They were summarized by Mr. Justice Trainor in Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), and adopted on appeal in that case by McEachern C.J.B.C., who set them out in the following fashion at (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), p. 201:

> The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:
>
> (1) There must be strict compliance with all statutory requirements . . .
>
> (2) All materials filed and procedures carried out must be examined to determine if anything has been done [or purported to have been done] which is not authorized by the C.C.A.A.;
>
> (3) The plan must be fair and reasonable.

18 In an earlier Ontario decision, Re Dairy Corp. of Canada, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under

the Ontario Companies Act, R.S.O. 1927, c. 218. The Nova Scotia Court of Appeal recently followed Re Northland Properties Ltd. in Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116 (N.S.C.A.). Farley J. did as well in Re Campeau (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.).

Strict compliance with statutory requirements

19 Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: see Re Campeau.

20 At the outset, on May 14, 1992, I found that the applicants met the criteria for access to the protection of the Act -- they are insolvent; they have outstanding issues of bonds issued in favour of a trustee, and the compromise proposed at that time, and now, includes a compromise of the claims of those creditors whose claims are pursuant to the trust deeds. During the course of the proceedings creditors' committees have been formed to facilitate the negotiation process, and creditors have been divided into classes for the purposes of voting, as envisaged by the Act. Votes of those classes of creditors have been held, as required.

21 With the consent, and at the request of, the applicants and the creditors' committees, the Honourable David H.W. Henry, a former justice of this court, was appointed "claims officer" by order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or the Honourable M. Craig or the Honourable W. Gibson Gray -- both also former justices of this court -- as his designees, presided over the meetings of the classes of creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the court orders pertaining to them and the CCAA.

22 I am quite satisfied that there has been strict compliance with the statutory requirements of the Companies' Creditors Arrangement Act.

Unauthorized conduct

23 I am also satisfied that nothing has been done or purported to have been done which is not authorized by the CCAA.

24 Since May 14, the court has been called upon to make approximately 60 orders of different sorts, in the course of exercising its supervisory function in the proceedings. These orders involved the resolution of various issues between the creditors by the court in its capacity as "referee" of the negotiation process; they involved the approval of the "GAR" orders negotiated between the parties with respect to the funding of O & Y's general and administrative expenses and restructuring costs throughout the "stay" period; they involved the confirmation of the sale of certain of the applicants' assets, both upon the agreement of various creditors and for the purposes of funding the "GAR" requirements; they involved the approval of the structuring of creditors' committees, the classification of creditors for purposes of voting, the creation and defining of the role of "information officer" and, similarly, of the role of "claims officer". They involved the endorsement of the information

circular respecting the Final Plan and the mail and notice that was to be given regarding it. The court's orders encompassed, as I say, the general supervision of the negotiation and arrangement period, and the interim sanctioning of procedures implemented and steps taken by the applicants and the creditors along the way.

25 While the court, of course, has not been a participant during the elaborate negotiations and undoubted boardroom brawling which preceded and led up to the Final Plan of compromise, I have, with one exception, been the judge who has made the orders referred to. No one has drawn to my attention any instances of something being done during the proceedings which is not authorized by the CCAA .

26 In these circumstances, I am satisfied that nothing unauthorized under the CCAA has been done during the course of the proceedings.

27 This brings me to the criterion that the Plan must be "fair and reasonable".

Fair and reasonable

28 The Plan must be "fair and reasonable". That the ultimate expression of the court's responsibility in sanctioning a plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. "Fairness" is the quintessential expression of the court's equitable jurisdiction -- although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity -- and "reasonableness" is what lends objectivity to the process.

29 From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs, whose decision in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.), contains much helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p. 314 C.B.R., p. 116 B.C.L.R., that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.

30 If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced -- or "reasonable" -- manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it -- technical and procedural compliance with the Act aside -- the plan should be sanctioned if it is "fair and reasonable".

31 When a plan is sanctioned it becomes binding upon the debtor company and upon creditors of that company. What is "fair and reasonable", then, must be assessed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the CCAA.

32 On the appeal in Re Northland Properties Ltd., supra, at p. 201, Chief Justice McEachern made the following comment in this regard:

> . . . there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

33 In Re Alabama, New Orleans, Texas & Pacific Junction Railway Co., [1891] 1 Ch. 213 (C.A.), a case involving a scheme and arrangement under the Joint Stock Companies Arrangement Act, 1870 (U.K.), c. 104, Lord Justice Bowen put it this way, at p. 243:

> Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation . . . Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

Again at p. 245:

> It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

34 Is the Final Plan presented here by the O & Y applicants "fair and reasonable"?

35 I have reviewed the Plan, including the provisions relating to each of the classes of creditors. I believe I have an understanding of its nature and purport, of what it is endeavouring to accomplish, and of how it proposes this be done. To describe the Plan as detailed, technical, enormously complex and all-encompassing, would be to understate the proposition. This is, after all, we are told, the largest corporate restructuring in Canadian -- if not worldwide -- corporate history. It would be folly for me to suggest that I comprehend the intricacies of the Plan in all of its minutiae and in all of its business, tax and corporate implications. Fortunately, it is unnecessary for me to have that depth of understanding. I must only be satisfied that the Plan is fair and reasonable in the sense that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders.

36 One important measure of whether a plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.

37 As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

38 This point has been made in numerous authorities, of which I note the following: Re Northland Properties Ltd., supra, at p. 205; Re Langley's Ltd. , [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.), at p. 129 O.R., pp. 233-34 D.L.R.; Re Keddy Motor Inns Ltd, supra; École internationale de haute esth etique Edith Serei Inc. (Receiver of) v. Edith Serei internationale (1987) Inc. (1989), 78 C.B.R. (N.S.) 36 (Que. S.C.).

39 In Re Keddy Motor Inns Ltd., the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a plan is not fair and reasonable, involving "matters of substance", when the plan has been approved by the requisite majority of creditors: see pp. 257-58 C.B.R., pp. 128-29 B.L.R. Freeman J.A. stated at p. 258 C.B.R., p. 129 B.L.R.:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

40 In Re École internationale, at p. 38, Dugas J. spoke of the need for "serious grounds" to be advanced in order to justify the court in refusing to approve a proposal, where creditors have accepted it, unless the proposal is unethical.

41 In this case, as Mr. Kennedy points out in his affidavit filed in support of the sanction motion, the Final Plan is "the culmination of several months of intense negotiations and discussions between the applicants and their creditors, [reflects] significant input of virtually all of the classes of creditors and [is] the product of wide-ranging consultations, give and take a compromise on the part of the participants in the negotiating and bargaining process". The body of creditors, moreover, Mr. Kennedy notes, "consists almost entirely of sophisticated financial institutions represented by experienced legal counsel" who are, in many cases, "members of creditors' committees constituted pursuant to the amended order of May 14, 1992". Each creditors' committee had the benefit of independent and experienced legal counsel.

42 With the exception of the eight classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the applicants. This level of approval is something the court must acknowledge with some deference.

43 Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of five years.

44 The claims of creditors -- in this case, secured creditors -- who did not approve the Plan are specifically treated under the Plan as "unaffected claims", i.e., claims not compromised or bound by the provisions of the Plan. Section 6.2(c) of the Final Plan states than the applicants may apply to the court for a sanction order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.

45 The claims of unsecured creditors under the Plan are postponed for five years, with interest to accrue at the relevant contract rate. There is a provision for the administrator to calculate, at least

annually, an amount out of OYDL's cash on hand which may be made available for payment to the unsecured creditors, if such an amount exists, and if the court approves its payment to the unsecured creditors. The unsecured creditors are given some control over the transfer of real estate to O & Y Properties, and, at the end of the Plan period, are given the right, if they wish, to convert their debt to stock.

46 Faced with the prospects of recovering nothing on their claims in the event of a liquidation, against the potential of recovering something if O & Y is able to turn things around, the unsecured creditors at least have the hope of gaining something if the applicants are able to become the "self-sustaining and viable corporation" which Mr. Kennedy predicts they will become "in accordance with the terms of the Plan".

47 Speaking as co-chair of the unsecured creditors' committee at the meeting of that class of creditors, Mr. Ed Lundy made the following remarks:

> Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a position to give a general overview observation to the Plan.
>
> The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S. Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.
>
> In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.
>
> The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.
>
> After such consideration, the members have indicated their intentions as follows . . .
>
> Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One

member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

48 After further discussion at the meeting of the unsecured creditors, the vote was taken. The Final Plan was approved by 83 creditors, representing 93.26 per cent of the creditors represented and voting at the meeting and 93.37 per cent in value of the claims represented and voting at the meeting.

49 As for the O & Y applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the properties for the newly incorporated O & Y Properties and an opportunity for the shareholders to salvage something from the wrenching dis-embodiment of their once shining real estate empire.

50 In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non- intrusive and as non-prejudicial a manner as possible.

51 I am satisfied that the Final Plan treats creditors evenly and fairly. With the "drop out" clause entitling secured creditors to realize upon their security, should they deem it advisable at any time, all parties seem to be entitled to receive at least what they would receive out of a liquidation, i.e., as much as they would have received had there not been a reorganization: see Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295 (T.D.). Potentially, they may receive more.

52 The Plan itself envisages other steps and certain additional proceedings that will be taken. Not the least inconsiderable of these, for example, is the proposed GW reorganization and contem-plated arrangement under the Business Corporations Act, R.S.O. 1990, c. B.16. These further steps and proceedings, which lie in the future, may well themselves raise significant issues that have to be resolved between the parties or, failing their ability to resolve them, by the court. I do not see this prospect as something which takes away from the fairness or reasonableness of the Plan but rather as part of grist for the implementation mill.

53 For all of the foregoing reasons, I find the Final Plan put forward to be "fair and reasonable".

54 Before sanction can be given to the Plan, however, there is one more hurdle which must be overcome. It has to do with the legal question of whether there must be unanimity amongst the classes of creditors in approving the Plan before the court is empowered to give its sanction to the Plan.

Lack of unanimity amongst the classes of creditors

55 As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each class). In eight of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50/75 per cent test of s. 6.

56 The classes of creditors who voted against acceptance of the Plan are in each case comprised of secured creditors who hold their security against a single project asset or, in the case of the Carena claims, against a single group of shares. Those who voted "no" are the following:

> Class 2 -- First Canadian Place Lenders Class 8 -- Fifth Avenue Place Bondholders Class 10 -- Amoco Centre Lenders Class 13 -- L'Esplanade Laurier Bondholders Class 20 -- Star Top Road Lenders Class 21 -- Yonge-Sheppard Centre Lenders Class 29 -- Carena Lenders
> Class 33a -- Bank of Nova Scotia Other Secured creditors

57 While s. 6 of the CCAA makes the mathematics of the approval process clear -- the Plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class -- it is not entirely clear as to whether the Plan must be approved by every class of creditors before it can be sanctioned by the court. The language of the section, it will be recalled, is as follows:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors . . . agree to any compromise or arrangement . . . the compromise or arrangement may be sanctioned by the court.

(Emphasis added)

58 What does "a majority . . . of the . . . class of creditors" mean? Presumably it must refer to more than one group or class of creditors, otherwise there would be no need to differentiate between "creditors" and "class of creditors". But is the majority of the "class of creditors" confined to a majority within an individual class, or does it refer more broadly to a majority within each and every "class", as the sense and purpose of the Act might suggest?

59 This issue of "unanimity" of class approval has caused me some concern, because, of course, the Final Plan before me has not received that sort of blessing. Its sanctioning, however, is being sought by the applicants, is supported by all of the classes of creditors approving, and is not opposed by any of the classes of creditors which did not approve.

60 At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a prerequisite to the court having jurisdiction to sanction a plan: See Re Keddy Motor Inns Ltd., supra. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.

61 In assessing this question, it is helpful to remember, I think, that the CCAA is remedial and that it "must be given a wide and liberal construction so as to enable it to effectively serve this . . . purpose": Elan Corp. v. Comiskey , supra, per Doherty J.A., at p. 307 O.R., p. 120 C.B.R. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297 O.R., pp. 110-11 C.B.R.:

> It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits

> for the company, its shareholders and employees. For this reason the debtor companies . . . are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

62 Approaching the interpretation of the unclear language of s. 6 of the Act from this perspective, then, one must have regard to the purpose and object of the legislation and to the wording of the section within the rubric of the Act as a whole. Section 6 is not to be construed in isolation.

63 Two earlier provisions of the CCAA set the context in which the creditors' meetings which are the subject of s. 6 occur. Sections 4 and 5 state that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors (s. 4) or its secured creditors (s. 5), the court may order a meeting of the creditors to be held. The format of each section is the same. I reproduce the pertinent portions of s. 5 here only, for the sake of brevity. It states:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor . . . order a meeting of the creditors or class of creditors.

(Emphasis added)

64 It seems that the compromise or arrangement contemplated is one with the secured creditors (as a whole) or any class -- as opposed to all classes -- of them. A logical extension of this analysis is that, other circumstances being appropriate, the plan which the court is asked to approve may be one involving some, but not all, of the classes of creditors.

65 Surprisingly, there seems to be a paucity of authority on the question of whether a plan must be approved by the requisite majorities in all classes before the court can grant its sanction. Only two cases of which I am aware touch on the issue at all, and neither of these is directly on point.

66 In Re Wellington Building Corp., [1934] O.R. 653 (S.C.), Mr. Justice Kingstone dealt with a situation in which the creditors had been divided, for voting purposes, into secured and unsecured creditors, but there had been no further division amongst the secured creditors who were comprised of first mortgage bondholders, second, third and fourth mortgagees, and lienholders. Kingstone J. refused to sanction the plan because it would have been "unfair" to the bondholders to have done so (p. 661). At p. 660, he stated:

> I think, while one meeting may have been sufficient under the Act for the purpose of having all the classes of secured creditors summoned, it was necessary under the Act that they should vote in classes and that three-fourths of the value of each class should be obtained in support of the scheme before the Court could or should approve of it.

(Emphasis added)

67 This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 660):

> Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal, as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the Act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company; otherwise this would permit the holders of junior securities to put through a scheme inimical to this class and amounting to confiscation of the vested interest of the bondholders.

68 Thus, the plan in Re Wellington Building Corp. went unsanctioned, both because the bondholders had unfairly been deprived of their right to vote on the plan as a class and because they would have been unfairly deprived of their rights by the imposition of what amounted to a confiscation of their vested interests as bondholders.

69 On the other hand, the Quebec Superior Court sanctioned a plan where there was a lack of unanimity in Multidev Immobilia Inc. v. S.A. Just Invest (1988), 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.). There, the arrangement had been accepted by all creditors except one secured creditor, S.A. Just Invest. The company presented an amended arrangement which called for payment of the objecting creditor in full. The other creditors were aware that Just Invest was to receive this treatment. Just Invest, nonetheless, continued to object. Thus, three of eight classes of creditors were in favour of the plan; one, Bank of Montreal, was unconcerned because it had struck a separate agreement; and three classes of which Just Invest was a member, opposed.

70 The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the court to ratify an arrangement which had been refused by a class or classes of creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved as regards the other creditors who voted in favour of the Plan. The other creditors were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.

71 While it might be said that Multidev, supra, supports the proposition that a Plan will not be ratified if a class of creditors opposes, the decision is also consistent with the carving out of that portion of the Plan which concerns the objecting creditor and the sanctioning of the balance of the Plan, where there was no prejudice to the objecting creditor in doing so. To my mind, such an approach is analogous to that found in the Final Plan of the O & Y applicants which I am being asked to sanction.

72 I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation. That, however, is not what is proposed here.

73 By the terms of the Final Plan itself, the claims of creditors who reject the Plan are to be treated as "unaffected claims" not bound by its provisions. In addition, secured creditors are entitled to exercise their realization rights either immediately upon the "consummation date" (March 15, 1993) or thereafter, on notice. In short, even if they approve the Plan, secured creditors have the

right to drop out at any time. Everyone participating in the negotiation of the Plan and voting on it, knew of this feature. There is little difference, and little different effect on those approving the Plan, it seems to me, if certain of the secured creditors drop out in advance by simply refusing to approve the Plan in the first place. Moreover, there is no prejudice to the eight classes of creditors which have not approved the Plan, because nothing is being imposed upon them which they have not accepted and none of their rights is being "confiscated".

74 From this perspective it could be said that the parties are merely being held to -- or allowed to follow -- their contractual arrangement. There is, indeed, authority to suggest that a plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a plan that could be lawfully incorporated into any contract: see Re Canadian Vinyl Industries Inc. (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.), at p. 18; Houlden & Morawetz, Bankruptcy Law of Canada, vol. 1 (Toronto: Carswell, 1984), pp. E-6 and E-7.

75 In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfairness to the creditors who have not approved it, in doing so. Where, as here, the creditors classes which have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is nothing unfair in sanctioning the Final Plan without unanimity, in my view.

76 I am prepared to do so.

77 A draft order, revised as of late this morning, has been presented for approval. It is correct to assume, I have no hesitation in thinking, that each and every paragraph and subparagraph, and each and every word, comma, semicolon, and capital letter has been vigilantly examined by the creditors and a battalion of advisers. I have been told by virtually every counsel who rose to make submissions, that the draft as it exists represents a very "fragile consensus", and I have no doubt that such is the case. Its wording, however, has not received the blessing of three of the classes of project lenders who voted against the Final Plan -- the First Canadian Place, Fifth Avenue Place and L'Esplanade Laurier Bondholders.

78 Their counsel, Mr. Barrack, has put forward their serious concerns in the strong and skilful manner to which we have become accustomed in these proceedings. His submission, put too briefly to give it the justice it deserves, is that the Plan does not and cannot bind those classes of creditors who have voted "no", and that the language of the sanctioning order should state this clearly and in a positive way. Paragraph 9 of his factum states the argument succinctly. It says:

> 9. It is submitted that if the Court chooses to sanction the Plan currently before it, it is incumbent on the Court to make clear in its Order that the Plan and the other provisions of the proposed Sanction Order apply to and are binding upon only the company, its creditors in respect of claims in classes which have approved the Plan, and trustees for such creditors.

79 The basis for the concern of these "no" creditors is set out in the next paragraph of the factum, which states:

> 10. This clarification in the proposed Sanction Order is required not only to ensure that the Order is only binding on the parties to the compromises but also to clarify that if a creditor has multiple claims against the company and only some fall within approved classes, then the Sanction Order only affects those claims and is not binding upon and has no effect upon the balance of that creditor's claims or rights.

80 The provision in the proposed draft order which is the most contentious is para. 4 thereof, which states:

> 4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.

81 Mr. Barrack seeks to have a single, but much debated word -- "only" -- inserted in the second line of that paragraph after the word "will", so that it would read "and will only be binding on . . . the Applicants and the Creditors holding Claims in Classes [which have approved the Plan]". On this simple, single word, apparently, the razor-thin nature of the fragile consensus amongst the remaining creditors will shatter.

82 In the alternative, Mr. Barrack asks that para. 4 of the draft be amended and an additional paragraph added as follows:

> 35. It is submitted that to reflect properly the Court's jurisdiction, paragraph 4 of the proposed Sanction Order should be amended to state:
>
> 4. This Court Orders that the Plan be and is hereby sanctioned and approved and is binding only upon the Applicants listed in Schedule A to this Order, creditors in respect of the claims in those classes listed in paragraph 2 hereof, and any trustee for any such class of creditors.
>
> 36. It is also submitted that any additional paragraph should be added if any provisions of the proposed Sanction Order are granted beyond paragraph 4 thereof as follows:
>
> This Court Orders that, except for claims falling within classes listed in paragraph 2 hereof, no claims or rights of any sort of any person shall be adversely affected in any way by the provisions of the Plan, this Order or any other Order previously made in these proceedings.

83 These suggestions are vigorously opposed by the applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed order is necessary in order to provide those creditors with the protection to which they say they are entitled. In any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise if arise they do.

84 The difficulty is that there may or may not be a difference between the order "binding" creditors and "affecting" creditors. The Final Plan is one that has specific features for specific classes of creditors, and as well some common or generic features which cut across classes. This is the inevitable result of a Plan which is negotiated in the crucible of such an immense corporate restructuring. It may be, or it may not be, that the objecting project lenders who voted "no" find themselves "affected" or touched in some fashion, at some future time by some aspect of the Plan. With a reorganization and corporate restructuring of this dimension it may simply not be realistic to expect that the world of the secured creditor, which became not-so-perfect with the onslaught of the applicants' financial difficulties, and even less so with the commencement of the CCAA proceedings, will ever be perfect again.

85 I do, however, agree with the thrust of Mr. Barrack's submissions that the sanction order and the Plan can be binding only upon the applicants and the creditors of the applicants in respect of claims in classes which have approved the Plan, and trustees for such creditors. That is, in effect, what the Final Plan itself provides for when, in s. 6.2 (c), it stipulates that, where classes of creditors do not agree to the Plan,

> (i) the applicants shall treat such class of claims to be an unaffected class of claims; and,
> (ii) the applicants shall apply to the court "for a Sanction Order which sanctions the Plan only insofar as it affects the Classes which have agreed to the Plan".

86 The Final Plan before me is therefore sanctioned on that basis. I do not propose to make any additional changes to the draft order as presently presented. In the end, I accept the position, so aptly put by Ms. Caron, that the price of an overabundance of caution in changing the wording may be to destroy the intricate balance amongst the creditors which is presently in place.

87 In terms of the court's jurisdiction, s. 6 directs me to sanction the order, if the circumstances are appropriate, and enacts that, once I have done so, the order "is binding . . . on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors . . . and on the company". As I see it, that is exactly what the draft order presented to me does.

88 Accordingly, an order will go in terms of the draft order marked "revised Feb. 5, 1993", with the agreed amendments noted thereon, and on which I have placed my fiat.

89 These reasons were delivered orally at the conclusion of the sanctioning hearing which took place on February 1 and February 5, 1993. They are released in written form today.

Counsel:

COUNSEL FOR SANCTIONING HEARING ORDER SCHEDULE "A"

[para90] David A. Brown, Q.C., Yoine Goldstein, Q.C., Stephen Sharpe and Mark E. Meland, for Olympia & York.

[para91] Ronald N. Robertson, Q.C., for Hong Kong & Shanghai Banking Corp.

[para92] David E. Baird, Q.C., and Patricia Jackson, for Bank of Nova Scotia.

[para93] Michael Barrack and S. Richard Orzy, for First Canadian Place Bondholders, Fifth Avenue Place Bondholders and L'Esplanade Laurier Bondholders.

[para94] William G. Horton, for Royal Bank of Canada.

[para95] Peter Howard and J. Superina, for Citibank Canada.

[para96] Frank J.C. Nebould, Q.C., for Unsecured/Under Secured Creditors Committee.

[para97] John W. Brown, Q.C., and J.J. Lucki, for Canadian Imperial Bank of Commerce.

[para98] Harry Fogul and Harold S. Springer, for The Exchange Tower Bondholders

[para99] Allan Sternberg and Lawrence Geringer, for O & Y Eurocreditco Debenture Holders.

[para100] Arthur O. Jacques and Paul M. Kennedy, for Bank of Nova Scotia, Agent for Scotia Plaza Lenders.

[para101] Lyndon Barnes and J.E. Fordyce, for Crédit Lyonnais, Cr edit Lyonnais Canada.

J. Carfagnini, for National Bank of Canada.

J.L. McDougall, Q.C., for Bank of Montreal.

[para102] Carol V. E. Hitchman, for Bank of Montreal (Phase I First Canadian Place).

[para103] James A. Grout, for Credit Suisse.

[para104] Robert I. Thornton, for I.B.J. Market Security Lenders.

C. Carron, for European Investment Bank.

[para105] W.J. Burden, for some debtholders of O & Y Commercial Paper II Inc.

G.D. Capern, for Robert Campeau.

[para106] Robert S. Harrison and A.T. Little, for Royal Trust Co. as trustee.

Order accordingly.

TAB 21

Case Name:

Calpine Canada Energy Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited and 3094479 Nova Scotia Company (the "CCAA Applicants")

Between

Calpine Power L.P., Appellant/Applicant (Creditor),

and

The CCAA Applicants and Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership, Respondents (Applicants)

And between

Calpine Canada Natural Gas Partnership, Respondent (Applicant/CCAA Party), and

Calpine Energy Services Canada Partnership and Lisa Winslow, Trustee of Calpine Greenfield Commercial Trust, Respondents (CCAA Applicant and Interested Parties), and

Calpine Power L.P., Appellant/Applicant (Creditor in CCAA Proceedings)

[2007] A.J. No. 917

2007 ABCA 266

80 Alta. L.R. (4th) 60

417 A.R. 25

33 B.L.R. (4th) 94

35 C.B.R. (5th) 27

161 A.C.W.S. (3d) 370

2007 CarswellAlta 1097

Docket: 0701-0222-AC and 0701-0223-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

C.D. O'Brien J.A. (In Chambers)

Heard: August 15, 2007.
Judgment: August 17, 2007.

(42 paras.)

Insolvency law -- Proposals -- Court approval -- Voting by creditors -- Application by creditor for leave to appeal from three orders approving agreement between Canadian and U.S. debtor companies dismissed -- Judge had jurisdiction to approve agreement, regardless of its complexity -- Monitor was of opinion agreement would result in payment in full to all creditors including applicant -- Judge committed no palpable or overriding error in finding agreement was not plan of arrangement such that voting by creditors was necessary -- If agreement did what it was expected to do, there would be no reason to make plan of arrangement, and if it did not, creditors would still be able to vote on plan of arrangement -- Companies' Creditors Arrangement Act, ss. 4, 5, 6.

Insolvency law -- Practice -- Proceedings in bankruptcy -- Appeal -- Jurisdiction of courts -- Orders -- Application by creditor for leave to appeal from three orders approving agreement between Canadian and U.S. debtor companies dismissed -- Judge had jurisdiction to approve agreement, regardless of its complexity -- Monitor was of opinion agreement would result in payment in full to all creditors including applicant -- Judge committed no palpable or overriding error in finding agreement was not plan of arrangement such that voting by creditors was necessary -- If agreement did what it was expected to do, there would be no reason to make plan of arrangement, and if it did not, creditors would still be able to vote on plan of arrangement.

Application by Calpine Power for leave to appeal from three orders. Several related companies obtained protection under the Companies' Creditors Arrangement Act in December 2005. The United States debtors obtained similar protection in the United States. Ernst & Young was appointed monitor in the extremely complex insolvency of the Calpine companies. The Canadian and U.S. debtors reached a settlement agreement in June 2007, resolving all the cross-border issues between them. The Canadian companies were subsequently granted orders approving the terms of the agreement, permitting the companies to take steps necessary to sell certain holdings, and extending the initial stay of proceedings under the Act to December 20, 2007. The U.S. companies were granted similar orders in the U.S. Calpine Power, one of the companies' creditors, opposed the approval of the

agreement. It submitted the judge erred in finding the agreement was not a compromise or plan of arrangement, thereby dispensing with the need for a vote on the agreement by creditors. The judge based that conclusion on her finding the agreement did not unilaterally deprive creditors of contractual rights without their participation. She accepted Ernst & Young's analysis that the agreement would likely result in payment in full of all Canadian creditors, including Calpine Power.

HELD: Application dismissed. To have succeeded in its appeal Calpine Power was required to show the judge made a palpable and overriding error in her findings with respect to the nature and effects of the agreement. Calpine Power failed to do so. There was no serious issue with respect to the judge's authority to approve the agreement. The complexity of the agreement at issue did not affect this jurisdiction. The judge carefully reviewed the circumstances in concluding the agreement was not a plan of arrangement. Her decision was entitled to deference, especially in light of the fact she had been overseeing the proceedings with respect to the insolvency for more than 18 months prior to making the orders. If the monitor's analysis turned out to be right, no plan of arrangement would be necessary as all the Canadian creditors would be fully repaid. The agreement did not usurp the right of the creditors to vote on a plan of arrangement in the event one was presented.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 5, s. 6

Appeal From:

Application for Leave to Appeal and Stay Pending Appeal of the Orders granted by The Honourable Madam Justice B.E. Romaine. Dated the 24th day of July, 2007. Filed on the 27th day of July, 2007. (Dockets: 0501-17864; 0601-14198).

Counsel:

P.T. Linder, Q.C. and R. Van Dorp, for the Applicant, CPL.

L.B. Robinson, Q.C., S.F. Collins and J.A. Carfagnini, for the CCAA Applicants and the CCAA Parties (Respondents).

H.A. Gorman, for the Ad Hoc ULC1 Noteholders Committee.

P.H. Griffin and U. Sheikh, for the Calpine Corporation and other U.S. Debtors.

F.R. Dearlove, for HSBC.

P. McCarthy, Q.C. and J. Kruger, for Ernst & Young Inc., the Monitor.

N.S. Rabinovitch, for the Lien Debtholders.

R. De Waal, for the Unsecured Creditors Committee.

Reasons for Decision

C.D. O'BRIEN J.A.:--

Introduction

1 Calpine Power L.P. (CLP) applies for a stay pending appeal and leave to appeal three orders granted on July 24, 2007 in a proceeding under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (C.C.A.A.). At the request of counsel, the applications have been dealt with on an expedited basis. Oral submissions were heard on August 15, at the close of which I undertook to deliver judgment by the end of the week. I do so now.

Background facts

2 In December 2005, Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (CCAA Applicants) sought and obtain protection under the C.C.A.A. At the same time, the parties referred to as the U.S. Debtors sought and obtained similar protection under Chapter 11 of the U.S. Bankruptcy Code.

3 A monitor, Ernst & Young Inc., was appointed under the C.C.A.A. proceedings and a stay of proceedings was ordered against the C.C.A.A. Applicants and against Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership. The latter three parties collectively are referred to as the C.C.A.A. Parties and those parties together with the C.C.A.A. Applicants as the C.C.A.A. Debtors.

4 This insolvency is extremely complex, involving many related corporations and partnerships, and highly intertwined legal and financial obligations. The goal of restructuring and realizing maximum value for assets has been made more difficult by a number of cross-border issues.

5 As described in the Monitor's 23rd Report, dated June 28, 2007, the C.C.A.A. Debtors and the U.S. Debtors concluded that the most appropriate way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the material cross-border issues between them. The parties negotiated a global settlement agreement (GSA) subject to the approval of both Canadian and U.S. courts, execution of the GSA and the sale by Calpine Canada Resources Company of its holdings of Calpine Canada Energy Finance ULC (ULC1) Notes in the face amount of US$359,770,000 (the CCRC ULC1 Notes). Counsel at the oral hearing informed me that the Notes were sold on August 14, 2007, yielding a net amount of approximately U.S. $403 million, an amount exceeding the face amount.

6 On July 24, 2007, the C.C.A.A. Applicants sought and obtained three orders. First, an order approving the terms of the GSA and directing the various parties to execute such documents and implement the transactions necessary to give effect to the GSA. Second, an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, an extension of the stay contemplated by the initial C.C.A.A. order to December 20, 2007. No objection was taken to the latter two orders and both were granted. The supervising judge also, in brief oral reasons, approved the GSA with written reasons to follow. Written Reasons for Judgment were subsequently filed on July 31, 2007: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABQB 504. The reasons are careful and detailed. They fully set out the relevant facts and canvas the applicable law and as I see no need to repeat the facts and authorities, the reasons should be read in conjunction with these relatively short reasons dealing with the applications arising therefrom.

7 The applications to the supervising judge were made concurrently with applications by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the applications proceeding simultaneously by video conference. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

8 The applicant, CLP, the Calpine Canada Energy Finance II ULC (ULC2) Indenture Trustee and a group referring to itself as the "Ad Hoc Committee of Creditors of Calpine Canada Resources Company" opposed the approval of the GSA. CPL is the only party seeking leave to appeal.

9 CLP submits that the supervising judge erred in concluding that the GSA was not a compromise or plan of arrangement and therefore, sections 4 and 5 of the C.C.A.A. did not apply and no vote by creditors was necessary.

10 Sections 4 and 5 of the C.C.A.A. provide:

> 4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

11 CLP further submits that the jurisdiction of the supervising judge to approve the GSA is governed by section 6 of the C.C.A.A. Section 6 provides:

> Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

12 The supervising judge found that the GSA is not linked to or subject to a plan of arrangement and does not compromise the rights of creditors that are not parties to it or have not consented to it, and it does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. She concluded that the GSA was not a compromise or arrangement for the purposes of section 4 of the C.C.A.A. In the course of her reasons she cites a number of cases for support that the court has jurisdiction to review and approve transactions and settlement agreements during the stay period of a C.C.A.A. proceedings if an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

Test for leave to appeal

13 This Court has repeatedly stated, for example in Re Liberty Oil & Gas Ltd., 2003 ABCA 158, 44 C.B.R. (4th) 96 at paras. 15-16, that the test for leave under the C.C.A.A. involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

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

14 In assessing these factors, consideration should also be given to the applicable standard of review: Re Canadian Airlines Corp., 2000 ABCA 149, 261 A.R. 120. Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a C.C.A.A. proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: Re Smoky River Coal Ltd., 1999 ABCA 252, 244 A.R. 196 at para. 61.

Analysis

15 The standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal. The supervising judge, on the record of evidence before her, found that the GSA was "not a plan of compromise or arrangement with creditors" (Reasons, para. 51). This was a finding of fact, or at most, a finding of mixed law and fact. The applicant has identified no extricable error of law so the applicable standard is palpable or overriding error.

16 The statute itself contains no definition of a compromise or arrangement. Moreover, it does not appear that a compromise or an arrangement has been proposed between a debtor company and either its unsecured or secured creditors, or any class of them within the scope of sections 4 or 5 of the C.C.A.A. Neither the company, a creditor, nor anyone made application to convene a meeting under those sections.

17 Rather, the GSA settles certain intercorporate claims between certain Canadian Calpine entities and certain U.S. Calpine entities subject to certain conditions, including the approvals both of the Court of Queen's Bench of Alberta and of the U.S. Bankruptcy Court.

18 This is not to minimize the magnitude, significance and complexity of the issues dealt with in the intercorporate settlement which, by definition, was not between arm's length companies. The

material cross-border issues are identified in the 23rd Report of the monitor and listed by the supervising judge (Reasons, para. 5).

19 It is implicit in her reasons, if not express, that the supervising judge accepted the analysis of the monitor, and found that the GSA would likely ultimately result in payment in full of all Canadian creditors, including CLP. CLP does not challenge this finding, but points out that payment is not assured, and rightly relies upon its status as a creditor to challenge the approval in the meantime until such time as it has been paid.

20 The supervising judge further found that the GSA "does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA" (Reasons, para. 51). CPL challenges this finding. In order to succeed in its proposed appeal, CPL must also demonstrate palpable and overriding error in these further findings of the supervising judge which once again, involve findings of fact or of mixed law and fact.

Application in this case

21 CPL submits that the "fundamental problem" with the approval granted by the supervising judge is that the GSA is in reality a plan of arrangement because it settles virtually all matters in dispute in the Canadian C.C.A.A. estate and therefore, entitles the applicant to a vote. CPL argues that the GSA must be an arrangement or compromise within the meaning of sections 4, 5 and 6 of the C.C.A.A. because, in its view, the GSA requires non party creditors to make concessions, re-orders the priorities of creditors and distributes assets of the estate.

22 The supervising judge acknowledged at the outset of her analysis that if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary (Reasons, para. 41). However, she was satisfied that the GSA did not constitute a plan of arrangement with creditors.

23 The applicant conceded that a C.C.A.A. supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period and prior to any plan of arrangement being proposed to creditors. This concession was proper having regard to case authority recognizing such jurisdiction and cited in the reasons of the supervising judge, including Re Air Canada (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.), Re Playdium Entertainment Corp. (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.), Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Re T. Eaton Co. (1999), 14 C.B.R. (4th) 298 (Ont. S.C.) and Re Stelco Inc. (2005), 78 O.R. (3d) 254 (C.A.).

24 The power to approve such transactions during the stay is not spelled out in the C.C.A.A. As has often been observed, the statute is skeletal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the C.C.A.A., including the survival program of the debtor until it can present a plan: Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 at para. 8 (Ont. Gen. Div.).

25 Hunt J.A. in delivering the judgment of this Court in Smoky River Coal considered the history of the legislation and its objectives in allowing the company to take steps to promote a successful eventual arrangement. She concluded at para. 53:

> These statements about the goals and operation of the C.C.A.A. support the view that the discretion under s. 11(4) should be interpreted widely.

and further at para. 60:

> To summarize, the language of s. 11(4) is very broad. The C.C.A.A. must be interpreted in a remedial fashion.

26 In my view, there is no serious issue as to the jurisdiction of a supervising judge to approve a settlement agreement between consenting parties prior to consideration of a plan of arrangement pursuant to section 6 of the C.C.A.A. The fact that the GSA is not a simple agreement between two parties, but rather resolves a number of complex issues between a number of parties, does not affect the jurisdiction of the court to approve the agreement if it is for the general benefit of all parties and otherwise meets the tests identified in the reasons of the supervising judge.

27 CPL urges that the legal issue for determination by this Court is where the line is to be drawn to say when a settlement becomes a compromise or arrangement, thus requiring a vote under section 6 before the court can grant approval. It suggests that it would be useful to this practice area for the court to set out the criteria to be considered in this regard.

28 An element of compromise is inherent in a settlement as there is invariably some give and take by the parties in reaching their agreement. The parties to the GSA made concessions for the purpose of gaining benefits. It is obvious that something more than compromise between consenting parties within a settlement agreement is required to constitute an arrangement or compromise for purposes of the C.C.A.A. as if that were not so, no settlement agreement could be approved without a vote of the creditors. As noted, that is contrary to case authority accepted by all parties to these applications.

29 The C.C.A.A. deals with compromises or arrangements sought to be imposed upon creditors generally, or classes of creditors, and a vote is a necessary mechanism to determine whether the appropriate majority of the creditors proposed to be affected support the proposed compromise or arrangement.

30 As pointed out by the supervising judge, a settlement will almost always have an impact on the financial circumstances of a debtor. A settlement will invariably have an effect on the size of the estate available for other claimants (Reasons, para. 62).

31 Whether or not a settlement constitutes a plan of arrangement requiring a vote will be dependent upon the factual circumstances of each case. Here, the supervising judge carefully reviewed the circumstances and concluded, on the basis of a number of the fact findings, that there was no plan of arrangement within the meaning of the C.C.A.A., and that the settlement merited approval. She recognized the peculiar circumstances which distinguishes this case, and observed at para. 76 of her Reasons:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

32 At the time of granting her approval, the supervising judge had been overseeing the conduct of these C.C.A.A. proceedings since their inception -- some 18 months earlier. She had the benefit of the many reports of the monitor and was familiar with the record of the proceedings. Her determination of this issue is entitled to deference in the absence of legal error or palpable and overriding error of fact.

33 CPL submits that the GSA compromises its rights and claims, and thus, challenges the express finding of the supervising judge that the settlement neither compromises the rights of creditors before it, nor deprives them of their existing contractual rights. The applicant relies upon the following effects of the GSA in making this submission:

(i) a priority payment of $75 million out of the proceeds of the sale of bonds owned by Calpine Canada Resources Company;
(ii) the release of a potential claim against Calpine Canada Energy Limited, the parent of Calpine Canada Resources Company, which is a partner of Calpine Energy Services Canada Ltd., against which CPL has a claim;
(iii) the dismissal of a claim by Calpine Canada Energy Limited against Quintana Canada Holdings LLC, thereby depleting Calpine Canada Energy Limited of a potential asset which that company could use to satisfy any potential claim by CPL for any shortfall, were it not for the release of claims against Calpine Canada Energy Limited (see (ii) above); and
(iv) the dismissal of the Greenfield Action brought by another C.C.A.A. Debtor against Calpine Energy Services Canada Ltd. for an alleged fraudulent conversion of its interest in Greenfield LP which was developing a 1005 Megawatt generation plant.

34 For purposes of the C.C.A.A. proceedings, the applicant is a creditor of Calpine Energy Services Canada Ltd., Calpine Canada Power Ltd. and perhaps, also, Calpine Canada Resources Company. The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.

35 In my view, the submission of the applicant does not show any palpable and overriding error in the findings of the supervising judge that the right of creditors not parties to the GSA have not been compromised or taken away. Firstly, there is no compromise of debt if such indebtedness, as ultimately found due to the applicant, is paid in full, which is the likely result as found by the supervising judge, albeit she acknowledged that this result was not guaranteed (Reasons, para. 81). Secondly, and in any event, the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

36 The GSA does not usurp the right of the creditors to vote on a plan of arrangement if it becomes necessary to propose such a plan to the creditors. As explained by the supervising judge, the settlement between the C.C.A.A. Debtors and the U.S. Debtors unlocked the Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided the mechanisms for resolving the remaining issues and significant creditor claims, and the clarification of priorities.

37 It is correct, of course, that if the claims of CPL are paid in full in the course of the C.C.A.A. proceedings, it will never be necessary for it to vote on a plan of arrangement. The applicant should have no complaint with that result. On the other hand, if the claims are not satisfied, it seems likely a plan of arrangement will ultimately be proposed to the applicant, who will then have its right to vote on any such plan.

38 CPL argues that the supervising judge was not entitled to assess the merits of the GSA vis-a-vis the creditors as this was a matter for the exclusive business judgment of the creditors and to be exercised by their vote. As became apparent during the course of its submissions, if a vote were required, from the perspective of the CPL, this would give it veto power over the GSA. Unless clearly mandated by the statute, this is a result to be avoided. While it is understandable that an individual creditor seeks to obtain as much leverage as possible in order to enhance its negotiating position, the objectives and purposes of the C.C.A.A. could easily be frustrated in such circumstances by the self interest of a single creditor. Court approval requires, as a primary consideration, the determination that an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. As the supervising judge noted, court approval of settlements and major transaction can and often is given over the objections of one or more parties because the court must act for the greater good consistent with the purpose and spirit and within the confines of the legislation.

39 I am not persuaded that the applicant has demonstrated any reasonably arguable error of law in the reasons of the supervising judge or any palpable and overriding errors in her findings of fact or findings of mixed fact and law. In the absence of any such error, it follows that she had discretion to approve the GSA, which she exercised based upon her assessment of the merits and reasonableness of the settlement, and other factors in accordance with the principles set out in the authorities, cited in her reasons, governing the approval of transactions, including settlements, during the stay period prior to a plan of arrangement being submitted to the creditors.

Conclusion

40 CPL has failed to establish serious and arguable grounds for granting leave. In particular, two of the factors used to assess whether this criterion is present have not been met. It has not been demonstrated that the point on appeal is of significance to the parties having regard to the fact dependent nature of whether a plan of arrangement has been proposed to creditors. More importantly, having regard to the standard of review and the findings of the supervising judge, the applicant has not demonstrated that the appeal for which leave is sought is prima facie meritorious.

41 The application for leave is dismissed. It follows that the application for a stay likewise fails and is dismissed.

42 Finally, I would be remiss if I did not acknowledge the excellent quality of the submissions, both written and oral, of counsel on these applications. The submissions were of great assistance in permitting the application to be dealt with in an abbreviated time frame.

C.D. O'BRIEN J.A.

cp/e/qlfxs/qljjn/qljxl/qlcas