Court of Appeal File No.: C56961 / M42404 / M42453
S.C.J. Court File No.: CV-12-9667-00CL

**COURT OF APPEAL FOR ONTARIO**

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

Court of Appeal File No.: C56961 / M42404 / M42453
S.C.J. Court File No.: CV-11-431153-00CP

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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**BOOK OF AUTHORITIES OF THE RESPONDENTS (APPELLANTS), INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, and MONTRUSCO BOLTON INVESTMENTS INC.**
**(Motions to Quash Returnable June 28, 2013)**

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May 17, 2013

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**TO: THE SERVICE LIST**

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*Case Name:*

# 1250264 Ontario Inc. v. Pet Valu Canada Inc.

**Between**
**1250264 Ontario Inc., Plaintiff (Respondent), and**
**Pet Valu Canada Inc., Defendant (Appellant)**

[2013] O.J. No. 2012

2013 ONCA 279

Docket: C55949

Ontario Court of Appeal
Toronto, Ontario

**W.K. Winkler C.J.O., R.P. Armstrong and A. Hoy JJ.A.**

Heard: February 26, 2013.
Judgment: May 3, 2013.

(84 paras.)

*Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Members of class or sub-class -- Procedure -- Appeal by franchisor and group of non-party franchisees from order invalidating opt-out notices filed by other franchisees allowed -- Franchisor had nothing to do with non-party franchisees' campaign to convince other franchisees to opt-out of class proceeding commenced against franchisor -- Non-parties had no obligation to communicate with each other objectively -- Increasing number of opt-outs did not place action itself at risk -- No evidence supported finding any franchisees opted out due to intimidation -- Class Proceedings Act, 1992, ss. 9, 12, 17.*

*Commercial law -- Franchising -- Association of franchisees -- Appeal by franchisor and group of non-party franchisees from order invalidating opt-out notices filed by other franchisees allowed -- Franchisor had nothing to do with non-party franchisees' campaign to convince other franchisees to opt-out of class proceeding commenced against franchisor -- Non-parties had no obligation to communicate with each other objectively -- Increasing number of opt-outs did not place action itself at risk -- No evidence supported finding any franchisees opted out due to intimidation.*

Appeal by Pet Valu and 12 non-party franchisees, members of a group calling itself Concerned Pet Valu Franchisees, from an order setting aside opt-out notices filed by several other Pet Valu franchisees in relation to a class proceeding commenced by 1250264, another franchisee, against Pet Valu. The basis of the claim was an alleged breach by Pet Valu of its contractual duty to franchisees by failing to share certain volume discounts and rebates it received from suppliers and manufacturers. Communication with class members was subject to the court's supervision. Pet Valu had to communicate with its franchisees due to their ongoing business relationships, but such communications were subject to the court's direction, especially during the opt-out period. Pet Valu's franchisee association, CFC, was not curtailed in its communications about the class proceeding. The CFC met in August 2011. There was much dissention within the CFC about the merits of the class proceeding. Members of the executive opposing the action ultimately formed the group

Concerned Pet Valu Franchisees, with the intention of encouraging other franchisees to opt out of the action. The group contacted other franchisees by telephone and via the Internet, during the opt-out period, encouraging them to opt out for various reasons. The campaign resulted in a dramatic increase in the number of opt-out notices during the campaign. The principal of 1250264 moved to have these notices set aside. In allowing this motion, the judge concluded there was a reasonable probability many franchisees opted out as a result of misleading information and unfair pressure exerted by the group. He expressed concern the survival of the class proceeding was placed at risk because almost half the class had opted out. He accepted Pet Valu itself had no control over the group or the CFC and Pet Valu did not exert pressure on class members to opt out. He declared invalid all opt-out notices filed after September 5, 2011, and ordered a new opt-out process to commence after the class proceeding was decided on its merits.

HELD: Appeal allowed. The order invalidating the opt-out notices was set aside. The judge proceeded on the erroneous principle the class proceeding was at risk of decertification based on the number of opt-outs. He also erred in imposing on class members an obligation to communicate with each other in an objective manner. As representative plaintiff, 1250264 had an obligation to bring any concerns about the group's campaign to the attention of the judge promptly, but it failed to do so. There was no direct evidence from any franchisee stating whether or not its opt-out decision was voluntary and informed. There was no valid evidentiary basis for the judge to conclude any franchisees decided to opt out due to unfair pressure amounting to intimidation.

**Statutes, Regulations and Rules Cited:**

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, s. 4(1)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 2(d)

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 9, s. 12, s. 17, s. 17(6)(b), s. 20

**Appeal From:**

On appeal from the order of Justice George R. Strathy of the Ontario Superior Court of Justice, dated July 27, 2012, with reasons reported at 2012 ONSC 4317, 112 O.R. (3d) 294, and on appeal from his costs order, dated September 11, 2012, with reasons reported at 2012 ONSC 5029.

**Counsel:**

Geoffrey B. Shaw and Derek Ronde, for the appellant Pet Valu Canada Inc.

Lawrence G. Theall and Bevan Brooksbank, for the appellant franchisees.

David Sterns and Jean-Marc Leclerc, for the respondent.

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The judgment of the Court was delivered by

**W.K. WINKLER C.J.O.:--**

**A. OVERVIEW**

1 This is an appeal from an order made by a motion judge concerning the validity of the opt-out process in a class proceeding certified under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*").

2 Section 9 of the *CPA* provides class members with the right to opt out of a class proceeding. The right to opt out must be exercised during a finite period which is set out in the certification order and spelled out in the court-approved notice to class members of the certification of the action. Critical to the integrity of the opt-out process is the right of individual class members to make a fully informed and voluntary decision about whether to remain as a member of the class or to exercise the right to opt out.

3 The disputed opt-out process in this case followed the certification of a class proceeding brought on behalf of franchisees against the appellant franchisor, Pet Valu Canada Inc. Towards the end of the opt-out period, a group of Pet Valu franchisees who opposed the class action and who called themselves "Concerned Pet Valu Franchisees" ("CPVF")[1]

waged a concerted campaign to try to persuade class members to opt out. After the CPVF's campaign began, the number of returned opt-out notices increased dramatically. By the end of the opt-out period, more than half of the class had submitted opt-out notices.

4 A considerable time after the opt-out period ended, Robert Rodger, the principal of the representative plaintiff, 1250264 Ontario Inc., moved for an order setting aside the received opt-out notices. The motion judge granted the motion in part and invalidated any opt-out notices received on or after the beginning of the CPVF's opt-out campaign. The motion judge provided for a new opt-out period to take place after the final disposition of the action on its merits.

5 The motion judge's remedial order followed from his conclusion that there was a "reasonable probability" that many franchisees decided to opt out due to misleading information and unfair pressure amounting to intimidation resulting from the CPVF's campaign. The motion judge found there was no evidence that the defendant Pet Valu was responsible for, or connected to, this misleading information or unfair pressure. Rather, he exclusively attributed the impugned conduct to activities of the members of the CPVF.

6 Both the defendant Pet Valu and 12 non-party franchisees who were members of the CPVF ("appellant franchisees") appeal from the motion judge's order. The motion judge based his decision that the conduct of the CPVF undermined the opt-out process on the following considerations: his analysis of the content of the CPVF's web site and its telephone campaign; his inference that class members were coerced or intimidated by the conduct of the campaign; and his finding that the campaign resulted in misinformation due to its lack of objectivity.

7 In my view, the motion judge erred in two material respects: drawing the inference in the absence of any direct evidence and holding the CPVF to a standard of objectivity. The information disseminated amounted to no more than opinion as to the advisability of the lawsuit from a business perspective. It did not purport to comment on the legal merits of the action. Information relating to the action was already available through neutral court approved notices. The communications here were simply acceptable intra-class debate. Therefore, the motion judge misapplied the fully informed and voluntary test enunciated in the jurisprudence. I would allow the appeal and set aside the order invalidating the opt-out notices. My reasons follow.

## B. FACTUAL BACKGROUND

8 The factual background is well-stated by the motion judge at paras. 5-55, and, for the most part, I simply repeat the relevant details from his reasons.

9 The Pet Valu chain consists of specialty stores selling pet food and supplies. The certified class consists of 256 Pet Valu franchisees who operated stores in Ontario and Manitoba between December 31, 2003 and March 28, 2011. At the time of certification, there were 155 Pet Valu franchised stores, with 145 in Ontario and 10 in Manitoba. Pet Valu also operated a total of 214 corporate stores, about 144 of which were under the "Pet Valu" banner, with the remainder operating under other trade names.

10 The motion judge presided over a number of case conferences and several motions. Pet Valu has vigorously defended the action and the motion judge characterized the atmosphere on motions and case conferences as highly adversarial. The plaintiff has a pending motion for partial summary judgment. Pet Valu has indicated that it proposes to bring a motion to de-certify the class proceeding. It has also filed a competing motion for summary judgment.

11 The motion judge certified the action in January 2011: see reasons reported at 2011 ONSC 287, 16 C.P.C. (7th) 52. The central common issue that was certified is whether Pet Valu breached its contractual duty to class members by failing to share with its franchisees certain volume discounts and rebates that it received from suppliers and manufacturers during the class period.

12 Following certification, communication with class members was an extremely contentious subject. A case conference was held in February 2011, which included a discussion of communications with class members. The minutes of the conference state:

> His Honour expressed his general concern about communications to the class and advised that there was to be no communications to the class without court approval.

13 The formal certification order issued on June 29, 2011 incorporated a Plan of Proceeding. The Plan of Proceeding includes provisions dealing with communications with class members. There was a concern on both sides, which the

motion judge shared, that communications with the class between certification and the end of the opt-out period should be carefully supervised.

**14** Pet Valu had to be able to communicate with franchisees due to their ongoing commercial relationship. However, each party was extremely distrustful of the other and neither wanted the other to be able to sway class members' freedom to make their own decision about whether to opt out. The Plan of Proceeding therefore provided:

> Communications with the Class Members before the expiry of the opt-out period are subject to the direction of the class proceedings judge.

**15** The certification order and the Plan of Proceeding did not purport to curtail the right of other franchisees -- including Pet Valu's franchisee association known as the Canadian Franchise Council ("CFC") -- from communicating about the class action.

**16** Section 17(6)(b) of the *CPA* provides that the right to opt out of a class proceeding must be exercised during a finite period which is set out in the certification order and spelled out in the court-approved notice to class members of the certification of the action. In the present case, the certification notice approved by the case management judge was distributed to class members on July 15, 2011. The notice specified that the opt-out period would be a 60-day opt-out period, expiring on September 15, 2011.

(1) The Opt-Out Process

**17** At an annual general meeting of the CFC held in August 2011 (during the opt-out period), there was considerable discussion amongst franchisees about the merits of the class action. Some class members, including Mr. Rodger, spoke in favour of the action while others, including members of the Executive Committee of the CFC, voiced opposition.

**18** The Executive made a motion to authorize it to present its view of the class action to those attending the annual general meeting. The motion carried and the Executive read a statement indicating in strong terms its opposition to the lawsuit as being harmful to franchisees' businesses and profitability, and their financial futures. A motion to have the entire membership of the CFC vote on a resolution to support the Executive's unanimous statement was withdrawn.

**19** In early September 2011, 10 of the 11 members of the Executive Committee of the CFC, as well as a spouse of an Executive member and two other franchisees, became founding members of the CPVF. The sole purpose of the CPVF was to encourage other Pet Valu franchisees to opt out of the class action.

**20** The campaign mounted by the CPVF had two major fronts. First, beginning on the Labour Day weekend, the founding members did a telephone blitz, calling every franchisee to encourage them to opt out of the class action. The calls followed a standard script. CPVF members identified themselves and explained that they were calling to encourage the franchisee to opt out. The caller asked whether the franchisee had already opted out and also asked whether, if the franchisee was opting out, the CPVF could publish his/her name. The caller also directed the franchisee to the CPVF's website.

**21** Second, in conjunction with the telephone campaign, in early September 2011, the CPVF launched a website. The motion judge set out much of the content of the website at para. 53 of his reasons.

**22** The website included a tally of the number of franchisees who had opted out of the action and a list of the names and store locations of the franchisees who had declared their intention to opt out. In addition, it contained statements voicing strong opposition to the class action based on beliefs that it would: hurt profitability; damage the brand; divert time and resources away from building a stronger franchise; place walls between franchisees and the new management who were described as being committed to improving the brand; and would reduce growth by deterring prospective purchasers of the franchise: see motion judge's reasons, at para. 53. The website also stated that class members who opt out "still have the right to individually or collectively pursue [their] rights." It continued: "This will not waive your rights or stop you from pressing forward with issues individually or through the CFC, although statutory time limits can prevent how far a court can 'look back'."

**23** By September 4, 2011, only 37 opt-out forms had been received from class members. After the start of the CPVF's campaign, there was a noticeable spike in the delivery of opt-out forms. By the end of the opt-out period on September 15, 2011, a total of 140 forms were received, which amounted to about 65 percent of current franchisees and 10 percent of former franchisees.

(2) The Plaintiff's Motion

**24** On November 16, 2011, two months after the end of the opt-out period, the plaintiff served a notice of motion, without any supporting affidavit or other material, requesting an order setting aside all the opt-out notices. On February 13, 2012, the plaintiff served a further notice of motion with the supporting affidavit of Mr. Rodger. The plaintiff filed an amended notice of motion in June 2012, almost a year after the certification order was made. The motion was heard on July 4, 2012.

**25** In cross-examination on his affidavit, Mr. Rodger acknowledged that he knew that the CPVF's campaign was going on during the opt-out period, but he did not seek direction from the motion judge during the opt-out period.

**C. REASONS OF THE MOTION JUDGE**

**26** The motion judge observed that the question before him was whether the opt-out process was "so irreparably impaired as to justify the extraordinary measure of judicial intervention" (at para. 2).

**27** He attributed the dramatic increase in the number of opt-out notices that were received in the last two weeks of the opt-out period to "a well-organized, systematic and highly effective campaign by the CPVF to deal a death blow to the class action by persuading other franchisees to opt out" (at para. 24).

**28** The motion judge found that the CPVF's website contained statements that had no factual basis and that were exaggerated or misleading. He expressed nine specific concerns about the content of the CPVF's website, at para. 54, which are set out below, at para. 53 of my reasons. He concluded, at para. 55, that the CPVF's telephone campaign and website "were an unabashed attempt to destroy the class action", "made no attempt to provide [franchisees] with any information concerning the positive aspects of the class action", and gave franchisees "more misinformation and added to the confusion".

**29** Based on the conduct of the CPVF and the content of its website, the motion judge concluded that there was "a reasonable probability ... that many franchisees decided to opt out as a result of misleading information and unfair pressure amounting to intimidation" (at para. 75). He was not swayed by the affidavit evidence of some class members that they did not experience pressure.

**30** Significantly, however, the motion judge found there was no evidence indicating that Pet Valu was somehow controlling the members of the CFC or the CPVF, or that Pet Valu had exerted any form of pressure on class members to opt out: see paras. 27, 31, 65-66.

**31** Turning to the issue of remedy, the motion judge concluded that an extraordinary remedy was warranted by the need to protect the integrity of the court process and the rights of all class members to make an informed and voluntary choice about whether to opt out (at paras. 80-81). He declared invalid any opt-out notice received on or after September 5, 2011. He further declared that opt-out notices received prior to that date were presumptively valid, but were subject to the right of a franchisee to move to set aside his or her opt-out. Finally, he made an order for a new opt-out process that would occur following the release of the court's decision on the summary judgment motion, or other final disposition of the action on its merits.

**32** In fashioning this remedy, the motion judge dismissed the concern that his order would undo the *res judicata* effect of the *CPA* by permitting class members to wait and see if the action is successful before deciding whether to opt out, thereby giving them a "second kick at the can" either individually or collectively. In his view, if the class action were dismissed on the merits, it would be highly unlikely that any subsequent action, individual or collective, would succeed (at para. 86).

**33** The motion judge acknowledged that the plaintiff may have delayed in bringing the motion and that Mr. Rodger may have engaged in unsanctioned communication. However, he did not find these concerns determinative, noting that this did not detract from his conclusion that the appellant franchisees' actions had impaired the opt-out process (at para. 87).

**34** Finally, the motion judge dismissed concerns that had been raised about franchisees' rights of association pursuant to s. 4(1) of the *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O. 2000, c. 3 ("*Franchise Disclosure Act*"). He found that in the unique circumstances of this case the exercise of these rights had interfered with the rights conferred by the *CPA* such that relief was necessary (at para. 88).

**35** In separate reasons prepared after receiving written submissions on costs, the motion judge awarded $60,000 in costs to the plaintiff, payable jointly and severally by Pet Valu and the appellant franchisees: see reasons reported at 2012 ONSC 5029.

**D. ISSUES**

**36** The appellants allege that the motion judge made the following errors of law:

1) He failed to hold the plaintiff to the civil standard of proof.
2) He erred in requiring that communications by the appellant franchisees satisfy a legal standard of objectivity and impartiality, which applies to court-approved notices under ss. 17-20 of the *CPA*.
3) He erred in failing to accept the uncontroverted evidence of the appellant franchisees and independent affiants that franchisees were not intimidated or coerced by the CPVF's campaign.
4) He erred in disregarding the association rights of the appellant franchisees provided by s. 4(1) of the *Franchise Disclosure Act* and he failed to exercise his statutory authority in conformity with the right of association provided by s. 2(d) of the *Charter*.
5) He erred in granting equitable relief without giving any weight to the plaintiff's failure to pursue the motion expeditiously or the misconduct of the plaintiff in engaging in unsanctioned communication with class members during the opt-out period.
6) He erred in deferring the opt-out period until after the final determination of the case on its merits, thereby eviscerating the *res judicata* principles of the *CPA*.
7) He erred by ordering an extraordinary remedy where more appropriate alternative measures were available, such as the holding of a new opt-out period without delay.

**37** The appellants further argue that the motion judge committed palpable and overriding error in finding that class members were misled and pressured into opting out when there was no evidentiary basis capable of supporting this finding.

**38** No issue was taken with the appellant franchisees' standing on the motion or the appeal. As former class members who have opted out of the class proceeding, the appellant franchisees are not parties as of right. There was no judicial order conferring intervener status on them. The only order against them was the motion judge's costs order, which the appellant franchisees have not appealed and which, in any event, I would set aside. Accordingly, in my view, the appellant franchisees were not proper parties on the motion and are not proper appellants. However, nothing turns on this lack of standing for purposes of dealing with the merits of the appeal. In oral argument before this court, the appellant Pet Valu adopted the submissions of the appellant franchisees in their entirety.

**39** Only Pet Valu seeks leave to appeal the costs award. It argues that the plaintiff's notice of motion contained serious allegations of misconduct on the part of Pet Valu that were unsubstantiated and that deserved the sanction of costs.

**E. ANALYSIS**

**(1) Section 12 of the *CPA* and the *A&P* Test**

**40** The motion judge's order was an exercise of his "broad, discretionary jurisdiction" under s. 12 of the *CPA*: *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767, at para. 42. A discretionary decision to safeguard the fairness of a class proceeding is entitled to receive significant deference from this court. It may only be set aside if it is based on an error of law, a palpable and overriding error of fact, the consideration of irrelevant factors or the omission of factors that ought to have been considered, or if the decision was unreasonable: *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FCA 390, 44 C.P.R. (4th) 326, at para. 4.

**41** In making his remedial order, the motion judge properly recognized the need to protect the interests of the absent class members in the opt-out process. He stated, correctly, that class members "ought to be free to exercise their right to participate in or abstain from the class action on an informed, voluntary basis, free from undue influence", citing *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), affirmed (2004), 70 O.R. (3d) 182 (Div. Ct.), leave to appeal refused, [2004] O.J. No. 2009, (May 11, 2004), Court File No. M31109 (Ont. C.A.), at para. 74 (emphasis added by the motion judge). As explained in *A&P*, at paras. 75-76:

> The primary protection for the absent class members in the class proceeding process is the right to opt out of the class action. It is axiomatic that no class member need participate in a class action against his or her will. However, to ensure the integrity of the opt out process, absent class

> members must be fully informed of the issues in the proceeding and the impact on them as individuals.
>
> Where ... a communication constitutes misinformation, a threat, intimidation, coercion or is made for some other improper purpose aimed at undermining the process, the court must intervene.

**42** The reason why the opt-out decision must be informed and voluntary is that the choice to opt out of a class proceeding involves a serious access to justice issue. Once a class member opts out of a class proceeding, that person is either left to pursue his or her rights individually, which may be an unrealistic possibility depending on the nature of the claim, or the class member must relinquish the right to participate in any remedy that may be obtained for the underlying conduct of the defendant.

**43** Where class members engage in conduct that amounts to misinformation, threats, intimidation, coercion or that reveals some other improper purpose in an attempt to undermine the opt-out process, the court may intervene to restrain and remediate the effect of such conduct. The court may do so based on the jurisdiction under s. 12 of the *CPA to protect the fair determination of the proceeding.*

**44** Where the parties become aware that class members or former class members are engaging in tactics that may demand judicial scrutiny during the opt-out period, the representative plaintiff should promptly seek the intervention of the supervising judge. As well, the defendant may not sit idly by in the face of such conduct without running the risk that a court will invalidate opt-outs based on the application of the informed and voluntary test established in *A&P*.

### (2) Application to the Present Case

**45** The purpose of the opt-out process is to provide class members with the opportunity to make an informed and voluntary decision as to whether they wish to remain as participants in the class action.

**46** The motion judge was rightly motivated by a concern for protecting the fairness of the opt-out process and by the goal of ensuring that opt-out decisions were not the product of misinformation or intimidation. He was deeply troubled that the "CPVF telephone campaign and website were an unabashed attempt to destroy the class action" (at para. 55). In his decision awarding the plaintiff its costs of the opt-out motion, the motion judge stated, at para. 20, that the "survival of the class action depended on the outcome of the [opt-out] motion."

**47** These comments reveal that the motion judge was proceeding on an erroneous principle, at least to the extent that his analysis was premised on the view that the survival of the class action depended on the outcome of the opt-out motion. The motion judge believed that because slightly more than half the class had opted out, the very survival of the class action was at stake on the plaintiff's motion. He did not explain exactly what he meant by "the survival of the class action". In his reasons on the opt-out motion, he mentioned, at para. 6, that the defendant had raised the prospect of bringing a decertification motion.

**48** If by the survival of the class action the motion judge was referring to the prospect of decertification, he did not explain why the number of class opt-outs could undermine the evidence satisfying the certification criteria. Indeed, other than perhaps in the most extreme cases, I fail to see any reason why the number of opt-outs would be a basis for decertification. Alternatively, if he meant the viability of the class action somehow depends on the number of remaining class members, there is no basis for this concern. A certified class proceeding will continue regardless of the diminished size of the class and the correspondingly diminished damages award or settlement amount that might follow therefrom.

**49** The motion judge evaluated the fairness of the opt-out process based on an incorrect belief that the viability of the class action was in peril. From that viewpoint, the CPVF's actions would have appeared more troubling than they actually were.

**50** The motion judge's view that the survival of the class action was at stake on the opt-out motion -- although incorrect -- reflected the CPVF's motivation for waging the opt-out campaign. They were at least in part trying to end the class action by encouraging class members to opt out.

**51** Given these misconceptions about the nature of the opt-out process, I think it is important to emphasize that the *CPA* does not contemplate the politicization of the opt-out process. The opt-out process is not analogous to the labour context where majority support or opposition is required to certify or decertify a union. Within the statutory framework of the *CPA*, there is no legitimate purpose that can be achieved by politicizing the opt-out process. As explained in *A&P*, at para. 32, certification motions are not determined through a referendum of the class members. Nor is the viabil-

ity of the class action dependant on majority support. Just as the percentage of support amongst class members is not an element of certification, opting out cannot stop a class action. The number of opt-outs does not in itself provide a basis for decertifying a class action.

**52** In a class proceeding, a representative plaintiff seeks to obtain court approval through certification of the action to pursue a remedy for a group -- the class -- who have suffered a common wrong. Once the action is certified, as it was here, the representative plaintiff is obliged to pursue the action on behalf of the class, subject to receiving court approval to withdraw. The opt-out process is not a vote on whether the class action should go forward. It is simply a process by which members of the class can individually elect not to have the representative plaintiff continue to act and pursue the claim on their behalf and in so doing, forego any right to share in the success of the lawsuit. Once a class member has opted out of the class proceeding, he or she is a stranger to the lawsuit and has no standing before the court. Thus, the person who has opted out has no say about how the action is conducted or whether or not it will continue to go forward.

**53** The motion judge was right to be attuned to the possibility that the CPVF was attempting to undermine the opt-out process by politicizing it. He was also right to analyze this possibility by applying the *A&P* test. However, he erred in his portrayal of the impact of the opt-out process. He also erred in imposing on the class members the obligation to communicate in an objective manner and in his interpretation of the campaign as a whole.

**54** The motion judge identified the following nine specific concerns about the misleading and intimidating nature of the language of the CPVF's website, at para. 54:

(a) The identification of the names of opt-outs was clearly designed to put pressure on those who had not opted out -- the message was, "get on the bandwagon, because almost everyone else has and you don't want to be one of the few left standing at the end."

(b) The message of the website was that the CPVF had determined that the class action was bad for franchisees and the implication was that anyone who did not opt out (and who would be readily identifiable as a non-conformist) was damaging the business, harming other franchisees, and undermining the efforts of the CFC.

(c) The message that the class action would "create walls" between the franchisees and the franchisor was designed to enhance the position of the Executive as the sole voice of Pet Valu franchisees and to exploit franchisees' concerns about the power imbalance between themselves and the franchisor. It in fact runs contrary to McNeely's evidence ... that Pet Valu intended to treat all its franchisees fairly and equally, regardless of their participation in the class action.

(d) There was no attempt to provide any form of informational balance or to discuss the issues in the class action -- the fact that, if the action was successful, every class member might have a right to substantial damages, was not even mentioned.

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

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

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

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

(i) The statement that opting out would not prevent franchisees from individually or collectively pursuing their rights was misleading. It failed to address the reality, to which I averted in my decision on certification at para. 111, that individual claims by franchisees would be impractical. Collective pursuit would almost certainly be ineffective without the

> clout of a class action, given that Pet Valu continues to vigorously contest the franchisees' rights to share in volume rebates.

**55** He went on to make the following findings about the CPVF's campaign, at para. 55:

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

**56** In the Plan of Proceeding, the motion judge had restricted communications by the plaintiff and the defendant. He did not impose restrictions on members of the class. I agree that in the present case there was a real risk that the CPVF's opt-out campaign could cross the line of pressuring or intimidating class members into opting out on an uninformed or involuntary basis.

**57** Despite this risk, however, a finding that the CPVF's campaign crossed the line described in *A&P* was unavailable to the motion judge on the record before him. It is instructive to describe the nature of the evidence of the defendant's conduct in *A&P* and the representative plaintiffs' response to it, and to compare these circumstances to the present case.

**58** In *A&P*, the plaintiff franchisees brought a certification motion as well as a motion seeking an order restricting communications by the defendant franchisor with class members during the opt-out period. After granting the certification order, the court considered whether it was appropriate to grant the extraordinary relief requested by the plaintiffs on their additional motion.

**59** The plaintiffs in *A&P* introduced affidavit and *viva voce* evidence indicating that, prior to the certification motion, the defendant franchisor had "engaged in a course of conduct that is intimidating, threatening, and coercive, and in consideration of the information vacuum, sufficiently misleading to vitiate any notion that the franchisees executing releases are doing so on an informed basis" (at para. 80). The evidence showed that the defendant had monitored franchisees' legal services, imposed unlawful and unilateral rent increases on non-cooperative franchisees, and had arranged for franchisor executives to personally visit franchisees to solicit releases of their claims. Based on this evidence, the court made an order restricting the franchisor's communications with franchisees and prohibiting it from circulating its new franchise agreements to, or entering into releases with, class members during the opt-out period.

**60** In the present case, both parties became well-aware of the CPVF's opt-out campaign soon after it began. Either party could have sought the motion judge's intervention to determine if the CPVF's telephone campaign and website were misleading, or if its tactics were threatening, intimidating or coercive. The motion judge had given the parties an open invitation to seek his direction regarding communications with class members. Yet neither side acted on this invitation during the opt-out period.

**61** Here, unlike the pre-emptive approach of the moving party in *A&P*, the plaintiff waited for two months after the expiry of the opt-out period to file a notice of motion questioning the fairness of the opt-out process. Supporting material for the motion was not delivered until three months later, in February 2012. The motion was not made returnable until July 4, 2012, almost ten months after the opt-out period had expired and more than a year after the certification of the action.

**62** This dilatory conduct by the representative plaintiff is very troubling. Post-certification, the representative plaintiff represented all class members up until the time that they chose to opt out of the proceeding. Prior to that point, the representative plaintiff had a duty to protect their interests. In the present circumstances, this duty included a responsibility to alert the motion judge to any communications that appeared to coerce, intimidate or mislead class members into opting out. The purpose behind ensuring that the opt-out decision is made voluntarily and with full information is not to protect the size of the class for the benefit of the representative plaintiff or his counsel. If the representative plaintiff had concerns about the nature of the CPVF's communications during the opt-out period, it was incumbent upon the representative plaintiff to bring the issue to the attention of the motion judge as soon as possible.

**63** Also distinguishing this case from *A&P* is the lack of evidence adduced by the plaintiff capable of establishing that class members had been misled or intimidated. The plaintiff filed no direct evidence from any class member going to the issue of whether their opt-out decisions were voluntary and informed. Considering that the only issue on the plaintiff's motion was whether the opt-outs were involuntary or misinformed because of the CPVF's campaign, it is strange indeed that no evidence was adduced from a single opt-out to the effect that any one of them felt intimidated or misled into opting out.

**64** The only affidavit evidence filed in support of the motion consisted of Mr. Rodger's affidavit, which refers to unnamed franchisees allegedly having experienced pressure from members of the CPVF to opt out. The motion judge did not rely on this evidence in coming to his conclusions (at para. 89). Thus, the motion judge's finding that the telephone campaign and the public disclosure on the CPVF's website of the names and store locations of opt-outs had a coercive effect on the rest of the class was not based on direct evidence from any class member.

**65** Instead, the motion judge's conclusion was based on an inference that class members were misled or pressured into opting out by the CPVF's campaign. His reasons, at paras. 68 and 70, illustrate this:

> The CPVF exploited this [vulnerability of the relationship between franchisor/franchisee] by asking for an electronic show of hands on the website -- asking, in effect, "are you with us and your fellow franchisees or against us?"
>
> ...
>
> The CFC, wearing the hat of the CPVF, mounted a campaign designed to kill the class action. It did so by putting subtle and not-so-subtle pressure on hold-outs by prominently listing the "growing" list of names of opt-outs. A franchisee who did not pledge allegiance to the CPVF and promise to opt out could reasonably conclude that he or she would be outed as part of an identified minority who were pursuing their own selfish interests, who were not team players and who were indifferent to the concerns of the majority.

**66** There can be no doubt that there was evidence that the CPVF were attempting to persuade and pressure the class members to opt out of the proceeding. The issue is whether this evidence is capable of supporting an inference that the campaign was coercive. In relying on the posting of names of opt-outs as supporting the inference of coercion, the motion judge did not take into account the following evidence: that the CPVF's telephone callers asked class members for permission to publish their names; that the website listed the number of franchisees who had opted out but who preferred to remain anonymous; and that the certification order, posted on class counsel's website, required class counsel to serve on Pet Valu a list of the names of opt-outs. In short, the CPVF's website explicitly respected class members' anonymity and did not divulge any information about class members that Pet Valu was not otherwise entitled to receive pursuant to the certification order.

**67** There was no evidence that any class member perceived a threat that Pet Valu might take retaliatory action against them for remaining in the class. To the extent that the motion judge's inference that pressure to opt out took advantage of the vulnerability inherent in the franchisor/franchisee relationship, this is inconsistent with his finding that Pet Valu was not linked to the impugned conduct of the CPVF. The motion judge made multiple findings to this effect:

> I did not accept the plaintiff's submission that the CFC or the Executive is somehow under the control of Pet Valu. It receives some modest operational funding from Pet Valu, but it is otherwise independent (at para. 27).
>
> ...
>
> There is no evidence that Pet Valu has taken any repercussions against any franchisee as a result of the class action. Indeed, Pet Valu's evidence is that it treated its franchisees equally and impartially, regardless of their support of the class action (at para. 31).
>
> ...
>
> I also accept Pet Valu's assurances that it was not party to the activities of the CPVF. An extensive affidavit was sworn by McNeely [the Chief Executive Officer] of Pet Valu. On the basis of that affidavit, which is largely unchallenged, I conclude that Pet Valu itself did not interfere with

> the integrity of the opt-out process or attempt to influence franchisees to opt out of the class action. I also conclude that Pet Valu did not directly encourage the CFC or the CPVF to do so. That said, McNeely was clearly aware of what CPVF was up to and was content to let it continue unabated (at para. 65). [Emphasis in original.]

**68** The motion judge's inference that class members were intimidated into opting out by the public disclosure of the names of opt-outs is also inconsistent with his acceptance of the evidence of Mr. McNeely, the CEO of Pet Valu, that: Pet Valu "had not taken and would not take repercussions against a franchisee as a result of his or her or its participation in the class action"; and he "consistently" told franchisees that whatever their decision on the class action, it would not affect their relationship with him or Pet Valu (at para. 66). The motion judge commented that while this attitude was "commendable", it is "inconsistent with the message delivered to franchisees by the CFC and the CPVF." However, the CPVF could not, and did not, speak on behalf of Pet Valu. Any inference to the effect that it did is inconsistent with the motion judge's findings concerning the absence of involvement by Pet Valu in the campaign.

**69** Appellate intervention is warranted where an inference of fact is not supported by any evidence and where an improper inference has a material effect on the outcome: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 22-23. The conclusion reached by the motion judge, at para. 75, that there is "a reasonable probability" that many franchisees decided to opt out due to "unfair pressure amounting to intimidation" is based on the inferences he drew. In my view, these inferences lack a valid evidentiary basis and, given their significance to the outcome of the motion, must be set aside.

**70** The motion judge also erred in law in holding the CPVF to a standard of objectivity in the circumstances. He concluded, at para. 54(d), that the CPVF's campaign rendered the opt-out process unfair because there was no attempt on the website "to provide any form of informational balance or to discuss the issues in the class action". He noted: "the fact that, if the action was successful, every class member might have a right to substantial damages, was not even mentioned."

**71** However, unlike the situation in *A&P*, the CPVF's campaign took place following certification. At the start of the opt-out period, the class members received a court-approved notice of certification describing the nature of the proceeding and indicating that damages were being sought on their behalf. The notice describes the opt-out process and the consequences of opting out. In addition, the notice has a link to class counsel's website and advises class members that a copy of the statement of claim and the rulings by the court in the action are available on that site. Thus, the class members had readily-available information about the possible benefits of the class proceeding through the court-approved notice of certification and class counsel's website.

**72** Indeed, had the representative plaintiff brought his concerns before the motion judge in a timely fashion, the motion judge could have dealt with any problem of improper communications whether by relieving the plaintiff from the terms of the "gag order", by giving some form of direction to the parties, or by reminding the parties and the class members that objective information regarding the lawsuit was available through the sources just discussed. The motion judge was not afforded the opportunity to do so.

**73** When the motion judge was eventually asked to deal with the plaintiff's concerns, he should not have held the CPVF's communications to a standard of objectivity. These former class members had an unassailable right to speak out in opposition to the class proceeding in an attempt to convince other class members to opt out, subject only to the overriding principles set out in *A&P*.

**74** The CPVF's website to which the motion judge took exception, at para. 54, contains assertions of belief that the class action is not in the best interests of franchisees and that it is driven by lawyers with a large financial stake in the outcome. The comments amount to no more than the CPVF members expressing their opinion on the undesirability from a business perspective of pursuing the lawsuit, as opposed to denigrating the technical merits of the action. The opt-out provision is the appropriate mechanism for class members to voice these types of objections to the wisdom of a class action: see *Fairview Donut Inc. v. TDL Group Corp.*, 2008 CanLII 60983 (On. S.C.), at para. 11. Class members are able to consider such objections in the context of the other information made available to them in the notice of certification and on class counsel's website. Apart from attempting to persuade other class members to forego their legal recourse against a defendant in a class proceeding, this interaction has no effect on the lawsuit other than reducing the number of persons in the class.

**75** The motion judge's application of the fully informed and voluntary test from *A&P* was flawed in these circumstances where there was no evidence linking the defendant to the impugned conduct and where the communications amounted to the type of intra-class debate that is acceptable during the opt-out period.

**F. CONCLUSION AND DISPOSITION**

**76** For these reasons, despite the deference that is owed to a discretionary decision by the motion judge, I would allow the appeal and set aside the order at issue.

**77** It was within the purview of the motion judge to scrutinize the CPVF's campaign according to the fully informed and voluntary test as enunciated in *A&P*. In so doing, the motion judge found that the appellant Pet Valu was not implicated in the CPVF's campaign. Given the evidentiary record on the motion, the power imbalance inherent in the franchisor/franchisee relationship was not properly considered in assessing the effect of the CPVF's communications on class members.

**78** At the start of the opt-out period, the class members were provided with a court-approved notice of certification and had access to class counsel's website with full particulars regarding the action. In this manner and in accordance with the statutory scheme, they were afforded access to objective information regarding the legal proceeding.

**79** The CPVF's campaign only dealt with the opinion as to the advisability of the legal proceeding from the business perspective of the franchisees. The campaign had as its central theme the suggestion that the class members should give the franchisor's new management team a chance to deal with the complaint underlying the primary common issue certified in the proceeding. The CPVF's campaign advocated as a matter of opinion that it was not in the interests of the class members to have an outstanding lawsuit between them and the franchisor because it would distract the franchisor from running the business, would harm the Pet Valu trademark and would devalue their assets. In other words, the campaign did not attempt to address the technical merits of the lawsuit.

**80** The motion judge ought not to have held the CPVF's campaign to a standard of objectivity but should only have considered if the conduct of the campaign constituted misinformation, threats, coercion, intimidation or was otherwise unlawful. As explained, there is no evidence to support a finding that the opt-outs by individual class members were not voluntary or fully informed.

**81** The representative plaintiff was aware of the campaign by the CPVF to encourage class members to opt out of the action during the opt-out period. Nonetheless, he took no action to bring the campaign to the motion judge's attention until months after the opt-out period had expired. When he finally argued his motion to invalidate the opt-out decisions, he was unable to tender evidence from a single other class member indicating that the CPVF's campaign improperly influenced the decision to opt out of the proceeding in the sense contemplated by the test established in *A&P*.

**82** I would therefore allow Pet Valu's appeal and set aside the order invalidating the opt-out notices. I would also set aside the motion judge's cost award against Pet Valu and the members of the CPVF.

**83** The appellant Pet Valu shall have its costs of the appeal fixed in the amount of $10,000, inclusive of disbursements and HST.

**84** As noted, the appellant franchisees had no standing on the motion or the appeal. As such, they are not entitled to their costs of the motion or the appeal.

W.K. WINKLER C.J.O.
R.P. ARMSTRONG J.A.:-- I agree.
A. HOY J.A.:-- I agree.

cp/e/ln/qljel/qlpmg/qlhcs/qlrxg/qlmll

1 Twelve franchisees who were founding members of the CPVF were named as respondents in the plaintiff's amended notice of motion, dated February 13, 2012 (amended June 19, 2012).

# Tab 2

*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.

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**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 afford 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 3

*Case Name:*

# Grass (Litigation guardian of) v. Women's College Hospital

**Between**
**Natalie Grass, a minor by her Litigation Guardian, Marilyn Grass and the said Marilyn Grass personally, Plaintiffs (Respondents), and Women's College Hospital, Jane Doe, John Doe, Beth Gherson and Fay Weisberg, Defendants (Appellant)**

[2007] O.J. No. 2918

2007 ONCA 542

159 A.C.W.S. (3d) 201

Docket: C46985

Ontario Court of Appeal
Toronto, Ontario

**J.I. Laskin, J.L. MacFarland JJ.A. and M.L. Benotto J. (ad hoc)**

Heard: July 17, 2007.
Oral judgment: July 17, 2007.

(9 paras.)

*Civil evidence -- Opinion evidence -- Expert evidence -- Appeal from decision of motion judge to grant an application to amend a settlement made for a child in 1998 and allow for an increase in the claim for damages based on a doctor's opinion evidence as to the increased life expectancy of the child -- Appeal dismissed -- The doctor's opinion evidence was admissible -- His opinion provided a basis for the motion judge's order -- The weight to be accorded his opinion was a matter for the trial judge.*

*Civil procedure -- Settlements -- Approval -- Setting aside, grounds -- Appeal from decision of motion judge to grant an application to amend a settlement made in 1998 and allow for an increase in the claim for damages by the guardian of a child as opposed to maintaining the settlement -- Appeal dismissed -- The amendment was in the best interests of the child.*

Appeal from decision of motion judge to grant an application to amend a settlement made in 1998 and allow for an increase in the claim for damages by Grass, as opposed to maintaining the settlement. The basis for the amendment was the child's increased life expectancy today compared to her life expectancy in 1998. The only evidence before the mo-

tion judge on the child's life expectancy today was the opinion evidence of a doctor that the child now had a life expectancy approximately 30 to 35 years greater than the experts considered she had when the settlement was made nine years previously. The Hospital filed no contrary opinion. It did cross-examine the doctor and, in oral argument, argued that in the light of that cross-examination his opinion should be given no weight.

HELD: Appeal dismissed. The amendment was in the best interests of the child. The doctor's opinion evidence was admissible. His opinion provided a basis for the motion judge's order. The cross-examination went to the weight of that opinion. The weight to be accorded his opinion was a matter for the trial judge.

**Appeal From:**

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice dated March 9, 2007.

**Counsel:**

Harry Underwood and Erica J. Baron for the appellant.

Susan M. Chapman and David S. Steinberg for the respondents.

J. Gregory Richards and Caroline E. Abela for the Children's Lawyer.

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ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- We agree with the reasons of the motion judge and with his conclusion. We add the following.

2 Whether the motion judge ought to have granted the amendment increasing the claim for damages or whether he should have approved the settlement made in 1998, at heart raised the same question: At the time of the motion, what was in the best interests of the child?

3 That is the question the motion judge asked. His conclusion that it was in the best interests of the child to grant the amendment and to refuse to approve the settlement is a conclusion reasonably supported by the record before him.

4 The basis for the amendment was the child's increased life expectancy today compared to her life expectancy in 1998. The only evidence before the motion judge on the child's life expectancy today was the opinion evidence of Dr. William Geisler. His opinion was that the child now has a life expectancy approximately 30 to 35 years greater than the experts considered she had when the settlement was made nine years ago. The appellant filed no contrary opinion. The appellant did cross-examine Dr. Geisler and, in oral argument, argued that in the light of that cross-examination, his opinion should be given no weight.

5 We cannot accept that argument. In our view, the motion judge properly rejected it as well. Dr. Geisler's opinion evidence was admissible. Thus, the cross-examination went to the weight of that opinion. The weight to be accorded his opinion is a matter for the trial judge. His opinion provided a basis for the motion judge's order.

6 The appellant also contended that the motion judge erred in not following the procedure outlined by the English Court of Appeal in *Bailey v. Warren*, [2006] E.W.C.A. 51. We do not agree with this contention. Our procedure is set out in rule 7.08 of the *Rules of Civil Procedure*, which the motion judge did follow. Moreover, nothing in *Bailey v. Warren* detracts from the principle that a motion judge must focus on the best interests of the child and exercise his or her discretion on that basis. Finally, we note that *Bailey v. Warren* is entirely distinguishable on its facts.

7 We add that today the child, Natalie Grass, has outlived the life expectancy proffered by the appellant's own expert nine years ago. By itself that would cause any judge to doubt the wisdom of approving the settlement.

8 In summary, the motion judge had before him evidence showing that it was in the child's best interests to grant the amendment, and no evidence showing that it was not in the child's best interests to do so. The motion judge was therefore entirely correct to refuse to approve the settlement and to grant the amendment.

9 The appeal is dismissed, with costs fixed at $15,000, all inclusive.

J.I. LASKIN J.A.
J.L. MacFARLAND J.A.
M.L. BENOTTO J. (ad hoc)

cp/e/qlhjk/qlmxt

# Tab 4

*Indexed as:*

# Hollick v. Toronto (City)

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

[2001] 3 S.C.R. 158

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

2001 SCC 68

File No.: 27699.

Supreme Court of Canada

2001: June 13 / 2001: October 18.

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

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

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

The appellant complains of noise and physical pollution from a landfill owned and operated by the respondent city. He sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill. The motions judge found that the appellant had satisfied each of the five certification requirements set out in s. 5 of the Act and ordered that the appellant be allowed to pursue his action as representative of the stated class. The Divisional Court overturned the certification order on the grounds that the appellant had not stated an identifiable class [page159] and had not satisfied the commonality requirement. The Court of Appeal dismissed the appellant's appeal, agreeing with the Divisional Court that commonality had not been established.

Held: The appeal should be dismissed.

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

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

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

**Cases Cited**

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

**Statutes and Regulations Cited**

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

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Code of Civil Procedure, R.S.Q., c. C-25, Book IX.
Environmental Bill of Rights,1993, S.O. 1993, c. 28, ss. 61(1), 74(1).
Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 14(1), 99, 172(1), 186(1).

Family Law Act, R.S.O. 1990, c. F.3.
Federal Rules of Civil Procedure, Rule 23(b)(3).
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 12.01.

**Authors Cited**

Branch, Ward K. Class Actions in Canada. Vancouver: Western Legal Publications, 1996 (loose-leaf updated December 1998, release 4).
Cochrane, Michael G. Class Actions: A Guide to the Class Proceedings Act, 1992. Aurora, Ont.: Canada Law Book, 1993.
Eizenga, Michael A., Michael J. Peerless and Charles M. Wright. Class Actions Law and Practice. Toronto: Butterworths, 1999 (loose-leaf updated June 2001, issue 4).
Friedenthal, Jack H., Mary K. Kane and Arthur R. Miller. Civil Procedure, 2nd ed. St. Paul, Minn.: West Publishing Co., 1993.
Ontario. Attorney General's Advisory Committee on Class Action Reform. Report of the Attorney General's Advisory Committee on Class Action Reform. Toronto: The Committee, 1990.
Ontario. Law Reform Commission. Report on Class Actions. Toronto: Ministry of the Attorney General, 1982.

APPEAL from a judgment of the Ontario Court of Appeal (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (sub nom. Hollick v. Metropolitan Toronto (Municipality)), 127 O.A.C. 369, 32 C.E.L.R. (N.S.) 1, 41 C.P.C. (4th) 93, 7 M.P.L.R. (3d) 244, [1999] O.J. No. 4747 (QL), dismissing an appeal from a decision of the Divisional Court (1998), 42 O.R. (3d) 473, 168 D.L.R. (4th) 760, 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, 31 C.P.C. (4th) 64, [1998] O.J. No. 5267 (QL), allowing an appeal from a decision of the Ontario Court (General Division) (1998), 27 C.E.L.R. (N.S.) 48, 18 C.P.C. (4th) 394, [1998] O.J. No. 1288 (QL), granting a motion to have an action certified as a class proceeding. Appeal dismissed.

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

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Graham Rempe and Kalli Y. Chapman, for the respondent.
Robert V. Wright and Elizabeth Christie, for the interveners Friends of the Earth, West Coast Environmental Law Association and Canadian Association of Physicians for the Environment.
Doug Thomson and David McRobert, for the intervener the Environmental Commissioner of Ontario.
Written submissions only by Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.

Solicitors for the appellant: McGowan & Associates, Toronto.
Solicitor for the respondent: H. W. O. Doyle, Toronto.
Solicitors for the interveners Friends of the Earth, West Coast Environmental Law Association and Canadian Association of Physicians for the Environment: Sierra Legal Defence Fund, Toronto.
Solicitors for the intervener the Environmental Commissioner of Ontario: McCarthy Tétrault and David McRobert, Toronto.
Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

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The judgment of the Court was delivered by

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

I. Facts

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

> A. All persons who have owned or occupied property in the Regional Municipality of York, in the geographic [page163] area bounded by Rutherford Road on the south, Jane Street on the west, King-Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991, or where such a person is deceased, the personal representative of the estate of the deceased person; and
>
> B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the Family Law Act) of persons who were owners and/or occupiers ... .

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

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

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

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

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

The appellant filed a motion for certification on November 28, 1997. In support of his motion, the appellant pointed out that, in 1996, some 139 complaints were registered with the respondent's telephone complaint system. (Before this Court, the appellant submitted that "at least 500" complaints were made "to various governmental authorities between 1991 and 1996" (factum, at para. 7).) The appellant also noted that, in 1996, the respondent was fined by the Ministry of Environment in relation to the composting of grass clippings at a facility located just north of the Keele Valley landfill. In the appellant's view, the class members form a well-defined group with a common interest vis-à-vis the respondent, and the suit would be best prosecuted as a class action. The appellant seeks, on behalf of the class, injunctive relief, $500 million in compensatory damages and $100 million in punitive damages.

6 The respondent disputes the legitimacy of the appellant's complaints and disagrees that the suit should be permitted to proceed as a class action. The respondent claims that it has monitored air emissions from the Keele Valley site and the data confirm that "none of the air levels exceed Ministry of the Environment trigger levels". It notes that there are other possible sources for the pollution of which the appellant complains, including an active quarry, a private transfer

station for waste, a plastics factory, and an asphalt plant. In addition, some farms in the area have private compost operations. The respondent also argues that the number of registered complaints -- it says that 150 people complained over the six-year period covered in the [page165] motion record -- is not high given the size of the class. Finally, it notes that, to date, no claims have been made against the Small Claims Trust Fund.

II. Judgments

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

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

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

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

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

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

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

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

III. Legislation

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

> 5. -- (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,

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> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
>
> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> 2. The relief claimed relates to separate contracts involving different class members.
> 3. Different remedies are sought for different class members.
> 4. The number of class members or the identity of each class member is not known.
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

IV. Issues

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

V. Analysis

13 Ontario's Class Proceedings Act, 1992, like similar legislation adopted in British Columbia and Quebec, allows a member of a class to prosecute a suit on behalf of the class: see Ontario Class Proceedings Act, 1992, s. 2(1); see also Quebec Code of Civil Procedure, R.S.Q., c. C-25, Book IX; British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50. In order to commence such a proceeding, the person who seeks to represent the class must make a motion for an order certifying the action as a class proceeding and recognizing him or her as the representative of the class: see Class Proceedings Act, 1992, s. 2(2). Section 5 of the Act sets out five criteria by which a motions judge is to assess whether [page169] the class should be certified. If these criteria are satisfied, the motions judge is required to certify the class.

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

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

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

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

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

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

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

**19** In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim -- or at least what might be termed a "colourable claim" -- against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see Western Canadian Shopping Centres, at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints against the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated vis-à-vis the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that

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

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

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

22 The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. The recommendations of the Ontario Law Reform Commission's 1982 report on this point should perhaps be given limited weight because, as discussed above, those recommendations were made in the context of a proposal that the certification stage include a preliminary merits test: see Report on Class Actions, supra, vol. II, at pp. 422-26 (recommending that both the representative plaintiff and the defendant be required, at the certification stage, to file one or more affidavits setting out all the facts upon which they intend to rely, and that the parties be permitted to examine the deponents of any such affidavits). The 1990 report of the Attorney General's Advisory Committee is perhaps a better guide. That report suggests that "[u]pon a motion for certification ... , the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely" (emphasis added): see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

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

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

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

26 In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Environment and Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(1)(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions -- judicial economy, ac-

cess to justice, and behaviour modification: see also Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453 (Div. Ct.); compare British Columbia Class Proceedings Act, s. 4(2) (listing factors that court must consider in [page177] assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues -- common and individual -- raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.

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

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

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

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

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

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

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

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

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

**35** I would note, further, that Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification: see Environmental Bill of Rights, 1993, ss. 61(1) (stating that "[a]ny two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be [page182] amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister") and 74(1) (stating that "[a]ny two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister"); Environmental Protection Act, s. 14(1) (stating that "[d]espite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect"); s. 172(1) (stating that "[w]here a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may, within fourteen days after the injury or damage becomes apparent, re-

quest the Minister to conduct an investigation"); and s. 186(1) (stating that "[e]very person who contravenes this Act or the regulations is guilty of an offence").

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

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

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

cp/e/qllls

# Tab 5

*Case Name:*

# Kidd v. Canada Life Assurance Co.

**Proceeding under the Class Proceedings Act, 1992**
**Between**
**David Kidd, Alexander Harvey, Jean Paul Marentette, Garry C. Yip, Louie Nuspl, Susan Henderson and Lin Yeomans, Plaintiffs, and**
**The Canada Life Assurance Company, A.P. Symons, D. Allen Loney and James R. Grant, Defendants**

[2013] O.J. No. 1468

2013 ONSC 1868

Court File No. 05-CV-287556CP

Ontario Superior Court of Justice

**P.M. Perell J.**

Heard: March 18, 2013.
Judgment: March 28, 2013.

(179 paras.)

*Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Settlements -- Approval -- Motion by proponents for approval of amendment to approved settlement of class action dismissed -- Approved settlement concerned ownership of pension plan surpluses -- Parties discovered that assumptions about value of surplus were wrong -- Parties negotiated amended settlement -- Amended settlement was substantively, procedurally, circumstantially and institutionally unfair -- Proponents did little to share pain, they should have paid for lawyer for objectors and objectors opposed amended settlement.*

*Pensions and benefits law -- Private pension plans -- Administration of pensions -- Surplus funds -- Civil procedure -- Parties -- Settlements -- Motion by proponents for approval of amendment to approved settlement of class action dismissed -- Approved settlement concerned ownership of pension plan surpluses -- Parties discovered that assumptions about value of surplus were wrong -- Parties negotiated amended settlement -- Amended settlement was substantively, procedurally, circumstantially and institutionally unfair -- Proponents did little to share pain, they should have paid for lawyer for objectors and objectors opposed amended settlement.*

Motion by the proponents for approval of an amendment to an approved settlement of a class action. The approved settlement concerned the ownership of pension plan surpluses. It affected an insurance company, its employees and four pension plan partial wind-ups, including the Integration Group. After the settlement was approved, the parties discovered that their assumptions about the value of the surplus to be distributed to the Integration Group were wrong. The

parties negotiated an amended settlement. The proponents were class counsel and the insurance company. Over 90 class members from the Integration Group objected.

HELD: Motion dismissed. The amended settlement was substantively, procedurally, circumstantially and institutionally unfair. The proponents did very little to share with the Integration Group the pain of the disappearing surplus. Class counsel would receive $4.6 million in counsel fees. The insurance company's proportionate share of any surplus would potentially increase and the company had a temporally-unlimited ability to recapture the diminishment of the surplus. The proponents should have paid for a lawyer to provide independent legal representation for the objectors, given an unprecedented campaign by the insurance company and its employees for the approved settlement and the fact that the misfortune of false estimates was a matter of fickle fate and forces beyond the parties' control. The objectors opposed the amended settlement. The fact that it was a better monetary choice than the approved settlement was not a reason to approve it.

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992, S.O. 1992, c. C.6, s. 12, s. 29(2)

Pension Benefits Act, R.S.O. 1990, c. P.8,

Rules of Civil Procedure, R.R.O. 1990, s. 59.06(2), s. 59.06(2) (d)

Variation of Trusts Act, R.S.O. 1990, c. V.1,

**Counsel:**

*Mark Zigler* and *Clio M. Godkewitsch* for the Plaintiffs David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson and Lin Yeomans.

*Darrell Brown* for the Plaintiffs Garry C. Yip and Louie Nuspl.

*Jeffrey W. Galway* and *Doug Rienzo* for the Defendant, The Canada Life Assurance Company.

*John C. Field* for the Defendants A.P. Symons, D. Allen Loney, and James R. Grant.

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## REASONS FOR DECISION

P.M. PERELL J.:--

### I. INTRODUCTION

1 In this class action, under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6, the court has already approved a settlement. I shall refer to that settlement as the "Approved Settlement."

2 This is a motion, and the moving parties seek the court's approve for an amendment to the Approved Settlement. I shall refer to the amendment as the "Amended Settlement."

3 On a motion to approve a class action settlement, the court's only choices are to approve or to reject the settlement using the test of whether the proposed settlement is fair, reasonable, and in the best interests of the class members. The court does not have the choice of fixing or revising the settlement to make it fair, reasonable, or in the best interests of the class members. The court's only choices are to approve or to not approve the proposed settlement.

4 Most unfortunately, in the case at bar, these choices of approval or disapproval present the court with a double bind, a choice between unpleasant and distressing alternatives. As the discussion below will reveal, the circumstances of the case at bar are such that the court is being asked to make a choice between two courses where neither course is substantively, procedurally, circumstantially, or institutionally fair to the class members.

5 As I will detail below, in this class action, the Plaintiffs sued Canada Life Assurance Company for a declaration as to the ownership of pension plan surpluses and for damages for breach of the Pension Plan. In the class action, it was

alleged that Canada Life employees owned any surplus in their Pension Plan and that Canada Life had wrongfully charged administrative expenses to the Pension Plan. There were also claims for partial wind-ups of the Pension Plan.

6 In addition to resolving the claims of some Canada Life employees, the already Approved Settlement settled the claims of four discrete groups of claimants, who were identified with four different pension plan partial wind-ups; namely: (1) the Integration Partial Wind Up Group; (2) the Pelican Partial Wind Up Group; (3) the Indago Partial Wind Up Group; and (4) the Adason Partial Wind Up Group.

7 Under the Approved Settlement: (a) plan members would receive 57.22% of the surplus for their designated part of the Pension Plan; (b) inactive plan members would receive 12.44% of the designated surplus; and (c) Canada Life would receive 30.34% of the surplus allocable to the partial winding ups.

8 The Plaintiffs and Canada Life elaborately campaigned to secure the support of Class Members for the proposed settlement. There were organized meetings across the country and an elaborate information package. Untypically, and without precedent, the proposed Class Members were asked to vote for or against the Approved Settlement. As a part of the promotional campaign, without being given any guarantee, the Integration Group's members were told that it was estimated that they would be sharing about 70% of a surplus estimated for them to be worth $55 million.

9 Unfortunately, after the Approved Settlement was approved by the court and after the parties set about to implement it, almost immediately, they discovered that their assumptions or predications about the value of the surplus to be distributed to the Integration Group were very-very wrong.

10 The unhappy discovery was that the anticipated surplus of $55 million, upon which the Approved Settlement had been predicated and which, as noted above, was to be shared by the Integration Group and Canada Life was diminishing dramatically and quickly.

11 The diminishment of the surplus came about mainly for two reasons. First, a decline in interest rates in the Canadian financial marketplace increased the notional liabilities of the Pension Plan for the Integration Group's members, which liabilities are calculated in accordance with prescribed actuarial principles. Second, a greater than anticipated number of Integration Group class members chose or were deemed to have chosen pension benefit annuities rather than choosing to take the accumulated value of their pension benefits. In other words, fewer Integration Group pensioners than predicted cashed out their benefits and this, in turn, increased the liabilities of the Pension Plan on an on-going basis and all this diminished the actuarially calculated surplus or deficit.

12 And to further complicate matters, there was another surprise for the Integration Group and Canada Life, because the marketplace for annuities shut down, and annuities were not available for those who had chosen to stay with Canada Life's Pension Plan. The Plan's Administrators had to internalize the cost of the annuities rather than outsource this liability for the pension benefits.

13 These problems did not, however, materially affect the Pelican, Indago, and Adason Groups' part of the Approved Settlement, nor did the surprises affect current employees of Canada Life, who were to enjoy a two-year contribution holiday under the Approved Settlement.

14 The problems, however, were grave for the Integration Group because Canada Life proposed to implement the settlement without purchasing annuities. Canada Life intended to unilaterally transfer the assets and liabilities of the Integration Group from the old Pension Plan into the ongoing portion of a new Pension Plan, which had been established as a part of the overall settlement between the parties.

15 The Integration Group moved to enjoin Canada Life from acting unilaterally to implement the Approved Settlement.

16 Class Counsel preferred to delay the implementation of the settlement to see if interest rates would rebound and to allow a recalculation of the Pension Plan surplus for the Integration Group when the economy and interest rates might have bounced back. Nothing however could be done to change the impact of the unexpected numbers of Integration Members who had chosen to stay with the Pension Plan.

17 The injunction motion, however, was not argued. Instead, the parties negotiated a settlement, the "Amended Settlement." The Plaintiffs now move for approval of the Amended Settlement. The Plaintiffs and Canada Life submit that the Amended Settlement is fair, reasonable, and in the best interests of the class members.

18 The moving parties main argument is that the Amended Settlement is fair, reasonable, and in the best interests of the class members because it is better than the alternative of rejecting the Amended Settlement and just implementing the Approved Settlement, which I will later in this judgment rename the "Stark-Reality" Settlement.

19 In other words, their argument is that under the Approved Settlement that became the Stark-Reality Settlement, the Integration Group will receive a terribly disappointing monetary award, but under the Amended Settlement, they will receive a terribly disappointing monetary award with a "shot" at a second distribution of surplus re-calculated as at December 31, 2014 when interest rates may have rebounded. This shot at a second distribution - capped at $15 million - makes the Amended Settlement fair, reasonable, and in the best interests of the class members and better than the alternative of reviving the litigation, which would be purposeless.

20 Numerous class members from the Integration Group object to the Amended Settlement, and they ask the court not to approve it. They submit that the Amended Settlement is unfair, unreasonable, and not in the best interests of the Class Members.

21 Over 90 class members filed a petition with the court, also unprecedented, asking the court not to approve the Amended Settlement but rather to approve a settlement where there would be a temporally unlimited and uncapped second distribution of the surplus. As one petitioner expressed it: "I hope the Honourable Judge sees our petition and gives us some fairness."

22 The double bind for the court, however, is that approving the unfair Amended Settlement is monetarily better than the alternative of not approving the Amended Settlement. Approving the unfair Amended Settlement also avoids renewed litigation and the collateral damage to the current employees of Canada Life and the Pelican, Indago, and Adason Groups, who are indifferent to the unfair Amended Settlement and who just want to have this litigation at an end and certainly not resumed.

23 The court cannot make a fair settlement for the parties, and for the reasons that follow, my conclusion is that the Amended Settlement is not fair. The disappointment and anger of the objectors and the reasons for their objection are reasonable, and, I agree with them that the Amended Settlement is unfair. In my opinion, the Amended Settlement is all of substantively, procedurally, circumstantially, and institutionally unfair. Therefore, I shall not approve it. Approving an unfair settlement would be contrary to both the letter and the spirit of the *Class Proceedings Act,* 1992. It also would be inconsistent with the court's responsibilities when asked to review a settlement under the *Act*. I cannot in judicial good conscience put the court's endorsement to the Amended Settlement. Accordingly, I dismiss the motion.

## II. FACTUAL BACKGROUND

24 The Representative Plaintiffs are David Kidd, Alexander Harvey, Jean Paul Marentette, Garry C. Yip, Louie Nuspl, Susan Henderson, and Lin Yeomans.

25 Each of the Representative Plaintiffs is or was a member or former member of the Pension Plan. They are also members of Canada Life Canadian Pension Plan Members' Rights Group ("CLPENS"), which is a voluntary, unincorporated association of members and former members of the Pension Plan. CLPENS includes active employees, pensioners, deferred vested pension members, and former Canada Life employees whose employment was terminated as a result of various partial wind-ups. The members of the CLPENS Executive Committee have actuarial experience and are knowledgeable about the operation of the Canada Life Pension Plan.

26 Class Counsel for the Plaintiffs Kidd, Harvey, Marentette, Henderson and Yeomans are Koskie Minsky LLP and Harrison Pensa LLP. Class Counsel for the Plaintiffs Yip and Nuspl is Sack Goldblatt Mitchell LLP.

27 The Plaintiffs' action was against Canada Life and against A.P. Symons, D. Allen Loney, and James R. Grant, who are the trustees of the Canada Life Canadian Employees' Pension Plan.

28 The original trust agreement for a pension plan for Canada Life employees was established on December 31, 1964. Canada Life is the sponsor and administrator of the Pension Plan. The Pension Plan is funded through a trust agreement between Canada Life and the Trustees of the Fund.

29 Effective January 1, 1997, the Pension Plan was merged with The Canada Life Assurance Company Trust Canadian Staff Pension Fund (1958) and The Canada Life Assurance Company Trust Canadian Agents' Pension Fund. A consolidated Pension Plan was created, and the associated funds were merged into a single fund.

**30** A major issue in this class action is who owns the surplus in the Pension Plan. Pension surplus is the excess value of the assets in a pension plan over the value of the liabilities, both calculated in a manner prescribed by pension laws. The amount of surplus at any given time is actuarially determined under set guidelines and prescribed factors. It will become important to understand that at any given time, a pension surplus is a legal fiction. A pension surplus only becomes tangible and real when trust fund monies calculated at a particular date are actually paid out to the owners of the surplus.

**31** In this class action, the Plaintiffs claimed that the 1997 amendments to the Pension Plan and other amendments relating to the possibility of reversion of surplus assets to Canada Life on plan and fund termination were unlawful and of no force or effect. The Plaintiffs' position was that the Pension Plan surplus belonged to the Class Members.

**32** During the course of its administration of the Pension Plan, Canada Trust made certain amendments to the plan documents that permitted it to charge expenses to the pension fund. In the class action, the Plaintiffs alleged that the plan expense amendments were a breach of contract and a breach of trust.

**33** During the course of its administration of the Pension Plan, Indago Capital Management Inc., a subsidiary of Canada Life, whose employees participated in the Pension Plan, merged with another corporation. As a result of the merger, the employment of 14 employees of Indago was terminated, but there was no partial wind-up of the Pension Plan with respect to the termination of employment.

**34** During the course of its administration of the Pension Plan, the employment of 37 employees of Adason Properties Limited, a subsidiary of Canada Life, was terminated, but there was no partial wind-up of the Pension Plan with respect to the termination of employment.

**35** During the course of its administration of the Pension Plan, the employment of 38 employees of Pelican Food Services Limited, a subsidiary of Canada Life, was terminated, but there was no partial wind-up of the Pension Plan with respect to the termination of employment.

**36** In 2003, a partial wind-up of the Pension Plan within the meaning of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 was declared as of July 10, 2003 in relation to members of the Pension Plan who were terminated from employment, retired or resigned voluntarily from the Company as a result of the integration of Canada Life with The Great-West Life Assurance Company.

**37** As of June 30, 2005, Canada Life's Partial Wind-up Report for the Integration Group disclosed an estimated partial wind-up surplus of approximately $93 million attributable to the Integration Group.

**38** In 2005, the Representative Plaintiffs Kidd and Harvey retained Koskie Minsky LLP and Harrison Pensa LLP for their advice and services in relation to the Integration Group Partial Wind-up and about the issue of Canada Life charging expenses to the fund.

**39** Mr. Kidd commenced a class action by Notice of Action issued on April 12, 2005, and filed on May 11, 2005. Mr. Marentette commenced a similar action by Statement of Claim issued on February 3, 2005. He discontinued his action, and he was added as a Plaintiff to Mr. Kidd's action.

**40** These actions were commenced after CLPENS had filed a complaint with the Ontario pension regulator. The complaint led to an investigation by the Financial Services Commission of Ontario ("FSCO"), which investigation was suspended, pending the resolution of the class action.

**41** In the class action, the Plaintiffs made three major claims: (1) they claimed that amendments to the Pension Plan concerning the reversion of surplus assets to Canada Life on Plan and Fund termination were unlawful; (2) they claimed that Canada Life had wrongfully been reimbursed for expenses charged to the Pension Plan in excess of $41 million; and (3) they claimed that certain groups of employees had a claim for a partial winding-up of the Pension Plan. The action sought winding up orders with respect to the Integration, Pelican, Indago, and Adason Groups.

**42** In October, 2005, the Plaintiffs filed material supporting a motion for certification. The motion for certification was scheduled to be heard in February, 2006, but the original certification motion was adjourned pending settlement discussions.

**43** In April 2007, the parties attended a two-day mediation session facilitated by Justice Winkler, as he then was. The mediation resulted in an agreement on the framework for a potential settlement.

**44** Negotiations continued, and on November 9, 2007, the parties signed a Memorandum of Understanding.

**45** Between 2008 and 2010, the parties continued their negotiations about the details of the proposed settlement. During these negotiations, the Indago, Pelican, and Adason Partial Wind-Ups claims were added to the agenda of matters to be settled.

**46** It was part of the plan to settle that Canada Life would, in effect, restart its Pension Plan under a new trust, which would receive the assets from the Pension Plan. Implementation would also require a court application to obtain a variation of trust.

**47** The negotiations culminated in the Surplus Settlement Agreement, which I have labelled the Approved Settlement. The Surplus Settlement Agreement was conditional on obtaining certain levels of consent from past and present plan members.

**48** The Surplus Settlement Agreement (the Approved Settlement) involved five key elements:

(1) the assets of the Pension Plan would be transferred to a new Pension Plan;
(2) administrative expenses would be paid from the assets of the new Pension Plan;
(3) eligible active Plan members would be able to suspend their contributions to the Plan for two years; (The value of the contribution holiday for active Plan members is $4.6 million.)
(4) former Plan members affected by a partial wind-up and other Plan members not included in a partial wind-up (deferred/vested members and pensioners) would each receive a share of the surplus assets (estimated to be worth $49.4 million) related to the partial wind-ups of the Pension Plan; and
(5) Canada Life would also receive a share of the surplus related to the partial wind-ups (estimated to be worth $21.5 million).

**49** Under the Approved Settlement: (a) plan members would receive 57.22% of the surplus for their designated part of the Pension Plan; (b) inactive plan members would receive 12.44% of the designated surplus; and (c) Canada Life would receive 30.34% of the surplus allocable to the partial winding ups.

**50** In March 2011, a detailed information package was sent to all persons included under the Surplus Settlement Agreement (the Approved Settlement).

**51** Following mailing of the Information Packages, a total of 15 meetings were held in cities across Canada (Vancouver, Calgary, Regina, Toronto, London, Montreal and Halifax) to describe the agreement and to provide an opportunity to Class Members to ask questions. At each of the meetings, presentations were made by Canada Life, a CLPENS representative, and Mr. Kidd's counsel. There were also meetings held with active employees of Canada Life to respond to some of their concerns, on May 17, 18, and 19, 2011, in Regina, London, and Toronto respectively.

**52** By order dated October 26, 2011, I certified this action as a class action for settlement purposes. See *Kidd v Canada Life*, 2011 ONSC 6324.

**53** There was a great deal of support for the proposed settlement. There are 5,228 persons in the classes. As of January 3, 2012, 4,293 Class Members in the Integration Group (82%) voted in favour of settling their claims in accordance with the Surplus Settlement Agreement. Overall, there were just 57 no votes. There was one objector.

**54** The parties moved for approval of the Approved Settlement, which I granted on January 27, 2012, for reasons released on February 6, 2012. See: *Kidd v Canada Life*, 2012 ONSC 740.

**55** As a part of the settlement, Canada Life required an order approving a variation of trust pursuant to the *Variation of Trusts Act*, R.S.O. 1990, c. V.1 and the rule from *Saunders v. Vautier*, (1841), Cr. & Ph. 240, 41 E.R. 482. This too was granted.

**56** I also approved: (a) Sack Goldblatt Mitchell LLP's fee request of $119,911.47 for legal services to the Adason Group plus $105,000 for future legal work; and (b) Koskie Minsky LLP and Harrison Pensa LLPs' fee request of $4,667,845 plus applicable taxes and disbursements of $60,601.84 plus payment for post-settlement work at an hourly rate without multiplier. Class Counsel was to receive approximately $5 million for fees and disbursements under the Approved Settlement.

**57** The value of the contribution holiday for active Plan members was $4.6 million. Thus, the total financial benefit to Class Members from the Approved Settlement was estimated to be $54 million, plus payment of all of their legal fees and expenses estimated at $5 million.

**58** However, one month after the settlement had been approved, Class Counsel were advised by Canada Life that the Integration Group's surplus had decreased to $23.7 million. The explanations for the decrease were that: (a) changes in interest and inflation assumptions with respect to annuity purchases had increased the actuarial cost of these expenses; and (b) a higher than assumed take-up rate of the guaranteed pension option for members of the Integration Group had increased the liabilities, depleting the surplus.

**59** To be more precise, on February 23, 2012, legal counsel to Canada Life provided to Class Counsel a memorandum reflecting updated information on the estimated actuarial surplus available for distribution under the Approved Settlement. The memorandum from Canada Life's actuary indicated that as at December 31, 2011, the Integration Partial Wind Up surplus had diminished from an estimated $54 million as at June 30, 2011 to approximately $23.7 million.

**60** The Plaintiffs and the CLPENS Executive Committee were sceptical about the truth of Canada Life's calculation of the Integration Group's surplus, and with the assistance and guidance of Class Counsel and the actuarial advisor; Class Counsel investigated the information provided by Canada Life. They satisfied themselves that it was correct from an actuarial perspective.

**61** The Plaintiffs and Class Counsel also explored solutions, and two possible solutions were initially identified: (1) delay the implementation of the Approved Settlement to allow a recovery in interest rates with the hope that the surplus would recover; and (2) provide annuities to members of the Integration Group, with indexation provided through an inflation hedging product created and insured by a third party, with a view to reducing the plan liabilities.

**62** With these solutions in mind, Class Counsel approached counsel to Canada Life to initiate negotiations aimed at amending the Approved Settlement.

**63** The parties attended case management conferences before me on April 20 and May 7, 2012 to report on the situation and to obtain approval of a notice to update Class Members of the situation.

**64** Notices were approved and sent to Class Members by direct mail on or before May 15, 2012, and also posted to Class Counsel's website. The letters described the precipitous decline in the Integration Group's surplus and informed the Class Members that the parties were working together to address the situation. The letters were modified for each group because the problems mostly concerned the Integration Group.

**65** Meanwhile, the surplus continued to decline through 2012, and as of August 31, 2012, the Integration Groups' part of the surplus was estimated to be just $2.6 million.

**66** Based on the new estimates of the surplus and Class Members' share of 69.66% plus the value of the contribution holiday, the monetary value of the Approved Settlement to Class Members was $14.4 million, down from $54 million.

**67** Pausing here, in order to understand some of the arguments of the parties discussed below, it is important to appreciate that the reason the surplus in the Pension Plan for the Integration Group declined has nothing to do with a decline in the value of the assets held by the Pension Plan. In fact, the value of the assets has increased slightly.

**68** The reason that the surplus was vaporizing was that the actuarially estimated value of the cost of providing future pension benefits (which estimate is subtracted from the value of the assets to determine whether the plan is in a surplus or deficit position) had increased because of low interest rates and because most Integration Group Plan Members were electing to stay with the Pension Plan rather than choosing the option of taking the commuted value of their pension benefits.

**69** The principle reason for the increase in liabilities was the decline in yields on Government of Canada real-return, long-term bonds. For example, at December 31, 2008, this yield was reported at 2.10%, whereas at December 31, 2011, the yield was reported at 0.45%. At August 31, 2012, the yield on real-return, long-term bonds was 0.40%.

**70** Returning to the factual background, the Plaintiffs, Class Counsel, the CLPENS Executive Committee, and their expert actuarial advisor, Marcus Robertson, had extensive discussions to analyze the information, to test its accuracy, and to consider next steps. Mr. Robertson is a fellow of the Canadian Institute of Actuaries, a former partner in the firm of Robertson, Eadie & Associates. He had been retained by the Plaintiffs to provide actuarial advice to the Plaintiffs and Class Counsel throughout the class action.

71 In the interim, Canada Life proceeded to solicit bids for annuities for members of the Integration Group who elected a guaranteed pension option under the Approved Settlement. However, they were no bidders. Canada Life had approached seven Canadian insurance providers (including Canada Life) for immediate and deferred indexed annuities as required under the Approved Settlement. All seven annuity providers declined to take on the business, apparently because of the complicated indexing provisions in the Pension Plan, the number of deferred members, the deferral periods, the unavailability of assets to back the liabilities, and the size of the request.

72 With no annuities to be had, Canada Life decided it could implement the Approved Settlement in another way. In August 2012, Canada Life proposed to unilaterally transfer the assets and liabilities of the Integration Group into the ongoing portion of the Pension Plan, and proceed with the implementation of the Approved Settlement. By this time, the anticipated surplus had continued its decline in value, and there was the prospect that there would be no surplus. Canada Life's plan would crystallize the surplus, stop the bleeding, and avoid the risk that the surplus would become a deficit, for which it as plan sponsor would become responsible under the *Pension Benefits Act*.

73 In other words, because there was no market in Canada for the annuities, Canada Life proposed unilaterally to transfer the liabilities of the partial winding up to the ongoing portion of the Pension Plan, which had been re-established under the Approved Settlement in a way favourable to Canada Life. The Integration Group's surplus would be calculated, in part, on estimated rather than actual annuity prices.

74 Canada Life took the position that no amendment to the Approved Settlement was necessary following the drop in the surplus, while Class Counsel viewed the Approved Settlement as unworkable and Canada Life's plans as a breach of contract.

75 The Plaintiffs brought a motion returnable on September 27, 2012 objecting to Canada Life's plans about how to implement the Approved Settlement and seeking the appointment of a mediator.

76 In their motion, the Plaintiffs sought a declaration that the unilateral actions proposed by Canada Life would breach the terms of the Approved Settlement. Both sides filed evidence that provided details about the circumstances leading to the reduction in the estimated Integration Group's surplus.

77 The motion was not argued. I made the following endorsement.

> This motion for a declaration has been settled on the following terms that shall be incorporated into a court order:
>
> 1. Canada Life may proceed to file with FSCO the transfer report concerning the transfer of the Integration PWU assets and liabilities to the ongoing plan.
> 2. The Representative Plaintiffs shall not object to any such filing and transfer of assets and liabilities to the ongoing plan subject to paragraph 4 below.
> 3. If the parties do not reach an agreement on the implementation of the Surplus Sharing Agreement within 45 days from today, the court shall appoint a mediator to assist the parties in reaching an agreement; and
> 4. If no agreement is reached about implementing the Surplus Sharing Agreement, the Representative Plaintiffs reserve the right to take such action as they may be advised.

78 Following the settlement of the motion, Justice Strathy agreed to act as mediator to assist the parties in resolving their dispute.

79 In December 2012, the parties attended a one-day mediation, and negotiations in writing followed until the parties came to an agreement to revise the Approved Settlement. The main terms of the Amended Settlement are as follows:

* Canada Life will fund top-up payments (at an estimated cost of $1.2 million) in order to ensure that Integration Group will receive the promised minimum surplus shares of $1,000 required under the Approved Settlement.
* Canada Life will waive its right to any interest on the amount of its expense reimbursement under the Approved Settlement (estimated value $800,000).
* Canada Life will waive its right to reimbursement of $500,000 of its professional fees.

* The Plaintiffs and CLPENS Executive Committee will waive their entitlement to reimbursement of future legal fees (but not disbursements) previously approved by the Court (estimated at $200,000).
* For any member of the Integration Group who elected to receive a deferred or immediate pension, their portability rights would be satisfied by Canada Life transferring their assets to the ongoing portion of the Plan effective August 31, 2012.
* The assets and liabilities related to members of the Integration Group who elected a deferred or immediate pension will be notionally segregated (the "Segregated Portion") until the completion of a second distribution, if any.
* If a surplus exists for the notionally segregated Integration Groups assets as at December 31, 2014, there will be a second distribution to the Integration Group and Inactive Eligible Class Members subject to the conditions that:

o 10% of the 2014 Gross Surplus shall be deducted off the top and remain in the Plan as a cushion;

o The 2014 Gross Surplus will be reduced to take into account any contributions and other payments (together with interest at the Plan rate of return) made by Canada Life into the Plan after August 31, 2012 and that are notionally allocated to the Segregated Portion.

o 69.66% of the net Surplus, to a maximum of $15 million, will be paid to the Integration Group and Inactive Eligible Class Members.

o In order to avoid distributing numerous small amounts, the threshold for surplus payments under the possible second distribution is $100.

o If any individual would be receiving $100 or less, no payment will be made to that individual and the individual's surplus share will instead be shared with the remaining members (if any) who are receiving $100 or more.

**80** Under the Amended Settlement, it is anticipated that the surplus for the first distribution for the Integration Group will be $4,116,740.

**81** I pause here to foreshadow that one of the major objections to the Amended Settlement are about the terms that circumscribe the possible second distribution to the Integration Group.

**82** With the approval of the court, letters were sent to all Class Members in February 2013, describing the proposed amendment to the Approved Settlement and giving notice of the next steps in the proceeding, including this fairness hearing.

**83** Since the mailing of the notices, Class Counsel has fielded over 70 inquiries by Class Members, and Class Counsel has communicated with the objectors.

**84** The Representative Plaintiffs, Class Counsel, and their actuarial advisor believe that the Amended Settlement is the best agreement that can be achieved. They recommend the Amended Settlement as fair, reasonable, and in the best interests of the Class, given the circumstances.

**85** It was Mr. Robertson's opinion that the dramatic reduction in the estimated value of the surplus was directly related to the decline in yields on Government of Canada real-return, long-term bonds and that this decline was a direct result of economic forces beyond the control of the parties. It was his opinion that giving some Class Members the pos-

sibility of a future surplus distribution ameliorates this economic misfortune and that overall Amended Settlement presents a better outcome than if the Approved Settlement were implemented without any amendment.

**86** As of the date of the fairness hearing, Class Counsel had received 15 written objections to the Amended Settlement and a petition from over 90 objector-Class Members was filed with the court. I will describe the nature of the objections later in these Reasons for Decision.

**87** In addition, Class Counsel exchanged emails with Class Member Dan Anderson. Mr. Anderson, who has an actuarial background, also participated in two lengthy conference calls with Ms. Clio Godkewitsch of Koskie Minsky LLP and Mr. Robinson, the actuary for the Plaintiffs.

**88** Mr. Anderson's concerns about the Amended Settlement were not placated, and he set them out in two information sheets his concerns. Several of the objectors relied on Mr. Anderson's information sheets that were made attachments to some of the written objections.

**89** At the fairness hearing I spent several hours listening and speaking with the objectors. I heard from five objectors: Paul Ludzki, Fred Taggart, Anne Carey, Dan Anderson, and Emily Truong.

## III. THE POSITION OF THE PLAINTIFFS

**90** The Plaintiffs and Class Counsel believe that the Amended Settlement presents the best set of terms that could be negotiated under unanticipated circumstances that seriously undermined implementation of the Approved Settlement.

**91** They submit that Class Counsel, who are very experienced in pension matters and class proceedings, diligently investigated the reasons for the diminution of the surplus and sought to negotiate a reasonable set of amendments in adversarial arm's length negotiations. In their view, these factors favour approving the Amended Settlement.

**92** They point out that mediation and negotiations continued over almost nine months and each of the parties were independently represented and advised by sophisticated legal and actuarial professionals. They note that the terms of the Amended Settlement were reached with the assistance of Justice Strathy in his capacity as a neutral mediator.

**93** On the merits of the settlement, the Plaintiffs submit the analytical question for the court is whether the proposed Amended Settlement is better for the class than the *status quo* of implementing the Approved Settlement to the extent that this is even possible. In this regard, they submit that the question for the court is whether Class Members are likely to recover more from the proposed Amended Settlement than under the Approved Settlement.

**94** The proponents submit that the answer to this question is yes, because under the Approved Settlement, the Integration Group would recover $1.8 million (its share of $2.6 million), assuming that the surplus does not diminish further before distribution. Under the Approved Settlement, there will be insufficient funds to pay the minimum $1,000 surplus payments and there would be no possible future distribution. In contrast, under the Amended Settlement, the Integration Group will receive at least $1,000 per eligible member and there is the possibility of a future distribution of surplus in 2014, if available.

**95** Further, Class Counsel submits that approval of the Amended Settlement is superior to the alternative of revived litigation. Class Counsel and the Plaintiffs believe that without the Amended Settlement, the Approved Settlement cannot be implemented because it requires Canada Life to purchase indexed annuities for members of the Integration Group, which Canada Life cannot do and it requires eligible Class members to receive a minimum cash distribution of $1,000, which is impossible, given the status of the Integration Group's surplus. However, Canada Life disputes that the Approved Settlement cannot be implemented and obviously it disagrees that it is breaching the Approved Settlement.

**96** Canada Life's position raises the issue of whether or not there is a means of challenging any future steps taken by Canada Life to implement the Approved Settlement over the objections of the Plaintiffs. For present purposes, more significantly, the Plaintiffs and Class Counsel assert that Amended Settlement is better for the class than the alternative of litigation about the Approved Settlement or about the original claims in the class action.

**97** The Plaintiffs submit that continued litigation does not represent a viable alternative, as no litigation can restore the surplus. They point out that the estimates of surplus were always variable and dependent on factors such as interest rates and the cost of purchasing annuities and thus the amount of the surplus was never guaranteed, nor could it ever be guaranteed. Further, they note that the plan expense claim of the Plaintiffs has already been compromised, and stands a very limited chance of success given the decision of the Supreme Court of Canada in *Nolan v. Kerry (Canada) Inc.* [2009] 2 S.C.R. 678.

**98** The Plaintiffs submit that revived litigation would be lengthy and expensive and would not have the result of increasing the surplus. Indeed, they submit that the situation may get worse and even the current small surplus may vanish.

**99** The Plaintiffs submit that it would not be fair to the Indago, Pelican, and Adason Groups to hold up the Approved Settlement because of the plight of the Integration Group. In a message from the CLPENS Executive Committee dated March 12, 2013 to class members, the Executive stated:

> What to do?
>
> Technically, CLPENS could have asked the Court to set aside the previously-approved settlement on the grounds that it could not be implemented as written. It is not clear that the Court would have done so and, even if the Court agreed to this course of action, we would have been back to the scenario of returning to court to argue about the ownership of the (much diminished) surplus. However, by doing do so, no Class Member would receive any current payment. Although members of the IPWU Group had little to lose and may have wished to pursue this strategy, members of the other partial wind-up groups (Indago, Adason, Pelican Foods) had a lot to lose. As Non-Partial Wind-up members (retirees, deferred vested members and active members) would be part of any subsequent court action, they would receive nothing. Accordingly, CLPENS did not think it right to pursue a solution that eliminated all current payouts in return for the possibility of the partial wind-up groups being declared owners of whatever plan surplus existed at an unknown future date. ... In conclusion, while the outcome of our class action is disappointing, it is the result of unprecedented market developments and your Executive Committee believes that the amended settlement is the best result achievable in the circumstances.

**100** The Plaintiffs and Class Counsel submit that the outcome is fair and reasonable and in the best interests of the Class. They submit that the Amended Settlement ought to be approved.

## IV. THE POSITION OF THE OBJECTORS

**101** All of the objectors request the court to not approve the Amended Settlement.

**102** Several of the objectors objected to the approval process, and they submit that they have been denied natural justice. They dispute that they have been properly apprised on the situation after the settlement was initially approved, and they complain that they have not been given ample time or ample information about the causes of the problems and about the merits of the Amended Settlement. This objection is well expressed by Fred J. Taggart in his letter to the court dated March 8, 2013. Mr. Taggart states:

> All this is being done via an amendment to the settlement, with no further information sessions for plan members, no opportunity to ask questions, and no opportunity to vote - yet members are bound by all of the terms and conditions and concessions that they agreed to in the original settlement when they would share in $62 million rather than $5 million.

**103** Ms. Carey, one of the objectors who spoke at the fairness hearing, asked for an adjournment in order to hire a lawyer to provide her with independent legal advice.

**104** Several objectors found it incomprehensible that the Representative Plaintiffs and Class Counsel did not foresee the problem caused by declining interest rates and the low numbers of class members choosing not to take the commuted value of their pension benefits. Some objectors suggested that Canada Life duped or tricked or schemed to deny them the surplus by purposely delaying the litigation precisely because they knew that the surplus would be depleted.

**105** Several objectors felt that they had been deceived when they agreed to the Approved Settlement and that the Amended Settlement amounts to a revocation of the Approved Settlement. An example of this objection is provided by Ms. Anne Carey in her e-mail message dated March 12, 2013. She writes:

> With respect to the substance of the matter, I think it is necessary to emphasize as strongly as possible that the resolution which is being presented at this time does not constitute a minor change or "amendment" but rather represents a virtual rescind of everything that was proposed as late as 2011, when we were asked to agree on the settlement proposed. Specifically, it had been

> previously confirmed in written communication that I was entitled to approximately $38,000 of surplus, at this point, the "amendment" is offering me a meagre $1,000 in lieu of this $38,000, and others I know stand to lose upwards of $57,000 to $98,000.

**106** Several objectors expressed the view that the Integration Group was being singled out for unfair treatment. Objector Mary-Anne Matthews is representative of this view point. In her objection, she wrote:

> While I can appreciate and understand that Koskie Minsky, the Plaintiffs and the CLPENS group has done on the members' behalf, particularly over the past year, I feel that the proposed amendment to the settlement is not the best for all of us and I would have preferred a delayed settlement for the [Integration Group] until the economy and interest rates recover to a degree that would afford us an increase in the surplus. It appears to me as though Canada Life/Great West Life will continue to enjoy the benefits afforded to them in the original settlement while those of us in the [Integration Group] (excluding Indago, Pelican Foods and Adason, as well as the current Canada Life employees) will be sacrificing their [benefits]. If the group had an opportunity to come together with one voice, I believe that as a group we would be opposed to the amended proposal being put forth on March 18, 2013. This settlement is not what we voted for in 2011.

**107** Several objectors found the proposal under the Amended Settlement for a second distribution of surplus unfair and unreasonable. This objection is again well expressed by Mr. Taggart in his letter, where he states:

> Now that the assets and liabilities have been transferred to the on-going plan, what happens if and when interest rates recover to a historically normal level? Don't the liabilities shrink as rapidly as they ballooned, thus restoring the healthy surplus that the plan has enjoyed for decades? With a certain set of assumptions, we've seen nearly $100 million disappear in the last 6 years. With a different set of assumptions, might we see the $100 million reappear in the next 6 years? It is unlikely that we will see a rebound by December 31, 2014 as the US Fed is on record to hold interest rates steady until at least mid-2014. However, if it did magically occur, why would the second surplus distribution be capped at $15 million?
>
> It seems to this observer that Canada Life has seen a window of opportunity to move assets and liabilities to the ongoing plan, temporarily value the liabilities at historically low interest levels, distribute a severely diminished surplus to the plan members, and then wait for rising interest rates to restore the healthy surplus that the plan has enjoyed for many years. ... Canada Life has locked the members' surplus claims into these tough economic circumstances while insulating their own share and in fact the entire PWU surplus from those same economic circumstances.

**108** Many of the objectors, were upset that the Amended Settlement was vastly different from what they expected when they voted for approval of the Accepted Settlement. Susan Marles made the point neatly in her e-mail message. She wrote:

> I am a [Integration Group] member. Like many other members, I am greatly concerned, confused and highly suspicious in the huge drop in surplus. I had agreed to the original surplus settlement based on the amount of surplus what was detailed to me at that time. I understand now that amount in the proposed settlement will be $1,000, which is vastly different from the amount in which I made the decision to support the surplus settlement. I am objecting to the amendment to the original settlement.

**109** All of the objectors were disappointed; some were angry. Several objectors found the commitments of Class Counsel and Canada Life under the Amended Settlement to augment what remains of the surplus paltry and insulting.

## V. DISCUSSION

### 1. Jurisdiction to Vary an Approved Settlement in a Class Proceeding

**110** As far as I am aware, this is the first time that parties to an already approved settlement agreement in a class action have sought approval to an amendment to the agreement. The Plaintiffs submit that the court has the jurisdiction to

grant this relief from two sources; namely: (a) under Rule 59.06(2)(d) of the *Rules of Civil Procedure*; and (b) under s. 12 of the *Class Proceedings Act, 1992.*

**111** Rule 59.06(2)(d) of the *Rules of Civil Procedure* states:

> 59.06(2) A party who seeks to, [...]
>
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed.

**112** Section 12 of the CPA states:

> 12. The court, on the motion of a party or class member, may make any 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.

**113** I do not think that s. 12 of the *Class Proceedings Act, 1992* applies to the circumstances of this case, because I do not regard settlement approval to be an order respecting the conduct of a class proceeding to ensure its fair and expeditious determination, and it would be odd to resort to this section of the Act, when s. 29 (2) deals expressly with the approval of any settlement. Section 29 (2) states: "A settlement of a class proceeding is not binding unless approved by the court."

**114** It seems obvious to me that s. 29 (2) applies to the circumstances of this case. The parties have entered into a settlement and they seek court approval.

**115** In my opinion, I have jurisdiction under s. 29 (2) to approve or deny approval of the proposed Amended Settlement, and I do not need to resort to rule 59.06 (2).

> 2. Is the Amended Settlement Fair, Reasonable, and in the Best Interests of those Affected by It?

**116** The design of North American class action regimes is to advance access to justice through a representative action with (a) a genuine claimant, the representative plaintiff, who is the party with legal standing to advance the class members' claims and to represent the class members; and (b) an entrepreneurial Class Counsel, who bears the financial risk of failure but who shares in the class members' aggregate success. Most class actions settle, and under s. 29 (2) of the *Class Proceedings Act, 1992*, a settlement of a class proceeding must be approved by the court to be binding on the parties.

**117** As I noted, in *Berry v. Pulley*, 2011 ONSC 1378 at para. 80, Class Counsel is confronted with an inherent conflict of interest when proposing a settlement of a class action. I stated:

> 80. As is well known, the settlement of class actions raises very difficult ethical problems for class counsel because of the inherent conflicts of interest that arise because class counsel has an enormous financial interest in the class members' causes of action. There is also the potential conflict of interest of class counsel of having legal and ethical responsibilities to class members whose interests are not homogeneous.

**118** Settlement approval is the most important and difficult task for a judge under all class action regimes, including Ontario's *Class Proceedings Act, 1992*. Since most class actions settle, the integrity and the legitimacy of class actions as a means to secure access to justice largely depend upon the court properly exercising its role in the settlement approval process. In scrutinizing a settlement, the court is called on to protect the interests of the class members who are to be bound by the outcome and who will be compelled to release their claims against the defendant in exchange for their participation in the class action settlement.

**119** The design of the approval process requires the court to carefully scrutinize any proposed settlement. The design of the approval process: (a) requires the proponents of the settlement to justify it; (b) provides an opportunity for those affected by the settlement to be heard: and (c) requires the court to evaluate the settlement and make a formal order. This design is meant both to deter bad settlements and also to ensure good ones that achieve the goals of the class action regime; namely: access to justice, behaviour modification, and judicial economy.

**120** Of these goals of class actions, the most important for the approval process is access to justice, because a settlement always achieves judicial economy, and a settlement may sometimes not achieve behaviour modification yet still be a good settlement. However, a settlement will be a bad settlement if it does not achieve procedural and substantive access to justice. The court's job is to review a proposed settlement to ensure that the class members have achieved access to justice through a representative action.

**121** The judge's task is difficult because judges are more accustomed and more comfortable adjudicating in the context of an adversarial system, but at the time of the settlement approval process, the active parties to the class action are no longer adversarial, and they all will be recommending the settlement.

**122** I think judges are up to the task, but they are required to be more inquisitorial and to compensate for the adversarial void by being diligent in testing the one-sided arguments of the proponents of the settlement and by being attentive to the views of objectors who may provide cogent counter-arguments to the united front promoting the settlement.

**123** There is a great deal of academic literature and criticism about the law and practice of class action settlements, most of it from the United States, but there are valuable Canadian studies including: C. Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011); J. Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LL.M. Thesis: University of Toronto, 2009); G. Watson, "Settlement Approval - The Most Difficult and Problematic Area of Class Action Practice" (NJI Conference on Class Actions, 2008); C. Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003). There are also some settlement approval manuals for judges including: S. Marcus (ed,), *Manual for Complex Litigation* (4th) (Washington, D.C.: Federal Judicial Centre, 2004) and B.J. Rothstein and T.G. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (2nd ed.) (Washington, D.C.: Federal Judicial Center, 2009).

**124** In the case at bar, it was not a difficult task analyzing and approving the initial settlement of this action, the Accepted Settlement. The various factors favoured settlement, and there were no warning signs. I did not undertake a detailed explanation of my decision to approve the Approved Settlement. However, in order for me to explain my judgment not to approve the Amended Settlement, it will be necessary for me to review more fulsomely the law and the literature about settlement approval then I did when I approved the Approved Settlement, which was at a time when the parties and the court's understanding of the circumstances of the Integration Group were different.

**125** With respect to the law to be applied under s. 29 (2), I will begin by repeating what I said at paragraphs 108 to 111 of my reasons for granting approval to the Approved Settlement. I stated:

> 108. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.
>
> 109. In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.
>
> 110. When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms' length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

> 111. A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372.

**126** As may be observed from this brief discussion of settlement approval, courts have developed a test for settlement approval and courts have developed a non-exhaustive list of factors to use to apply the test. As it happens, the test for settlement approval is almost identical in Canadian and American class actions, and the test involves determining whether the settlement is fair, reasonable, and in the best interests of class members.

**127** Professor Piché in her text *Fairness in Class Action Settlements*, *supra* at pp. 179-80 summarizes the various factors for the settlement approval test into seven factors; i.e.: (1) judicial risk analysis: likelihood of recovery, or likelihood of success on the merits weighed against amount and form of settlement relief; (2) future expense, complexity and likely duration of litigation; (3) class reaction: number and nature of objections; (4) recommendations and experience of counsel and opinion of interested persons; (5) adequacy of representation: good faith and absence of collusion; (6) discovery evidence sufficient for "effective representation" and (7) adequacy of notice of proposed settlement to absent class members. Professor Piché observes that the first four factors are pertinent to substantive fairness and the remaining three factors are pertinent to procedural fairness.

**128** Professor Piché's summary is very helpful, but I would add to it by suggesting that in addition to using the various factors to determine substantive and procedural fairness, the court should also examine circumstantial fairness and institutional fairness.

**129** By circumstantial fairness, I mean the fairness of the settlement to the parties and the class members in their particular circumstances, and by institutional fairness, I mean the fairness of the settlement from the perspective of a robust notion of access to justice that includes an outcome that objectively should satisfy the class members' entitlement to justice for their grievances.

**130** Having regard to institutional fairness will elevate the standard for approval and send the message that courts will not rubber stamp settlements and turn a blind eye to what are in truth strike suits or suits where the defendant or the defendant's insurer pays a modest price for buying peace rather than paying a fair price to compensate the class members for their injuries. Having regard to institutional fairness will send the message that the court will not rubber stamp settlements where the law suit is genuine but Class Counsel are content to take a low-ball offer because it suits their entrepreneurial business model. Having regard to institutional fairness will send the message that the court will not approve a settlement if through misadventure, incompetence, opportunism, lassitude, or fatigue the Representative Plaintiff and Class Counsel do not achieve a settlement that is truly fair, reasonable, and in the best interests of class members.

**131** *Epstein v. First Marathon Inc.* [2000] O.J. No. 452 (S.C.J.) is one of the very few cases where a settlement has been rejected, and it provides an example of a case where the proposed outcome would have been institutionally unfair. The proposed settlement was that Class Counsel would receive $190,000 in legal fees and that the class members would receive nothing. The court viewed the settlement as demonstrating that the action was a strike suit, and the court would not approve the settlement.

**132** In Canada, a few settlements have been initially rejected but subsequently approved after the parties fixed an apparent unfairness. See: *Burnett Estate v. St. Jude Medical Inc.*, [2009] B.C.J. 2403; *G.M. v. Associated Selwyn House*, 2008 QCCS 395 and 2009 QCCS 989. Very few settlements have been rejected, and it would be salutary for the institution of class actions if the standard for settlement approval was elevated by having regard to the institutional fairness of the settlement.

**133** With these comments as background, I turn now to evaluate the Amended Settlement and to explain why in my opinion, it is not substantively, procedurally, circumstantially, or institutionally fair. I will begin this part of the discussion by noting the factors that were not particularly helpful.

**134** In determining the fairness of the Amended Settlement, the following factors are not particularly helpful or they are neutral, at best; namely: (a) amount and nature of discovery, evidence or investigation; (b) recommendation and experience of counsel; (c) recommendation of neutral parties, if any; (d) the presence of good faith, arms' length bar-

gaining and the absence of collusion; and (e) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

**135** The fact that a judge, in this case, Justice Strathy, or an experienced mediator facilitated a settlement is in my opinion, nothing more than a narrative fact. I do not know what Justice Strathy's views are about the fairness of the Amended Settlement and his involvement is no testimonial for the Amended Settlement.

**136** The overall thrust of the unhelpful factors is that they are designed to satisfy the court that Class Counsel, which has most to gain and most to lose in taking on a class action, is not acting in their own self-interest in recommending a settlement, and they are designed to ensure the court that the proposed settlement is the product of hard-bargaining and a genuine and intelligent evaluation of the merits of the litigation and the substantive merits of the settlement.

**137** In the case at bar, I have no doubt that Class Counsel tried its best, but in light of the surprises since the Approved Settlement, this is not one of those cases where the court should give the Amended Settlement an "A" for effort.

**138** Thus, the factors associated with the substantive merits of the Amended Settlement are the most weighty factors in the case at bar. It is because of the importance I place on the substantive merits of the Amended Settlement, that I regard the weighty factors to be: (a) the settlement terms and conditions; (b) number of objectors and nature of objections; (c) likelihood of recovery or likelihood of success; and (d) future expenses and likely duration of litigation and risk.

**139** In the circumstances of the immediate case, I also regard the degree and nature of communications by counsel and the representative parties with class members during the litigation as an important factor, but it is a factor that is more pertinent to procedural and circumstantial fairness than it is to substantive fairness.

**140** I turn now to the matter of substantive fairness. Having the above factors in mind, it is analytically helpful to consider not only the substantive fairness of the Amended Settlement but also the fairness of three other settlements, one of which is hypothetical. The other three settlements to consider are: (1) the Approved Settlement; (2) what I shall call the Stark-Reality Settlement; and (3) what I shall call the Objectors' Settlement. An analysis of these four settlements informs why I conclude that the Amended Settlement is substantively unfair.

**141** In my opinion, at the time of its approval, the Approved Settlement was substantively fair. In other words, since the dispute was about who owned a pension plan surplus estimated to be worth $64.3 million and whether Canada Life should pay $41 million for wrongful expense charges, a substantively fair settlement was for the class to receive 70% of the surplus, the current employees to receive a two-year contribution holiday, and Class Counsel to receive $5 million in fees and disbursements.

**142** As explained above, the Approved Settlement, however, was based on mistaken assumptions about future participation in the Pension Plan and about the availability of annuities and on a false estimate of the surplus. The Approved Settlement has become the Stark-Reality Settlement.

**143** In my opinion, the Stark-Reality Settlement, which is the first branch of the court's double-bind decision, is unfair. In other words, if the litigation were being settled today but without the mistakes and false estimates, the settlement would be the Stark-Reality Settlement. Under this settlement there is only one distribution of surplus and Class Members would recover 70% of a small surplus and Class Counsel is paid $5 million in legal fees. In my opinion, the Stark-Realty Settlement is unfair.

**144** A 70:30 split was fair in dividing up an estimated surplus of $64 million. A 70:30 split is not fair in dividing up a surplus of $14 million, particularly when only Canada Life is in a position to weather the economic storm and where Canada Life achieves significant benefits under the Stark-Reality Settlement (from a new trust arrangement that indisputably allows it to charge for services) and where its own right to claim 100% of any future surplus is unaffected. If there was some component of behavior modification in conceding 70% of an estimated surplus of $64 million, there is very little in conceding 70% of a surplus of $14 million, especially when Canada Life is left in a position to economically recover all of what it gives away once the economic conditions right themselves.

**145** Further, a $5 million counsel fee under the Stark-Reality Settlement is unfair. The value of the Stark-Reality Settlement to the Class Members is $14.4 million. In hindsight, knowing what I know now and did not know then, I would not have approved the counsel fee because in the disappointing circumstances of this case, it would be disproportionate (35%) to the value to the class of the settlement. See *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92.

**146** This brings the analysis to a hypothetical settlement that I shall call the Objectors' Settlement. As noted above, the objectors propose a different settlement than the one before the court. With two exceptions, the objectors would accept the terms of the Amended Settlement. The exceptions to the Amended Settlement are to remove the cap of $15 million and to extend the time period for a second distribution beyond the re-calculation date of December 31, 2014.

**147** Analyzing the Objectors' Settlement, in my opinion, an open-ended calculation date for the second distribution would be unreasonable and unfair, but if the re-calculation date of December 31, 2014, at the choice of the Class Members, could be waived and extended to December 31, 2017, then in my opinion, the Objector's Settlement would be fair, reasonable, and in the best interests of the Class Members.

**148** Recalling that the action commenced in 2005, when the surplus was closer to $100 million, and that it took seven years to more or less deplete the surplus in 2012, a re-calculation date of 2017 is a fairer date to allow the economy to turn over again than is 2014.

**149** The Objector's Settlement Proposal addresses two manifestly unfair elements of the Amended Settlement, the $15 million cap and the 2014 re-calculation date, discussed further below, but it does more. The Objector's Settlement addresses Canada Life's moral duty to take more responsibility for the fact that it campaigned for the Approved Settlement with an unprecedented procedure that included a vote by Class Members.

**150** In talking about moral duty, I do not mean to suggest a want of integrity or any moral turpitude. I am rather alluding to Canada Life doing the decent, honourable, and right thing even though there may be no legal obligation to do anything. I say nothing about whether there is a legal responsibility for the estimates and the promotional material, but it seems to me that when Canada Life mounts an elaborate cross-country campaign for the Approved Settlement, there is a moral responsibility to fully share the disappointment when the Approved Settlement becomes the Stark-Reality Settlement even in the absence of a legal obligation.

**151** To show itself as the better corporate citizen, Canada Life cannot simply wash its hands of the matter and say it never guaranteed there would be a significant surplus and that it has exculpated itself from liability by making no promises. There is a circumstantial unfairness if Canada Life does not adequately share the pain of the disappointment of its inaccurate estimates of the surplus and as I will explain below, Canada Life does not adequately share the pain.

**152** I wish to be clear, I am making no finding about whether Canada Life has any legal responsibility for inducing the Approved Settlement, and I am making no finding that the Class suffered any damages as a result of what occurred in the making of the Approved Settlement. I also do not mean to shame Canada Life or Class Counsel. The circumstances were unfair, and it simply strikes me and many objectors that it is circumstantially unfair to persuade the Class Members to endorse the Approved Settlement and then not do more to soften the disappointment of the electorate in the substantive outcome of the campaign, which is the Stark-Reality Settlement.

**153** With this background analysis, I now turn to the substantive fairness of the Amended Settlement.

**154** The apparent purpose of the Amended Settlement is to lessen the pain of the disappearance of the surplus that was to be shared by the Integration Group and Canada Life. However, under the Amended Settlement Class Counsel and Canada Life, the proponents for the Amended Settlement, do very little to share the pain of the Integration Group.

**155** Class Counsel for the Integration Group are to be modestly commended for their $200,000 indirect contribution to the Amended Settlement, but the fact remains that they shall receive $4.6 million in counsel fees. I do not see much sharing of the pain by Class Counsel.

**156** As for Canada Life's sharing the pain, under the Amended Settlement with its $15 million cap, Canada Life's proportionate share of any surplus is potentially increased, and unlike the Integration Group they have a temporally-unlimited ability to recapture the diminishment of the surplus.

**157** For Canada Life, there is no arbitrary 2014 deadline for recalculating the surplus in light of what might be better economic conditions. Should there be a second distribution, the taking of 10% off the top of any second distribution and the cap of $15 million is a disguised way for Canada Life to increase its share of the surplus from the 30.34% originally allocated to it.

**158** I appreciate that that Canada Life's share of the Integration Group's surplus also declined. It declined to 30.34% of $3.9 million. Thus, Canada Life's share of the surplus is now around $1.2 million, which I observe is precisely the sum that Canada Life is contributing to top up the surplus for the first distribution under the Amended Settlement. Thus, Canada Life is not necessarily contributing its own money to the Amended Settlement because there has never been a

judicial determination of who actually owns the surplus. The issue of ownership was settled not resolved by the Approved Settlement.

**159** One may admire the negotiating acumen of Canada Life, but its acumen does not make the Amended Settlement reasonable or fair or in the best interests of the Integration Group

**160** Further, I regard the 2014 date for re-calculating the surplus as arbitrary and unfair. It is an offer of a faint hope.

**161** Thus, in my opinion, the Accepted Settlement was fair but is no longer fair. Nevertheless, transformed into the unfair Stark-Reality Settlement, it remains a binding settlement. In my opinion, the Objectors' Settlement as revised would be fair, but it is a hypothetical settlement not before the court. In my opinion, the Amended Settlement is not substantively fair.

**162** In my opinion, the Amended Settlement is also not procedurally fair.

**163** In the context of a representative action, procedural fairness is a nebulous concept. It is nebulous because as a matter of civil procedure, the class members are bound by the result but typically, they are not actively involved in the prosecution of the case, and they have ceded the control of the litigation to their representative and to Class Counsel. In these circumstances, the standards for procedural fairness are unclear.

**164** At the settlement approval stage, procedural fairness is usually achieved by a class member receiving adequate notice of the terms of the settlement, having an opportunity to voice support or opposition, and having a right to make representations at the fairness hearing.

**165** This minimum standard for procedural fairness was met in the case at bar. However, in my opinion, the minimum standard was not good enough for the circumstances of the Amended Agreement.

**166** Having regard to such things as the unprecedented campaign for approval of a settlement agreement and the fact that it is the position of both sides that the misfortune of false estimates was a matter of fickle fate and forces beyond their control, the objectors needed something more than the minimum standard to provide them with procedural fairness. In my opinion, the proponents of the Amended Agreement ought to have paid for a lawyer to provide the objectors independent legal representation.

**167** While the objectors, particularly the five who spoke at the fairness hearing, proved themselves to be good advocates, their arguments would have been better made if they had been made by legal counsel with the skills to match those of Class Counsel and counsel for Canada Life.

**168** This last comment brings the discussion to the matter of circumstantial fairness and to the matter of what weight should be given to the arguments and positions of the objectors and petitioners.

**169** I do not think that the Amended Agreement is circumstantially fair. First, there is the unfairness, discussed above, of Class Counsel and Canada Life not sharing the disappointment caused by the false estimates. Second, it was not fair for Canada Life, in circumstances where it had campaigned for the Approved Settlement and obtained significant benefits, to potentially improve its proportionate share of the surplus by imposing a cap on the surplus to be shared. Third, there is the unfortunate circumstance that the Pelican, Indago, and Adason Groups are being used as ransom for the Amended Agreement. Fourth, and most significantly, the objectors oppose the Amended Settlement.

**170** Historically, objectors to class action settlements have been few in number, perhaps because they cannot afford to pay for legal representation and are intimidated by the process or perhaps because the harm they individually suffered was never that much in the first place. Nevertheless, the proponents for a settlement, typically, rely on the absence of opposition as a point in favour of settlement approval. In the case at bar, there was almost no opposition to the Approved Settlement.

**171** However, this is no longer the case. There is fierce opposition to the Amended Settlement, and the objectors as individuals had a substantial personal interest to protect. While some of the criticism is misguided, much of the criticism is telling against the fairness of the Amended Settlement.

**172** In my opinion, in the circumstances of this case, considerable weight should be given to the views of the objectors, and they believe the Amended Settlement to be unfair.

**173** Finally, I come to the matter of institutional fairness, which places the settlement approval process in the context of the institutional purposes of class proceedings legislation.

**174** In my opinion, from the perspective of institutional fairness, there is little to commend the Amended Settlement. The best that can be said for it is that it is monetarily better than the Stark-Reality Settlement that is the Approved Settlement and better than the futility of renewed litigation.

**175** However, I do not think that a court should approve an unfair settlement because it is the best monetary choice in a double bind. The court should not approve a settlement unless it is all of fair, reasonable, and in the best interests of the class. If the proposed settlement is not fair, the court should reject it. The court should not approve an unfair settlement simply because it's the better of two unfair choices.

**176** In this case, the Amended Settlement is substantively, procedurally, circumstantially, and institutionally unfair. I do not approve it.

**177** Some good may yet come of not approving the Amended Settlement. It is open to the parties to come back with a fair settlement. But even if they do not, it will be a good thing for others to know that under the *Class Proceedings Act, 1992*, the court will not approve an unfair settlement. If that has the effect of elevating the standard for other settlements, then the institutional purposes of the class proceedings legislation of achieving meaningful access to justice will be served.

## VI. CONCLUSION

**178** For the above reasons, I dismiss the motion.

**179** There should be no order as to costs.

P.M. PERELL J.

cp/e/qllqs/qlrdp

# Tab 6

*Case Name:*

# McRitchie v. Natale

**Between**
**Cathy Louise McRitchie, Henry Spinks, Audrey Spinks, Terry Spinks, Lyle Spinks, Barb Houlbrook, Merv Yandernol, Zora Yandernol, Ron McRitchie, Barbara McRitchie, Isobel McRitchie, Robert Charles McRitchie and Jennifer Rae McRitchie and Heather Louise McRitchie, both minors by their litigation guardian The Children's Lawyer, Plaintiffs, and**
**Dr. R. Natale, Dr. W. Lomax, Dr. J. Spano, Cathy Cameron, David Josephson, Dr. W. McCurdy, Dr. G. Hancock, Dr. L. Gunter, Dr. M. Rebel, Dr. J. Chamberlain, Dr. H. Akoury, Dr. M. Kozak, Dr. O. Dasilva, Dr. W.D. Reid, Dr. R. Osak, N.R. Bert Bueckert, Ross Mantle, Dr. P.E. Rowe, Dr. J.H.D. Black, Dr. H.W. Edgar, Dr. W. Squires, B. Dushinski and St. Joseph's Health Centre and St. Joseph's Hospital, Defendants**

[2011] O.J. No. 2489

2011 ONSC 3400

Court File No. 56164

Ontario Superior Court of Justice

**W.U. Tausendfreund J.**

Heard: May 31, 2011.
Judgment: June 2, 2011.

(24 paras.)

**Counsel:**

Robert Charles McRitchie and Cathy Louise McRitchie, Self Represented.

Andrea H. Plumb and Carolyn Brandow, for the Defendants Dr. Natale and Dr. Lomax.

William J. Bullivant for St. Joseph's Health Centre.

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**W.U. TAUSENDFREUND J.:--**

**Overview**

1 This is an action by the plaintiffs, Robert Charles McRitchie ("the Father") and Cathy Louise McRitchie ("the Mother"), collectively ("the Parents"), under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") for damages based on alleged medical negligence of various doctors and other health professionals in connection with the pre-mature birth, disabilities and injuries suffered by their daughters, Jennifer McRitchie ("Jennifer") and Heather McRitchie ("Heather"), collectively ("the Twins").

2 In addition, the Mother advances a claim of battery based on a certain drug administered to her at the hospital while in labour for the birth of Jennifer and Heather.

3 Jennifer and Heather were both born May 5, 1994 at St. Joseph's Hospital in London at 26 weeks and 4 days gestation.

4 Heather suffers from profound disabilities. She is blind, deaf and a spastic quadriplegic. Jennifer's disabilities are less severe and are far more subtle. She has some developmental challenges but is able to function with assistance.

5 The Office of the Children's Lawyer ("OCL") brought a motion on notice under Rule 7.08 of the *Rules of Civil Procedure* to dismiss on a without costs basis, the claims in this action brought by Jennifer and Heather.

6 The order was granted by Rady J. on June 24, 2009. The issue now before me is whether this order is an estoppel by *res judicata* to the continuation of this action by the Parents of their derivative claims under the *FLA*.

7 As of the start this trial, the claims of all plaintiffs, but for the Parents, had been discontinued. As well, the action had been dismissed against all defendants, but for Drs. Natale and Lomax and a nurse, Brenda Dushinski.

8 Regardless of my decision on this matter, the claim of the Mother for battery may proceed as a live issue.

**Background**

9 This action was started by Statement of Claim dated November 18, 1998. The Father initially acted as litigation guardian for his twin daughters. In 2007, and at the request of the Father, the OCL reviewed the matter and then consented to being appointed as litigation guardian for the Twins. An Order of August 2, 2007 formalized the OCL appointment. Collaterally and as of July 13, 2006, the then counsel for the Parents was removed at his request as their counsel of record. As of that date, the parents were and have remained self represented litigants in this action.

10 After appointment as litigation guardian for the Twins, the OCL retained Andrew Spurgeon as its agent lawyer. He conducted a thorough review of the already extensive investigations undertaken by the Parents' previous counsel. Additionally, he canvassed at least 11 experts in the fields of obstetrics and gynaecology, neonatology and child neurology, including four experts retained at his instance. Mr. Spurgeon then concluded that there was no reasonable prospect of establishing liability on behalf of the Twins against any of the then remaining defendants in the action.

11 Based on that opinion, the OCL concluded that it was not tenable to continue the litigation further as litigation guardian for the Twins. The OCL, in due course, brought a motion under Rule 7.08 of the *Rules of Civil Procedure* to dismiss, without costs, the claims of the Twins, the infant plaintiffs in this action, as against the remaining defendants. Justice Rady granted that order on June 24, 2009 ("the Rady J. order").

**Analysis**

12 Essentially, the two questions before me are these:

(a) Is the claim of the parents under s. 61 of the *FLA* a derivative claim?
(b) If so, and as the claim of the two minor plaintiffs was dismissed, does the principle of *res judicata* apply to the claim advanced by the parents?

**Section 61 *FLA* claim - is it derivative?**

13 The applicable parts of s. 61 of the *FLA* provide:

> **61(1)** If a person is injured ... by fault or neglect of another under circumstances where the person is entitled to recover damages, ... parents ... of the person are entitled to recover their pecuniary loss resulting from the injury ... from the person from whom the person injured ... is entitled to recover ... and to maintain an action for [that] purpose in a court of competent jurisdiction.

> **(2)** The damages recoverable in a claim under subsection (1) may include,
>
> (a) actual expenses reasonably incurred for the benefit of the person injured
>
> ...
>
> (c) A reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
> (d) Where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for the loss of income or the value of the services; and
> (e) An amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person with the injury or death, if the injury ... had not occurred.

**14** It is clear from the Statement of Claim that this action was brought as a result of the alleged compromised birth of the Twins. With respect to the claims of the Parents, in this regard, the pleadings state:

> 40. ... the plaintiffs have suffered traumatic, emotional and nervous upset and lost enjoyment of life. The plaintiffs, Cathy Louise McRitchie and Robert Charles McRitchie, in addition, suffered damages, including loss of income and competitive advantage.
> 41. As a result of the aforesaid accident and negligence, the plaintiffs have incurred special damages for hospital accounts, X-ray accounts, doctor's accounts, drugs, transportation, lost income, housekeeping, clothing, personal effects and other related expenses ...

**15** The jurisprudence on this question is clear. A claim brought under s. 61 of the *FLA,* does not have a legal life of its own. Such a claim is a derivative right and subject to the entitlement of the injured person personally to maintain an action for damages in the circumstances alleged in the statement of claim: See *Drummon Estate v. Reid Estate,* 1993 CanLII 5482 (ONSC) at para. 17, *Von Cramm v. Riverside Hospital of Ottawa et al,* [1986] O.J. No. 999 at para. 11 and *Smith et al v. College of Physicians and Surgeons* 1998 CanLII 1523 (ONCA) para. 38.

**Res Judicata - Does it apply?**

**16** The authors of Sopinka Lederman & Bryant - The Law of Evidence in Canada, 3d Edition, on the principle of *res judicata,* state:

> **19.53** The modern rule of estoppel by *res judicata* is grounded upon two broad principles of public policy; first, that the state has an interest that there should be an end to litigation ... and secondly, that no individual should be sued more than once for the same cause ...
>
> ...
>
> **19.73** Subject to certain exceptions, [such as] cases of fraud or mistake, a judgment by consent raises an estoppel in the same manner as a judgment which has been contested.

**17** The motion by the OCL for approval of the settlement to dismiss the action of the Twins was brought under Rule 7.08 of the *Rules of Civil Procedure.* The applicable parts of that rule are:

> **7.08(1)** No settlement of a claim made by or against a person under disability ... is binding on the person without the approval of a judge;
>
> **(2)** Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge;
>
> ...

> (4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the Notice of Motion or Notice of Application,
>
> (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;
>
> (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;
>
> (c) where the person under disability is a minor who is over the age of 16 years, the minor's consent in writing, unless the judge orders otherwise; and
>
> (d) a copy of the proposed Minutes of Settlement.

**18** In *Otto Rivera et al* v. *Sayaka LeBlond et al* 2007 CanLII 7396 (ONSC) Thornburn J. reviewed the application of Rule 7.08, noting:

> **23.** Rule 7.08(4) and the obligation of the court pursuant to its *parens patriae* jurisdiction require a party seeking approval to submit sufficient evidence to make a meaningful assessment of the reasonability of the proposed settlement of the claims of a person under a disability.
>
> **24.** This is a serious and substantial requirement ... It requires full disclosure of evidence regarding the material issues ...
>
> **25** Rule 7.08(4) does not, however, require a full trial of the material issues ...
>
> **26** ... it is necessary to provide sufficient evidence to demonstrate that the proposal is secure, provides a real benefit to the disabled person and adequately addresses the long-term needs and interests of the disabled person.

**19** A motion for a settlement approval under Rule 7.08, as amplified in *Rivera v. LeBlond, ibid.* requires full and complete disclosure. Upon approval, a decision represents a decision on the merits and a final disposition of the claim. The Order of Rady J. approving the settlement of the Twins is such a decision.

**20** I am also guided by these comments of the author of *The Doctrine of Res Judicata in Canada,* 3d edition at p. 351:

> The traditional view of a consent judgment is that it is a judgment of the court, not an agreement between the parties to the proceeding, and it is enforceable in the same manner as if it had not been created by consent, but by the court on completion of a trial or hearing. It is to be regarded as a judgment after a hearing on the merits: *Whitmell v. Ritchie*, [2009] O.J. No. 2064 (Div. Ct.) at para. 42.

**21** A consent order which ends part of an action is of the same strength and effect for purposes of the *res judicata* doctrine as a judgment issued by the court on completion of a trial or hearing: *Abramson v. Oshawa (City)*, [1998] O.J. No. 2205 at para. 2 and *Canada Permanent Corp. v. Christensen,* [1929] B.C.J. No. 72 at para. 4.

**22** The Ontario Court of Appeal in *Tsaoussis v. Baetz* 1998 CanLII 5454 stated this on the doctrine of *res judicata*:

> **16** ... Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large....
>
> **17** The parties in the community require that there be a definite and discernable end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernable end point, the parties cannot get on with the rest of their lives, secure the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal in-

> jury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.
>
> ...
>
> **19** The importance attached to finality is reflected in the doctrine of *res judicata*. That doctrine prohibits re-litigation of matters that have been decided and requires that parties put forward their entire case in a single action. Litigation by instalment is not tolerated: *Toronto General Trusts Corporation v. Roman,* [1963] 1 O.R. 312 (C.A.). Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved: *R. v. Thomas,* [1990] 1 S.C.R. 713....

**23** For reasons noted, I find:

(a) The claim of the Parents is a derivative one depending entirely on the claim which had been advanced by the Twins, the two minor plaintiffs; and
(b) As the claim of the Twins was dismissed, the claim of the Parents can proceed no further, based on the principle of *res judicata.*

**24** The claims of the Parents, but for the claim of the Mother for battery, are dismissed with costs, if demanded.

W.U. TAUSENDFREUND J.

cp/e/qlafr/qlvxw

# Tab 7

*Indexed as:*

# Tsaoussis (Litigation guardian of) v. Baetz

**Between**
**Lorrie Tsaoussis, by her Litigation guardian, Carol Metcalf, Carol Metcalf, personally and Angela Tsaoussis, by her Litigation guardian, Carol Metcalf, plaintiffs (respondents),**
**and**
**Juanita M. Baetz, defendant (appellant)**
**And between**
**Lorrie Tsaoussis, by her Litigation guardian, Carol Metcalf, applicant, and**
**Juanita M. Baetz, respondent**

[1998] O.J. No. 3516

41 O.R. (3d) 257

165 D.L.R. (4th) 268

112 O.A.C. 78

27 C.P.C. (4th) 223

1998 CanLII 5454

82 A.C.W.S. (3d) 260

1998 CarswellOnt 3409

Docket No. C27319

Ontario Court of Appeal
Toronto, Ontario

**Doherty, Abella and Charron JJ.A.**

Heard: April 30, 1998.
Judgment: September 2, 1998.

(29 pp.)

*Infants -- Legal proceedings -- Jurisdiction -- Common law or inherent jurisdiction of courts (parens patriae) -- Approval of settlements and judgments -- Practice -- Judgments and orders -- Setting aside judgments -- Settlements -- Setting aside, grounds -- Court approval, case involving minors.*

This was an appeal by the defendant from an order setting aside a 1992 judgment, and directing that an action brought in 1994 should proceed. In April 1990, the plaintiff, Tsaoussis, who was then three years old, was struck by a car driven by the defendant. The plaintiff suffered a skull fracture, and brought an action against the defendant. Following negotiations between counsel for the plaintiff and the defendant's insurer, the parties reached a settlement. Early in 1992, the former counsel for the plaintiff applied for the requisite court approval of a settlement involving a minor. On February 7, 1992, the settlement was approved, and judgment was granted in terms of the settlement. However, the plaintiff continued to have health problems attributable to the 1990 accident. The medical evidence gathered after the 1992 judgment strongly suggested that the child was significantly under-compensated by the terms of the 1992 judgment. The plaintiff retained new counsel who, in 1994, commenced a new action claiming that the defendant's negligence had caused injuries to the infant plaintiff resulting in damages of $2,200,000. The new action also sought damages for the plaintiff's mother and sister under the Family Law Act. The defendant claimed that the matter had been settled by the judgment in 1992. In the fall of 1996, the plaintiff brought a motion to set aside the 1992 judgment. The motion was allowed, the 1992 judgment was set aside, and a direction issued that the 1994 action was to proceed. The judge considered the medical evidence that had developed, and concluded that the 1992 judgment was not in the child's best interests. In her view, the criteria generally applicable to a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement.

HELD: The appeal was allowed, the order was set aside, and the 1994 action was dismissed. The best interests of the infant plaintiff did not govern whether the 1992 judgment had to be set aside. A judgment approving the settlement of a minor's personal injury claim that had been signed, entered, and not appealed, was final, and had to be given the same force and effect as any other final judgment. A motion to set aside that judgment should have been tested according to the same criteria used on motions to set aside other final judgments. It was not enough in personal injury litigation to say that something was discovered after the final judgment to show that the award was too little. The plaintiff had to show circumstances which warranted deviation from the fundamental principle that a final judgment, unless appealed, marked the end of the litigation line. A minor plaintiff was entitled to full but fair compensation. The court's parens patriae jurisdiction did not expand that entitlement. Once the settlement was approved, and the judgment was final and not appealed, the parens patriae jurisdiction was spent. The finality principle was not to yield unless the moving party could show that new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings. The plaintiff could not show that the evidence which surfaced after the 1992 judgment could not have been made available by the exercise of reasonable diligence prior to obtaining that judgment.

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, R.S.O. 1990, c. 43, s. 116.
Family Law Act, R.S.O. 1990, c. F.3.
Insurance Act.
Ontario Rules of Civil Procedure, Rules 7.03, 7.04, 7.05, 7.06, 7.08(4), 7.09, 59.06(2)(a).

**Counsel:**

Sheldon A. Gilbert, Q.C., for the appellant.
Andre I.G. Michael, for the respondents.

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The judgment of the Court was delivered by

**DOHERTY J.A.:--**

The Issue

1 Should a judgment approving a settlement made on behalf of a minor plaintiff in a personal injury case be set aside some 4 1/2 years later if, based on medical assessments done after the settlement, it appears that the minor was significantly under-compensated by the terms of the settlement?

I.

2 In April, 1990, the respondent, Lorrie Tsaoussis (Lorrie), aged three, was struck by a car driven by the appellant, Juanita Baetz. Lorrie was hospitalized for three days and subsequently seen by her family doctor and paediatrician. Her mother, Carol Metcalf, retained counsel who, within a month of the accident, notified the appellant of Lorrie's claim against her. After negotiations between Lorrie's former counsel and counsel for the appellant's insurer, the parties reached a settlement. As the settlement involved a minor plaintiff, it had to be approved by the court.

3 Early in 1992, former counsel for Lorrie brought an application under rule 7.08 seeking court approval of the settlement of Lorrie's claim against the appellant arising out of the accident. In compliance with rule 7.08(4), counsel filed his affidavit and the affidavit of Carol Metcalf, Lorrie's mother and litigation guardian. Counsel also attached the hospital records and reports from Lorrie's family doctor and her paediatrician to his affidavit. According to that material, Lorrie had suffered a skull fracture in the accident. Although she had some medical problems in the weeks following the accident, they seemed relatively minor. Assessments done in the six months following the accident indicated that Lorrie was essentially "normal." Nearly a year after the accident her family doctor said:

> It is my impression that she should have a complete recovery without any significant sequela anticipated.

4 In Ms. Metcalf's affidavit, she indicated that the information supplied on the medical records was correct, and that based on counsel's advice, she had accepted the terms of the settlement on behalf of Lorrie.

5 On February 7, 1992, Scott J. of the Ontario Court (Gen. Div.) approved the settlement and granted judgment (the 1992 judgment). Under the terms of the settlement and judgment, $5,420.00 was paid into court for the benefit of Lorrie and $1,250.00 was paid by the appellant in full satisfaction of costs. After the funds were paid into court, counsel for Ms. Baetz wrote to Lorrie's counsel confirming that "this resolves all claims arising out of this accident."

6 Ms. Metcalf remained concerned about her daughter's health. Lorrie had headaches, did not sleep through the night, seemed easily distracted and had become increasingly clumsy. With the help of a social worker, Lorrie's mother arranged to have Lorrie seen by a paediatric neurologist at Children's Hospital in London, Ontario. Assessments done between the summer of 1992 and the fall of 1994 revealed that Lorrie had numerous ongoing medical and developmental problems, some of which were attributed to the head injury she had suffered in the car accident in 1990. By February, 1996, Lorrie's doctor opined that Lorrie's "attention and concentration problems are attributable to the motor vehicle accident." Her doctor also felt that the full extent of those problems could not be determined for another year or two.

7 At some point, Lorrie's mother retained new counsel on behalf of Lorrie. In the fall of 1994, that counsel commenced a new action (the 1994 action) claiming that the appellant's negligence had caused injuries to Lorrie resulting in damages of some $2.2 million. Counsel also claimed damages under the Family Law Act, R.S.O. 1990, c. F.3 on behalf of Lorrie's mother and sister. In her defence, Ms. Baetz pleaded that the claim had been settled by the 1992 judgment leaving Lorrie with no cause for action against her. Ms. Baetz also denied any liability for the accident.

8 In the fall of 1996, counsel brought a motion in the 1994 action to set aside the 1992 judgment.[1] Although counsel argued that Scott J. should not have approved the settlement in 1992, the affidavits filed on the motion make it clear that medical evidence developed after the 1992 judgment provided the sole basis for setting aside that judgment. The final paragraph of counsel's affidavit filed on the motion summarizes his position:

> There is no doubt in my mind that the present medical evidence now clearly establishes that the court approved settlement was not in the best interests of either Lorrie or her mother. The medical tests and assessments which have been performed since the time of the court approval have clearly provided new evidence of the extent and effect of the brain damage sustained by Lorrie which was not available to Madam Justice Scott. It is my opinion that the interests of justice require that the judgment of Madam Justice Scott be set aside. ...

9 Leitch J., for reasons reported at (1997), 33 O.R. (3d) 679, granted the motion, set aside the 1992 judgment and directed that the 1994 action should proceed.[2] In doing so, she did not purport to review the correctness of the judgment as of the date it was made. Instead, Leitch J. held that she was obliged to consider the medical evidence developed after

the 1992 judgment and decide whether in the light of that evidence the 1992 judgment could be said to be in the best interests of Lorrie. She said, at p. 688:

> I find it necessary to consider evidence that was not before the judge who approved the settlement in 1992 not to show that the assessment of the previously existing evidence was incorrect but to allow this court to assess whether Lorrie's best interests have been met.

**10** After a careful review of the new medical evidence, Leitch J. concluded that as the 1992 judgment had been premised on medical information indicating that Lorrie's injury was relatively minor and would cause no long-term effects, it could not be said to meet Lorrie's best interests in the face of medical evidence indicating a much more serious injury with significant long-term effects. Leitch J. made it clear that in setting aside the 1992 judgment she had considered only the best interests of Lorrie. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the appellant was irrelevant.

**11** I think Leitch J. properly characterized her function on the motion to set aside the 1992 judgment. She was not, and indeed could not, sit on appeal from the decision of Scott J. Arguments as to whether Scott J. should have approved the settlement based on the information placed before her could only be properly made by way of a direct appeal from that judgment and no such appeal was ever taken.

**12** Leitch J. also properly avoided any consideration of the adequacy of former counsel's representation of Lorrie in making her determination that the 1992 judgment should be set aside. Former counsel is not a party to these proceedings, and it would be inappropriate to take anything said by Leitch J. or by me as a comment on the adequacy of his representation. If Lorrie wishes to take issue with that representation, she can do so in separate proceedings instituted against the former counsel for that express purpose.[3]

II.

**13** If, as Leitch J. held, the best interests of Lorrie is the only factor to consider in deciding whether to set aside the 1992 judgment, her decision is unassailable. The medical evidence gathered after the 1992 judgment strongly suggests that if the appellant is responsible for Lorrie's injuries, Lorrie was significantly under-compensated by the terms of the 1992 judgment. I cannot agree, however, that the best interests of Lorrie govern the decision whether the 1992 judgment should be set aside. In my view, a judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments. Applying those criteria, I would hold that the 1992 judgment should not have been set aside.

III.

**14** A person who is injured as a result of the negligence of another is entitled to full but fair compensation for those injuries: Watkins v. Olafson (1989), 61 D.L.R. (4th) 577 at 581 (S.C.C.). Under our system of adjudication of personal injury cases, full but fair compensation is determined at a specific point in time on a once and for all basis, and awarded in the form of a single lump sum payment. Absent statutory authority, a court cannot provide for periodic payments to a plaintiff in a personal injury case, or periodically review damages based on developments subsequent to the initial assessment: Watkins v. Olafson, supra, at pp. 580-86. Because we assess damages on a once and for all basis and award a single lump sum amount, judges must determine what constitutes full but fair compensation on the basis of information available at the time the adjudication is made. Judges must also factor future costs and future losses into that assessment in many personal injury cases. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over or under compensation. Despite the likelihood of inaccuracy which has spawned strong judicial and academic criticism of one time lump sum awards,[4] this province maintains that approach in personal injury cases in all but very limited circumstances.[5] One time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those words.

**15** Paramount among those advantages is finality. Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, The Fabric of English Civil Justice, Hamlyn Lectures 1987, at pp. 23-24.

16 The parties and the community require that there be a definite and discernable end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernable end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.

17 Finality is important in all areas of the law, but is stressed more in some than in others. Its significance in tort law was highlighted by McLachlin J. in Watkins v. Olafson, supra, at p. 585, where in the course of discussing problems associated with a scheme of compensation based on reviewable periodic payments, she said:

> Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract - areas where the law recognizes periodic payments - the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.

18 The importance attached to finality is reflected in the doctrine of res judicata. That doctrine prohibits the relitigation of matters that have been decided and requires that parties put forward their entire case in a single action. Litigation by instalment is not tolerated: Toronto General Trusts Corporation v. Roman, [1963] 1 O.R. 312 (C.A.), aff'd., [1963] S.C.R. vi. Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved: R. v. Thomas, [1990] 1 S.C.R. 713; R. v. Sarson (1996), 107 C.C.C. (3d) 21 (S.C.C.); Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 at 757.

19 That is not to say that finality interests always win out over other interests once final judgment is signed and entered. Sometimes the rigor of the res judicata doctrine will be relaxed: Town of Grandview v. Doering, [1976] 2 S.C.R. 621 at 638; Hennig v. Northern Heights (Sault) Ltd. (1980), 30 O.R. (2d) 346 (C.A.). The court also has the power to set aside final judgments: Glatt v. Glatt, [1937] S.C.R. 347, aff'g, [1936] O.R. 75 (C.A.); Whitehall Development Corporation Ltd. v. Walker (1977), 4 C.P.C. 97 (Ont. C.A.). The limitations on the res judicata doctrine and the power to set aside previous judgments are, however, exceptions to the general rule that final judgments mark the end of litigation. Those exceptions recognize that despite the value placed on finality, there will be situations in which other legitimate interests clearly outweigh finality concerns. The power to set aside a final judgment obtained by fraud is the most obvious example. As important as finality is, it must give way when the preservation of the very integrity of the judgment process is at stake.

20 Attempts, whatever their form, to reopen matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line. I think Anderson J. struck the proper judicial tone on applications to reopen final judgments in L.M. Rosen Realty Ltd. v. D'Amore (1988), 29 C.P.C. (2d) 106 (Ont. H.C.J.). He was asked to set aside a judgment and vary the rate of post-judgment interest granted because subsequent events showed that the rate was much too high. He said, at p. 109:

> ... Even if I thought I had the discretion, I would be reluctant to intervene because I feel it would be offensive to the basic proposition that there should be finality in litigation. Adjusting the result after judgment, save in response to unusual circumstances, would be a conspicuous and dangerous meddling with that proposition.

21 I am not aware of any personal injury case in which a final judgment has been set aside, other than on appeal, because evidence developed after the judgment indicated that the award was much too high or much too low.[6] I would be surprised to find such a case as it would be entirely inconsistent with our system of one time lump sum awards for personal injuries. As assessments which ultimately prove to be inaccurate are inherent in that scheme, I do not see how the demonstration of that inaccuracy in a particular case could, standing alone, justify departure from the finality principle.

IV.

22 The approach taken by Leitch J. constitutes a departure from the traditional approach taken to final judgments in personal injury litigation. She discounts finality concerns entirely. If she is correct, no judgment approving an infant settlement is final. Instead, all carry the unwritten caveat - subject to being set aside if subsequent events reveal that the plaintiff may have been under-compensated.[7] Nor, in my view, would it be an unusual case in which this caveat would come into play. Medical assessments change, unanticipated losses arise and estimates of anticipated costs prove inaccurate. In all such situations where the change was significant, minor plaintiffs would be entitled to set aside a judgment approving a settlement and re-litigate their claim based on the latest information available as to the extent of the damage suffered by them.

23 In addition to discounting finality concerns, Leitch J. has, in effect, introduced a scheme of compensation by reviewable periodic payments in personal injury cases involving minor plaintiffs. Amounts awarded pursuant to settlements approved by the court would become periodic payments if, before the minor reached majority, circumstances revealed that the amount awarded did not provide full compensation. This is the sort of drastic innovation in our tort compensation scheme which the Court in Watkins v. Olafson, supra, instructed should be left to the legislature.

24 The respondent contends that the court's obligation to ensure that the best interests of Lorrie were met trumped all other concerns. There can be no doubt that a court is obliged to look to and protect the best interests of minors who are parties to legal proceedings.[8] This obligation, sometimes referred to as the court's parens patriae jurisdiction, requires that the court abandon its normal umpire-like role and assume a more interventionist mode. For example, the court must decide who will act on behalf of the minor (Rule 7.03 - 7.06) and the court must take control of any proceeds paid to the benefit of the minor (Rule 7.09). The supervisory powers of the court are most clearly evinced by the requirement that the court approve any consent judgment to which a minor is a party and the closely aligned requirement that the court approve any settlement of a minor's claim before that settlement will bind the minor (Rule 7.08). The duty on the court when a motion for approval of a settlement is made was authoritatively described by Robertson C.J.O. in Poulin v. Nadon, [1950] 0.R. 219 at 225:

> ... If, upon proper inquiry, the judge shall be of the opinion that the settlement is one that, in the interests of the infant, should be approved, he may give the required approval. If, on the other hand, the judge is not of the opinion that the settlement is one that should be approved, he may give such direction as to the trial of the action as may be proper. ...

25 The inquiry described by Robertson C.J.O. requires that the court make its own determination whether the proposed settlement is in the minor's best interests. Rule 7.08(4) demands that the parties place sufficient material before the court to allow it to make that determination.

26 As important and far reaching as the parens patriae jurisdiction is, it does not exist in a vacuum, but must be exercised in the context of the substantive and adjectival law governing the proceedings. The parens patriae jurisdiction is essentially protective. It neither creates substantive rights nor changes the means by which claims are determined.

27 The proper limits of the parens patriae jurisdiction were drawn in Carter v. Junkin (1984), 47 O.R. (2d) 427 (Div. Ct.). The defendant insurance company proposed to make an advance payment to a minor under the provisions of the Insurance Act. The defendant applied for an order approving the advance payment, but the motion judge refused to make that order unless the insurer agreed to a term which would protect the minor's claim to pre-judgment interest. The defendant refused to make the payment on that term and appealed. The Divisional Court held, at p. 430:

> The court has no jurisdiction to compel an insurer to pay money into court under s. 224 [The Insurance Act] and to make good the interest differential. But that is not what was done here. The learned motions court judge did not require the insurer to pay money into court. He simply granted leave to the insurer to do so, if the insurer was willing to agree to give the undertaking as to the interest differential. The insurer can still decline to make the payment, in which event the infant plaintiff will recover at trial the full amount of pre-judgment interest to which he is entitled.

28 The court properly drew a distinction between a court imposed term on a voluntary payment as a condition to court approval of that payment and the court requiring that the defendant make a payment. The former protected the minor's best interests under the scheme of voluntary payments established under the Insurance Act and was a proper exercise of the parens patriae jurisdiction. A forced payment would, however, have gone beyond the limits of the statute and given the minor rights which he did not have under that statute. While a forced advance payment may have been in

the minor's best interests, it was not within the scope of the parens patriae jurisdiction as it was not contemplated under the statutory scheme.

**29** A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The parens patriae jurisdiction does not expand that entitlement. For example, a minor plaintiff who cannot establish that the defendant's negligence caused the injury, cannot succeed on the basis that, despite that failure, compensation is in the minor's best interests. Similarly, a minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The parens patriae jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims: Kendall v. Kindl Estate (1992), 10 C.P.C. (3d) 24 at 27-28 (Ont. Gen. Div.).

**30** Finality, is as important in cases involving minor plaintiffs as it is in cases involving adult plaintiffs. The need for finality must temper the goal of meeting the minor's best interests just as it must temper the desire to provide every plaintiff with full but fair compensation. Proposed settlements of minors' personal injury claims, especially those involving very young children with head injuries, raise real concerns about the adequacy of compensation provided by those settlements. The risk of under-compensation in those cases is very real.[9] That risk demands that the court vigorously exercise its parens patriae jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the parens patriae jurisdiction is spent. It can only be reasserted if there is a valid basis for setting aside the final judgment.

**31** In arriving at the conclusion that the best interests of the minor justified setting aside the previous final judgment, Leitch J. relied exclusively on the decision of the British Columbia Court of Appeal in Makowka v. Anderson (1990), 67 D.L.R. (4th) 751. In Makowka, a motion judge was asked to approve an infant settlement. He did so over the objections of the Public Trustee acting on behalf of the infant. The Public Trustee argued that more time was needed to assess the extent of the minor's head injury and the cause of her various medical problems. The Public Trustee appealed the judgment approving the settlement and sought to introduce evidence on appeal of medical assessments done between the judgment approving the settlement and the hearing of the appeal. Those assessments confirmed the Public Trustee's concerns and indicated that the minor's injuries were serious and that in all likelihood she would suffer significant long-term disabilities.

**32** On a motion to admit the fresh evidence heard before the actual appeal, Lambert J.A., for the court, while accepting the importance of finality, even in litigation involving minors, acknowledged that the appeal court could receive evidence of matters arising after the judgment appealed from. He stressed that the evidence proffered by the Public Trustee was not directed to a purely factual question, but rather to the assessment of the minor's best interests. The reasons of Lambert J.A. admitting the evidence are referred to in the reasons disposing of the appeal. He said, at p. 758:

> ... So the purpose of the introduction of fresh evidence in this appeal is not to show that a factual assessment of the previously existing evidence was incorrect, but it is to show that the best interests of the infant may not in fact have been carried through in the way that the chambers judge thought he was carrying them through.
>
> Accordingly, the factors are quite different in this case. Having regard to the crucial ones, which are the best interests of the child and the good administration of justice, it would, in my opinion, in the words of the cases, be an affront to justice to insist on imposing this settlement on this infant if it was, when it was agreed upon, an unjust settlement.

**33** The court hearing the appeal described its task in words that were adopted by Leitch J.

> So we are entitled to look at the new evidence, which includes subsequent medical reports, for the purpose of determining whether the settlement originally placed before the court seems a just one today. We are not limited to considering the strengths and weaknesses of Meghan's [the minor] case as they appeared from the material placed before the judge below. [p. 758]

**34** Not surprisingly, the court went on to conclude that the amount provided for in the settlement was totally inadequate and set aside the order approving the settlement.

35 The facts in Makowka are quite similar to our facts. The proceedings were, however, fundamentally different. Makowka was a direct appeal from the judgment approving the settlement. When the fresh evidence was tendered the matter was still in the litigation system and the rights and obligations of the parties were subject to appellate review, the purpose of which was to determine the correctness of the order approving the settlement. The defendant in Makowka had no reason to think the end of the litigation line had been reached. The Public Trustee continued to maintain that the settlement should not have been approved and the new evidence went directly to the central issue both on the motion and on the appeal.

36 On this motion, Leitch J. was not asked to, and could not, review the correctness of the order of Scott J. Instead, she was asked to allow Lorrie to begin her claim afresh and to re-litigate a claim which, in the eyes of the law and the mind of Ms. Baetz, had ceased to exist when it became the subject of final judgment in 1992. In my opinion, there is an important difference between allowing a party to supplement a record at the appellate stage of an ongoing proceeding and allowing a party to resurrect a claim which is the subject of a final judgment. That distinction has been recognized by appellate courts faced with applications to admit fresh evidence concerning events which occurred between the judgment and the appeal. In McCann v. Shepherd, [1973] 2 All. E.R. 885 (C.A.), Lord Denning M.R., said:

> ... The general rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing; and this court will be slow to admit evidence of subsequent events to vary it. It will not normally do so after the time for appeal has expired without an appeal being entered - because the proceedings are then at an end. They have reached finality. But if notice of appeal has been entered in time - and pending the appeal, a supervening event occurs such as to falsify the previous assessment - then the court will be more ready to admit fresh evidence because until the appeal is heard and determined, the proceedings are still pending. Finality has not been reached. ...

37 Admitting fresh evidence on appeal of events which occurred between the judgment and the appeal raises finality concerns for the reasons set out by Lord Denning, however, those concerns are moderated, first by the fact that the proceeding is still underway and second because the parties know that their rights remain undetermined until appellate remedies have been exhausted. Even in those circumstances, evidence is only admitted where it would be "an affront to common sense" to refuse to admit the evidence on appeal: Mercer v. Sijan (1976), 14 O.R. (2d) 12 at 17 (C.A.); Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208 at 211 (C.A.). This was the test applied in Makowka.

38 Leitch J. erred in equating her position on a motion to set aside a final judgment with that of an appellate court asked to admit evidence of events which occurred between the judgment and the appeal.[10] While finality concerns are relevant in both situations, they must carry a great deal more weight where the judgment is final and the proceedings which culminated in that judgment have long since ended. The court in Makowka did not have to address the threshold issue raised on this motion - should a litigant, based on evidence developed after final judgment and after proceedings have ended, be allowed to start the litigation process all over again? That issue could not be resolved by reliance on the parens patriae jurisdiction.

V.

39 A party who would otherwise be bound by a previous judgment can bring an action to set aside that judgment. Fraud in the obtaining of the initial judgment is the most common ground relied on in such actions: McGuire v. Naugh, [1934] O.R. 9 at 11-13 (C.A.); Russell v. Brown, [1948] O.R. 835 per Hogg J.A. (concurring) at pp. 846-48 (C.A.); Glatt v. Glatt, supra, at p. 79 (C.A.). Rule 59.06 allows that kind of relief to be claimed by way of a motion in the original proceedings. The rule does not, however, confer the power to set aside a previous judgment, nor does it articulate a test to be applied in deciding whether a previous judgment should be set aside. The rule merely provides a more expeditious procedure for seeking that remedy: Glatt v. Glatt, supra; Braithwaite v. Haugh (1978), 19 O.R. (2d) 288 at 289 (Cty. Ct.). The language of Rule 59.06 does, however, provide insight into the varied factual circumstances which may give rise to motions to set aside a judgment.

40 For present purposes, I am concerned with Rule 59.06(2)(a) and particularly, the part of the rule which refers to motions to set aside orders "on the ground ... of facts arising or discovered after it [the order] was made." The rule draws a distinction between facts which come into existence after the judgment was made and facts which, while existing when the judgment was made, were discovered after judgment. In this case, the facts relied on to set aside the previous judgment concerned the exact nature of Lorrie's head injury and, more importantly, its potential impact on her

physical, intellectual and cognitive development. That injury and those potential effects existed at the time of the judgment.

41 In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. In Glatt v. Glatt, supra, the appellant moved to set aside a judgment partly on the basis of evidence discovered after the judgment. Duff C.J., for a unanimous court, rejected the claim stating, at p. 350:

> It is well established law that a judgment cannot be set aside on such a ground unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule were applied with the utmost strictness.

42 That same view prevailed in the majority judgment in Grandview v. Doering, supra, some 40 years later. Mr. Doering sued the Town of Grandview alleging that it was responsible for the flooding of his land. The suit was dismissed. A few months later he commenced a second action, again claiming damages for the flooding of his land. The second claim referred to different years than the first claim and alleged a different means by which the flooding occurred. An expert consulted by Mr. Doering after the first trial had developed a new theory explaining how the flooding had occurred. The Town moved to have the second action stayed on the basis that it was res judicata. A closely divided Supreme Court of Canada sided with the Town and stayed Mr. Doering's claim. The minority were of the view that the two actions did not raise the same issue. The majority took the position that the two actions were sufficiently similar to warrant the application of res judicata. Ritchie J., for the majority, went on to consider whether the new theory as to the cause of the flooding could provide a basis for re-litigating the Town's liability. He cited with approval, at p. 636, the judgment of Lord Cairns in Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801 at 814-15, where his Lordship said:

> As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before ... [Emphasis added]

43 Ritchie J., at 638, observed that Mr. Doering had not alleged, much less proved, that the expert evidence advancing the new theory concerning the flooding could not have been available by the exercise of reasonable diligence at the first trial. Consequently, Mr. Doering had not cleared the first hurdle required to allow him to re-litigate a claim which was res judicata.

44 These and numerous other authorities (e.g. Whitehall Development Corporation Ltd. v. Walker, supra, at p. 98) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus.

45 Lorrie cannot show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. Ms. Metcalf testified that she told Lorrie's former lawyer that Lorrie was having problems sleeping and walking before the 1992 judgment. According to Ms. Metcalf, the former counsel was aware that arrangements had already been made to have Lorrie seen at the Brain Injury Clinic in London

when the settlement was made in February, 1992. Documentation produced by Lorrie's present counsel in response to undertakings given during Ms. Metcalf's cross-examination indicates that the arrangements were actually made shortly after the 1992 judgment. The fact remains, however, that according to Ms. Metcalf, she and Lorrie's former counsel were aware of Lorrie's ongoing problems and Ms. Metcalf's desire to have a further medical assessment done. Ms. Metcalf testified that Lorrie's former counsel did not suggest that the settlement be delayed pending further assessment and Ms. Metcalf did not request that the settlement be delayed for that purpose.

46 The reasons no further assessments were made prior to proceeding with the settlement and judgment are irrelevant in this proceeding. Certainly, there is no suggestion that Ms. Baetz or her insurers were aware that further assessments were needed or even contemplated. Those acting on behalf of Lorrie chose to proceed with the settlement without further medical assessments. It cannot now be said that the evidence eventually generated by further assessments could not have been available by the exercise of reasonable diligence prior to the judgment approving the settlement.

47 I would allow the appeal, set aside the order of Leitch J., and in its place make an order dismissing the 1994 action. Ms. Baetz is entitled to her costs both here and in the court below.

DOHERTY J.A.
ABELLA J.A. -- I agree.
CHARRON J.A. -- I agree.

cp/d/mii/mjb/DRS/qlgxc

1 Under the terms of Rule 59.06(2), the motion should have been brought in the 1992 proceedings, but it would appear that nothing turns on this procedural irregularity.

2 Justice Leitch also directed that the payment pursuant to the 1992 judgment should be treated as an advance payment to Lorrie under the terms of the Insurance Act. She further dismissed a motion brought by Ms. Baetz for summary judgment on the derivative action brought by Lorrie's mother, Carol Metcalf under the Family Law Act. Given my disposition of the appeal from the order setting aside the 1992 judgment, I need not consider the correctness of either of these orders.

3 In the cross-examination of Ms. Metcalf on her affidavit, counsel for Lorrie indicated that the former solicitor had been put on notice of a possible claim against him based on the 1992 settlement. That lawsuit is being held in abeyance pending the result of this appeal.

4 E.g. see the comments of Dickson J. in Andrews v. Grand & Toy Alberta, [1978] 2 S.C.R. 229 at 236.

5 Section 116 of the Courts of Justice Act, R.S.O. 1990, c. 43 provides for periodic payment and review of damages on consent of the parties and in one other very limited circumstance.

6 In Tiwana v. Popove (1988), 23 B.C.L.R. (2d) 392 (S.C.), the court reopened the trial after it had delivered its reasons for judgment, set aside its reasons and allowed the plaintiff to call further evidence concerning certain medical evidence which had developed after the trial had ended. In that case, however, formal judgment had not been entered when the plaintiff moved to set aside the reasons and call further evidence. A trial judge has a wide discretion to permit the reopening of a case prior to the entering of judgment: Castlerigg Investments Inc. v. Lam (1991), 2 O.R. (3d) 216 (Gen. Div.).

7 Leitch J. was concerned with a judgment approving a settlement, however, if she is correct in holding that the best interests of the child are paramount, I see no reason why a judgment following a trial could not also be set aside if subsequent events showed that the child had been under-compensated by the amount awarded at trial.

8 The parens patriae jurisdiction over minors extends beyond claims to which minors are a party. It also protects others who are under a legal disability: See Re Eve (1986), 31 D.L.R. (4th) 1 at 13-28 (S.C.C.); Rule 7. I refer only to minors, and only to the exercise of the parens patriae jurisdiction in the context of proceedings in which a minor is a party because those are the circumstances which operate in this case.

9 Steeves v. Fitzsimmons (1975), 11 O.R. (2d) 387 (H.C.) provides an interesting approach to this problem. The settlement approved by the court provided that the minor could apply to vary the judgment at any time before his seventh birthday.

10 Tepperman v. Rosenberg (1985), 48 C.P.C. 317 (Ont. H.C.) is more on point than Makowka. In that case an infant plaintiff moved before O'Leary J. to set aside an order of Craig J. approving a settlement. The infant relied on evidence that was not before Craig J. O'Leary considered the fresh evidence so that he could decide whether the settlement was in the infant's best interests. He held that it was and dismissed the motion. As the fresh evidence did not affect the result, O'Leary did not have to decide whether he could have set aside the judgment of Craig J. solely on the basis that the new evidence suggested that the child's best interests were not served. The concluding paragraphs of his rea-

sons (p. 320) suggest he would have set the judgment aside if he thought the fresh evidence supported the conclusion that it was not in the child's best interests. In my view, it would have been wrong to do so without first considering the other relevant factors.

# Tab 8

*Case Name:*

# Wu Estate v. Zurich Insurance Co.

**Between**
**The Estate of Yuan Yuan Wu (also known as Rebecca Wu), deceased, by the Trustees of her Estate, Zhi Chen and Fu Li Zhang, Zhi Chen, personally and Xu-Qi Wu, Applicants (Appellants), and Zurich Insurance Company and ING Insurance Company of Canada, Respondents (Respondents in Appeal)**

[2006] O.J. No. 1939

268 D.L.R. (4th) 670

211 O.A.C. 133

37 C.C.L.I. (4th) 222

27 C.P.C. (6th) 207

23 E.T.R. (3d) 205

[2006] I.L.R. I-4504

148 A.C.W.S. (3d) 394

2006 CarswellOnt 2971

Docket: C43454

Ontario Court of Appeal
Toronto, Ontario

**J.I. Laskin, R.J. Sharpe and J.L. MacFarland JJ.A.**

Heard: November 28, 2005.
Judgment: May 17, 2006.

(31 paras.)

*Insurance law -- Automobile insurance -- Accident benefits -- Appeal by the Estate from an application judge's ruling refusing to approve minutes of settlement allowed -- Deceased died after minutes of settlement respecting accident benefits had been agreed upon but not approved by court -- Claim for accident benefits had, by virtue of the settlement,*

*become a contractual right to the agreed amount -- Once the contractual right passed to the estate, there was no longer a party under disability -- Court approval was no longer required.*

*Wills, estates & trusts law -- Devolution of estates -- Appeal by the Estate from an application judge's ruling refusing to approve minutes of settlement allowed -- Deceased died after minutes of settlement respecting accident benefits had been agreed upon but not approved by court -- Claim for accident benefits had, by virtue of the settlement, become a contractual right to the agreed amount -- Once the contractual right passed to the estate, there was no longer a party under disability -- Court approval was no longer required.*

Appeal by the Wu Estate from an application judge's ruling refusing to approve minutes of settlement. Wu was struck by an impaired driver. She sustained serious physical and brain injuries, resulting in significant cognitive impairment. At the time of the accident Wu was 28 years old, married, and had one child. Wu, represented by her mother and litigation guardian, commenced an action claiming damages against the tortfeasor and claiming statutory accident benefits against the respondents, Zurich Insurance and ING Insurance. Following mediation, the parties agreed to settle the claim for $3.1 million. Due to Wu's mental disability, the settlement was "subject to necessary court approval." Three months after the date of settlement with the respondents, Wu died unexpectedly. Pending resolution of the tort claim, Wu's counsel had not presented the settlement of the accident benefits claim for court approval. The Estate's application to enforce the minutes of settlement was dismissed. Wu's death made it impossible for the court to approve the settlement.

HELD: Appeal allowed. The settlement did not die with Wu. Prior to her death, Wu's claim for accident benefits had, by virtue of the settlement, become a contractual right to the agreed amount, contingent upon court approval. The contractual right was a chose in action that, by operation of law, devolved to Wu's estate upon death. Once the contractual right passed to the estate, there was no longer a party under disability. Court approval was no longer required to protect the interest of the party seeking to enforce the settlement. The minutes of settlement became operational upon death and Wu's estate could enforce the obligation to pay.

**Statutes, Regulations and Rules Cited:**

Insurance Act, R.S.O. 1990, c. I.8

Ontario Rules of Civil Procedure, Rules 7.08(1)

Statutory Accident Benefits Schedule- Accidents After December 31, 1993, and Before November 1, 1996, Reg. 776/93

**Appeal From:**

On appeal from the order of Justice J.B. McMahon of the Superior Court of Justice dated April 5, 2005.

**Counsel:**

Earl A. Cherniak, Q.C. and Kirk F. Stevens for the appellants

Geoffrey D.E. Adair, Q.C. and Robert M. Ben for the respondents

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The following judgment was delivered by

1 THE COURT:-- A party under disability died unexpectedly before the court approved the defendant's agreement to settle her accident benefits claim for a lump sum. The issue before us on this appeal is whether the estate of the party under disability can enforce the settlement.

**FACTS**

2 Yuan Yuan Wu (known as "Rebecca Wu") was hit by an impaired driver as she crossed a street in downtown Toronto. She suffered serious physical injuries and brain injuries resulting in significant cognitive impairment. At the time of the accident, Rebecca Wu was twenty-eight years old. She was married and had one child.

3 Rebecca Wu, represented by her mother and litigation guardian, commenced an action claiming tort damages against the tortfeasor and claiming statutory accident benefits against Zurich Insurance Company and ING Insurance Company of Canada ("the respondents"), pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8 and the *Statutory Accident Benefits Schedule - Accidents After December 31, 1993, and Before November 1, 1996*, Reg. 776/93.

4 The respondents obtained comprehensive medical assessments of Rebecca Wu's injuries and future care costs. Despite her severe injuries, Rebecca Wu's life expectancy was estimated to be sixty-eight years. Her own experts estimated her claim for past and future income loss and future care costs at between $5.8 and $6.6 million. After mediation, the respondents agreed to settle her claim for $3.1 million. Because of Rebecca's mental disability, the settlement was "subject to necessary court approval." The tort claim remained outstanding but subject to ongoing settlement discussions.

5 Three months after the date of the settlement with the respondents, Rebecca died suddenly and unexpectedly. Pending resolution of the tort claim, Rebecca Wu's counsel had not presented the settlement of the accident benefits claim for court approval.

6 The settlement agreement was reduced to writing in the form of minutes of settlement.

> **Accident of Benefits of Rebecca Wu**
>
> **Minutes of Settlement**
>
> In consideration of the amount $3,000,000 plus $90,000 for party and party costs and $10,000 for disbursements, Yuan Yuan Wu also known as Rebecca Wu, by her Guardian of Property, Zhi Chen and Zhi Chen and Xu-Qi Wu personally, hereby agree to settle with Zurich Insurance Company and ING Insurance Company of Canada and any successors, for all past, present and future accident benefit claims in connection with the motor vehicle accident of August 29, 1996.
>
> *All of the above is subject to necessary court approval to be obtained by counsel for the applicants.*
>
> Pending securing all necessary approval, Zurich/ING agree to pay all current AB Benefits to the time of securing necessary court approval. The total amount of accident benefits paid after February 3, 2003, and up to the date of court approval shall be paid back by the applicants to Zurich/ING out of the court approved settlement amount. The Full and Final Release and Disclosure Notice will be paid by counsel for the insurer and will be executed by the applicants after court approval [emphasis added].

7 Rebecca Wu's estate, her estate trustees, her spouse and her parents ("the appellants") brought an application to enforce the minutes of settlement. The application judge ruled that the requirement for court approval amounted to a "true condition precedent" that had to be satisfied in order to make the settlement agreement enforceable. He ruled that Rebecca Wu's death made it impossible for the court to approve the settlement and, as her estate could not meet the condition precedent, there was no longer a binding agreement between the parties.

## ISSUE

8 The sole issue on this appeal is whether the appellants can enforce the settlement of the accident benefits claim against the respondents.

## ANALYSIS

9 The starting point for analyzing the legal status of the settlement agreement is to consider the situation that existed immediately before Rebecca Wu's unexpected death. In *Smallman v. Smallman*, [1971] 3 All E.R. 717 at 720 (C.A.), Denning M.R. provided the following helpful statement of the legal status of a settlement agreement that is subject to court approval:

> In my opinion, if the parties have reached an agreement on all essential matters, then the clause subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is

> binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.

**10** The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves ... to be exercised in the best interest' of the protected person ... for his or her benefit or welfare'": *Re Eve*, [1986] 2 S.C.R. 388 at para. 73. The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined": *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 at 268 (C.A.). The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability: *Poulin v. Nadon*, [1950] O.R. 219 (C.A.). The purpose of court approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper compensation.

**11** The requirement for court approval of settlements involving parties under disability is codified in Ontario in rule 7.08(1):

> No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

**12** As explained by Garry D. Watson and Craig Perkins, *Holmested and Watson: Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984) vol. 2 at 7-33

> Rule 7.08 ... merely codifies a rule established by case law that a party under disability is bound only by a settlement that is for his or her benefit ... it is designed to protect the party under disability from mistakes of the litigation guardian. The settlement of a claim by or against a party under disability, whether or not a proceeding has been commenced, is not binding on the party under disability without the approval of a judge.

**13** The wording of rule 7.08(1) may be contrasted with the language of the English "compromise rule" that provides that no settlement involving a party under disability shall "be valid without the approval of the court." This wording was considered by the House of Lords in *Dietz v. Lennig Chemicals*, [1969] 1 A.C. 170 to deprive a settlement that is subject to court approval of any legal effect and to allow either party to repudiate it unless and until it was approved by the court. The situation in Ontario is different: see *Richard (Litigation Guardian of) v. Worth* (2004), 73 O.R. (3d) 154 (S.C.J.), holding that an insurer could not repudiate an infant settlement, yet to be approved by the court, on the ground that the law relating the insurer's liability had been changed by a subsequent Court of Appeal decision. The effect of rule 7.08(1) coincides with *Smallman v. Smallman, supra*, to this extent: the party under disability has an agreement from which the opposite party cannot resile and that will become fully operational once approved by the court.

**14** We conclude from this analysis that immediately prior to Rebecca Wu's death there was in law an agreement, which the respondents could not disavow, to settle her claim on the terms recorded in the minutes of settlement, but that the operation of that agreement was suspended pending "necessary" court approval.

**15** The crucial issue for us to decide is what effect did Rebecca Wu's death have on the status of the settlement agreement? The respondents make two central submissions. First, they say that the obligation to pay the settlement never arose because the requirement for court approval was never met. They say that the application judge correctly found that the requirement for court approval is a "true condition precedent" upon which the existence of any contractual obligation to pay depends and, as the settlement was not approved, it died with Rebecca Wu. Second, the respondents submit that it is an implicit term of the settlement that Rebecca Wu must be alive to permit the court to approve it. As her death makes court approval impossible, the respondents submit that the agreement must be treated as being void *ab initio*.

**16** For the following reasons, we are unable to accept the respondents' submissions.

**17** With respect to the respondent's first submission, we do not agree that that the settlement died with Rebecca Wu. Prior to her death, Rebecca Wu's claim for accident benefits had, by virtue of the settlement, become a contractual right to the agreed amount, contingent upon obtaining the court's approval of the settlement. That contractual right was a chose in action that, by operation of law, devolved to Rebecca Wu's estate upon her death: *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 2.; Carmen S. Thériault ed, *Widdifield on Executors and Trusts*, looseleaf (Toronto: Carswell,

2002) at p. 2-52: "The general principle is that a right of action in common law survives death and is transmissible automatically to the personal representative." By their terms, the minutes of settlement speak of "necessary" court approval. Once Rebecca Wu's contractual right passed to the estate, there was no longer a party under disability. Court approval was no longer necessary to protect the interest of the party seeking to enforce the settlement. As the need for court approval disappeared upon Rebecca Wu's death, the minutes of settlement became operational and her estate could enforce the obligation to pay.

**18** This analysis is supported by a purposive interpretation of the need for court approval. The respondents' argument that the settlement in Rebecca Wu's favour should be nullified because it was not approved in her lifetime runs directly contrary to the protective purpose of *parens patriae* jurisdiction and of court approval of settlements involving parties under disability. The risk created by the enforced gap in time to allow the court to review the settlement to ensure it meets the plaintiff's interests should not be borne by the plaintiff and *parens patriae* jurisdiction should not be used to defeat the very interests it serves to protect. In this regard, we find persuasive the reasoning in *Reed v. United States of America*, 891 F. 2d 878 at 881 (11th Cir. 1990). The claim of an infant plaintiff was settled days prior to his death and "all that remained for final judgment to obtain was for the court to approve the settlement and enter judgment." The court ruled that as "[t]he statute requiring court approval is designed for the protection of minors" and as the defendant had agreed to settle the case, the only legitimate basis for refusing enforcement would be the failure of the agreement to protect the minor's interests. See also *Blackhurst v. Transamerica Insurance Co.*, 699 P. 2d 688 (Sup. Ct. of Utah 1985).

**19** In *Olive Clear v. Thermal (Ireland) Limited*, [1969] I.R. 133, the Supreme Court of Ireland considered the enforceability of an infant settlement where the infant had died prior to court approval. O'Dalaigh C.J. analyzed the legal effect of the settlement in terms similar to those expressed in *Smallman v. Smallman, supra*, but ruled, at p. 139, that the requirement for court approval implied that the infant must be alive. We return to the issue of post-death court approval below, but for present purposes the significant point from this decision is that the other two members of the court suggested that the settlement contract survived and that the proper procedure was for the infant's estate to sue upon the contract: per Walsh J. at p. 140 and per Budd J. at p. 141. Accordingly, although the court concluded that the settlement could not be approved after the death of the infant plaintiff, there is a majority view that the settlement contract could be enforced at the suit of the infant's estate despite the fact that it had never been approved by the court.

**20** Nor do we agree with the submission that the issue before us should be resolved on the basis of *Turney v. Zilka*, [1959] S.C.R. 578 and so-called "true conditions precedent." *Turney v. Zilka* involved an agreement for the purchase and sale of land that made the contract conditional on the annexation of the subject property to another municipality. The Supreme Court of Canada rejected the contention that the clause was for the benefit of the purchaser and could therefore be waived by the purchaser. As the condition had not been met, neither party had any right to enforce performance. Judson J. explained at pp. 583-84:

> The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party ... This is a true condition precedent - an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side.

**21** *Turney v. Zilka* and other similar cases involving "true conditions precedent" typically involve the interpretation of agreements for the purchase and sale of real estate and terms negotiated by the parties to allocate the risk of uncertain future events, such as planning approval, that are beyond the control of the parties but that will affect the value of the property that is the subject of the contract. That contractual setting is, in our view, distinguishable from the circumstances of the present case.

**22** When determining whether a contractual term is to be considered a "true condition precedent," the intentions of the parties must be considered: see *Kempling v. Hearthstone Manor Corp.*, [1996] A.J. No. 654 at para. 32 (C.A.). See also G. Davies, "Conditional Contracts of the Sale of Land in Canada" (1977), 55 Can. Bar Rev. 289 at 322: "a desirable approach to the interpretation of conditional contracts would be to recognize that the effect of a condition must depend upon the language in which it is expressed with the result that conditions must be subjected to individual scrutiny." The requirement for court approval in the case at bar was not a negotiated term designed to allocate the risk of an uncertain future event that would affect the value of the bargain. As reflected by the language of the minutes of settlement - "subject to *necessary* court approval" - the requirement for court approval was a term legally imposed upon the parties specifically to protect the interests of the party under disability.

**23** It is significant that rule 7.08(1) provides that the agreement is not binding on the party under disability unless the court approves the agreement, but says nothing to limit the binding effect of the agreement on the other party. This reflects the unilateral and protective purpose of court approval that is related to ensuring the fairness of the agreement itself, quite unlike the type of extraneous third-party decision at issue in *Turney v. Zilka*. In our view, *Turney v. Zilka* does not apply to the contract at issue here.

**24** With respect to the respondent's second submission, even if we were to accept the respondents' submission that court approval is a "condition precedent" that must be satisfied to make the agreement enforceable by the appellant, we see no reason why court approval cannot be granted despite Rebecca Wu's death. The purposive interpretation of the *parens patriae* jurisdiction and rule 7.8(1) that we have already outlined suggests that authority to approve the settlement should survive the death of the party under disability to the benefit of that party's estate. There was an obvious risk that Rebecca Wu might die earlier than projected and the respondents must have taken into account her projected life expectancy as one of the many contingencies that influenced their assessment of the value of her claim: *White (Litigation Guardian of) v. Godin*, [1997] O.J. No. 314 (C.A.) at para. 3: "In agreeing to the assessment of damages, the defendants knew that there was a risk that their evaluation of the life expectancy of the plaintiff ... might be proved wrong by future events." Parties under disability cannot re-open settled claims when unfavourable contingencies materialize: see *Tsaoussis (Litigation Guardian of) v. Baetz, supra*. Fairness requires similar treatment for insurers. The minutes of settlement could have provided that Rebecca Wu must be alive at the time of court approval but they do not. We do not agree that it would be just to imply a term that would, after the fact, materially alter the parties' allocation of the risk related to her life expectancy.

**25** We do not find persuasive the opinion to the contrary in *Olive Clear v. Thermal (Ireland) Limited, supra*. O'Dalaigh C.J., at pp. 138-39, gave the following example which corresponds to some degree to the case at bar:

> An example will illustrate the point. A defendant, in a case of paraplegic injury to an infant plaintiff, agrees to pay to the next friend a large sum for damages, a great part of which is calculated to be in respect of full-time nursing care. Before approval of the settlement the infant dies from extraneous causes. The infant's death, as it seems to me, prevents the exercise of the court's function of pronouncing on the adequacy of the settlement. A new situation has arisen; a situation which the parties have not contemplated.
>
> The death of the infant alters the basis of the settlement, and its effect must, in my opinion, be to discharge the parties. The foundation of their dealings, the continued existence of the infant, is withdrawn, and the parties are left to such rights as they had before the settlement was entered into and as survive the infant's death.

**26** The death of the plaintiff may eliminate the cost of future care and thereby diminish the value of the claim but, for the reasons already expressed, it does not create a new situation that should not have been contemplated by the parties. Life expectancy is but one of many contingencies that parties settling personal injury claims are bound to take into account when determining the worth of the claim, and the unexpected death of the plaintiff does not remove the entire foundation for the agreement.

**27** The statement in *Stevens (Litigation Guardian of) v. Forney*, [1994] O.J. No. 407 (Gen. Div.) to the effect that court approval cannot be given after the death of a party under disability is not binding on this court and, in any event, was *obiter* as the court held that no contract had been formed prior to the infant plaintiff's death.

**28** In the absence of any persuasive authority to the contrary, we hold that if it were necessary to do so, the settlement in favour of Rebecca Wu could be approved by the court after her death.

**29** Finally, we note that the considerations of fairness and promoting settlements favour enforcement. We see nothing unfair to the respondents in enforcing this settlement. They agreed to pay the sum specified in the minutes of settlement to settle Rebecca Wu's accident benefits claim. When they decided to settle the claim for that amount, they were in possession of all the relevant facts respecting the claim and had ample opportunity to assess all contingencies. There are no grounds such as mistake or misrepresentation for refusing to enforce the settlement.

## CONCLUSION

**30** For these reasons, the appeal is allowed, the decision below is set aside, and in its place, there shall be judgment in the following terms:

1. A declaration that a valid settlement agreement was reached between Yuan Yuan Wu ((also known as Rebecca Wu) by her guardian of property, Zhi Chen, Zhi Chen personally, Xu-Qi Wu, Zurich Insurance Company and ING insurance Company of Canada on February 3, 2003, on the following terms;

   (i) payment in the amount of $3,000,000.00, plus $90,000.00 for costs and $10,000.00 for disbursements from Zurich Insurance Company and/or ING Insurance Company of Canada to Rebecca Wu, Zhi Chen and Xu-Qi Wu; and
   (ii) settlement of all past, present and future accident benefit claims in connection with a motor vehicle accident that occurred on August 29, 1996.

2. An order and judgment requiring the respondents to pay the appellants the sum of $3,100,000.00
3. Pre-judgment interest and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

**31** The appellants are entitled to their costs of this appeal fixed at $20,000 inclusive of disbursements and GST. If the parties are unable to agree as to the costs before the application judge, we will receive brief written submissions in that regard.

J.I. LASKIN J.A.
R.J. SHARPE J.A.
J.L. MacFARLAND J.A.

cp/e/qw/qlmxf/qlmrz

**Court of Appeal File No.: C56961/M42453/M42404**
**Superior Court File No.: CV-12-9667-00CL**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED,

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

**Court of Appeal File No.: C56961/M42453/M42404**
**Superior Court File No.: CV-10-414302CP**

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, et al.

Plaintiffs

-and-

SINO-FOREST CORPORATION, et al.

Defendants

***COURT OF APPEAL FOR ONTARIO***

(Proceeding Commenced at Toronto)

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