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

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

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

BRIEF OF AUTHORITIES OF SINO-FOREST CORPORATION

(Motion for Sanction Order Returnable December 7 and 10, 2012)

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14. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.,* [2008] O.J. No. 1818 (S.C.J.)

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19. *Re T. Eaton Co*., [1999] O.J. No. 5322 (S.C.J. (Comm.List))

20. *Re Metacalfe & Mansfield Alternative Investments II Corp,* 92 O.R. (3d) 513 (O.N.C.A.)

21. *Muscletech Research and Development Inc. (Re.),* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J.)

22. *Armbro Enterprises Inc. (Re.)* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.)

23. *Uniforet Inc. (Re.)* (2003), 43 C.B.R. (4th) 254 (Que. S.C.)

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27. *Cuchuran v. Dubitz*, [1945] 3 W.W.R. 541 (Alta. Dist. Ct.)

28. *Re Coughlin & Co*., [1923] 1 D.L.R. 632 (Man. K.B.)

29. *Deco Electric Ltd. v. Republic Building Systems Alberta Ltd*. (1983), 45 A.R. 325 (Q.B.)

30. *Isabelle Estate (Trustee of) v. Royal Bank of Canada*, 2008 NBCA 69

31. *Riddler (Re)* (1991), 3 C.B.R. (3d) 273 (B.C. S.C.)

32. *Labarre (Syndic de),* [2004] Q.J. No. 13895 (S.C.)

33. *Olympia & York Developments (Re)* (1998), 4 C.B.R. (4th) 189 (Ont. Gen. Div.)

34. *Ravelston Corp., Re.* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J.)

35. *Angiotech Pharmaceuticals Inc*., 2011 BCSC 450

36. *Kitchener Frame Limited*, 2012 ONSC 234

37. *Re Nortel Networks Corp*., 2010 ONSC 1708

38. *BlueStar Battery Systems International Corp.*, 2000 Carswell Ont 4837 (S.C.J. (Comm.List))

39. *Ayles v. Neil*, 2002 CanLII 54082 (NL SCTD)

40. *Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017

41. Oxford Concise English, 2d ed, sub verdo "compromise"

Tab 1

Case Name:

Smith v. Sino-Forest Corp.

Between
Douglas Smith and Zhongjun Goa, Plaintiffs, and
Sino-Forest Corporation, Allen T.Y. Chan, James M.E. Hyde, Edmund Mak, W. Judson Martin, Simon Murray, Peter D.H. Wang, David J. Horsley, Ernst & Young LLP, BDO 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., and Maison Placements Canada Inc., Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992
And between
The Trustees of the Labourers' Pension Fund of Central and Eastern Canada and the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Plaintiffs, and
Sino-Forest Corporation, Ernst & Young LLP, Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, Kai Kit Poon, David J. Horsley, 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., and Maison Placements Canada Inc., Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992
And between
Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Plaintiffs, and
Sino-Forest Corporation, Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, Hua Chen, Wei Mao Zhao, Alfred C.T. Hung, Albert Ip, George Ho, Thomas M. Maradin, William E. Ardell, James M.E. Hyde, Simon Murray, Garry J. West, James P. Bowland, Edmund Mak, Peter Wang, Kee Y. Wong, The Estate of John Lawrence, Simon Yeung, Ernst & Young LLP, BDO Limited, Pöyry Forest Industry PTE Limited, Pöyry (Beijing) Consulting Company Limited, JP Management Consulting (Asia-Pacific) PTE

Ltd., Dundee Securities Corporation, UBS Securities Canada Inc., Haywood Securities Inc., Credit Suisse Securities (Canada), Inc., TD Securities Inc., RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada, Inc. Canaccord Financial Ltd., Maison Placements Canada Inc., Morgan Stanley & Co. Incorporated, Credit Suisse Securities (USA), LLC, Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992

[2012] O.J. No. 88

2012 ONSC 24

Court File Nos. 11-CV-428238CP, 11-CV-431153CP, 11-CV-435826CP

Ontario Superior Court of Justice

P.M. Perell J.

Heard: December 20 and 21, 2011.
Judgment: January 6, 2012.

(332 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Class counsel -- Definition of class -- Members of class or sub-class -- Representative plaintiff -- Motions by law firms for carriage of class action -- Carriage awarded to law firm acting in Labourers v. Sino-Forest -- There were three proposed class actions against Sino-Forest to recover alleged losses arising from crash in value of its shares and notes -- Determinative factors were characteristics of representative plaintiffs, definition of class membership, definition of class period, theory of case, causes of action, joinder of defendants and prospects of certification -- Neutral or non-determinative factors were attributes of class counsel; retainer, legal and forensic resources; funding; conflicts of interest; and plaintiff and defendant correlation.

Motions by law firms for carriage of a class action. Sino-Forest was a forestry plantation company. There were three proposed class actions against it to recover alleged losses arising from the crash in value of its shares and notes. The proposed class actions were Labourers v. Sino-Forest, Smith v. Sino-Forest and Northwest v. Sino-Forest. The proposed representative plaintiffs for Labourers v. Sino-Forest were three pension funds and two individuals. The proposed representative plaintiffs for Smith v. Sino-Forest were two individuals. The proposed representative plaintiffs for Northwest v. Sino-Forest were an investment management company, a non-profit financial services firm and a partnership that managed portfolios and investment funds. Labourers v. Sino-Forest included as class members shareholders and noteholders who purchased in Canada, but excluded non-Canadians who purchased in a foreign marketplace. Smith v. Sino-Forest included sharehold-

ers, but not bondholders. Northwest v. Sino-Forest included both, with no geographic limits. All proposed actions focused primarily on claims of negligence and negligent misrepresentation, but Northwest v. Sino-Forest also claimed fraudulent misrepresentation against all defendants. The law firms, in advancing their respective merits for carriage, made arguments raising as issues the characteristics of the representative plaintiffs; definition of class membership; definition of class period; theory of the case; causes of action; joinder of defendants; prospects of certification; attributes of class counsel; retainer, legal and forensic resources; funding; conflicts of interest; and the plaintiff and defendant correlation.

HELD: Carriage awarded to the law firm acting in Labourers v. Sino-Forest; stay of the other two proposed actions. The determinative factors were the characteristics of the representative plaintiffs, definition of class membership, definition of class period, theory of the case, causes of action, joinder of defendants and prospects of certification. The expertise and participation of the institutional candidates for representative plaintiffs, as investors in the securities marketplace, could contribute to the successful prosecution of the lawsuit on behalf of the class members. The institutional candidates were pursuing access to justice in a way that ultimately benefited other class members should their actions be certified as a class proceeding. The individual candidates might not be the best voice for their fellow class members. The institutional candidates could not opt out, which advanced judicial economy. They were already to a large extent representative plaintiffs as they were, practically speaking, suing on behalf of their own members, who numbered in the hundreds of thousands. Labourers v. Sino-Forest had the further advantage of individual investors who could give voice to the interests of similarly situated class members. The bondholders should be included as class members. They had essentially the same misrepresentation claims as the shareholders and it made sense to have their claims litigated in the same proceeding. This conclusion hurt the case for Smith v. Sino-Forest, even though it had the best class period. Reliance on fraudulent misrepresentation as a cause of action in Northwest v. Sino-Forest was a substantial weakness. That cause of action was less desirable than those used in the other two proposed actions. It added needless complexity and costs. It was far more difficult to prove. The class members were best served by the approach in Labourers v. Sino-Forest. Neutral or non-determinative factors for purposes of carriage were the attributes of class counsel; retainer, legal and forensic resources; funding; conflicts of interest; and the plaintiff and defendant correlation. There was little difference among the law firms in terms of their suitability for bringing a proposed class action against Sino-Forest. The fact that the three institutional candidates for representative plaintiffs in Northwest v. Sino-Forest made their investments on behalf of others did not create a conflict of interest. Nor did allegations that they, having been involved in corporate governance matters associated with Sino-Forest, failed to properly evaluate the risks of investing in it. There was no conflict of interest based on the fact that Labourers' auditor was an international associate of a defendant. There was no conflict of interest between the bondholders and shareholders merely because the bondholders, unlike the shareholders, also had a cause in action in debt.

Statutes, Regulations and Rules Cited:

Act Respecting the Distribution of Financial Products and Services, R.S.Q., chapter D-9.2,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50(14)

Canada Business Corporations Act, R.S.C. 1985, c. C-44,

Class Proceedings Act, 1982, S.O. 1992, c. 6, s. 12, s. 13, s. 35

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2)

Courts of Justice Act, R.S.O. 1990, c. 43, s. 138

National Instrument 51-102,

Ontario Securities Act, R.S.O. 1990, c. S.5, s. 1(1), s. 138.1, s. 138.5, s. 138.14, Part XVIII, Part XXIII, Part XXIII.1, Part XXX.1

Private Securities Litigation Reform Act of 1995 (U.S.),

Public Sector Pension Plans Act,

Rules of Civil Procedure, S.O. 1992, c. 6, Rule 1.04, Rule 6

Counsel:

J.P. Rochon, J. Archibald and S. Tambakos, for the Plaintiffs in 11-CV-428238CP.

K.M. Baert, J. Bida, and C.M. Wright for the Plaintiffs in 11-CV-431153CP.

J.C. Orr, V. Paris, N. Mizobuchi, and A. Erfan for the Plaintiffs in 11-CV-435826CP.

M. Eizenga, for the defendant Sino-Forest Corporation.

P. Osborne and S. Roy, for the defendant Ernst & Young LLP.

E. Cole, for the defendant Allen T.Y. Chan.

J. Fabello, for the defendant underwriters.

[Editor's note: A corrigendum was released by the Court January 27, 2012; the corrections have been made to the text and the corrigendum is appended to this document.]

REASONS FOR DECISION

P.M. PERELL J.:--

A. INTRODUCTION

1 This is a carriage motion under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. In this particular carriage motion, four law firms are rivals for the carriage of a class action against Sino-Forest Corporation. There are currently four proposed Ontario class actions against Sino-Forest to recover losses alleged to be in the billions of dollars arising from the spectacular crash in value of its shares and notes.

2 Practically speaking, carriage motions involve two steps. First, the rival law firms that are seeking carriage of a class action extoll their own merits as class counsel and the merits of their client as the representative plaintiff. During this step, the law firms explain their tactical and strategic plans for the class action, and, thus, a carriage motion has aspects of being a casting call or rehearsal for the certification motion.

3 Second, the rival law firms submit that with their talent and their litigation plan, their class action is the better way to serve the best interests of the class members, and, thus, the court should

choose their action as the one to go forward. No doubt to the delight of the defendants and the defendants' lawyers, which have a watching brief, the second step also involves the rivals hardheartedly and toughly reviewing and criticizing each other's work and pointing out flaws, disadvantages, and weaknesses in their rivals' plans for suing the defendants.

4 The law firms seeking carriage are: Rochon Genova LLP; Koskie Minsky LLP; Siskinds LLP; and Kim Orr Barristers P.C., all competent, experienced, and veteran class action law firms.

5 For the purposes of deciding the carriage motions, I will assume that all of the rivals have delivered their Statements of Claim as they propose to amend them.

6 Koskie Minsky and Siskinds propose to act as co-counsel and to consolidate two of the actions. Thus, the competition for carriage is between three proposed class actions; namely:

* *Smith v. Sino-Forest Corp.* (11-CV-428238CP) ("*Smith v. Sino-Forest*") with Rochon Genova as Class Counsel
* *The Trustees of Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.* (11-CV-431153CP) ("*Labourers v. Sino-Forest*") with Koskie Minsky and Siskinds as Class Counsel (This action would be consolidated with "*Grant. v. Sino Forest*" (CV-11-439400-00CP)
* *Northwest & Ethical Investments L.P. v. Sino-Forest Corp.* (11-CV-435826CP) ("*Northwest v. Sino-Forest*") with Kim Orr as Class Counsel.

7 It has been a very difficult decision to reach, but for the reasons that follow, I stay *Smith v. Sino-Forest* and *Northwest v. Sino-Forest,* and I grant carriage to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest.*

8 I also grant leave to the plaintiffs in *Labourers v. Sino-Forest* to deliver a Fresh as Amended Statement of Claim, which may include the joinder of the plaintiffs and the causes of action set out in *Grant v. Sino-Forest, Smith v. Sino-Forest,* and *Northwest v. Sino-Forest,* as the plaintiffs may be advised.

9 This order is without prejudice to the rights of the Defendants to challenge the Fresh as Amended Statement of Claim as they may be advised. In any event, nothing in these reasons is intended to make findings of fact or law binding on the Defendants or to be a pre-determination of the certification motion.

B. METHODOLOGY

10 To explain my reasons, first, I will describe the jurisprudence about carriage motions. Second, I will describe the evidentiary record for the carriage motions. Third, I will describe the factual background to the claims against Sino-Forest, which is the principal but not the only target of the various class actions. Fourth, deferring my ultimate conclusions, I will analyze the rival actions that are competing for carriage under twelve headings and describe the positions and competing arguments of the law firms competing for carriage. Fifth, I will culminate the analysis of the competing actions by explaining the carriage order decision. Sixth and finally, I will finish with a concluding section.

11 Thus, the organization of these Reasons for Decision is as follows:

* Introduction
* Methodology
* Carriage Orders Jurisprudence
* Evidentiary Background
* Factual Background to the Claims against Sino-Forest
* Analysis of the Competing Class Actions

    * The Attributes of Class Counsel
    * Retainer, Legal and Forensic Resources, and Investigations
    * Proposed Representative Plaintiffs
    * Funding
    * Conflicts of Interest
    * Definition of Class Membership
    * Definition of Class Period
    * Theory of the Case against the Defendants
    * Joinder of Defendants
    * Causes of Action
    * The Plaintiff and the Defendant Correlation
    * Prospects of Certification

* Carriage Order

    * Introduction
    * Neutral or Non-Determinative Factors
    * Determinative Factors

* Conclusion

C. CARRIAGE ORDERS JURISPRUDENCE

12 There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 14. See also *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (S.C.J.), aff'd [2002] O.J. No. 2010 (C.A.). When counsel have not agreed to consolidate and coordinate their actions, the court will usually select one and stay all other actions: *Lau* v. *Bayview Landmark,* [2004] O.J. No. 2788 (S.C.J.) at para. 19.

13 Where two or more class proceedings are brought with respect to the same subject matter, a proposed representative plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject matter: *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at paras. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.).

14 The *Class Proceedings Act, 1992,* confers upon the court a broad discretion to manage the proceedings. Section 13 of the Act authorizes the court to "stay any proceeding related to the class proceeding," and s. 12 authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Section 138 of

the *Courts of Justice Act*, R.S.O. 1990, c. 43 directs that "as far as possible, multiplicity of legal proceedings shall be avoided." See: *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at paras. 9-11.

15 The court also has its normal jurisdiction under the *Rules of Civil Procedure*. Section 35 of the *Class Proceedings Act, 1992,* provides that the rules of court apply to class proceedings. Among the rules that are available is Rule 6, the rule that empowers the court to consolidate two or more proceedings or to order that they be heard together.

16 In determining carriage of a class proceeding, the court's objective is to make the selection that is in the best interests of class members, while at the same time being fair to the defendants and being consistent with the objectives of the *Class Proceedings Act, 1992*: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 48; *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at para. 13 (S.C.J.); *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.) at para. 14. The objectives of a class proceeding are access to justice, behaviour modification, and judicial economy for the parties and for the administration of justice.

17 Courts generally consider seven non-exhaustive factors in determining which action should proceed: (1) the nature and scope of the causes of action advanced; (2) the theories advanced by counsel as being supportive of the claims advanced; (3) the state of each class action, including preparation; (4) the number, size and extent of involvement of the proposed representative plaintiffs; (5) the relative priority of the commencement of the class actions; (6) the resources and experience of counsel; and (7) the presence of any conflicts of interest: *Sharma v. Timminco Ltd.*, *supra* at para. 17.

18 In these reasons, I will examine the above factors under somewhat differently-named headings and in a different order and combination. And, I will add several more factors that the parties made relevant to the circumstances of the competing actions in the cases at bar, including: (a) funding; (b) definition of class membership; (c) definition of class period; (d) joinder of defendants; (e) the plaintiff and defendant correlation; and, (f) prospects of certification.

19 In addition to identifying relevant factors, the carriage motion jurisprudence provides guidance about how the court should determine carriage. Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class: *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), sub. nom *Mignacca v. Merck Frosst Canada Ltd.*, leave to appeal granted [2008] O.J. No. 4731 (S.C.J.), aff'd [2009] O.J. No. 821 (Div. Ct.), application for leave to appeal to C.A. ref'd May 15, 2009, application for leave to appeal to S.C.C. ref'd [2009] S.C.C.A. No. 261.

20 On a carriage motion, it is inappropriate for the court to embark upon an analysis as to which claim is most likely to succeed unless one is "fanciful or frivolous": *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at para. 19.

21 In analysing whether the prohibition against a multiplicity of proceedings would be offended, it is not necessary that the multiple proceedings be identical or mirror each other in every respect; rather, the court will look at the essence of the proceedings and their similarities: *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at para. 11.

22 Where there is a competition for carriage of a class proceeding, the circumstance that one competitor joins more defendants is not determinative; rather, what is important is the rationale for the joinder and whether or not it is advantageous for the class to join the additional defendants: *Joel v Menu Foods Gen-Par Limited*, [2007] B.C.J. No. 2159 (B.C.S.C.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd., supra.*

23 In determining which firm should be granted carriage of a class action, the court may consider whether there is any potential conflict of interest if carriage is given to one counsel as opposed to others: *Joel v. Menu Foods Gen-Par Limited, supra* at para. 16; *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) and [2001] O.J. No. 3673 (S.C.J.).

D. EVIDENTIARY BACKGROUND

Smith v. Sino-Forest

24 In support of its carriage motion in *Smith v. Sino-Forest*, Rochon Genova delivered affidavits from:

* Ken Froese, who is Senior Managing Director of Froese Forensic Partners Ltd., a forensic accounting firm
* Vincent Genova, who is the managing partner of Rochon Genova
* Douglas Smith, the proposed representative plaintiff

Labourers v. Sino-Forest

25 In support of their carriage motion in *Labourers v. Sino-Forest,* Koskie Minsky and Siskinds delivered affidavits from:

* Dimitri Lascaris, who is a partner at Siskinds and the leader of its class action team
* Michael Gallagher, who is the Chair of the Board of Trustees of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario ("Operating Engineers Fund"), a proposed representative plaintiff
* David Grant, a proposed representative plaintiff
* Richard Grottheim, who is the Chief Executive Officer of Sjunde AP-Fonden, a proposed representative plaintiff
* Joseph Mancinelli, who is the Chair of the Board of Trustees of The Trustees of the Labourers' Pension Fund of Central and Eastern Canada ("Labourers' Fund"), a proposed representative plaintiff. He also holds senior positions with the Labourers International Union of North America, which has more than 80,000 members in Canada
* Ronald Queck, who is Director of Investments of the Healthcare Employee Benefits Plans of Manitoba ("Healthcare Manitoba"), which would be a prominent class member in the proposed class action
* Frank Torchio, who is a chartered financial analyst and an expert in finance and economics who was retained to opine, among other things, about the damages suffered under various proposed class periods by Sino-Forest shareholders and noteholders under s. 138.5 of the *Ontario Securities Act*

* Robert Wong, who is a proposed representative plaintiff
* Mark Zigler, who is the managing partner of Koskie Minsky

Northwest v. Sino-Forest

26 In support of its carriage motion in *Northwest v. Sino-Forest*, Kim Orr delivered affidavits from:

* Megan B. McPhee, a principal of the firm
* John Mountain, who is the Senior Vice President, Legal and Human Resources, the Chief Compliance Officer and Corporate Secretary of Northwest Ethical Investments L.P. ("Northwest"), a proposed representative plaintiff
* Zachary Nye, a financial economist who was retained to respond to Mr. Torchio's opinion
* Daniel Simard, who is General Co-Ordinator and a non-voting ex-officio member of the Board of Directors and Committees of Comité syndical national de retraite Bâtirente inc. ("Bâtirente"), a proposed representative plaintiff
* Michael C. Spencer, a lawyer qualified to practice in New York, California, and Ontario, who is counsel to Kim Orr and a partner and member of the executive committee at the American law firm of Milberg LLP
* Brian Thomson, who is Vice-President, Equity Investments for British Columbia Investment Management Corporation ("BC Investment"), a proposed representative plaintiff

E. FACTUAL BACKGROUND TO THE CLAIMS AGAINST SINO-FOREST

27 The following factual background is largely an amalgam made from the unproven allegations in the Statements of Claim in the three proposed class actions and unproven allegations in the motion material delivered by the parties.

28 The Defendant, Sino-Forest is a Canadian public company incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 with its registered office in Mississauga, Ontario, and its head office in Hong Kong. Its shares have traded on the Toronto Stock Exchange ("TSX") since 1995. It is a forestry plantation company with operations centered in the People's Republic of China. Its trading of securities is subject to the regulation of the *Ontario Securities Act,* R.S.O. 1990, c. S.5, under which it is a "reporting issuer" subject to the continuous disclosure provisions of Part XVIII of the Act and a "responsible issuer" subject to civil liability for secondary market misrepresentation under Part XXIII.1 of the Act.

29 The Defendant, Ernst & Young LLP ("E&Y") has been Sino-Forest's auditor from 1994 to date, except for 1999, when the now-defunct Arthur Andersen LLP did the audit, and 2005 and 2006, when the predecessor of what is now the Defendant, BDO Limited ("BDO") was Sino-Forest's auditor. BDO is the Hong Kong member of BDO International Ltd., a global accounting and audit firm.

30 E&Y and BDO are "experts" within the meaning of s. 138.1 of the *Ontario Securities Act.*

31 From 1996 to 2010, in its financial statements, Sino-Forest reported only profits, and it appeared to be an enormously successful enterprise that substantially outperformed its competitors in the forestry industry. Sino-Forest's 2010 Annual Report issued in May 2011 reported that Si-

no-Forest had net income of $395 million and assets of $5.7 billion. Its year-end market capitalization was $5.7 billion with approximately 246 million common shares outstanding.

32 It is alleged that Sino-Forest and its auditors E&Y and BDO repeatedly misrepresented that Sino-Forest's financial statements complied with GAAP ("generally accepted accounting principles").

33 It is alleged that Sino-Forest and its officers and directors made other misrepresentations about the assets, liabilities, and performance of Sino-Forest in various filings required under the *Ontario Securities Act*. It is alleged that these misrepresentations appeared in the documents used for the offerings of shares and bonds in the primary market and again in what are known as Core Documents under securities legislation, which documents are available to provide information to purchasers of shares and bonds in the secondary market. It is also alleged that misrepresentations were made in oral statements and in Non-Core Documents.

34 The Defendant, Allen T.Y. Chan was Sino-Forest's co-founder, its CEO, and a director until August 2011. He resides in Hong Kong.

35 The Defendant, Kai Kit Poon, was Sino-Forest's co-founder, a director from 1994 until 2009, and Sino-Forest's President. He resides in Hong Kong.

36 The Defendant, David J. Horsley was a Sino-Forest director (from 2004 to 2006) and was its CFO. He resides in Ontario.

37 The Defendants, William E. Ardell (resident of Ontario, director since 2010), James P. Bowland (resident of Ontario, director since 2011), James M.E. Hyde (resident of Ontario, director since 2004), John Lawrence (resident of Ontario, deceased, director 1997 to 2006), Edmund Mak (resident of British Columbia, director since 1994), W. Judson Martin (resident of Hong Kong, director since 2006, CEO since August 2011), Simon Murray (resident of Hong Kong, director since 1999), Peter Wang (resident of Hong Kong, director since 2007) and Garry J. West (resident of Ontario, director since 2011) were members of Sino-Forest's Board of Directors.

38 The Defendants, Hua Chen (resident of Ontario), George Ho (resident of China), Alfred C.T. Hung (resident of China), Alfred Ip (resident of China), Thomas M. Maradin (resident of Ontario), Simon Yeung (resident of China) and Wei Mao Zhao (resident of Ontario) are vice presidents of Sino-Forest. The defendant Kee Y. Wong was CFO from 1999 to 2005.

39 Sino-Forest's forestry assets were valued by the Defendant, Pöyry (Beijing) Consulting Company Limited, ("Pöyry"), a consulting firm based in Shanghai, China. Associated with Pöyry are the Defendants, Pöyry Forest Industry PTE Limited ("Pöyry-Forest") and JP Management Consulting (Asia-Pacific) PTE Ltd. ("JP Management"). Each Pöyry Defendant is an expert as defined by s. 138.1 of the *Ontario Securities Act*.

40 Pöyry prepared technical reports dated March 8, 2006, March 15, 2007, March 14, 2008, April 1, 2009, and April 23, 2010 that were filed with SEDAR (the System of Electronic Document Analysis and Retrieval) and made available on Sino-Forest's website. The reports contained a disclaimer and a limited liability exculpatory provision purporting to protect Pöyry from liability.

41 In China, the state owns the forests, but the Chinese government grants forestry rights to local farmers, who may sell their lumber rights to forestry companies, like Sino-Forest. Under Chinese law, Sino-Forest was obliged to maintain a 1:1 ratio between lands for forest harvesting and lands for forest replantation.

42 Sino-Forest's business model involved numerous subsidiaries and the use of authorized intermediaries or "AIs" to assemble forestry rights from local farmers. Sino-Forest also used authorized intermediaries to purchase forestry products. There were numerous AIs, and by 2010, Sino-Forest had over 150 subsidiaries, 58 of which were formed in the British Virgin Islands and at least 40 of which were incorporated in China.

43 It is alleged that from at least March 2003, Sino-Forest used its business model and non-arm's length AIs to falsify revenues and to facilitate the misappropriation of Sino-Forest's assets.

44 It is alleged that from at least March 2004, Sino-Forest made false statements about the nature of its business, assets, revenue, profitability, future prospects, and compliance with the laws of Canada and China. It is alleged that Sino-Forest and other Defendants misrepresented that Sino-Forest's financial statements complied with GAPP ("generally accepted accounting principles"). It is alleged that Sino-Forest misrepresented that it was an honest and reputable corporate citizen. It is alleged that Sino-Forest misrepresented and greatly exaggerated the nature and extent of its forestry rights and its compliance with Chinese forestry regulations. It is alleged that Sino-Forest inflated its revenue, had questionable accounting practices, and failed to pay a substantial VAT liability. It is alleged that Sino-Forest and other Defendants misrepresented the role of the AIs and greatly understated the risks of Sino-Forest utilizing them. It is alleged that Sino-Forest materially understated the tax-related risks from the use of AIs in China, where tax evasion penalties are severe and potentially devastating.

45 Starting in 2004, Sino-Forest began a program of debt and equity financing. It amassed over $2.1 billion from note offerings and over $906 million from share issues.

46 On May 17, 2004, Sino-Forest filed its Annual Information Form for the 2003 year. It is alleged in *Smith v. Sino-Forest* that the 2003 AIF contains the first misrepresentation in respect of the nature and role of the authorized intermediaries, which allegedly played a foundational role in the misappropriation of Sino-Forest's assets.

47 In August 2004, Sino-Forest issued an offering memorandum for the distribution of 9.125% guaranteed senior notes ($300 million (U.S.)). The Defendant, Morgan Stanley & Co. Incorporated ("Morgan") was a note distributor that managed the note offering in 2004 and purchased and resold notes.

48 Under the Sino-Forest note instruments, in the event of default, the trustee may sue to collect payment of the notes. A noteholder, however, may not pursue any remedy with respect to the notes unless, among other things, written notice is given to the trustee by holders of 25% of the outstanding principal asking the trustee to pursue the remedy and the trustee does not comply with the request. The notes provide that no noteholder shall obtain a preference or priority over another noteholder. The notes contain a waiver and release of Sino-Forest's directors, officers, and shareholders from all liability "for the payment of the principal of, or interest on, or other amounts in respect of the notes or for any claim based thereon or otherwise in respect thereof." The notes are all governed by New York law and include non-exclusive attornment clauses to the jurisdiction of New York State and United States federal courts.

49 On March 19, 2007, Sino-Forest announced its 2006 financial results. The appearance of positive results caused a substantial increase in its share price which moved from $10.10 per share to $13.42 per share ten days later, a 33% increase.

50 In May 2007, Sino-Forest filed a Management Information Circular that represented that it maintained a high standard of corporate governance. It indicated that its Board of Directors made compliance with high governance standards a top priority.

51 In June 2007, Sino-Forest made a share prospectus offering of 15.9 million common shares at $12.65 per share ($201 million offering). Chan, Horsley, Martin, and Hyde signed the prospectus. The underwriters (as defined by s. 1. (1) of the *Ontario Securities Act*) were the Defendants, CIBC World Markets Inc. ("CIBC"), Credit Suisse Securities Canada (Inc.) ("Credit Suisse"), Dundee Securities Corporation ("Dundee"), Haywood Securities Inc. ("Haywood"), Merrill Lynch Canada, Inc. ("Merrill") and UBS Securities Canada Inc. ("UBS").

52 In July 2008, Sino-Forest issued a final offering memorandum for the distribution of 5% convertible notes ($345 million (U.S)) due 2013. The Defendants, Credit Suisse Securities (USA), LLC ("Credit Suisse (USA)"), and Merrill Lynch, Fenner & Smith Inc. ("Merrill-Fenner") were note distributors.

53 In June 2009, Sino-Forest made a share prospectus offering of 34.5 million common shares at $11.00 per share ($380 million offering). Chan, Horsley, Martin, and Hyde signed the prospectus. The underwriters (as defined by s. 1. (1) of the *Ontario Securities Act*) were Credit Suisse, Dundee, Merrill, the Defendant, Scotia Capital Inc. ("Scotia"), and the Defendant, TD Securities Inc. ("TD").

54 In June 2009, Sino-Forest issued a final offering memorandum for the exchange of senior notes for new guaranteed senior 10.25% notes ($212 million (U.S.) offering) due 2014. Credit Suisse (USA) was the note distributor.

55 In December 2009, Sino-Forest made a share prospectus offering of 22 million common shares at $16.80 per share ($367 million offering). Chan, Horsley, Martin, and Hyde signed the prospectus. The underwriters (as defined by s. 1. (1) of the *Ontario Securities Act*) were Credit Suisse, the Defendant, Canaccord Financial Ltd. ("Canaccord"), CIBC, Dundee, the Defendant, Maison Placements Canada Inc. ("Maison"), Merrill, the Defendant, RBC Dominion Securities Inc. ("RBC"), Scotia, and TD.

56 In December 2009, Sino-Forest issued an offering memorandum for 4.25% convertible senior notes ($460 million (U.S.) offering) due 2016. The note distributors were Credit Suisse (USA), Merrill-Fenner, and TD.

57 In October 2010, Sino-Forest issued an offering memorandum for 6.25% guaranteed senior notes ($600 million (U.S.) offering) due 2017. The note distributors were Banc of America Securities LLC ("Banc of America") and Credit Suisse USA.

58 Sino-Forest's per-share market price reached a high of $25.30 on March 31, 2011.

59 It is alleged that all the financial statements, prospectuses, offering memoranda, MD&As (Management Discussion and Analysis), AIFs (Annual Information Forms) contained misrepresentations and failures to fully, fairly, and plainly disclose all material facts relating to the securities of Sino-Forest, including misrepresentations about Sino-Forest's assets, its revenues, its business activities, and its liabilities.

60 On June 2, 2011, Muddy Waters Research, a Hong Kong investment firm that researches Chinese businesses, released a research report about Sino-Forest. Muddy Waters is operated by Carson Block, its sole full-time employee. Mr. Block was a short-seller of Sino-Forest stock. His Report alleged that Sino-Forest massively exaggerates its assets and that it had engaged in extensive

related-party transactions since the company's TSX listing in 1995. The Report asserted, among other allegations, that a company-reported sale of $231 million in timber in Yunnan Province was largely fabricated. It asserted that Sino-Forest had overstated its standing timber purchases in Yunnan Province by over $800 million.

61 The revelations in the Muddy Waters Report had a catastrophic effect on Sino-Forest's share price. Within two days, $3 billion of market capitalization was gone and the market value of Sino-Forest's notes plummeted.

62 Following the release of the Muddy Waters Report, Sino-Forest and certain of its officers and directors released documents and press releases and made public oral statements in an effort to refute the allegations in the Report. Sino-Forest promised to produce documentation to counter the allegations of misrepresentations. It appointed an Independent Committee of Messrs. Ardell, Bowland and Hyde to investigate the allegations contained in the Muddy Waters Report. After these assurances, Sino-Forest's share price rebounded, trading as high as 60% of its previous day's close, eventually closing on June 6, 2011 at $6.16, approximately 18% higher from its previous close.

63 On June 7, the Independent Committee announced that it had appointed Pricewaterhouse-Coopers ("PWC") to assist with the investigation. Several law firms were also hired to assist in the investigation.

64 However, bad news followed. Reporters from the *Globe and Mail* travelled to China, and on June 18 and 20, 2011, the newspaper published articles that reported that Yunnan Province forestry officials had stated that their records contradicted Sino-Forest's claim that it controlled almost 200,000 hectares in Yunnan Province.

65 On August 26, 2011, the Ontario Securities Commission ("OSC") issued an order suspending trading in Sino-Forest's securities and stated that: (a) Sino-Forest appears to have engaged in significant non-arm's length transactions that may have been contrary to Ontario securities laws and the public interest; (b) Sino-Forest and certain of its officers and directors appear to have misrepresented in a material respect, some of its revenue and/or exaggerated some of its timber holdings in public filings under the securities laws; and (c) Sino-Forest and certain of its officers and directors, including its CEO, appear to be engaging or participating in acts, practices or a course of conduct related to its securities which it and/or they know or reasonably ought to know perpetuate a fraud.

66 The OSC named Chan, Ho, Hung, Ip, and Yeung as respondents in the proceedings before the Commission. Sino-Forest placed Messrs. Hung, Ho and Yeung on administrative leave. Mr. Ip may only act on the instructions of the CEO.

67 Having already downgraded its credit rating for Sino-Forest's securities, Standard & Poor withdrew its rating entirely, and Moody's reduced its rating to "junk" indicating a very high credit risk.

68 On September 8, 2011, after a hearing, the OSC continued its cease-trading order until January 25, 2012, and the OSC noted the presence of evidence of conduct that may be harmful to investors and the public interest.

69 On November 10, 2011, articles in the *Globe and Mail* and the *National Post* reported that the RCMP had commenced a criminal investigation into whether executives of Sino-Forest had defrauded Canadian investors.

70 On November 13, 2011, at a cost of $35 million, Sino-Forest's Independent Committee released its Second Interim Report, which included the work of the committee members, PWC, and three law firms. The Report refuted some of the allegations made in the Muddy Waters Report but indicated that evidence could not be obtained to refute other allegations. The Committee reported that it did not detect widespread fraud, and noted that due to challenges it faced, including resistance from some company insiders, it was not able to reach firm conclusions on many issues.

71 On December 12, 2011, Sino-Forest announced that it would not file its third-quarter earnings' figures and would default on an upcoming interest payment on outstanding notes. This default may lead to the bankruptcy of Sino-Forest.

72 The chart attached as Schedule "A" to this judgment shows Sino-Forest's stock price on the TSX from January 1, 2004, to the date that its shares were cease-traded on August 26, 2011.

F. ANALYSIS OF THE COMPETING CLASS ACTIONS

1. The Attributes of Class Counsel

Smith v. Sino-Forest

73 Rochon Genova is a boutique litigation firm in Toronto focusing primarily on class action litigation, including securities class actions. It is currently class counsel in the CIBC subprime litigation, which seeks billions in damages on behalf of CIBC shareholders for the bank's alleged non-disclosure of its exposure to the U.S. subprime residential mortgage market. It is currently the lawyer of record in *Fischer v. IG Investment Management Ltd* and *Frank v. Farlie Turner,* [2011] O.J. No. 5567, both securities cases, and it is acting for aggrieved investors in litigation involving two multi-million dollar Ponzi schemes. It acted on behalf of Canadian shareholders in relation to the Nortel securities litigation, as well as, large scale products liability class actions involving Baycol, Prepulsid, and Maple Leaf Foods, among many other cases.

74 Rochon Genova has a working arrangement with Lieff Cabrasser Heimann & Bernstein, one of the United States' leading class action firms.

75 Lead lawyers for *Smith v. Sino-Forest* are Joel Rochon and Peter Jervis, both senior lawyers with considerable experience and proficiency in class actions and securities litigation.

Labourers v. Sino-Forest

76 Koskie Minsky is a Toronto law firm of 43 lawyers with a diverse practice including bankruptcy and insolvency, commercial litigation, corporate and securities, taxation, employment, labour, pension and benefits, professional negligence and insurance litigation.

77 Koskie Minsky has a well-established and prominent class actions practice, having been counsel in every sort of class proceeding, several of them being landmark cases, including *Hollick v Toronto (City), Cloud v The Attorney General of Canada,* [2004] O.J. No. 4924, and *Caputo v Imperial Tobacco*. It is currently representative counsel on behalf of all former Canadian employees in the multi-billion dollar Nortel insolvency.

78 Siskinds is a London and Toronto law firm of 70 lawyers with a diverse practice including bankruptcy and insolvency, business law, and commercial litigation. It has an association with the Québec law firm Siskinds, Desmeules, avocats.

79 At its London office, Siskinds has a team of 14 lawyers that focus their practice on class actions, in some instances exclusively. The firm has a long and distinguished history at the class actions bar, being class counsel in the first action certified as a class action, *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, and it has almost a monopoly on securities class actions, having filed approximately 40 of this species of class actions, including 24 that advance claims under Part XXX.1 of the *Ontario Securities Act.*

80 As mentioned again later, for the purposes of *Labourers' Fund v. Sino-Forest*, Koskie Minsky and Siskinds have a co-operative arrangement with the U.S. law firm, Kessler Topaz Meltzer & Check LLP ("Kessler Topaz"), which is a 113-lawyer law firm specializing in complex litigation with a very high profile and excellent reputation as counsel in securities class action lawsuits in the United States.

81 Lead lawyers for *Labourers' v. Sino-Forest* are Kirk M. Baert, Jonathan Ptak, Mark Ziegler, and Michael Mazzuca of Koskie Minsky and A. Dimitri Lascaris of Siskinds, all senior lawyers with considerable experience and proficiency in class actions and securities litigation.

Northwest v. Sino-Forest

82 Kim Orr is a boutique litigation firm in Toronto focusing primarily on class action litigation, including securities class actions. It also has considerable experience on the defence side of defending securities cases.

83 As I described in *Sharma v. Timminco Ltd., supra*, where I choose Kim Orr in a carriage competition with Siskinds in a securities class action, Kim Orr has a fine pedigree as a class action firm and its senior lawyers have considerable experience and proficiency in all types of class actions. It was comparatively modest in its self-promotional material for the carriage motion, but I am aware that it is currently class counsel in substantial class actions involving claims of a similar nature to those in the case at bar.

84 Kim Orr has an association with Milberg, LLP, a prominent class action law firm in the United States. It has 75 attorneys, most of whom devote their practice to representing plaintiffs in complex litigations, including class and derivative actions. It has a large support staff, including investigators, a forensic accountant, financial analysts, legal assistants, litigation support analysts, shareholder services personnel, and information technology specialists.

85 Michael Spencer, who is a partner at Milberg and called to the bar in Ontario, offers counsel to Kim Orr.

86 Lead lawyers for *Northwest v. Sino-Forest* are James Orr, Won Kim, and Mr. Spencer.

2. Retainer, Legal and Forensic Resources, and Investigations

Smith v. Sino-Forest

87 Following the release of the Muddy Waters Report, on June 6, 2011, Mr. Smith contacted Rochon Genova. Mr. Smith, who lost much of his investment fortune, was one of the victims of the wrongs allegedly committed by Sino-Forest. Rochon Genova accepted the retainer, and two days later, a notice of action was issued. The Statement of Claim in *Smith v. Sino-Forest* followed on July 8, 2011.

88 Following their retainer by Mr. Smith, Rochon Genova hired Mr. X (his name was not disclosed), as a consultant. Mr. X, who has an accounting background, can fluently read, write, and

speak English, Cantonese, and Mandarin. He travelled to China from June 19 to July 3, 2011and again from October 31 to November 18, 2011. The purpose of the trips was to gather information about Sino-Forest's subsidiaries, its customers, and its suppliers. While in China, Mr. X secured approximately 20,000 pages of filings by Sino-Forest with the provincial branches of China's State Administration for Industry and Commerce (the "SAIC Files").

89 In August 2011, Rochon Genova retained Froese Forensic Partners Ltd., a Toronto-based forensic accounting firm, to analyze the SAIC files.

90 Rochon Genova also retained HAIBU Attorneys at Law, a full service law firm based in Shenzhen, Guangdong Province, China, to provide a preliminary opinion about Sino-Forest's alleged violations of Chinese accounting and taxation laws.

91 Exclusive of the carriage motion, Rochon Genova has already incurred approximately $350,000 in time and disbursements for the proposed class action.

Labourers v. Sino-Forest

92 On June 3, 2011, the day after the release of the Muddy Waters Report, Siskinds retained the Dacheng Law Firm in China to begin an investigation of the allegations contained in the report. Dacheng is the largest law firm in China with offices throughout China and Hong Kong and also offices in Los Angeles, New York, Paris, Singapore, and Taiwan.

93 On June 9, 2011, Guining Liu, a Sino-Forest shareholder, commenced an action in the Québec Superior Court on behalf of persons or entities domiciled in Québec who purchased shares and notes. Siskinds' Québec affiliate office, Siskinds, Desmeules, avocats, is acting as class counsel in that action.

94 On June 20, 2011, Koskie Minsky, which had a long standing lawyer-client relationship with the Labourers' Fund, was retained by it to recover its losses associated with the plummet in value of its holdings in Sino-Forest shares. Koskie Minsky issued a notice of action in a proposed class action with Labourers' Fund as the proposed representative plaintiffs.

95 The June action, however, is not being pursued, and in July 2011, Labourers' Fund was advised that Operating Engineers Fund, another pension fund, also had very significant losses, and the two funds decided to retain Koskie Minsky and Siskinds to commence a new action, which followed on July 20, 2011, by notice of action. The Statement of Claim in *Labourers v. Sino-Forest* was served in August, 2011.

96 Before commencing the new action, Koskie Minsky and Siskinds retained private investigators in Southeast Asia and received reports from them, along with information received from the Dacheng Law Firm. Koskie Minsky and Siskinds also received information from an unnamed expert in Suriname about the operations of Sino-Forest in Suriname and the role of Greenheart Group Ltd., which is a significant aspect of its Statement of Claim in *Labourers v. Sino-Forest.*

97 On November 4, 2011, Koskie Minsky and Siskinds served the Defendants in *Labourers v. Sino-Forest* with the notice of motion for an order granting leave to assert the causes of action under Part XXIII.1 of the *Ontario Securities Act.*

98 On October 26, 2011, Robert Wong, who had lost a very large personal investment in Sino-Forest shares, retained Koskie Minsky and Siskinds to sue Sino-Forest for his losses, and the firms decided that he would become another representative plaintiff.

99 On November 14, 2011, Koskie Minsky and Siskinds commenced *Grant v. Sino-Forest Corp.*, which, as already noted above, they intend to consolidate with *Labourers v. Sino-Forest.*

100 *Grant v. Sino-Forest* names the same defendants as in *Labourers v. Sino-Forest,* except for the additional joinder of Messrs. Bowland, Poon, and West, and it also joins as defendants, BDO, and two additional underwriters, Banc of America and Credit Suisse Securities (USA).

101 Koskie Minsky and Siskinds state that *Grant v. Sino-Forest* was commenced out of an abundance of caution to ensure that certain prospectus and offering memorandum claims under the *Ontario Securities Act,* and under the equivalent legislation of the other Provinces, will not expire as being statute-barred.

102 Exclusive of the carriage motion, Koskie Minsky has already incurred approximately $350,000 in time and disbursements for the proposed class action, and exclusive of the carriage motion, Siskinds has already incurred approximately $440,000 in time and disbursements for the proposed class action.

Northwest v. Sino-Forest

103 Immediately following the release of the Muddy Waters Report, Kim Orr and Milberg together began an investigation to determine whether an investor class action would be warranted. A joint press release on June 7, 2011, announced the investigation.

104 For the purposes of the carriage motion, apart from saying that their investigation included reviewing all the documents on SEDAR and the System for Electronic Disclosure for Insiders (SEDI), communicating with contacts in the financial industry, and looking into Sino-Forest's officers, directors, auditors, underwriters and valuation experts, Kim Orr did not disclose the details of its investigation. It did indicate that it had hired a Chinese forensic investigator and financial analyst, a market and damage consulting firm, Canadian forensic accountants, and an investment and market analyst and that its investigations discovered valuable information.

105 Meanwhile, lawyers at Milberg contacted Bâtirente, which was one of its clients and also a Sino-Forest shareholder, and Won Kim of Kim Orr contacted Northwest, another Sino-Forest shareholder. Bâtirente already had a retainer with Milberg to monitor its investment portfolio on an ongoing basis to detect losses due to possible securities violations.

106 Northwest and Bâtirente agreed to retain Kim Orr to commence a class action, and on September 26, 2011, Kim Orr commenced *Northwest v. Sino-Forest.*

107 In October 2011, BC Investments contacted Kim Orr about the possibility of it becoming a plaintiff in the class proceeding commenced by Northwest and Bâtirente, and BC Investments decided to retain the firm and the plan is that BC Investments is to become another representative plaintiff.

108 Exclusive of the carriage motion, Kim Orr and Milberg have already incurred approximately $1,070,000 in time and disbursement for the proposed class action.

3. Proposed Representative Plaintiffs

Smith v. Sino-Forest

109 In *Smith v. Sino-Forest*, the proposed representative plaintiffs are Douglas Smith and Frederick Collins.

110 Douglas Smith is a resident of Ontario, who acquired approximately 9,000 shares of Sino-Forest during the proposed class period. He is married, 48 years of age, and employed as a director of sales. He describes himself as a moderately sophisticated investor that invested in Sino-Forest based on his review of the publicly available information, including public reports and filings, press releases, and statements released by or on behalf of Sino-Forest. He lost $75,345, which was half of his investment fortune.

111 Frederick Collins is a resident of Nanaimo, British Columbia. He purchased shares in the primary market. His willingness to act as a representative plaintiff was announced during the reply argument of the second day of the carriage motion, and nothing was discussed about his background other than he is similar to Mr. Smith in being an individual investor. He was introduced to address a possible *Ragoonanan* problem in *Smith v. Sino-Forest;* namely, the absence of a plaintiff who purchased in the primary market, of which alleged problem I will have more to say about below.

Labourers v. Sino-Forest

112 In *Labourers v. Sino-Forest*, the proposed representative plaintiffs are: David Grant, Robert Wong, The Trustees of the Labourers' Pension Fund of Central and Eastern Canada ("Labourers' Fund"), the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario ("Operating Engineers Fund"), and Sjunde AP-Fonden.

113 David Grant is a resident of Alberta. On October 21, 2010, he purchased 100 Guaranteed Senior Notes of Sino-Forest at a price of $101.50 ($U.S.), which he continues to hold.

114 Robert Wong, a resident of Ontario, is an electrical engineer. He was born in China, and in addition to speaking English, he speaks fluent Cantonese. He was a substantial shareholder of Sino-Forest from July 2002 to June 2011. Before making his investment, he reviewed Sino-Forest's Core Documents, and he also made his own investigations, including visiting Sino-Forest's plantations in China in 2005, where he met a Sino-Forest vice-president.

115 Mr. Wong's investment in Sino-Forest comprised much of his net worth. In September 2008, he owned 1.4 million Sino-Forest shares with a value of approximately $26.1 million. He purchased more shares in the December 2009 prospectus offering. Around the end of May 2011, he owned 518,700 shares, which, after the publication of the Muddy Waters Report, he sold on June 3, 2011 and June 10, 2011, for $2.8 million.

116 The Labourers' Fund is a multi-employer pension fund for employees in the construction industry. It is registered with the Financial Services Commission in Ontario and has 52,100 members in Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador. It is a long-time client of Koskie Minsky.

117 Labourers' Fund manages more than $2.5 billion in assets. It has a fiduciary and statutory responsibility to invest pension monies on behalf of thousands of employees and pensioners in Ontario and in other provinces.

118 Labourer's Fund acted as representative plaintiff in a U.S. class actions against Fortis, Pitney Bowes Inc., Synovus Financial Corp., and Medea Health Solutions, Inc. Those actions involved allegations of misrepresentation in the statements and filings of public issuers.

119 The Labourers' Fund purchased Sino-Forest shares on the TSX during the class period, including 32,300 shares in a trade placed by Credit Suisse under a prospectus. Most of its purchases of Sino-Forest shares were made in the secondary market.

120 On June 1, 2011, the Labourers' Fund held a total of 128,700 Sino-Forest shares with a market value of $2.3 million, and it also had an interest in pooled funds that had $1.4 million invested in Sino-Forest shares. On June 2 and 3, 2011, the Labourers' Fund sold its holdings in Sino-Forest for a net recovery of $695,993.96. By June 30, 2011, the value of the Sino-Forest shares in the pooled funds was $291,811.

121 The Operating Engineers Fund is a multi-employer pension fund for employed operating engineers and apprentices in the construction industry. It is registered with the Financial Services Commission in Ontario, and it has 20,867 members. It is a long-time client of Koskie Minsky.

122 The Operating Engineers Fund manages $1.5 billion in assets. It has a fiduciary and statutory responsibility to invest pension monies on behalf of thousands of employees and pensions in Ontario and in other provinces.

123 The Operating Engineers Fund acquired shares of Sino-Forest on the TSX during the class period. The Operating Engineers Fund invested in Sino-Forest shares through four asset managers of a segregated fund. One of the managers purchased 42,000 Sino-Forest shares between February 1, 2011, and May 24, 2011, which had a market value of $764,820 at the close of trading on June 1, 2011. These shares were sold on June 21, 2011 for net $77,170.80. Another manager purchased 181,700 Sino-Forest shares between January 20, 2011 and June 1, 2011, which had a market value of $3.3 million at the close of trading on June 1, 2011. These shares were sold and the Operating Engineers Fund recovered $1.5 million. Another asset manager purchased 100,400 Sino-Forest shares between July 5, 2007 and May 26, 2011, which had a market value of $1.8 million at the close of trading on June 1, 2011. Many of these shares were sold in July and August, 2011, but the Operating Engineers Fund continues to hold approximately 37,350 shares. Between June 15, 2007 and June 9, 2011, the Operating Engineers Fund also purchased units of a pooled fund managed by TD that held Sino-Forest shares, and it continues to hold these units. The Operating Engineers Fund has incurred losses in excess of $5 million with respect to its investment in Sino-Forest shares.

124 Sjunde AP-Fonden is the Swedish Nation Pension Fund, and part of Sweden's national pension system. It manages $15.3 billion in assets. It has acted as lead plaintiff in a large securities class action and a large stockholder class action in the United States.

125 In addition to retaining Koskie Minsky and Siskinds, Sjunde AP-Fonden also retained the American law firm Kessler Topaz to provide assistance, if necessary, to Koskie Minsky and Siskinds.

126 Sjunde AP-Fonden purchased Sino-Forest shares on the TSX from outside Canada between April 2010 and January 2011. It was holding 139,398 shares with a value of $2.5 million at the close of trading on June 1, 2011. It sold 43,095 shares for $188,829.36 in August 2011 and holds 93,303 shares.

127 Sjunde AP-Fonden is prepared to be representative plaintiff for a sub-class of non-Canadian purchasers of Sino-Forest shares who purchased shares in Canada from outside of Canada.

128 Messrs. Mancinelli, Gallagher, and Grottheim each deposed that Labourers' Fund, the Operating Engineers Fund, and Sjunde AP-Fonden respectively sued because of their losses and because of their concerns that public markets remain healthy and transparent.

129 Although it does not seek to be a representative plaintiff, the Healthcare Employee Benefits Plans of Manitoba ("Healthcare Manitoba") is a major class member that supports carriage being granted to Koskie Minsky and Siskinds, and its presence should also be mentioned here because it actively supports the appointment of the proposed representative plaintiffs in *Labourers v. Sino-Forest.*

130 Healthcare Manitoba provides pensions and other benefits to eligible healthcare employees and their families throughout Manitoba. It has 65,000 members. It is a long-time client of Koskie Minsky. It manages more than $3.9 billion in assets.

131 Healthcare Manitoba, invested in Sino-Forest shares that were purchased by one of its asset managers in the TSX secondary market. Between February and May, 2011, it purchased 305,200 shares with a book value of $6.7 million. On June 24, 2011, the shares were sold for net proceeds of $560,775.48.

Northwest v. Sino-Forest

132 In *Northwest v. Sino-Forest*, the proposed representative plaintiffs are: British Columbia Investment Management Corporation ("BC Investment"); Comité syndical national de retraite Bâtirente inc. ("Bâtirente") and Northwest & Ethical Investments L.P. ("Northwest").

133 BC Investment, which is incorporated under the British Columbia *Public Sector Pension Plans Act*, is owned by and is an agent of the Government of British Columbia. It manages $86.9 billion in assets. Its investment activities help to finance the retirement benefits of more than 475,000 residents of British Columbia, including public service employees, healthcare workers, university teachers, and staff. Its investment activities also help to finance the WorkSafeBC insurance fund that covers approximately 2.3 million workers and over 200,000 employers in B.C., as well as, insurance funds for public service long term disability and credit union deposits.

134 BC Investment, through the funds it managed, owned 334,900 shares of Sino-Forest at the start of the Class Period, purchased 6.6 million shares during the Class Period, including 50,200 shares in the June 2009 offering and 54,800 shares in the December 2009 offering; sold 5 million shares during the Class Period; disposed of 371,628 shares after the end of the Class Period; and presently holds 1.5 million shares.

135 Bâtirente is a non-profit financial services firm initiated by the Confederation of National Trade Unions to establish and promote a workplace retirement system for affiliated unions and other organizations. It is registered as a financial services firm regulated in Quebec by the Autorité des marchés financiers under *the Act Respecting the Distribution of Financial Products and Services*, R.S.Q., chapter D-9.2. It has assets of about $850 million.

136 Bâtirente, through the funds it managed, did not own any shares of Sino-Forest before the class period, purchased 69,500 shares during the class period, sold 57,625 shares during the class period, and disposed of the rest of its shares after the end of the class period.

137 Northwest is an Ontario limited partnership, owned 50% by the Provincial Credit Unions Central and 50% by Federation des caisses Desjardin du Québec. It is registered with the British Columbia Securities Commission as a portfolio manager, and it is registered with the OSC as a portfolio manager and as an investment funds manager. It manages about $5 billion in assets.

138 Northwest, through the funds it managed, did not own any shares of Sino-Forest before the class period, purchased 714,075 shares during the class period, including 245,400 shares in the De-

cember 2009 offering, sold 207,600 shares during the class period, and disposed of the rest of its shares after the end of the class period.

139 Kim Orr touts BC Investment, Bâtirente, and Northwest as candidates for representative plaintiff because they are sophisticated "activist shareholders" that are committed to ethical investing. There is evidence that they have all raised governance issues with Sino-Forest as well as other companies. Mr. Mountain of Northwest and Mr. Simard of Bâtirente are eager to be actively involved in the litigation against Sino-Forest.

4. Funding

140 Koskie Minsky and Siskinds have approached Claims Funding International, and subject to court approval, Claims Funding International has agreed to indemnify the plaintiffs for an adverse costs award in return for a percentage of any recovery from the class action.

141 Koskie Minsky and Siskinds state that if the funding arrangement with Claims Funding International is refused, they will, in any event, proceed with the litigation and will indemnify the plaintiffs for any adverse costs award.

142 Similarly, Kim Orr has approached Bridgepoint Financial Services, which subject to court approval, has agreed to indemnify the plaintiffs for an adverse costs award in return for a percentage of any recovery in the class action. If this arrangement is not approved, Kim Orr intends to apply to the Class Proceedings Fund, which would be a more expensive approach to financing the class action.

143 Kim Orr states that if these funding arrangements are refused, it will, in any event, proceed with the litigation and it will indemnify the plaintiffs for any adverse costs award.

144 Rochon Genova did not mention in its factum whether it intends to apply to the Class Proceedings Fund on behalf of Messrs. Smith and Collins, but for the purposes of the discussion later about the carriage order, I will assume that this may be the case. I will also assume that Rochon Genova has agreed to indemnify Messrs. Smith and Collins for any adverse costs award should funding not be granted by the Fund.

5. Conflicts of Interest

145 One of the qualifications for being a representative plaintiff is that the candidate does not have a conflict of interest in representing the class members and in bringing an action on their behalf. All of the candidates for representative plaintiff in the competing class actions depose that they have no conflicts of interest. Their opponents disagree.

146 Rochon Genova submits that there are inherent conflicts of interests in both *Labourers v. Sino-Forest* and in *Northwest v. Sino-Forest* because the representative plaintiffs bring actions on behalf of both shareholders and noteholders. Rochon Genova submits that these conflicts are exacerbated by the prospect of a Sino-Forest bankruptcy.

147 Relying on *Casurina Ltd. Partnership v. Rio Algom Ltd.* [2004] O.J. No. 177 (C.A.) at paras. 35-36, aff'g [2002] O.J. No. 3229 (S.C.J.), leave to appeal to the S.C.C. denied, [2004] S.C.C.A. No. 105 and *Amaranth LLC. v. Counsel Corp.*, [2003] O.J. No. 4674 (S.C.J.), Rochon Genova submits that a class action by the bondholders is precluded by the pre-conditions in the bond instruments, but if it were to proceed, it might not be in the best interests of the bondholders, who might prefer to have Sino-Forest capable of carrying on business. Further still, Rochon Genova

submits that, in any event, an action by the bondholders' trustee may be the preferable way for the noteholders to sue on their notes. Further, Rochon Genova submits that if there is a bankruptcy, the bondholders may prefer to settle their claims in the context of the bankruptcy rather than being connected in a class action to the shareholder's claims over which they would have priority in a bankruptcy.

148 Further still, Rochon Genova submits that a bankruptcy would bring another conflict of interest between bondholders and shareholders because under s. 50(14) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and 5.1(2) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 the claims of creditors against directors that are based on misrepresentation or oppression may not be compromised through a plan or proposal. In contrast, *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (S.C.J.) at paras. 48-52 is authority that shareholders are not similarly protected, and, therefore, Rochon Genova submits that the noteholders would have a great deal more leverage in resolving claims against directors than would the shareholder members of the class in a class action.

149 Kim Orr denies that there is a conflict in the representative plaintiffs acting on behalf of both shareholders and bondholders. It submits that while boldholders may have an additional claim in contract against Sino-Forest for repayment of the debt outside of the class action, both shareholders and bondholders share a misrepresentation claim against Sino-Forest and there is no conflict in advancing the misrepresentation claim independent of the debt repayment claim.

150 Koskie Minsky and Siskinds also deny that there is any conflict in advancing claims by both bondholders and shareholders. They say that the class members are on common ground in advancing misrepresentation, tort, and the various statutory causes of action. Koskie Minsky and Siskinds add that if there was a conflict, then it is manageable because they have a representative plaintiff who was a bondholder, which is not the case for the representative plaintiffs in *Northwest v. Sino-Forest*. It submits that, if necessary, subclasses can be established to manage any conflicts of interest among class members.

151 Leaving the submitted shareholder and bondholder conflicts of interest, Rochon Genova submits that Labourers' Fund has a conflict of interest because BDO Canada is its auditor. Rochon Genova submits that Koskie Minsky also has a conflict of interest because it and BDO Canada have worked together on a committee providing liaison between multi-employer pension plans and the Financial Services Commission of Ontario and have respectively provided services as auditor and legal counsel to the Union Benefits Alliance of Construction Trade Unions. Rochon Genova submits that it is telling that these conflicts were not disclosed and that BDO, which is an entity that is an international associate with BDO Canada was a late arrival as a defendant in *Labourers v. Sino-Forest*, although this can be explained by changes in the duration of the class period.

152 For their part, Koskie Minsky and Siskinds raise a different set of conflicts of interest. They submit that Northwest, Bâtirente, and BC Investments have a conflict of interest with the other class members who purchased Sino-Forest securities because of their role as investment managers.

153 Koskie Minsky and Siskinds' argument is that as third party financial service providers, BC Investment, Bâtirente, and Northwest did not suffer losses themselves but rather passed the losses on to their clients. Further, Koskie Minsky and Siskinds submit that, in contrast to BC Investment, Bâtirente, and Northwest, their clients, Labourers' Fund and Operating Engineers Fund, are acting

as fiduciaries to recover losses that will affect their members' retirements. This arguably makes Koskie Minsky and Siskinds better representative plaintiffs.

154 Further still, Koskie Minsky and Siskinds submit that the class members in *Northwest v. Sino-Forest* may question whether Northwest, Bâtirente, and BC Investments failed to properly evaluate the risks of investing in Sino-Forest. Koskie Minsky and Siskinds point out that the Superior Court of Québec in *Comité syndical national de retraite Bâtirente inc. c. Société financière Manuvie*, 2011 QCCS 3446 at paras. 111-119 disqualified Bâtirente as a representative plaintiff because there might be an issue about Bâtirente's investment decisions. Thus, Koskie, Minsky and Siskinds attempt to change Northwest, Bâtirente, and BC Investments' involvement in encouraging good corporate governance at Sino-Forest from a positive attribute into the failure to be aware of ongoing wrongdoing at Sino-Forest and a negative attribute for a proposed representative plaintiff.

6. Definition of Class Membership

Smith v. Sino-Forest

155 In *Smith v. Sino-Forest*, the proposed class action is: (a) on behalf of all persons who purchased shares of Sino-Forest from May 17, 2004 to August 26, 2011 on the TSX or other secondary market; and (b) on behalf of all persons who acquired shares of Sino-Forest during the offering distribution period relating to Sino-Forest's share prospectus offerings on June 1, 2009 and December 10, 2009 excluding the Defendants, members of the immediate families of the Individual Defendants, or the directors, officers, subsidiaries and affiliates of the corporate Defendants.

156 Both Koskie Minsky and Siskinds and Kim Orr challenge this class membership as inadequate for failing to include the bondholders who were allegedly harmed by the same misconduct that harmed the shareholders.

Labourers v. Sino-Forest

157 In *Labourers v. Sino-Forest*, the proposed class action is on behalf of all persons and entities wherever they may reside who acquired securities of Sino-Forest during the period from and including March 19, 2007 to and including June 2, 2011 either by primary distribution in Canada or an acquisition on the TSX or other secondary markets in Canada, other than the defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is an immediate member of the family of an individual defendant.

158 The class membership definition in *Labourers v. Sino-Forest* includes non-Canadians who purchased shares or notes in Canada but excludes non-Canadians who purchased in a foreign marketplace.

159 Challenging this definition, Kim Orr submits that it is wrong in principle to exclude persons whose claims will involve the same facts as other class members and for whom it is arguable that Canadian courts may exercise jurisdiction and provide access to justice.

Northwest v. Sino-Forest,

160 In *Northwest v. Sino-Forest*, the proposed class action is on behalf of purchasers of shares or notes of Sino-Forest during the period from August 17, 2004 through June 2, 2011, except: Sino-Forest's past and present subsidiaries and affiliates; the past and present officers and directors of Sino-Forest and its subsidiaries and affiliates; members of the immediate family of any excluded

person; the legal representatives, heirs, successors, and assigns of any excluded person or entity; and any entity in which any excluded person or entity has or had a controlling interest.

161 Challenging this definition, Koskie Minsky and Siskinds submit that the proposed class in *Northwest* has no geographical limits and, therefore, will face jurisdictional and choice of law challenges that do not withstand a cost benefit analysis. It submits that Sino-Forest predominantly raised capital in Canadian capital markets and the vast majority of its securities were either acquired in Canada or on a Canadian market, and, in this context, including in the class non-residents who purchased securities outside of Canada risks undermining and delaying the claims of the great majority of proposed class members whose claims do not face such jurisdictional obstacles.

7. Definition of Class Period

Smith v. Sino-Forest

162 In *Smith v. Sino-Forest,* the class period is May 17, 2004 to August 26, 2011. This class period starts with the release of Sino-Forest's release of its 2003 Annual Information Form, which indicated the use of authorized intermediaries, and it ends on the day of the OSC's cease-trade order.

163 For comparison purposes, it should be noted that this class period has the earliest start date and the latest finish date. *Labourers v. Sino-Smith* and *Northwest v. Sino-Forest* both use the end date of the release of the Muddy Waters Report.

164 In making comparisons, it is helpful to look at the chart found at Schedule A of this judgment.

165 Rochon Genova justifies its extended end date based on the argument that the Muddy Waters Report was a revelation of Sino-Forest's misrepresentation but not a corrective statement that would end the causation of injuries because Sino-Forest and its officers denied the truth of the Muddy Waters Report.

166 Kim Orr's criticizes the class definition in *Smith v. Sino-Forest* and submits that purchasers of shares or notes after the Muddy Waters Report was published do not have viable claims and ought not be included as class members.

167 Koskie Minsky and Siskinds' submission is similar, and they regard the extended end date as problematic in raising the issues of whether there were corrective disclosures and of how Part XXIII.1 of the *Ontario Securities Act* should be interpreted.

Labourers v. Sino-Forest

168 In *Labourers v. Sino-Forest*, the class period is March 19, 2007 to June 2, 2011.

169 This class period starts with the date Sino-Forest's 2006 financial results were announced, and it ends on the date of the publication of the Muddy Waters Report.

170 The March 19, 2007, commencement date was determined using a complex mathematical formula known as the "multi-trader trading model." Using this model, Mr. Torchio estimates that 99.5% of Sino-Forest's shares retained after June 2, 2011, had been purchased after the March 19, 2007 commencement date. Thus, practically speaking, there is almost nothing to be gained by an earlier start date for the class period.

171 The proposed class period covers two share offerings (June 2009 and December 2009). This class period does not include time before the coming into force of Part XXIII.1 of the *Ontario*

Securities Act (December 31, 2005), and, thus, Koskie Minsky and Siskinds submit that this aspect of their definition avoids problems about the retroactive application, if any, of Part XXIII.1 of the Act.

172 For comparison purposes, the *Labourers* class period has the latest start date and shares the finish date used in the *Northwest v. Sino-Forest* action, which is sooner than the later date used in *Smith v. Sino-Forest*. It is the most compressed of the three definitions of a class period.

173 Based on Mr. Torchio's opinion, Koskie Minsky and Siskinds submit that there are likely no damages arising from purchases made during a substantial portion of the class periods in *Smith v. Sino-Forest* and in *Northwest v. Sino-Forest*. Koskie Minsky and Siskinds submit that given that the average price of Sino's shares was approximately $4.49 in the ten trading days after the Muddy Waters report, it is likely that any shareholder that acquired Sino-Forest shares for less than $4.49 suffered no damages, particularly under Part XXIII.1 of the *Ontario Securities Act*.

174 In part as a matter of principle, Kim Orr submits that Koskie Minsky and Siskinds' approach to defining the class period is unsound because it excludes class members who, despite the mathematical modelling, may have genuine claims and are being denied any opportunity for access to justice. Kim Orr submits it is wrong in principle to abandon these potential class members.

175 Rochon Genova also submits that Koskie Minsky and Siskinds' approach to defining the class period is wrong. It argues that Koskie Minsky and Siskinds' reliance on a complex mathematical model to define class membership is arbitrary and unfair to share purchasers with similar claims to those claimants to be included as class members. Rochon Genova criticizes Koskie Minsky and Siskinds' approach as being the condemned merits based approach to class definitions and for being the sin of excluding class members because they may ultimately not succeed after a successful common issues trial.

176 Relying on what I wrote in *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 296 at para. 157, Rochon Genova submits that the possible failure of an individual class member to establish an individual element of his or her claim such as causation or damages is not a reason to initially exclude him or her as a class member. Rochon Genova submits that the end date employed in *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* is wrong.

Northwest v. Sino-Forest

177 In *Northwest v. Sino-Forest*, the class period is August 17, 2004 to June 2, 2011.

178 This class period starts from the day Sino-Forest closed its public offering of long-term notes that were still outstanding at the end of the class period and ends on the date of the Muddy Waters Research Report. This period covers three share offerings (June 2007, June 2009, and December 2009) and six note offerings (August 2004, July 2008, July 2009, December 2009, February 2010, and October 2010).

179 For comparison purposes, the *Northwest v. Sino-Forest* class period begins 3 months later and ends three months sooner than the class period in *Smith v. Sino-Forest*. The *Northwest v. Sino-Forest* class period begins approximately two-and-a-half years earlier and ends at the same time as the class period in *Labourers v. Sino-Forest*.

180 Kim Orr submits that its start date of August 17, 2004 is satisfactory, because on that date, Sino-Forest shares were trading at $2.85, which is below the closing price of Sino-Forest shares on the TSX for the ten days after June 3, 2011 ($4.49), which indicates that share purchasers before

August 2004 would not likely be able to claim loss or damages based on the public disclosures on June 2, 2011.

181 However, Koskie Minsky and Siskinds point out that Kim Orr's submission actually provides partial support for the theory for a later start date (March 19, 2007) because, there is no logical reason to include in the class persons who purchased Sino-Forest shares between May 17, 2004, the start date of the *Smith Action* and December 1, 2005, because with the exception of one trading day (January 24, 2005), Sino-Forest's shares never traded above $4.49 during that period.

8. Theory of the Case against the Defendants

Smith v. Sino-Forest

182 In *Smith v. Sino-Forest,* the theory of the case rests on the alleged non-arms' length transfers between Sino-Forest and its subsidiaries and authorized intermediaries, that purported to be suppliers and customers. Rochon Genova's investigations and analysis suggest that there are numerous non-arms length inter-company transfers by which Sino-Forest misappropriated investors' funds, exaggerated Sino-Forest's assets and revenues, and engaged in improper tax and accounting practices.

183 Mr. Smith alleges that Sino-Forest's quarterly interim financial statements, audited annual financial statements, and management's discussion and analysis reports, which are Core Documents as defined under the *Ontario Securities Act,* misrepresented its revenues, the nature and scope of its business and operations, and the value and composition of its forestry holdings. He alleges that the Core Documents failed to disclose an unlawful scheme of fabricated sales transactions and the avoidance of tax and an unlawful scheme through which hundreds of millions of dollars in investors' funds were misappropriated or vanished.

184 Mr. Smith submits that these misrepresentations and failures to disclose were also made in press releases and in public oral statements. He submits that Chan, Hyde, Horsley, Mak, Martin, Murray, and Wang authorized, permitted or acquiesced in the release of Core Documents and that Chan, Horsley, Martin, and Murray made the misrepresentations in public oral statements.

185 In *Smith v. Sino-Forest*, Mr. Smith (and Mr. Collins) brings different claims against different combinations of Defendants; visualize:

* misrepresentation in a prospectus under Part XXIII of the *Ontario Securities Act*, against all the Defendants
* subject to leave being granted, misrepresentation in secondary market disclosure under Part XXIII.1 of the Ontario *Securities Act* as against the defendants: Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, BDO and E&Y
* negligent, reckless, or fraudulent misrepresentation against Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, and Wang. This claim would appear to cover sales of shares in both the primary and secondary markets.

186 It is to be noted that *Smith v. Sino-Forest* does not make a claim on behalf of noteholders, and, as described and explained below, it joins the fewest number of defendants.

187 *Smith* also does not advance a claim on behalf of purchasers of shares through Sino-Forest's prospectus offering of June 5, 2007, because of limitation period concerns associated

with the absolute limitation period found in 138.14 of the *Ontario Securities Act*. See: *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 at paras. 98-100.

Labourers v. Sino-Forest

188 The theory of *Labourers v. Sino-Forest* is that Sino-Forest, along with its officers, directors, and certain of its professional advisors, falsely represented that its financial statements complied with GAAP, materially overstated the size and value of its forestry assets, and made false and incomplete representations regarding its tax liabilities, revenue recognition, and related party transactions.

189 The claims in *Labourers v. Sino-Forest* are largely limited to alleged misrepresentations in Core Documents as defined in the *Ontario Securities Act* and other Canadian securities legislation. Core Documents include prospectuses, annual information forms, information circulars, financial statements, management discussion & analysis, and material change reports.

190 The representative plaintiffs advance statutory claims and also common law claims that certain defendants breached a duty of care and committed the torts of negligent misrepresentation and negligence. There are unjust enrichment, conspiracy, and oppression remedy claims advanced against certain defendants.

191 In *Labourers v. Sino-Forest*, different combinations of representative plaintiffs advance different claims against different combinations of defendants; visualize:

* Labourers' Fund and Mr. Wong, purchasers of shares in a primary market distribution, advance a statutory claim under Part XXIII of the *Ontario Securities Act* against Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD and Pöyry
* Labourers' Fund and Mr. Wong, purchasers of shares in a primary market distribution, advance a common law negligent misrepresentation claim against Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, and TD based on the common misrepresentation that Sino-Forest's financial statements complied with GAPP
* Labourers' Fund and Mr. Wong, purchasers of shares in a primary market distribution, advance a common law negligence claim against Sino-Forest, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD and Pöyry
* Grant, who purchased bonds in a primary market distribution, advances a statutory claim under Part XXIII of the *Ontario Securities Act* against Sino-Forest
* Grant, who purchased bonds in a primary market distribution, advances a common law negligent misrepresentation claim against Sino-Forest, E&Y and BDO based on the common misrepresentation that Sino-Forest's financial statements complied with GAPP

* Grant, who purchased bonds in a primary market distribution, advances a common law negligence claim against Sino-Forest, E&Y, BDO, Banc of America, Credit Suisse USA, and TD
* All the representative plaintiffs, subject to leave being granted, advance claims of misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation. This claim is against Sino-Forest, Ardell, Bowland, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, West, E &Y, BDO, and Pöyry
* All of the representative plaintiffs, who purchased Sino-Forest securities in the secondary market, advance a common law negligent misrepresentation claim against all of the Defendants except the underwriters based on the common misrepresentation contained in the Core Documents that Sino-Forest's financial statements complied with GAAP
* All the representative plaintiffs sue Sino-Forest, Chan, Horsley, and Poon for conspiracy. It is alleged that Sino-Forest, Chan, Horsley, and Poon conspired to inflate the price of Sino-Forest's shares and bonds and to profit by their wrongful acts to enrich themselves by, among other things, issuing stock options in which the price was impermissibly low
* While it is not entirely clear from the Statement of Claim, it seems that all the representative plaintiffs sue Chan, Horsley, Mak, Martin, Murray, and Poon for unjust enrichment in selling shares to class members at artificially inflated prices
* While it is not entirely clear from the Statement of Claim, it seems that all the representative plaintiffs sue Sino-Forest for unjust enrichment for selling shares at artificially inflated prices
* While it is not entirely clear from the Statement of Claim, it seems that all the representative plaintiffs sue Banc of America, Canaccord, CIBC, Credit Suisse, Credit Suisse USA, Dundee, Maison, Merrill, RBC, Scotia, and TD for unjustly enriching themselves from their underwriters fees
* All the representative plaintiffs sue Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, and Wang for an oppression remedy under the *Canada Business Corporations Act*

192 Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* is more focused than *Smith* and *Northwest* because: (a) its class definition covers a shorter time period and is limited to securities acquired by Canadian residents or in Canadian markets; (b) the material documents are limited to Core Documents under securities legislation; (c) the named individual defendants are limited to directors and officers with statutory obligations to certify the accuracy of Sino-Forest's public filings; and (d) the causes of action are tailored to distinguish between the claims of primary market purchasers and secondary market purchasers and so are less susceptible to motions to strike.

193 Koskie Minsky and Siskinds submit that save for background and context, little is gained in the rival actions by including claims based on non-Core Documents, which confront a higher threshold to establish liability under Part XXIII.1 of the *Ontario Securities Act*.

Northwest v. Sino-Forest

194 The *Northwest v. Sino-Forest* Statement of Claim focuses on an "Integrity Representation," which is defined as: "the representation in substance that Sino-Forest's overall reporting of its business operations and financial statements was fair, complete, accurate, and in conformity with international standards and the requirements of the *Ontario Securities Act* and National Instrument 51-102, and that its accounts of its growth and success could be trusted."

195 The *Northwest v. Sino-Forest* Statement of Claim alleges that all Defendants made the Integrity Representation and that it was a false, misleading, or deceptive statement or omission. It is alleged that the false Integrity Representation caused the market decline following the June 2, 2011, disclosures, regardless of the truth or falsity of the particular allegations contained in the Muddy Waters Report.

196 In *Northwest v. Sino-Forest*, the representative plaintiffs advance statutory claims under Parts XXIII and XXIII.1 of the *Ontario Securities Act* and a collection of common law tort claims. Kim Orr submits that to the extent, if any, that the statutory claims do not provide complete remedies to class members, whether due to limitation periods, liability caps, or other limitations, the common law claims may provide coverage.

197 In *Northwest v. Sino-Forest*, the plaintiffs advance different claims against different combinations of defendants; visualize:

* With respect to the June 2009 and December 2009 prospectus, a cause of action for violation of Part XXIII of the *Ontario Securities Act* against Sino-Forest, the underwriter Defendants, the director Defendants, the Defendants who consented to disclosure in the prospectus and the Defendants who signed the prospectus
* Negligent misrepresentation against all of the Defendants for disseminating material misrepresentations about Sino-Forest in breach of a duty to exercise appropriate care and diligence to ensure that the documents and statements disseminated to the public about Sino-Forest were complete, truthful, and accurate.
* Fraudulent misrepresentation against all of the Defendants for acting knowingly and deliberately or with reckless disregard for the truth making misrepresentations in documents, statements, financial statements, prospectus, offering memoranda, and filings issued and disseminated to the investing public including Class Members.
* Negligence against all the Defendants for a breach of a duty of care to ensure that Sino-Forest implemented and maintained adequate internal controls, procedures and policies to ensure that the company's assets were protected and its activities conformed to all legal developments.
* Negligence against the underwriter Defendants, the note distributor Defendants, the auditor Defendants, and the Pöyry Defendants for breach of a duty to the purchasers of Sino-Forest securities to perform their professional responsibilities in connection with Sino-Forest with appropriate care and diligence.
* Subject to leave being granted, a cause of action for violation of Part XXIII.1 of the *Ontario Securities Act* against Sino-Forest, the auditor Defendants, the individual Defendants who were directors and officers of Si-

no-Forest at the time one or more of the pleaded material misrepresentations was made, and the Pöyry Defendants.

198 Kim Orr submits that *Northwest v. Sino-Forest* is more comprehensive than its rivals and does not avoid asserting claims on the grounds that they may take time to litigate, may not be assured of success, or may involve a small portion of the total potential class. It submits that its conception of Sino-Forest's wrongdoing better accords with the factual reality and makes for a more viable claim than does Koskie Minsky and Siskinds' focus on GAAP violations and Rochon Genova's focus on the misrepresentations associated with the use of authorized intermediaries. It denies Koskie Minsky and Siskinds' argument that it has pleaded overbroad tort claims.

199 Koskie Minsky and Siskinds submit that its conspiracy claim against a few defendants is focused and narrow, and it criticizes the broad fraud claim advanced in *Northwest v. Sino-Forest* against all the defendants as speculative, provocative, and unproductive.

200 Relying on *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 at para. 49; *Corfax Benefits Systems Ltd. v. Fiducie Desjardins Inc.*, [1997] O.J. No. 5005 (Gen. Div.) at paras. 28-36; *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.) at paras. 25 and 38; and *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1998] O.J. No. 2637 (Gen. Div.) at para. 477, Koskie Minsky and Siskinds submit that the speculative fraud action in *Northwest v. Sino-Forest* is improper and would not advance the interests of class members. Further, the task of proving that each of some twenty defendants had a fraudulent intent, which will be vehemently denied by the defendants, and the costs sanction imposed for pleading and not providing fraud make the fraud claim a negative and not a positive feature of *Northwest v. Sino-Forest.*

9. Joinder of Defendants

Smith v. Sino-Forest

201 In *Smith v. Sino-Forest*, the Defendants are: Sino-Forest; seven of its directors and officers; namely: Chan, Horsley, Hyde, Mak, Martin, Murray, and Wang; nine underwriters; namely, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, and TD; and Sino-Forest's two auditors during the Class Period, E &Y and BDO.

202 The *Smith v. Sino-Forest* Statement of Claim does not join Pöyry because Rochon Genova is of the view that the disclaimer clause in Pöyry's reports likely insulates it from liability, and Rochon Genova believes that its joinder would be of marginal utility and an unnecessary complication. It submits that joining Pöyry would add unnecessary expense and delay to the litigation with little corresponding benefit because of its jurisdiction and its potential defences.

Labourers v. Sino-Forest

203 In *Labourers v. Sino-Forest*, the Defendants are the same as in *Smith v. Sino-Forest* with the additional joinder of Ardell, Bowland, Poon, West, Banc of America, Credit Suisse (USA), and Pöyry.

204 The *Labourers v. Sino-Forest* action does not join Chen, Ho, Hung, Ip, Maradin, Wong, Yeung, Zhao, Credit Suisse (USA), Haywood, Merrill-Fenner, Morgan and UBS, which are parties to *Northwest v. Sino-Forest.*

205 Koskie Minsky and Siskinds' explanation for these non-joinders is that the activities of the underwriters added to *Northwest v. Sino-Forest* occurred outside of the class period in *Labourers v.*

Sino-Forest and neither Lawrence nor Wong held a position with Sino-Forest during the proposed class period and the action against Lawrence's Estate is probably statute-barred. (See *Waschkowski v. Hopkinson Estate*, [2000] O.J. No. 470 (C.A.).)

206 Wong left Sino-Forest before Part XXIII.1 of the *Ontario Securities Act* came into force, and Koskie Minsky and Siskinds submit that proving causation against Wong will be difficult in light of the numerous alleged misrepresentations since his departure. Moreover, the claim against him is likely statute-barred.

207 Koskie Minsky and Siskinds submit that Chen, Maradin, and Zhao did not have statutory duties and allegations that they owed common law duties will just lead to motions to strike that hinder the progress of an action.

208 Further, Koskie Minsky and Siskinds submit that it is not advisable to assert claims of fraud against all defendants, which pleading may raise issues for insurers that potentially put available coverage and thus collection for plaintiffs at risk.

209 Kim Orr submits that it is a mistake in *Labourers v. Sino-Forest*, which is connected to the late start date for the class period, which Kim Orr also regards as a mistake, that those underwriters that may be liable and who may have insurance to indemnify them for their liability, have been left out of *Labourers v. Sino-Forest*.

Northwest v. Sino-Forest

210 In *Northwest v. Sino-Forest,* with one exception, the defendants are the same as in *Labourers v. Sino-Forest* with the additional joinder of various officers of Sino-Forest; namely: Chen, Ho, Hung, Ip, The Estate of John Lawrence, Maradin, Wong, Yeung, and Zhao; the joinder of Pöyry Forest and JP Management; and the joinder of more underwriters; namely: Haywood, Merrill- Fenner, Morgan, and UBS.

211 The one exception where *Northwest v. Sino-Forest* does not join a defendant found in *Labourers v. Sino-Forest* is Banc of America.

212 Kim Orr's submits that its joinder of all defendants who might arguably bear some responsibility for the loss is a positive feature of its proposed class action because the precarious financial situation of Sino-Forest makes it in the best interests of the class members that they be provided access to all appropriate routes to compensation. It strongly denies Koskie Minsky and Siskinds' allegation that *Northwest v. Sino-Forest* takes a "shot-gun" and injudicious approach by joining defendants that will just complicate matters and increase costs and delay.

213 Kim Orr submits that Rochon Genova has no good reason for not adding Pöyry, Pöyry Forest, and JP Management as defendants to *Smith v. Sino-Forest* and that Koskie Minsky and Siskinds have no good reason in *Labourers v. Sino-Forest* for suing Pöyry but not also suing its associated companies, all of whom are exposed to liability and may be sources of compensation for class members.

214 While not putting it in my blunt terms, Kim Orr submits, in effect, that Koskie Minsky and Siskinds' omission of the additional defendants is just laziness under the guise of feigning a concern for avoiding delay and unnecessarily complicating an already complex proceeding.

10. Causes of Action

Smith v. Sino-Forest

215 In *Smith v. Sino-Forest,* the causes of action advanced by Mr. Smith on behalf of the class members are:

* misrepresentation in a prospectus under Part XXIII of the *Ontario Securities Act*
* negligent, reckless, or fraudulent misrepresentation
* subject to leave being granted, misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation

Labourers v. Sino-Forest

216 In *Labourers v. Sino-Forest*, the causes of action advanced by various combinations of plaintiffs against various combinations of defendants are:

* misrepresentation in a prospectus under Part XXIII of the *Ontario Securities Act*
* negligent misrepresentation
* negligence
* subject to leave being granted misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation
* conspiracy
* unjust enrichment
* oppression remedy.

217 Kim Orr submits that the unjust enrichment claims and oppression remedy claims seemed to be based on and add little to the misrepresentation causes of action. It concedes that the conspiracy action may be a tenable claim but submits that its connection to the disclosure issues that comprise the nucleus of the litigation is unclear.

Northwest v. Sino-Forest

218 In *Northwest v. Sino-Forest*, the causes of action are:

* misrepresentation in a prospectus in violation of Part XXIII the *Ontario Securities Act*
* misrepresentation in an offering memorandum in violation of Part XXIII the *Ontario Securities Act*
* negligent misrepresentation
* fraudulent misrepresentation
* negligence
* subject to leave being granted misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation

219 The following chart is helpful in comparing and contrasting the joinder of various causes of action and the joinder of defendants in *Smith v. Sino-Forest, Labourers v. Sino-Forest* and *Northwest v. Sino-Forest.*

Cause of Action	*Smith v. Sino-Forest,*	*Labourers v. Sino-Forest,*	*Northwest v. Sino-Forest,*
Part XXIII of the *Ontario Securities Act* – primary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Canaccord, CIBC Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management [for June 2009 and Dec. 2009 prospectus]
Part XXIII of the *Ontario Securities Act* – primary market bonds		Sino-Forest [two bond issues]	Sino-Forest [six bond issues]
Negligent misrepresentation – primary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, E&Y, BDO	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest. JP Management,
Negligent misrepresentation – primary market bonds		Sino-Forest, E&Y, BDO	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligence – primary market shares		Sino-Forest, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, E &Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, Pöyry,	[see negligence, professional negligence]
Negligence – primary market bonds		Sino-Forest, E&Y, BDO, Banc of America, Credit Suisse USA, TD	[See negligence, professional negligence]
Negligence			Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao,

			Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Professional Negligence			Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Part XXIII.1 of the *Ontario Securities Act* – secondary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, E&Y, BDO	Sino-Forest, Ardell, Bowland, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, West, E &Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Part XXIII.1 of the *Ontario Securities Act* – secondary market bonds		Sino-Forest, Ardell, Bowland, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, West, E &Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligent misrepresentation – secondary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, E&Y, BDO	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligent misrepresentation – secondary market bonds		Sino-Forest, Ardell, Bowland, Chan, Horsley,	Sino-Forest, Ardell, Bowland, Chan, Horsley,

		Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, Pöyry	Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligence - secondary market shares		Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO, Pöyry	[see negligence, professional negligence]
Conspiracy		Sino-Forest, Chan, Horsley, Poon,	
Fraudulent Misrepresentation - Bonds, shares			Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Unjust Enrichment		Chan, Horsley, Mak, Martin, Murray, Poon,	
Unjust Enrichment		Sino-Forest,	
Unjust Enrichment		Banc of America, Canaccord, CIBC, Credit Suisse, Credit Suisse USA, Dundee, Maison, Merill, RBC, Scotia, TD	
Oppression Remedy		Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang	

11. The Plaintiff and Defendant Correlation

220 In class actions in Ontario, for every named defendant there must be a named plaintiff with a cause of action against that defendant: *Ragoonanan v. Imperial Tobacco Canada Ltd.*, [2000] O.J.

No. 4597 (S.C.J.) at para. 55 (S.C.J.); *Hughes v. Sunbeam Corp. (Canada)* (2002), 61 O.R. (3d) 433 (C.A.) at para. 18.

221 As an application of the *Ragoonanan* rule, a purchaser in the secondary market cannot be the representative plaintiff for a class member who purchased in the primary market: *Menegon v. Philip Services Corp.*, [2001] O.J. No. 5547 (S.C.J.) at paras. 28-30 aff'd [2003] O.J. No. 8 (C.A.).

222 Where the class includes non-resident class members, they must be represented by a representative plaintiff that is a non-resident: *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 at paras. 109, 117 and 184; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 at para. 30 (C.A.).

223 Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* has no *Ragoonanan* problems. However, they submit that the other actions have problems. For example, until Mr. Collins volunteered, there was no representative plaintiff in *Smith v. Sino-Forest* who had purchased shares in the primary market, and at this juncture, it is not clear that Mr. Collins purchased in all of the primary market distributions. Mr. Smith and Mr. Collins may have timing-of-purchase issues. Mr. Smith made purchases during periods when some of the Defendants were not involved; viz. BDO, Canaccord CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, and TD.

224 Koskie Minsky and Siskinds submit that none of the representative plaintiffs in *Northwest v. Sino-Forest* purchased notes in the primary market for the 2007 prospectus offering and that the plaintiffs in *Northwest* may have timing issues with respect to their claims against Wong, Lawrence, JP Management, UBS, Haywood and Morgan.

225 Rochon Genova's and Kim Orr's response is that there are no *Ragoonanan* problems or no irremediable *Ragoonanan* problems.

12. Prospects of Certification

226 Koskie Minsky and Siskinds framed part of their argument in favour of their being selected for carriage in terms of the comparative prospects of certification of the rival actions. They submitted that *Labourers v. Sino-Forest* was carefully designed to avoid the typical road blocks placed by defendants on the route to certification and to avoid inefficiencies and unproductive claims or claims that on a cost-benefit analysis would not be in the interests of the class to pursue. One of the typical roadblocks that they referred to was challenges to the jurisdiction of the Ontario Court over foreign class members and foreign defendants who have not attorned to the Ontario Superior Court of Justice's territorial jurisdiction.

227 Koskie Minsky and Siskinds submitted that their representative plaintiffs focus their claims on a single misrepresentation to avoid the pitfalls of seeking to certify a negligent misrepresentation claim with multiple misrepresentations over a long period of time. Such a claim apparently falls into a pit because it is often not certified. Koskie Minsky and Siskinds say it is better to craft a claim that has higher prospects of certification and leave some claims behind. They submit that the Supreme Court of Canada accepted that a representative plaintiff is entitled to restrict their causes of action to make their claims more amenable to class proceedings: *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 30.

228 Although *Smith v. Sino-Forest* is even more focused that *Labourers v. Sino-Forest,* Koskie Minsky and Siskinds still submit that their approach is better because *Smith v. Sino-Forest* goes too

far in cutting out the bondholders' claims and then loses focus by extending its claims beyond the release of the Muddy Waters Report.

229 In any event, Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* is better because the named plaintiffs are able to advance statutory and common law claims against all of the named defendants, which arguably is not the case for the plaintiffs in the other actions, who may have *Ragoonanan* problems or no tenable claims against some of the named defendants. Further, *Labourers* arguably is better because of a more focussed approach to maximize class recovery while avoiding the costs and delays inevitably linked with motions to strike.

230 Kim Orr submits that its more comprehensive approach, where there are more defendant parties and expansive tort claims, is preferable to *Labourers v. Sino-Forest* and *Smith v. Sino-Forest.* Kim Orr submits that it does not shirk asserting claims because they may be difficult to litigate and it does not abandon class members who may not be assured of success or who comprise a small portion of the class.

231 Kim Orr submits that *Northwest v. Sino-Forest* is comprehensive and also cohesive and corresponds to the factual reality. It submits that the theories of the competing actions do not capture the wrongdoing at Sino-Forest for which many are culpable and who should be held responsible. It submits that its approach will meet the challenges of certification and yield an optimum recovery for the class.

232 Rochon Genova submits that *Smith v. Sino-Forest* is much more cohesive that the other actions. It submits that the more expansive class definitions and causes of action in *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* will present serious difficulties relating to manageability, preferability, and potential conflicts of interest amongst class members that are not present in *Smith v. Sino-Forest.* Rochon Genova submits that it has developed a solid, straightforward theory of the case and made a great deal of progress in unearthing proof of Sino-Forest's wrongdoing.

G. CARRIAGE ORDER

1. Introduction

233 With the explanation that follows, I stay *Smith v. Sino-Forest* and *Northwest v. Sino-Forest*, and I award carriage to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest.* In the race for carriage of an action against *Sino-Forest*, I would have ranked Rochon Genova second and Kim Orr third.

234 This is not an easy decision to make because class members would probably be well served by any of the rival law firms. Success in a carriage motion does not determine which is the best law firm, it determines that having regard to the interests of the plaintiffs and class members, to what is fair to the defendants, and to the policies that underlie the class actions regime, there is a constellation of factors that favours selecting one firm or group of firms as the best choice for a particular class action.

235 Having regard to the constellation of factors, in the circumstances of this case, several factors are neutral or non-determinative of the choice for carriage. In this group are: (a) attributes of class counsel; (b) retainer, legal, and forensic resources; (c) funding; (d) conflicts of interest; and (e) the plaintiff and defendant correlation.

236 In the case at bar, the determinative factors are: definition of class membership, definition of class period, theory of the case, causes of action, joinder of defendants, and prospects of certification.

237 Of the determinative factors, the attributes of the representative plaintiffs is a standalone factor. The other determinative factors are interrelated and concern the rival conceptualizations of what kind of class action would best serve the class members' need for access to justice and the policies of fairness to defendants, behaviour modification, and judicial economy.

238 Below, I will first discuss the neutral or non-determinative factors. Then, I will discuss the determinative factors. After discussing the attributes of the representative plaintiffs, I will discuss the related factors in two groups. One group of related factors is about class membership, and the second group of factors is about the claims against the defendants.

2. Neutral or Non-Determinative Factors

(a) Attributes of Class Counsel

239 In the circumstances of the cases at bar, the attributes of the competing law firms along with their associations with prestigious and prominent American class action firms is not determinative of carriage, since there is little difference among the rivals about their suitability for bringing a proposed class action against Sino-Forest.

240 With respect to the attributes of the law firms, although one might have thought that Mr. Spencer's call to the bar would diminish the risk, Koskie and Minsky and Siskinds, particularly Siskinds, raised a question about whether Milberg might cross the line of what legal services a foreign law firm may provide to the Ontario lawyers who are the lawyers of record, and Siskinds alluded to the spectre of violations of the rules of professional conduct and perhaps the evil of champerty and maintenance. It suggested that it was unfair to class members to have to bear this risk associated with the involvement of Milberg.

241 However, at this juncture, I have no reason to believe that any of the competing law firms, all of which have associations with notable American class action firms, will shirk their responsibilities to control the litigation and not to condone breaches of the rules of professional conduct or tortious conduct.

(b) Retainer, Legal, and Forensic Resources

242 The circumstances of the retainers and the initiative shown by the law firms and their efforts and resources expended by them are also not determinative factors in deciding the carriage motions in the case at bar, although it is an enormous shame that it may not be possible to share the fruits of these efforts once carriage is granted to one action and not the others.

243 As I have already noted above, the aggregate expenditure to develop the tactical and strategic plans for litigation not including the costs of preparing for the carriage motion are approximately $2 million. It seems that this effort by the respective law firms has been fruitful and productive. All of the law firms claim that their respective efforts have yielded valuable information to advance a claim against Sino-Forest and others.

244 All of the law firms were quickly out of the starting blocks to initiate investigations about the prospects and merits of a class action against Sino-Forest. For different reasonable reasons, the statements of claim were filed at different times.

245 In the case at bar, I do not regard the priority of the commencement of the actions as a meaningful factor, given that from the publication of the Muddy Waters Report, all the firms responded immediately to explore the merits of a class action and given that all the firms plan to amend their original pleadings that commenced the actions. In any event, I do not think that a carriage motion should be regarded as some sort of take home exam where the competing law firms have a deadline for delivering a statement of claim, else marks be deducted.

(c) Funding

246 In my opinion, another non-determinative factor is the circumstances that: (a) the representative plaintiffs in *Labourers v. Sino-Forest* may apply for court approval for third-party funding; (b) the plaintiffs in *Northwest v. Sino-Forest* may apply for court approval for third-party funding or they may apply to the Class Proceedings Fund to be protected from an adverse costs award; (c) Messrs. Smith and Collins in *Smith v. Sino-Forest* may apply to the Class Proceedings Fund to be protected from an adverse costs award; and (d) each of the law firms have respectively undertaken with their respective clients to indemnify them from an adverse costs award.

247 In the future, the court or the Ontario Law Foundation may have to deal with the funding requests, but for present purposes, I do not see how these prospects should make a difference to deciding carriage, although I will have something more to say below about the significance of the state of affairs that clients with the resources of Labourers' Fund, Operating Engineers Fund, Sjunde AP-Fonden, BC Investment, Bâtirente, and Northwest would seek an indemnity from their respective class counsel.

248 In any event, in my opinion, standing alone, the funding situation is not a determinative factor to carriage, although it may be relevant to other factors that are discussed below.

(d) Conflicts of Interest

249 In the circumstances of the case at bar, I also do not regard conflicts of interest as a determinative factor.

250 I do not see how the fact that Northwest, Bâtirente, and BC Investments made their investments on behalf of others and allegedly suffered no losses themselves creates a conflict of interest. It appears to me that they have the same fiduciary responsibilities to their members as do Labourers' Fund, Operating Engineers Fund, Sjunde AP-Fonden, and Healthcare Manitoba.

251 Northwest, Bâtirente, and BC Investments were the investors in the securities of Sino-Forest and although there may be equitable or beneficial owners, under the common law, they suffered the losses, just like the other investors in Sino-Forest securities suffered losses. The fact that Northwest, Bâtirente, and BC Investments held the investments in trust for their members does not change the reality that they suffered the losses.

252 It is alleged that Northwest, Bâtirente, and BC Investments, who were involved in corporate governance matters associated with Sino-Forest, failed to properly evaluate the risks of invest-

ing in Sino-Forest. Based on these allegations, it is submitted that they have a conflict of interest. I disagree.

253 Having regard to the main allegation being that Sino-Forest was engaged in a corporate shell game that deceived everyone, it strikes me that it is almost a spuriously speculative allegation to blame another victim as being at fault. However, even if the allegation is true, the other class members have no claim against Northwest, Bâtirente, and BC Investments. If there were a claim, it would be by the members of Northwest, Bâtirente, and BC Investments, who are not members of the class suing Sino-Forest. The actual class members have no claim against Northwest, Bâtirente, and BC Investments but have a common interest in pursuing Sino-Forest and the other defendants.

254 Further, it is arguable that Koskie Minsky and Siskinds are incorrect in suggesting that in *Comité syndical national de retraite Bâtirente inc. c. Société financière Manuvie*, 2011 QCCS 3446, the Superior Court of Québec disqualified Bâtirente as a representative plaintiff because there might be an issue about Bâtirente's investment decisions.

255 It appears to me that Justice Soldevida did not appoint Bâtirente as a representative plaintiff for a different reason. The action in Québec was a class action. There were some similarities to the case at bar, insofar as it was an action against a corporation, Manulife, and its officers and directors for misrepresentations and failure to fulfill disclosure obligations under securities law. In that action, the personal knowledge of the investors was a factor in their claims against Manulife, and Justice Soldevida felt that sophisticated investors, like Bâtirente, could not be treated on the same footing as the average investor. It was in that context that she concluded that there was an appearance of a conflict of interest between Bâtirente and the class members.

256 In the case at bar, however, particularly for the statutory claims where reliance is presumed, there is no reason to differentiate the average investors from the sophisticated ones. I also do not see how the difference between sophisticated and average investors would matter except perhaps at individual issues trials, where reasonable reliance might be an issue, if the matter ever gets that far.

257 Another alleged conflict concerns the facts that BDO Canada, which is not a defendant, is the auditor of Labourers' Fund, and Koskie Minsky and BDO Canada have worked together on several matters. These circumstances are not conflicts of interest. There is no reason to think that Labourers' Fund and Koskie Minsky are going to pull their punches against BDO or would have any reason to do so.

258 Finally, turning to the major alleged conflict between the bondholders and the shareholders, speaking generally, the alleged conflicts of interest between the bondholders that invested in Sino-Forest and the shareholders that invested in Sino-Forest arise because the bondholders have a cause of action in debt in addition to their causes of action based in tort or statutory misrepresentation claims, while, in contrast, the shareholders have only statutory and common law claims based in misrepresentation.

259 There is, however, within the context of the class action, no conflict of interest. In the class action, only the misrepresentation claims are being advanced, and there is no conflict between the bondholders and the shareholders in advancing these claims. Both the bondholders and the shareholders seek to prove that they were deceived in purchasing or holding on to their Sino-Forest securities. That the Defendants may have defences associated with the terms of the bonds is a problem

for the bondholders but it does not place them in a conflict with shareholders not confronted with those special defences.

260 Assuming that the bondholders and shareholders succeed or are offered a settlement, there might be a disagreement between them about how the judgment or settlement proceeds should be distributed, but that conflict, which at this juncture is speculative, can be addressed now or later by constituting the bondholders as a subclass and by the court's supervisory role in approving settlements under the *Class Proceedings Act, 1992*.

261 If there are bondholders that wish only to pursue their debt claims or who wish not to pursue any claim against Sino-Force or who wish to have the bond trustee pursue only the debt claims, these bondholders may opt out of the class proceeding assuming it is certified.

262 If there is a bankruptcy of Sino-Forest, then in the bankruptcy, the position of the shareholders as owners of equity is different than the position of the bondholders as secured creditors, but that is a natural course of a bankruptcy. That there are creditors' priorities, outside of the class action, does not mean that, within the class action, where the bondholders and the shareholders both claim damages, i.e., unsecured claims, there is a conflict of interest.

263 The alleged conflict in the case at bar is different from the genuine conflict of interest that was identified in *Settington v. Merck Frost Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.), where, for several reasons, the Merchant Law Firm was not granted carriage or permitted to be part of the consortium granted carriage in a pharmaceutical products liability class action against Merck.

264 In *Settington,* one ground for disqualification was that the Merchant Law firm was counsel in a securities class action for different plaintiffs suing Merck for an unsecured claim. If the securities class action claim was successful, then the prospects of an unsecured recovery in the products liability class action might be imperiled. In the case at bar, however, within the class action, the bondholders are not pursuing a different cause of action from the shareholders; both are unsecured creditors for the purposes of their damages' claims arising from misrepresentation. If, in other proceedings, the bondholders or their trustee successfully pursue recovery in debt, then the threat to the prospects of recovery by the shareholders arises in the normal way that debt instruments have priority over equity instruments, which is a normal risk for shareholders.

265 Put shortly, although the analysis may not be easy, there are no conflicts of interest between the bondholders and the shareholders within the class action that cannot be handled by establishing a subclass for bondholders at the time of certification or at the time a settlement is contemplated.

(e) The Plaintiff and Defendant Correlation

266 In *Ragoonanan v. Imperial Tobacco Canada Ltd.,* (2000), 51 O.R. (3d) 603 (S.C.J.), in a proposed products liability class action, Mr. Ragoonanan sued Imperial Tobacco, Rothmans, and JTI-MacDonald, all cigarette manufacturers. He alleged that the manufacturers had negligently designed their cigarettes by failing to make them "fire safe." Mr. Ragoonanan's particular claim was against Imperial Tobacco, which was the manufacturer of the cigarette that allegedly caused harm to him when it was the cause of a fire at Mr. Ragoonanan's home. Mr. Ragoonanan did not have a claim against Rothmans or JTI-MacDonald.

267 In *Ragoonanan*, Justice Cumming established the principle in Ontario class action law that there cannot be a cause of action against a defendant without a plaintiff who has that cause of action. Rather, there must be for every named defendant, a named plaintiff with a cause of action against that defendant. The *Ragoonanan* principle was expressly endorsed by the Court of Appeal in *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.) at paras. 13-18, leave to appeal to S.C.C. ref'd (2003), [2002] S.C.C.A. No. 446, 224 D.L.R. (4th) vii.

268 It should be noted, however, that in *Ragoonanan*, Justice Cumming did not say that there must be for every separate cause of action against a named defendant, a named plaintiff. In other words, he did not say that if some class members had cause of action A against defendant X and other class members had cause of action B against defendant X that it was necessary that there be a named representative plaintiff for both the cause of action A v. X and for the cause of action B v. X. It was arguable that if the representative plaintiff had a claim against X, then he or she could represent others with the same or different claims against X.

269 Thus, there is room for a debate about the scope of the *Ragoonanan* principle, and, indeed, it has been applied in the narrow way, just suggested. Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (S.C.J.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 at para. 37. Thus, a representative plaintiff with damages for personal injury can claim in respect of dependents with derivative claims provided that the statutes that create the derivative causes of action are properly pleaded: *Voutour v. Pfizer Canada Inc.*, *supra*; *Boulanger v. Johnson & Johnson Corp.*, *supra*.

270 As noted above, in the case at bar, Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* has no problem with the *Ragoonanan* principle and that *Smith v. Sino-Forest* and especially the more elaborate *Northwest v. Sino-Forest* confront *Ragoonanan* problems.

271 For the purposes of this carriage motion, I do not feel it is necessary to do an analysis about the extent to which any of the rival actions are compliant with *Ragoonanan*.

272 The *Ragoonanan* problem is often easy to fix. The emergence of Mr. Collins in *Smith v. Sino-Forest* to sue for the primary market shareholders is an example, assuming that Mr. Smith's own claims against the defendants do not satisfy the *Ragoonanan* principle. Therefore, I do not regard the plaintiff and defendant correlation as a determinative factor in determining carriage.

273 It is also convenient here to add that I do not see the spectre of challenges to the Superior Court's jurisdiction over foreign class members or over the foreign defendants are a determinative factor to picking one action over another. It may be that *Northwest v. Sino-Forest* has the potential to attract more jurisdictional challenges but standing alone that potential is not a reason for disqualifying *Northwest v. Sino-Forest*.

3. Determinative Factors

(a) Attributes of the Proposed Representative Plaintiffs

274 I turn now to the determinative factors that lead me to the conclusion that carriage should be granted to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest.*

275 The one determinative factor that stands alone is the characteristics of the candidates for representative plaintiff. In the case at bar, this is a troublesome and maybe a profound determinative factor.

276 Kim Orr extolled the virtues of having its clients, Northwest, Bâtirente and BC Investments, which collectively manage $92 billion in assets, as candidates to be representative plaintiffs.

277 Similarly, Koskie Minsky and Siskinds extolled the virtues of having Labourers' Fund, Operating Engineers Fund, and Sjunde AP-Fonden as candidates for representative plaintiff, along with the support of major class member Healthcare Manitoba. Together, these parties to *Labourers v. Sino-Forest* collectively manage $23.2 billion in assets. As noted above, Koskie Minsky and Siskinds submitted that their clients were not tainted by involving themselves in the governance oversight of Sino-Forest, which had been lauded as a positive factor by Kim Orr.

278 As I have already discussed above in the context of the discussion about conflicts of interest, I do not regard Bâtirente's, and Northwest's interest in corporate governance generally or its particular efforts to oversee Sino-Forest as a negative factor.

279 However, what may be a negative factor and what is the signature attribute of all of these candidates for representative plaintiff is that it is hard to believe that given their financial heft, they need the *Class Proceedings Act, 1992* for access to justice or to level the litigation playing field or that they need an indemnity to protect them from exposure to an adverse costs award.

280 Although these candidates for representative plaintiff would seem to have adequate resources to litigate, they seem to be seeking to use a class action as a means to secure an indemnity from class counsel or a third-party funder for any exposure to costs. If they are genuinely serious about pursuing the defendants to obtain compensation for their respective members, they would also seem to be prime candidates to opt out of the class proceeding if they are not selected as a representative plaintiff.

281 Mr. Rochon neatly argued that the class proceedings regime was designed for litigants like Mr. Smith not litigants like Labourers Trust or Northwest. He referred to the *Private Securities Litigation Reform Act of 1995*, legislation in the United States that was designed to encourage large institutions to participate in securities class actions by awarding them leadership of securities actions under what is known as a "leadership order". He told me that the policy behind this legislation was to discourage what are known as "strike suits;" namely, meritless securities class actions brought by opportunistic entrepreneurial attorneys to obtain very remunerative nuisance value payments from the defendants to settle non-meritorious claims.

282 I was told that the American legislators thought that appointing a lead plaintiff on the basis of financial interest would ensure that institutional plaintiffs with expertise in the securities market and real financial interests in the integrity of the market would control the litigation, not lawyers. See: *LaSala v. Bordier et CIE*, 519 F.3d 121 (U.S. Ct App (3rd Cir)) (2008) at p. 128; *Taft v. Ackermans*, (2003), F.Supp.2d, 2003 WL 402789 at 1,2, D.H. Webber, "The Plight of the Individual Investor in Securities Class Actions" (2010) NYU Law and Economics Working Papers, para. 216 at p. 7.

283 Mr. Rochon pointed out that the litigation environment is different in Canada and Ontario and that the provinces have taken a different approach to controlling strike suits. Control is established generally by requiring that a proposed class action go through a certification process and by requiring a fairness hearing for any settlements, and in the securities field, control is established by requiring leave for claims under Part XXIII.1 of the *Ontario Securities Act.* See *Ainslie v. CV Technologies Inc.* (2008) 93 O.R. (3d) 200 (S.C.J.) at paras. 7, 10-13.

284 In his factum, Mr. Rochon eloquently argued that individual investors victimized by securities fraud should have a voice in directing class actions. Mr. Smith lost approximately half of his investment fortune; and according to Mr. Rochon, Mr. Smith is an individual investor who is highly motivated, wants an active role, and wants to have a voice in the proceeding.

285 While I was impressed by Mr. Rochon's argument, it did not take me to the conclusions that the attributes of the institutional candidates for representative plaintiff in *Labourers v. Sino-Forest* and in *Northwest v. Sino-Forest* when compared to the attributes of Mr. Smith should disqualify the institutional candidates from being representative plaintiffs or be a determinative factor to grant carriage to a more typical representative plaintiff like Mr. Smith or Mr. Collins.

286 I think that it would be a mistake to have a categorical rule that an institutional plaintiff with the resources to bring individual proceedings or the means to opt-out of class proceedings and go it alone should be disqualified or discouraged from being a representative plaintiff. In the case at bar, the expertise and participation of the institutional investors in the securities marketplace could contribute to the successful prosecution of the lawsuit on behalf of the class members.

287 Although Mr. Smith and Mr. Collins might lose their voice, they might in the circumstances of this case not be best voice for their fellow class members, who at the end of the day want results not empathy from their representative plaintiff and class counsel.

288 Access to justice is one of the policy goals of the *Class Proceedings Act, 1992* and although it may be the case that the institutional representative plaintiffs want but do not need the access to justice provided by the Act, they are pursuing access to justice in a way that ultimately benefits Mr. Smith and other class members should their actions be certified as a class proceeding.

289 On these matters, I agree with what Justice Rady said in *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (S.C.J.) at paras. 104-105:

> 104. I recognize that access to justice concerns may not be engaged when a class is comprised of large institutions with large claims. Authority for this proposition is found in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.). Moldaver J. made the following observation at p. 473:
>
> As a rule, certification should have as its root a number of individual claims which would otherwise be economically unfeasible to pursue. While not necessarily fatal to an order for certification, the absence of this important underpinning will certainly weigh in the balance against certification.
>
> 105. Nevertheless, I am satisfied on the basis of the record before me that the individual claims and those of small corporations would likely be economically unfeasible to pursue. Further, there is no good principled reason that a large corporation

should not be able to avail itself of the class proceeding mechanism where the other objectives are met.

290 Another goal of the *Class Proceedings Act, 1992* is judicial economy, and the avoidance of a multiplicity of actions. However, the Act envisions a multiplicity of actions by permitting class members to opt-out and bring their own action against the defendants. However, there is an exception. The only class member that cannot opt out is the representative plaintiff, and in the circumstances of the case at bar, one advantage of granting carriage to one of the institutional plaintiffs is that they cannot opt out, and this, in and of itself, advances judicial economy.

291 Another advantage of keeping the institutional plaintiffs in the case at bar in a class action is that the institutional plaintiffs are already to a large extent representative plaintiffs. They are already, practically speaking, suing on behalf of their own members, who number in the hundreds of thousands. Their members suffered losses by the investments made on their behalf by BC Investments, Bâtirente, Northwest, Labourers' Fund, Operating Engineers Fund, Sjunde AP-Fonden, and Healthcare Manitoba. These pseudo-class members are probably better served by the court case managing the class action, assuming it is certified and by the judicial oversight of the approval process for any settlements.

292 These thoughts lead me to the conclusion that in the circumstances of the case at bar, a determinative factor that favours *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* is the attributes of their candidates for representative plaintiff. In this regard, *Labourers v. Sino-Forest* has the further advantage that it also has Mr. Grant and Mr. Wong, who are individual investors and who can give voice to the interests of similarly situated class members.

(b) Definition of Class Membership and Definition of Class Period

293 The first group of interrelated determinative factors is: definition of class membership and definition of class period. These factors concern who, among the investors in Sino-Forest shares and bonds, is to be given a ticket to a class action litigation train that is designed to take them to the court of justice.

294 *Smith v. Sino-Forest* offers no tickets to bondholders because it is submitted that (a) the bondholders will fight with the shareholders about sharing the spoils of the litigation, especially because the bondholders have priority over the shareholders and secured and protected claims in a bankruptcy; (b) the bondholders will fight among themselves about a variety of matters including whether it would be preferable to leave it to their bond trustee to sue on their collective behalf to collect the debt rather than prosecute a class action for an unsecured claim for damages for misrepresentation; and (c) a misrepresentation action by the bondholders against some or all of the defendants may be precluded by the terms of the bonds.

295 In my opinion, the bondholders should be included as class members, if necessary, with their own subclass, and, thus, *Smith v. Sino-Forest* does not fare well under this group of interrelated factors. As I explained above, I do not regard the membership of both shareholders and bondholders in the class as raising insurmountable conflicts of interest. The bondholders have essentially the same misrepresentation claims as do the shareholders, and it makes sense, particularly as a matter of judicial economy, to have their claims litigated in the same proceeding as the shareholders' claims.

296 Pragmatically, if the bondholders are denied a ticket to one of the class actions now at the Osgoode Hall station because of a conflict of interest, then they could bring another class action in which they would be the only class members. That class action by the bondholders would raise the same issues of fact and law about the affairs of Sino-Forest. Thus, denying the bondholders a ticket on one of the two class actions that has made room for them would just encourage a multiplicity of litigation. It is preferable to keep the bondholders on board sharing the train with any conflicts being managed by the appointment of separate class counsel for the bondholders, who can form a subclass at certification or later assuming that certification is granted.

297 As already noted above, for those bondholders who do not want to get on the litigation train, they can opt-out of the class action assuming it is certified. That the defendants may have defences to the misrepresentation claims of the bondholders is just a problem that the bondholders will have to confront, and it is not a reason to deny them a ticket to try to obtain access to justice.

298 In *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.), Justice Winkler, as he then was, noted at para. 39 that there is a difference between restricting the joinder of causes of action in order to make an action more amenable to certification and restricting the number of class members in an action for which certification is being sought. He stated:

> Although *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 holds that the plaintiffs can arbitrarily restrict the causes of action asserted in order to make a proceeding more amenable to certification (at 201), the same does not hold true with respect to the proposed class. Here the plaintiffs have not chosen to restrict the causes of action asserted but rather attempt to make the action more amenable to certification by suggesting arbitrary exclusions from the proposed class. This is diametrically opposite to the approach taken by the plaintiffs in *Rumley*, and one which has been expressly disapproved by the Supreme Court in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158. There, McLachlin C.J. made it clear that the onus falls on the putative representative to show that the "class is defined sufficiently narrowly" but without resort to arbitrary exclusion to achieve that result....

299 For shareholders, *Smith v. Sino-Forest* is more accommodating; indeed, it is the most accommodating, in offering tickets to shareholders to board the class action train. Without prejudice to the arguments of the defendants, who may impugn any of the class period or class membership definitions, and assuming that the bondholders are also included, the best of the class periods for shareholders is that found in *Smith v. Sino-Forest.*

300 To be blunt, I found the rationales for shorter class periods in *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* somewhat paranoid, as if the plaintiffs were afraid that the defendants will attack their definitions for over-inclusiveness or for making the class proceeding unmanageable. Those attacks may come, but I see no reason for the plaintiffs in *Labourers* and *Sino-Forest* to leave at the station without tickets some shareholders who may have arguable claims.

301 If Mr. Torchio is correct that almost all of the shareholders would be covered by the shortest class period that is found in *Labourers v. Sino-Forest*, then the defendants may think the fight to shorten the class period may not be worth it. If they are inclined to challenge the class definition on grounds of unmanageability or the class action as not being the preferable procedure, the longer class period definition will likely be peripheral to the main contest.

302 I do not see the extension of the class period beyond June 2, 2011, when the Muddy Waters Report became public, as a problem. Put shortly, at this juncture, and subject to what the defendants may later have to say, I agree with Rochon Genova's arguments about the appropriate class period end date for the shareholders.

303 If I am correct in this analysis so far, where it takes me is only to the conclusion that the best class period definition for shareholders is found in *Smith v. Sino-Forest.* It, however, does not take me to the conclusion that carriage should be granted to *Smith v. Sino-Forest.* Subject to what the defendants may have to say, the class definitions and class period in *Labourers v. Sino-Forest* and in *Northwest v. Sino-Forest* appear to be adequate, reasonable, certifiable, and likely consistent with the common issues that will be forthcoming.

304 Since for other reasons, I would grant carriage to *Labourers v. Sino-Forest*, the question I ask myself is whether the class definition in *Labourers*, which favourably includes bondholders, but which is not as good a definition as found in *Smith v. Sino-Forest* or in *Northwest v. Sino-Forest* should be a reason not to grant carriage to *Labourers*. My answer to my own question is no, especially since it is still possible to amend the class definition so that it is not under-inclusive.

(c) Theory of the Case, Causes of Action, Joinder of Defendants, and Prospects of Certification

305 The second group of interrelated determinative factors is: theory of the case, causes of action, joinder of defendants, and prospects of certification. Taken together, it is my opinion, that these factors, which are about what is in the best interests of the putative class members, favour staying *Smith v. Sino-Forest* and *Northwest v. Sino-Forest* and granting carriage to *Labourers v. Sino-Forest.*

306 In applying the above factors, I begin here with the obvious point that it would not be in the interests of the putative class members, let alone not in their best interests to grant carriage to an action that is unlikely to be certified or that, if certified, is unlikely to succeed. It also seems obvious that it would be in the best interests of class members to grant carriage to the action that is most likely to be certified and ultimately successful at obtaining access to justice for the injured or, in this case, financially harmed class members. And it also seems obvious that all other things being equal, it would be in the best interests of class members and fair to the defendants and most consistent with the policies of the *Class Proceedings Act, 1992* to grant carriage to the action that, to borrow from rule 1.04 or the *Rules of Civil Procedure* secures the just, most expeditious and least expensive determination of the dispute on its merits.

307 While these points seem obvious, there is, however, a major problem in applying them, because the court should not and cannot go very far in determining the matters that would be most determinative of carriage. A carriage motion is not the time to determine whether an action will satisfy the criteria for certification or whether it will ultimately provide redress to the class members or whether it would be the preferable procedure or the most expeditious and least expensive procedure to resolve the dispute.

308 Keeping this caution in mind, in my opinion, certain aspects of *Northwest v. Sino-Forest* make the other actions preferable. In this regard, I find the joinder of some defendants to *Northwest v. Sino-Forest* mildly troublesome.

309 More serious, in *Northwest v. Sino-Forest,* I find the employment and reliance on the tort action of fraudulent misrepresentation less desirable than the causes of action utilized to provide procedural and substantive justice to the class members in *Smith v. Sino-Forest* and *Labourers v. Sino-Forest.* In my opinion, the fraudulent misrepresentation action adds needless complexity and costs.

310 While the finger-pointing of the OSC at Ho, Hung, Ip, and Yeung supports their joinder, the joinder of Chen, Lawrence Estate, Maradin, Wong, and Zhao is mildly troublesome. The joinder of defendants should be based on something more substantive than their opportunity to be a wrongdoer, and at this juncture it is not clear why Chen, Lawrence Estate, Maradin, Wong, and Zhao have been joined to *Northwest v. Sino-Forest* and not to the other proposed class actions. Their joinder, however, is only mildly troublesome, because the plaintiffs in *Northwest v. Sino-Forest* may have particulars of wrongdoing and have simply failed to plead them.

311 Turning to the pleading of fraudulent misrepresentation, when it is far easier to prove a claim in negligent misrepresentation or negligence, the claim for fraudulent misrepresentation seems a needless provocation that will just fuel the defendants' fervour to defend and to not settle the class action. Fraud is a very serious allegation because of the moral and not just legal turpitude of it, and the allegation of fraud also imperils insurance coverage that might be the source of a recovery for class members.

312 Kim Orr has understated the difficulties the plaintiffs in *Northwest v. Sino-Forest* will confront in impugning the integrity of Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management.

313 Fraud must be proved individually. In order to establish that a corporate defendant committed fraud, it must be proven that a natural person for whose conduct the corporation is responsible acted with a fraudulent intent. See: *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.) at para. 26; *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1998] O.J. No. 2637 (Gen. Div.) at paras. 477-479.

314 A claim for deceit or fraudulent misrepresentation typically breaks down into five elements: (1) a false statement; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff being induced to act; and (5) the defendant suffering damages: *Derry* v. *Peek* (1889), 14 App. Cas. 337 (H.L.); *Graham* v. *Saville*, [1945] O.R. 301 (C.A.); *Francis* v. *Dingman* (1983), 2 D.L.R. (4th) 244 (Ont. C.A.). The fraud elements are the second and third in this list.

315 In the famous case of *Derry* v. *Peek*, the general issue was what counts as a fraudulent misrepresentation. More particularly, the issue was whether a careless or negligent misrepresentation without more could count as a fraudulent misrepresentation. In the case, the defendants were responsible for a false statement in a prospectus. The prospectus, which was for the sale of shares in a tramway company, stated that the company was permitted to use steam power to work a tram line. The statement was false because the directors had omitted the qualification that the use of steam power required the consent of the Board of Trade. As it happened, the consent was not given, the

tram line would have to be driven by horses, and the company was wound-up. The Law Lords reviewed the evidence of the defendants individually and concluded that although the defendants had all been careless in their use of language, they had honestly believed what they had said in the prospectus.

316 In the lead judgment, Lord Herschell reviewed the case law, and at p. 374, he stated in the most famous passage from the case:

> I think the authorities establish the following propositions. First, in order to sustain an action for deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless, whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud is proved, the motive of the person guilty is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

317 Lord Herschell's third situation is the one that was at the heart of *Derry* v. *Peek*, and the Law Lords struggled to articulate that relationship between belief and carelessness in speaking. Before the above passage, Lord Herschell stated at p. 361:

> To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief.

318 Lord Herschell is saying that carelessness in making a statement does not necessarily entail that a person does not believe what he or she is saying. However, later in his judgment, he emphasizes that carelessness is relevant and could be sufficient to show that a person did not believe what he or she was saying. Thus, carelessness may prove fraud, but it is not itself fraud. Lord Herschell's famous quotation, where he states that fraud is proven when it is shown that a false statement was made recklessly, careless whether it be true or false, states only awkwardly the role of carelessness and must be read in the context of the whole judgment.

319 In *Angus* v. *Clifford*, [1891] 2 Ch. 449 (C.A.) at p. 471, Bowen, L.J. discussed the role of carelessness or recklessness in establishing fraud; he stated:

> Not caring, in that context [i.e., in the context of an allegation of fraud], did not mean taking care, it meant indifference to the truth, the moral obliquity which consists of wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of

> confusing the evidence from which the inference of dishonesty in the mind may be drawn - evidence which consists in a great many cases of gross want of caution - with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence.

320 Bowen, L.J.'s statement alludes to the second element of what makes a statement fraudulent. Deceit or fraudulent misrepresentation requires that the defendant have "a wicked mind:" *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491 at p. 498. Fraud involves intentional dishonesty, the intent being to deceive. If the plaintiff fails to prove this mental element, then, as was the case in *Derry* v. *Peek*, the claim is dismissed. To succeed in an action for deceit or for fraudulent misrepresentation, the plaintiff must show not only that the defendant spoke falsely and contrary to belief but that the defendant had the intent to deceive, which is to say he or she had the aim of inducing the plaintiff to act mistakenly: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1993), 99 D.L.R. (4th) 577 (S.C.C.).

321 The defendant's reason for deceiving the plaintiff, however, need not be evil. In the passage above from *Derry* v. *Peek*, Lord Herschell notes that the person's motive for saying something that he or she does not believe is irrelevant. A person may have a benign reason for defrauding another person, but the fraud remains because of the discordance between words and belief combined with the intent to mislead the plaintiff: *Smith* v. *Chadwick* (1854), 9 App. Cas. 187 at p. 201; *Bradford Building Society* v. *Borders*, [1941] 2 All E.R. 205 at p. 211; *Beckman* v. *Wallace* (1913), 29 O.L.R. 96 (C.A.) at p. 101.

322 In promoting its fraudulent misrepresentation claim, Kim Orr relied on *Gregory v. Jolley* (2001), 54 O.R. (3d) 481 (C.A.), which was a case where a trial judge erred by not applying the third branch of the test articulated in *Derry v. Peek.* Justice Sharpe discussed the trial judge's failure to consider whether the appellant had made out a case of fraud based on recklessness and stated at para. 20:

> With respect to the law, the trial judge's reasons show that he failed to consider whether the appellant had made out a case of fraud on the basis of recklessness. While he referred to a case that in turn referred to the test from *Derry v. Peek*, the reasons for judgment demonstrate to my satisfaction that the trial judge simply did not take into account the possibility that fraud could be made out if the respondent made misrepresentations of material fact without regard to their truth. The trial judge's reasons speak only of an intention to defraud or of statements calculated to mislead or misrepresent. He makes no reference to recklessness or to statements made without an honest belief in their truth. As *Derry v. Peek* holds, that state of mind is sufficient proof of the mental element required for civil fraud, whatever the motive of the party making the representation. In another leading case on civil fraud, *Edgington v. Fitzmaurice*, (1885), 29 Ch. D.459 at 481-82 (C.A.), Bowen L.J. stated: "[I]t is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest." The failure to give adequate consideration to the contention that the respondent had been reckless with the truth in regard to the income figures he gave in order to obtain disability insurance constitutes an error of law justifying the intervention of this court.

323 From this passage, Kim Orr extracts the notion that there is a viable fraudulent misrepresentation against forty defendants all of whom individually can be shown to be reckless as opposed to careless. That seems unlikely, but more to the point, recklessness is only half the battle. The overall motive may not matter, but the defendant still must have had the intent to deceive, which in *Gregory v. Jolley* was the intent to obtain disability insurance to which he was not qualified to receive.

324 Recklessness alone is not enough to constitute fraudulent misrepresentation, as Justice Cumming notes at para. 25 of his judgment in *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.), where he states:

> The representation must have been made with knowledge of its falsehood or recklessness without belief in its truth. The representation must have been made by the representor with the intention that it should be acted upon by the representee and the representee must in fact have acted upon it.

325 I conclude that the fraudulent misrepresentation action is a substantial weakness in *Northwest v. Sino-Forest.* In fairness, I should add that I think that the unjust enrichment causes of action and oppression remedy claims in *Labourers v. Sino-Forest* add little.

326 The unjust enrichment claims in *Labourers* seem superfluous. If Sino-Forest, Chan, Horsley, Mak, Martin, Murray, Poon, Banc of America, Canaccord, CIBC, Credit Suisse, Credit Suisse USA, Dundee, Maison, Merrill, RBC, Scotia and TD, are found to be liable for misrepresentation or negligence, then the damages they will have to pay will far exceed the disgorgement of any unjust enrichment. If they are found not to have committed any wrong, then there will be no basis for an unjust enrichment claim for recapture of the gains they made on share transactions or from their remuneration for services rendered. In other words, the claims for unjust enrichment are unnecessary for victory and they will not snatch victory if the other claims are defeated. Much the same can be said about the oppression remedy claim. That said, these claims in *Labourers v. Sino-Forest* will not strain the forensic resources of the plaintiffs in the same way as taking on a massive fraudulent misrepresentation cause of action would do in *Northwest v. Sino-Forest.*

327 For the purposes of this carriage motion, I have little to say about the "Integrity Representation" approach to the misrepresentation claims that are at the heart of the claims against the defendants in *Northwest v. Sino-Forest* or of the "GAAP" misrepresentation employed in *Labourers v. Sino-Forest,* or the focus on the authorized intermediaries in *Smith v. Sino-Forest.* Short of deciding the motion for certification, there is no way of deciding which approach is more likely to lead to certification or which approach the defendants will attack as deficient. For present purposes, I am simply satisfied that the class members are best served by the approach in *Labourers v. Sino-Forest.*

328 The cohesive, yet adequately comprehensive, approach used in *Smith v. Sino-Forest* appears to me close to *Labourers v. Sino-Forest,* but in my opinion, *Smith v. Sino-Forest* wants for the inclusion of the bondholders, and, as noted above, there are other factors which favour *Labourers v. Sino-Forest* over *Smith v. Sino-Forest.* That said, it was a close call for me to choose *Labourers v. Sino-Forest* and not *Smith v. Sino-Forest.*

H. CONCLUSION

329 For the above Reasons, I grant carriage to Koskie Minsky and Siskinds with leave to the plaintiffs in *Labourers v. Sino-Forest* to deliver a Fresh as Amended Statement of Claim.

330 In granting leave, I grant leave generally and the plaintiffs are not limited to the amendments sought as a part of this carriage motion. It will be for the plaintiffs to decide whether some amendments are in order to respond to the lessons learned from this carriage motion, and it is not too late to have more representative plaintiffs.

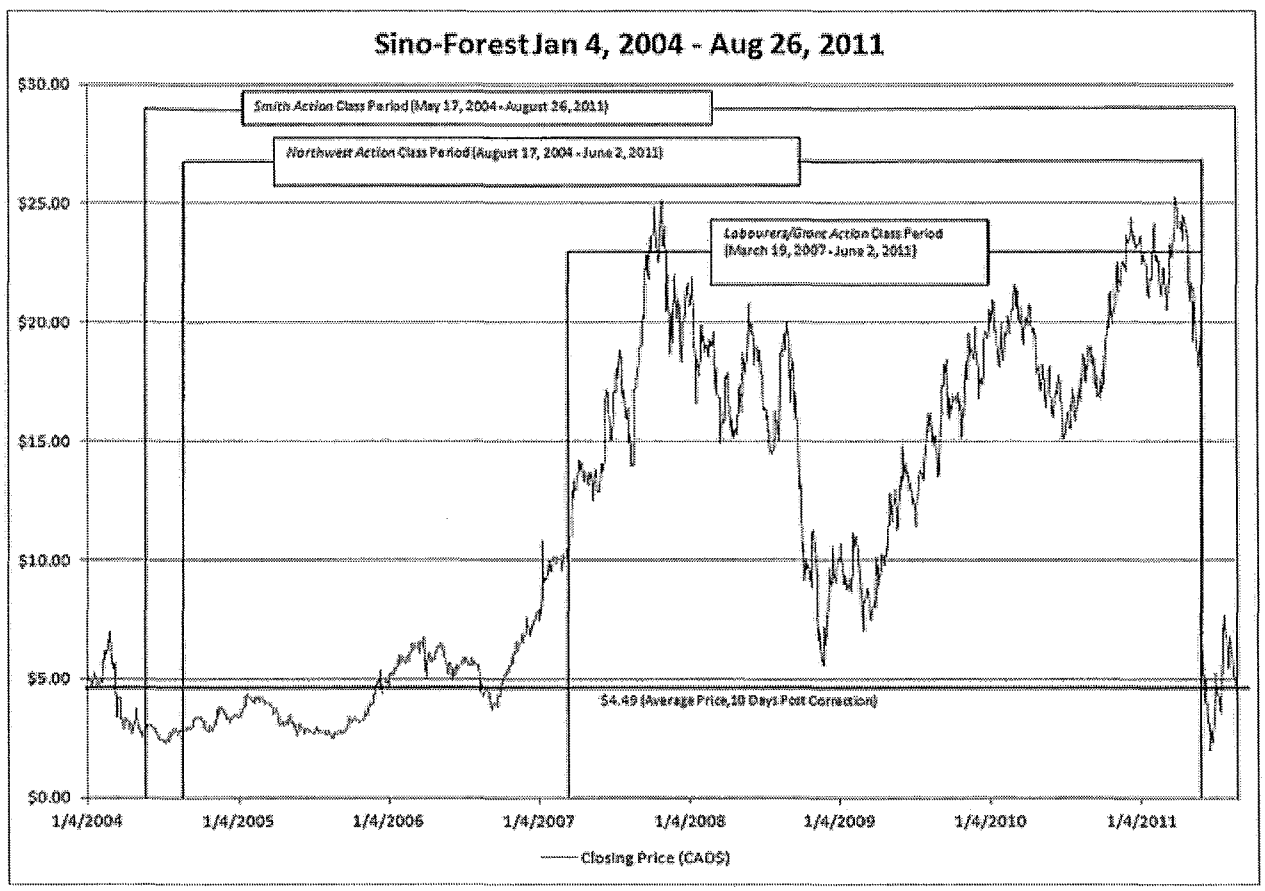
331 I repeat that a carriage motion is without prejudice to the defendants' rights to challenge the pleadings and whether any particular cause of action is legally tenable.

332 I make no order as to costs, which is in the usual course in carriage motions.

P.M. PERELL J.

* * * * *

SCHEDULE "A"



* * * * *

Corrigendum
Released: January 27, 2012

Paragraph 28 (page 8) - the second to last line should read "**a responsible issuer**" and not "a responsible issue"

Paragraph 73 (page 13) - the third line should read "**CIBC**" and not "CIDC"

Paragraph 228 (page 38) - on the third line, the word "losses" should be "**loses**"

Paragraph 252 (page 42) - on the third line, the word should be "**submitted**" and not "summited"

Paragraph 252 (page 42) - the last line should have a period at the end of the paragraph

Paragraph 282 (page 46) - on the last line, the word "paper" should be "**para.**"

cp/ci/e/qlafr/qlvxw/qlced/qljxh

Tab 2

Indexed as:

Microbiz Corp. v. Classic Software Systems Inc.

Between
Microbiz Corporation, respondent/plaintiff, and
Classic Software Systems Incorporated, applicant/defendant

[1996] O.J. No. 5094

45 C.B.R. (3d) 40

Doc. Toronto 95-CU-93753

Ontario Court of Justice (General Division)

Lederman J.

October 9, 1996.

Bankruptcy -- Proposals -- Effect of proposal -- Stay of proceedings, what proceedings stayed.

Motion respecting two actions by creditors Classic and Haggerty against the bankrupt Microbiz. Microbiz was a New Jersey corporation and it filed for bankruptcy in the U.S. Microbiz's plan of reorganization was approved by the U.S. Bankruptcy Court and confirmed by judgment. Both Haggerty and Classic recognized the judgment and filed proofs of claim in the U.S. proceedings.

HELD: Motion allowed. The Haggerty and Classic actions were stayed until further order. It was beneficial that Haggerty and Classic participate in the U.S. proceedings rather than obtain judgment in separate proceedings in Ontario and in New Jersey. By filing their proofs of claim, Classic and Haggerty attorned to the jurisdiction of the U.S. court in New Jersey. Multiplicity of proceedings in different jurisdictions should be avoided.

Counsel:

Peter J. Lukasiewicz, for the plaintiff, Microbiz Corporation.
No other counsel mentioned.

1 **LEDERMAN J.**:-- Mr. Peter Lukasiewicz for MicroBiz, Ms. Julia Scatz for Haggerty, Ms. I. Sutherland (not a lawyer) for Classic, with leave of the court. Ms. Sutherland served yesterday with volumes of documents requested adjournment of this action and 95-CU-102723. On consent, both actions adjourned to October 9, 1996, a date set by the Registrar of Motions.

2 Costs of today reserved to the Judge who disposes of these motions.

3 MicroBiz is a New Jersey corporation with its headquarters in that State. It carries on business in the U.S. It carries on business in Ontario only through its distributor, Classic Software. MicroBiz has no assets in Ontario. When it filed for bankruptcy in the U.S. on March 12, 1996 pursuant to the U.S. Bankruptcy Code, an automatic stay of all proceedings against it went into effect (as is the case under Canadian bankruptcy laws). MicroBiz's plan of reorganization was confirmed by judgment of Justice Winfield of the U.S. Bankruptcy Court on September 3, 1996. The plan of reorganization provides for distribution to all creditors whose claims are accepted, after adjudication if necessary, of 17.5% of their claims. There is no doubt that under the principles laid down in the Morguard Investments case, that judgment of the U.S. Court should be recognized in Canada as there is a real and substantial connection between the U.S. Court's judgment and the subject matter of the proceeding. More importantly, both Classic Software and Haggerty have recognized the judgment and in fact have filed Proofs of Claim in the U.S. proceeding to take advantage of the mechanism provided therein for adjudication of their claims and recovery to the extent of 17.5% of their proven claims. To participate in the U.S. proceedings is beneficial in that it allows Classic and Haggerty to prove their claims and obtain collection in one proceeding rather than obtain judgment on their claims in Ontario and in a separate proceeding in New Jersey seek to effect recovery against the estate of MicroBiz. By filing their Proofs of Claim, Classic and Haggerty have thereby altorned to the jurisdiction of the U.S. Court in New Jersey.

4 Multiplicity of proceedings in two different jurisdictions should be avoided.

5 Accordingly, there must be an order staying both Haggerty action and the Classic action in Ontario until further order of the court.

6 Costs of the motions are fixed at $750.00 payable by Classic and Haggerty forthwith.

LEDERMAN J.

qp/s/aaa

Tab 3

Indexed as:

Roberts v. Picture Butte Municipal Hospital

Between
Wanda Mae Roberts, a.k.a. Wanda Mae Lichuk, and Alan Roberts, plaintiffs, and
Picture Butte Municipal Hospital, St. Michael's General Hospital, Dr. Tom Melling, McGhan Medical Corporation and Dow Corning Corporation, defendants

[1998] A.J. No. 817

1998 ABQB 636

[1999] 4 W.W.R. 443

64 Alta. L.R. (3d) 218

227 A.R. 308

23 C.P.C. (4th) 300

81 A.C.W.S. (3d) 47

Action No. 8901-12679

Alberta Court of Queen's Bench
Judicial District of Calgary

Forsyth J.

July 10, 1998.

(14 pp.)

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2(1), 69(1).
U.S. Bankruptcy Code, s. 362.

Bankruptcy -- Practice -- Stay of proceedings -- Proceeding for the recovery of a claim against the bankrupt.

Application by the defendant, Dow, for a permanent stay of the proceedings against it by the plaintiff, Roberts. Roberts brought a claim against Dow and four other parties for problems with her breast implants manufactured by Dow that had been surgically implanted in 1983. Dow was the only remaining defendant as the actions against the other four parties had been dismissed. There was a class action against Dow in the U.S. which was discontinued when Dow filed for bankruptcy under the U.S. Bankruptcy Code in May 1995. This automatically stayed all claims against Dow which arose before the bankruptcy. Dow's bankruptcy plan set out a process whereby the breast implant claims would be resolved by a series of common issue trials or settlements. This included foreign claimants like Roberts. Roberts had filed a proof of her claim against Dow in the U.S. Bankruptcy Court.

HELD: Application allowed. The imposition of a stay on all claims once bankruptcy proceedings were begun was common to the Canadian bankruptcy legislation as well. The philosophy was to ensure a fair distribution of assets among all creditors and not just those who happen to have begun proceedings prior to the initiation of bankruptcy. Foreign claimants were provided for in Dow's bankruptcy plan. Roberts submitted to the jurisdiction of the U.S. by filing a proof of claim. Therefore, the appropriate forum to deal with all claims concerning Dow was the U.S. Bankruptcy Court.

Counsel:

G.J. Bigg, for the plaintiffs.
K.M. Eidsvik, for the defendant, McGhan Medical Corporation.
F. Foran, Q.C., for the defendant, Dow Corning Corporation.
J. Shriar, for the defendants, Picture Butte Municipal Hospital and St. Michael's General Hospital.
P. Leveque, for the defendant, Dr. Tom Melling.

REASONS FOR JUDGMENT

FORSYTH J.:--

APPLICATION

1 This is an application by the Defendant Dow Corning Corporation ("DCC") for a permanent stay of proceedings against it. DCC is now the only remaining Defendant in this action, as the actions against the other four Defendants were dismissed on the basis of having been commenced outside of the applicable limitation periods. DCC applies for a permanent stay of these proceedings on the grounds that this Court should recognize the jurisdiction of the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division. The Plaintiffs, Wanda and Alan Roberts, argue that a stay is inappropriate.

BACKGROUND

2 The female Plaintiff underwent surgery in 1981 for bilateral fibrocystic disease and mammary dysplasia in both breasts. Also in 1981, she received silicone gel breast implants manufactured by McGhan Medical Corporation ("McGhan"), a former Defendant. After problems with those implants, they were replaced in June 1983 with silicone gel implants manufactured by DCC. Soon after, one implant was found to have ruptured, necessitating surgery to clean up as much silicone as possible from her system.

3 Since that time, the female Plaintiff alleges widespread pain and problems, which she blames on the silicone gel released into her body. For this application, it is not necessary nor appropriate for me to comment on her symptoms or their cause.

4 The Plaintiffs started this action on August 31, 1989. There was also class action litigation in the U.S which coordinated all claims arising out of the failure of both McGhan and DCC implants. That class action collapsed when DCC sought bankruptcy protection on May 15, 1995 under Chapter 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code"). Section 362 of the U.S. Bankruptcy Code imposes an automatic stay on all actions or proceedings against DCC to recover claims that arose before the claims bar date.

5 The U.S. Bankruptcy Court set February 14, 1997 as the foreign claims bar date (the deadline for filing claims in the bankruptcy proceedings). The Plaintiffs filed proofs of claim in that U.S. proceeding on January 17, 1997. More than 700,000 proofs of claim were filed from many countries, including more than 30,000 by Canadian residents.

LEGISLATION

6 DCC is asking that this Court recognize the proceedings in the U.S. Bankruptcy Court. The U.S. Bankruptcy Code provides for an automatic stay once bankruptcy proceedings are commenced in the U.S.:

> 362 (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title...operates as a stay, applicable to all entities, of
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> ...
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

Section 541 provides that "property of the estate" is comprised of various types of property "wherever located and by whomever held".

7 Therefore, the stay purports to be extra-territorial, applying, for example, in Alberta. It is then up to this Court to decide whether the principles of comity favour upholding the stay in this juris-

diction. As the Plaintiffs emphasize, comity is a discretionary matter. I am not bound by the stay imposed by the U.S. Bankruptcy Act.

8 I note that the Canadian legislation has a similar provision (Bankruptcy and Insolvency Act ("BIA"), R.S.C. 1985, c.B-3):

> 69(1) Subject to subsections (2) and (3) and sections 69.4 and 69.5 on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

Under s. 2(1) "property" of the BIA:

> "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, ...

9 The Plaintiffs accept that the U.S. Bankruptcy Code governs DCC's estate, and that the Plaintiffs are creditors under the jurisdiction of the U.S. Bankruptcy Court.

PLAN OF REORGANIZATION

10 DCC filed a Plan of Reorganization (the "Plan") with the Bankruptcy Court on August 25, 1997. The Bankruptcy Court rejected this Plan, and an amended plan was presented on February 17, 1998. The Bankruptcy Court approved that Plan, which now has to be voted upon by the various classes of creditors. DCC's proposed Plan would allow it to pay most creditors and continue operating. To manage product liability claims, DCC would establish and fund two trusts with up to $2.4 billion U.S. DCC would separately pay approximately $1 billion to commercial creditors over seven years.

11 Breast implant claimants would have four settlement paths, based on their history, symptoms and past and proposed treatment. Any claims not settled by agreement under the Plan process would go to common issue trials. Any claims remaining after common issue trials would undergo individual claims review and mediation. The last resort would be individual litigation. These individual trials would be held in the U.S., dismissed in favour of litigation in the claimant's home jurisdiction, or held in the U.S. using the law of the claimant's home jurisdiction. The Plan is designed to solve as many claims as possible in an orderly and expeditious manner.

12 The U.S. procedure provides that once the Bankruptcy Court approves a Plan, it is sent to the creditors for a vote. The creditors vote by class. All of the Canadian breast implant claimants are in the foreign claimants' class of creditors. If more than two-thirds of those voting in a class approve, the Plan is considered approved by the class. After the vote, the Bankruptcy Court holds a confirmation hearing. It may confirm the Plan if it meets the U.S. Bankruptcy Code requirements. In DCC's words, the Bankruptcy Court must conclude:

> (i) that the Plan was proposed in good faith;

(ii) that each class of creditors that does not vote to accept the Plan will receive at least as great a recovery as such creditors would have received had the debtor been liquidated under the liquidation procedures provided in Chapter 7 of the Bankruptcy Code; and
(iii) that the Plan does not discriminate unfairly against any class of creditors that does not vote to accept the Plan.

Therefore, the Bankruptcy Court may approve a Plan even if all classes of creditors do not vote to accept it, as long as that Court finds the Plan does not discriminate unfairly against the rejecting class.

13 The originally proposed Plan did not make it to the creditor review stage. The Bankruptcy Court apparently had a number of concerns, one of which was the treatment of the foreign claimants. The Plaintiffs raise that concern in this Court also. The proposed settlement payments for foreign claimants would range from 35 to 60 per cent of those offered to U.S. claimants, on the theory that product liability litigation yields lower damage awards in non-U.S. jurisdictions. The proposed settlement for Canadian claimants is 60 per cent of the payments offered to U.S. claimants. According to DCC's affidavit (by Craig J. Litherland, dated December 12, 1997), some of the differing factors among U.S. and foreign jurisdictions are:

a. the absence of contingency fee arrangements;
b. the responsibility of judges rather than juries to asses [sic] liability and damages;
c. the award of costs to prevailing litigants;
d. limitations on theories of liability and recovery;
e. limited pretrial procedures;
f. the absence of the 'deep pocket expectation' prevalent in the United States resulting in lower damage awards;
g. lower damage awards for pain and suffering;
h. less or no punitive damages; and
i. nationalized health care insurance and other benefits that are either directly deducted from an award or operate to reduce the likelihood of a large damage award.

Of course, not all of these factors would apply in any one non-U.S. jurisdiction.

14 The Plaintiffs claim the foreign discount is discriminatory and inequitable. Not all of the factors are applicable in Alberta. Moreover, some simply try to shift the burden from DCC to other entities (such as the Canadian medicare system). In addition, the Plaintiffs claim that taking 40 per cent away from foreign claimants leaves that much more for U.S. claimants. DCC argues that the procedure is fair, not necessarily equal. It also emphasizes that the foreign discount only applies to settlements. Any claims that proceed to individual trials would not be discounted.

15 The amended Plan will be put to the creditors. It may be that the Plan will be confirmed, even if the foreign claimants' class rejects it.

ANALYSIS

General Principles

16 Where an appropriate forum must be chosen, the Courts may grant a stay of proceedings. In the words of the Supreme Court of Canada: "This enables the court of the forum selected by the Plaintiffs (the domestic forum) to stay the action at the request of the Defendant if persuaded that the case should be tried elsewhere." (Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897 at 912).This decision is completely discretionary. I am not bound to defer to the U.S. bankruptcy proceedings.

17 Amchem also discusses the vital principle of comity (at 913-14, citing Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1096):

> 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws....

18 After cautioning against abusing the power to enjoin foreign litigation, the S.C.C. in Amchem outlined the test for restraining foreign proceedings. Although a case on anti-suit injunctions, the first part of the test also relates to stays. The Court must determine if there is a forum other than the domestic forum which is "clearly more appropriate" (at 931). If not, the domestic forum should refuse to stay the domestic proceedings. At 931-32, the S.C.C. continued:

> In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

19 As La Forest J. stated in Morguard Investments Ltd. v. De Savoye (1990), 76 D.L.R. (4th) 256 (S.C.C.) at 268, modern states "cannot live in splendid isolation". They must follow comity, which is "the deference and respect due by other states to the actions of a state legitimately taken within its own territory."

20 Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty. See, for example, comments in Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.); Re Antwerp Bulkcarriers N.V. (1996), 43 C.B.R. (3d) 284 (Que.S.C.); and J.D. Honsberger, "Canadian Recognition of Foreign Judicially Supervised Arrangements" (1989), 76 D.B.R. (N.S.) 86.

21 I also note that U.S. Courts have shown themselves willing to grant comity in similar circumstances. For example, a Bankruptcy Court granted comity in In re American Sensors Inc. (Bkrtcy. S.D.N.Y., 1997). In that case, all proceedings against the Defendant Canadian corporation were stayed under the Companies' Creditors Arrangement Act. The Defendant successfully applied to the U.S. Bankruptcy Court for a stay in the U.S. based on comity. That Court stated that U.S. public policy should recognize the foreign proceedings, thus facilitating the "orderly and systematic distribution" of the debtor's assets. This was especially true for Canada, which has similar procedures and procedural safeguards.

Discussion

22 The U.S. Bankruptcy Code provision imposing a stay once bankruptcy proceedings have begun is comparable to Canada's BIA provision. They also both have the same underlying philosophy - to ensure a fair distribution of assets among all creditors, not just those who happen to have begun proceedings prior to the initiation of bankruptcy. In a situation such as DCC's, there is another motive - if all matters can be stayed, there is a better chance that the DCC will be able to restructure successfully.

23 The number of claims is significant. The U.S. Bankruptcy Court has decided that it is impractical and unfair to have thousands of individual claims going through the adversarial court system. Instead, it agrees with DCC's proposal to settle as many as possible, hold common issue trials as appropriate, then have as many individual trials as still necessary. This appears logical and in the interests of all creditors as a group.

24 An additional consideration is that the Plaintiffs have filed proofs of claim in the U.S. bankruptcy proceedings. The Plaintiffs have, therefore, attorned to the jurisdiction of the U.S. Bankruptcy Court. As stated in In re Neese, 12 B.R. 968 (Bkrtcy.W.D.Va., 1981) at 971:

> ... [the] defendants voluntarily availed themselves of the jurisdiction of this Court when they filed, by counsel, proofs of claim in the underlying title 11 bankruptcy case....Having filed their proofs of claim in the underlying bankruptcy case, the defendants cannot now deny this Court's personal jurisdiction over them in a proceeding directly related to that case.

The same principles apply in Canada - see, for example, Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.); and Pitts v. Hill & Hill Truck Line, Inc. (1987), 66 C.B.R. 273 (Alta.Q.B., Master).

25 The Plaintiffs argue that foreign claimants are not treated fairly by the proposed Plan because their settlement package would be at a discount from that given to U.S. claimants. However, there are several safeguards to prevent unfairness. First, the Plaintiffs, along with the rest of the class, have the opportunity to vote against the Plan. If, as a class, they vote against it, the U.S. Bankruptcy Court can only confirm the Plan if it feels the Plan does not "discriminate unfairly" against classes which rejected it. I understand this to mean that treatment can be fair across classes without being equal, as long as there is equality within the class itself. Second, the Plaintiffs are not obliged to settle under the Plan. They may proceed to trial. Third, this Plan actually protects creditors. If there were no stay and no Plan, only the first to trial and judgment would receive any compensation at all, and trials could potentially drag on for many years. Under the Plan, each creditor will receive something and will receive it much sooner.

26 I do not comment on the factors used to assess the discount rate for foreign claimants, except to say that they were not all intended to relate to each foreign jurisdiction. If these factors are accepted by the U.S. Bankruptcy Court in the exercise of its jurisdiction, a jurisdiction to which it is appropriate for me to grant comity and to which the Plaintiffs have attorned, then it is not for me to decide if I would have accepted the factors.

27 The Plaintiffs also argue that the recent Australian case Taylor v. Dow Corning Australia Pty. Ltd. (19 December 1997), No. 8438/95 (Vict.S.C.) should persuade me to dismiss this stay application. There, the Australian Court denied Dow Corning Australia's ("DCA's") application for a stay of proceedings in an action by an Australian plaintiff against DCA. While not binding on me in any event, the reasons in Taylor are clearly distinguishable.

28 DCA is a solvent subsidiary of DCC. DCC was initially a defendant, but that plaintiff discontinued against DCC. The Court ruled that any judgment against DCA would not disadvantage creditors of DCC. Further, the plaintiff was entitled to be treated as a creditor of DCA, not DCC.

29 In addition, that plaintiff did not file a proof of claim in the U.S. bankruptcy proceedings. This is extremely significant. In the present case, the Plaintiffs deliberately attorned to the U.S. jurisdiction by filing proofs of claim. In Taylor, the plaintiff deliberately did not. There is obiter in Taylor, as the Court held attornment was not relevant where a solvent subsidiary, not the insolvent parent, asks for the stay.

30 Finally, the Plaintiffs argue that I should not grant a stay when the U.S. Bankruptcy Court has not been asked to grant an injunction against non-U.S. proceedings such as this. For example, the Australian Court in Taylor queried why DCC had not requested such an injunction and concluded one would have been denied in any event. In the present case, however, an injunction is not necessary. The U.S. Bankruptcy Code itself provides for a stay of all proceedings against DCC. This is not comparable to Taylor, where the defendant was DCA, not DCC itself.

ORDER

31 In the circumstances of this case, the U.S. Bankruptcy Court has apparently decided that fairness among creditors is achieved without having complete equality across all classes of creditors. The Plaintiffs attorned to that jurisdiction. However, even had there been no attornment, I find that common sense dictates that these matters would be best dealt with by one Court, and in the interest of promoting international comity it seems the forum for this case is in the U.S.Bankruptcy Court. Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs' attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding. Lastly, while not determinative, I found it significant that there has been acceptance of the Plan in Ontario and Quebec. This not only suggests that the Plan proposes a reasonable offer, but it also suggests that the parties affected in these provinces have accepted the principle that international comity should be recognized in these proceedings.

FORSYTH J.

cp/d/drk/DRS

Tab 4

Case Name:

Canlau International (Barbados) Corp. v. Atlas Securities Inc. (Liquidator of)

Between
Canlau International (Barbados) Corporation, plaintiff, and Atlas Securities Inc. In Liquidation and Scott Turner, defendants

[2002] O.J. No. 2201

[2002] O.T.C. 481

35 C.B.R. (4th) 232

21 C.P.C. (5th) 360

118 A.C.W.S. (3d) 54

Court File No. 01-CL-4246

Ontario Superior Court of Justice

Spence J.

Heard: May 3, 2002.
Judgment: May 31, 2002.

(75 paras.)

Practice -- Service -- Service of notice, writ or statement of claim out of jurisdiction -- Consideration by court of forum conveniens -- Conflict of laws -- Actions -- Forum conveniens -- Considerations -- Procedure for determining forum conveniens -- Stay of proceedings where action pending in another jurisdiction (lis alibi pendens).

Motion by Liquidator of Atlas for an order setting aside service of the statement of claim and a permanent stay of the action. Canlau sought to dismiss or stay the motion. Atlas was a Turks and Caicos Island corporation. An order was made in Turks and Caicos for the voluntary liquidation of Atlas subject to supervision of the Court. The Ontario Court recognized the Turks and Caicos pro-

ceedings as a foreign proceeding. Atlas had never operated in Canada. Canlau was incorporated under the laws of Barbados. Canlau opened a trading account with Atlas in February 2001. It appointed Patrick Power, a resident of Quebec, as mandator of the Canlau account. Power's dealings with Atlas were through Scott Turner, the co-defendant, who was a Toronto resident. Canlau's claim was for damages arising from the unauthorized acts of Turner and Atlas, including a diminution in value of its shares and loss of investment income. Canlau filed a Proof of Debt in the liquidation proceedings. Canlau was dissatisfied with the progress of the liquidation proceedings and commenced this action in Ottawa. Canlau argued that Ottawa was the most convenient jurisdiction in which to conduct the litigation.

HELD: Motion of the liquidator granted and Canlau's motion dismissed. There were a number of connecting factors to Ontario and there was a juridical advantage to Canlau in having the action conducted under the case management rules of Ontario. Turner, a crucial witness, had attorned to the jurisdiction of Ontario. The liquidator's involvement would be limited to providing documents and instructions. None of the material witnesses had any connection to Turks and Caicos. Canlau suffered damages in Ontario. There were significant factors which gave a real and substantial connection to Turks and Caicos. All Atlas's records were in Turks and Caicos, the alleged improper dealings took place there and the contract was governed by its law. Canlau filed a Proof of Debt in the Turks and Caicos proceedings and it appeared to deal entirely with the subject matters which Canlau sought to litigate in Ontario. The Turks and Caicos proceeding was properly constituted there and properly recognized in Ontario. It was appropriate for the court in that jurisdiction to exercise principal control over the insolvency process of Atlas, in light of the principles of comity and to avoid a multiplicity of proceedings. No reason was established to support the making of an exception for Canlau's claim.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 69, 69(3), 271, 271(2), 271(5).

Companies' Creditors Arrangement Act, s. 18.6.

Ontario Rules of Civil Procedure, Rule 17.02, 17.02(b), 17.02(h), 17.02(o), 17.06(2)(c), Turks and Caicos Island Companies Ordinance (CAP 122)

Counsel:

Nancy K. Brooks, for the plaintiff, Canlau International (Barbados) Inc.
Richard B. Jones, for the Liquidator of Atlas Securities Inc.
Scott Turner, on his own behalf.

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1 **SPENCE J.**:-- The Liquidator of the Atlas Securities Inc. (the "Liquidator") seeks an order setting aside service on him of the statement of claim of the Plaintiff, and a permanent stay of the action of the Plaintiff as against the Liquidator, and related belief. Canlau moves against the Liquidator for an order to dismiss his motion or to stay it and direct that it be heard in Ottawa, and related relief.

Background Facts

The Liquidation of Atlas Securities Inc.

2 On June 28, 2001, an order was made by the Supreme Court of the Turks and Caicos Islands pursuant to the Companies Ordinance (CAP 122) of the Turks and Caicos Island for the voluntary liquidation of Atlas Securities Inc. ("Atlas") subject to supervision of the Court (the "Turks and Caicos Proceedings").

3 On August 31, 2001, an order was made by the Superior Court of Justice (Ontario). In that Order, the Turks and Caicos Proceedings were recognized in Canada as a foreign proceeding for the purposes of section 18.6 of the Companies' Creditors Arrangement Act and for Part XIII of the Bankruptcy and Insolvency Act. The Liquidator was recognized as a foreign representative for such purposes.

4 Paragraph 11 of Mr. Justice Nordheimer's Order dated August 31, 2001 stayed all proceedings against Atlas until September 30, 2001 "or such earlier or later date as this Court by further order may stipulate". No further order was sought or obtained either abridging or extending the stay of proceedings against Atlas.

5 On November 29, 2001, an Order was made by the Supreme Court of the Turks and Caicos Islands that Joseph P. Connolly ("Connolly") be appointed Liquidator of Atlas with effect from November 29, 2001. On December 18, 2001, an Order was made by the Superior Court of Justice (Ontario) confirming Connolly as successor Liquidator of Atlas with effect from November 29, 2001.

6 Atlas is a corporation incorporated pursuant to the laws of the Turks and Caicos Islands, British West Indies. It carried on business in Providenciales, Turks and Caicos Islands. Atlas does not and has never operated branch offices in Ontario or in any other jurisdiction in Canada, nor does Atlas hold any licenses to carry on business in Ontario or any other jurisdiction in Canada.

7 All claims for property as against Atlas in the liquidation and all creditors claims as against Atlas are being adjudicated upon by the Supreme Court of the Turks and Caicos Islands.

The Canlau Action

8 The plaintiff, Canlau, is incorporated under the laws of Barbados. Canlau has retained the services of the Corporate Secretary Limited in the Town of Bridgetown in Barbados, to act as secretary of the corporation. Canlau's corporate address is that of the Secretariat.

9 Canlau submitted the following particulars concerning its action against Atlas. These particulars were not materially disputed for purposes of the present motions.

10 Canlau opened trading account number XXXXXXX (the "Canlau Account") with Atlas in or about February, 2001. [Numbers replaced with X's by Quicklaw.]

11 Canlau appointed Patrick J. Power ("Power"), a director of Canlau and a resident of the Municipality of Chelsea, in the Province of Quebec, as mandator of the Canlau Account, with complete authority to provide instructions to Atlas regarding the Canlau Account.

12 At all times material to the action, that is, throughout the period between the opening of the Canlau Account in February 2001, and the voluntary liquidation of Atlas in July 2001, Power was the sole person dealing with Atlas on behalf of Canlau. All of Power's dealing with Atlas were with

Scott Turner, the co-defendant in this action. Power carried out all his dealings with Atlas from his office in Ottawa, Ontario.

13 Turner was at all times material to the action a director and officer of Atlas. Turner is a resident of Toronto, Ontario.

14 When the Canlau Account was opened, Power took steps to have 400,000 common shares (the "shares") of InBusiness Solutions Inc. ("InBusiness"), a publicly-traded corporation listed on the Toronto Stock Exchange, transferred into the Canlau Account from an outside, non-Atlas account.

15 Power later discovered that Turner and Atlas made an unauthorized transfer of a debt of $567,569.88 US, 125,000 warrants of InBusiness and 335,500 common shares of InBusiness into the Canlau Account.

16 Power was informed by Turner that he had transferred into the Canlau Account the debt and the unauthorized warrants/shares from another Atlas account numbered XXXXXXX (the "XXXXXXX Account"). Neither Canlau nor Power have ever had any interest in or relation to the XXXXXXX Account. [Numbers replaced with X's by Quicklaw.]

17 Canlau says that, through these unauthorized acts of Turner and Atlas, Canlau has suffered damages, including a diminution in value of its shares and loss of investment income. In addition, Canlau has suffered damages arising from its inability to deal with the shares.

18 Power received various communications from the Liquidator relating to the voluntary liquidation of Atlas. On August 3, 2001, Power filed a Phase 1 Direction with the Liquidator providing instruction for the transfer of the shares to another financial institution. Phase 1 accounts were those where Atlas was holding assets on trust for the account-holders, as opposed to Phase II accounts, where the Liquidator treats the account in question as a margined account and may dispute the claim of account holders regarding ownership of the securities contained therein. To the extent that a client did not receive the full amount of investments, they were to become creditors of Atlas. On the basis that Atlas was holding the shares in trust, Power sought the return of the shares and did not take the position that Canlau was a creditor of Atlas.

19 The transfer of shares in accordance with Canlau's Phase I Direction was never carried out by the Liquidator.

20 Canlau's counsel wrote to the then liquidator of Atlas, Ian F. Strang ("Strang'), by letter dated October 10, 2001, to assert Canlau's claim for the shares and deny any liability for the debt. In her letter, Canlau's counsel asserted that the Canlau Account should be classified as a Phase I account.

21 In his October 12, 2001 reply to Canlau's counsel's letter, counsel for the Liquidator stated that "At present time, the Liquidator is not in a position to determine the correct state of the account of Canlau International (Barbados) Corporation and he is not prepared to recommend that it be dealt with as a Phase I account."

22 On or about November 9, 2001, Power received a blank Proof of Debt form via e-mail from Strang.

23 A Proof of Debt was filed on behalf of Canlau stating that Canlau was not a creditor of Atlas, but that Atlas was holding the shares in trust for Canlau. The Proof of Debt expressly stated that it was filed without prejudice to Canlau's position that it was not a creditor of Atlas.

24 Neither Canlau nor its counsel has had any communication from the Liquidator nor counsel for the Liquidator setting out the reasons why they are not treating the Canlau Account as a Phase I account. Moreover, neither Canlau nor its counsel have had any communication regarding what entitlement, if any, the Liquidator deems Canlau is entitled to. In effect, Canlau considers it has been stonewalled.

25 In the absence of any satisfactory response from the Liquidator, Canlau commenced the present action seeking damages on behalf of Canlau relating to the unauthorized dealings with the Canlau Account and the unauthorized transfer into the Canlau Account of the debt and the unauthorized warrants and shares. The Statement of Claim was issued on February 4, 2002 and served on the Liquidator in Turks and Caicos.

26 The Statement of Claim was served on the Liquidator February 15, 2002 after the stay imposed by Mr. Justice Nordheimer expired on September 30, 2001.

27 Pursuant to the order of Mr. Justice Nordheimer dated August 31, 2001, counsel for the Liquidator served a Summons to Witness compelling Power to attend an examination pursuant to Rule 271(5) of the Bankruptcy and Insolvency Act ("BIA") in Ottawa, Ontario, on December 6, 2001. Power attended the examination and during the examination counsel for the Liquidator had in his possession in Ontario all documents in the possession of Atlas relating to the Canlau Account and also to the XXXXXXX Account. [Numbers replaced with X's by Quicklaw.]

28 The evidence of Turner will be crucial in the action. Turner resides in Toronto, Ontario, and has attorned to the jurisdiction of Ontario without dispute and filed a Statement of Defence. Canlau has filed a Reply to Turner's defence.

29 In his Statement of Defence, Turner alleges that one Turner Bahcheli, a resident of the Province of Alberta, was involved in the matters at issue in the action. Bahcheli will be a material witness at the trial of the action by virtue of the allegations made by Turner in his defence.

30 The witnesses who will be called upon to testify in the action will include Power, Turner and Bahcheli. The Liquidator's involvement will be largely limited to providing documents and instructions to his counsel in Toronto as he was not involved with Atlas at the times material to the action. None of the material witnesses has any connection to Turks and Caicos. As noted above, Turner is a resident of Ontario, Bahcheli is a resident of the Province of Alberta and Power resides in Chelsea, Quebec, an adjacent municipality to the City of Ottawa and part of the National Capital Region. The action was commenced in Ottawa as the most convenient jurisdiction in which to conduct the litigation in an expeditious and cost-effective manner.

31 The shares of InBusiness Solutions Inc. which Canlau claims are shares of a Canadian corporation and constitute the sole asset of Canlau. These shares trade on the Toronto Stock Exchange and Canlau has through the defendants' action suffered damages in Ontario.

Other Facts Raised by the Liquidator

32 All of the operating records of Atlas are in the possession of the Liquidator and are located in the Turks and Caicos Islands.

33 All acts that form the subject matter of the claim raised by Canlau occurred in the Turks and Caicos Islands or in Barbados, the home jurisdiction of Canlau.

34 Any alleged transfer of the customer records of Atlas of 125,000 warrants and 335,500 common shares in InBusiness Solutions Inc. ("InBusiness") to account number XXXXXXX from account number XXXXXXX would have taken place in the Turks and Caicos Islands. [Numbers replaced with X's by Quicklaw.]

35 The contract in question (the "Corporate Margin Agreement") between Atlas and Canlau respecting account number XXXXXXX was not made in the Province of Ontario. The offer was made by Atlas in the Turks and Caicos Islands and accepted by Canlau in Barbados. It was made between two corporations located in the Turks and Caicos Islands and Barbados respectively and is stated to be governed by the laws of the Turks and Caicos Islands. [Numbers replaced with X's by Quicklaw.]

36 Canlau has filed a Proof of Debt dated November 22, 2001 with the Liquidator in the Turks and Caicos Proceedings and such proof of debt appears to deal entirely with the subject matter which Canlau now seeks to litigate in Ontario. There is a procedure established by the Supreme Court of the Turks and Caicos Islands for the determination of claims in the liquidation of Atlas and Canlau has acted in accordance with such procedure.

37 The Liquidator has served Canlau with all notices to creditors including Notice to provide particulars of claims and debts and Notice of a Meeting of Creditors scheduled for November 26, 2000.

38 The Liquidator has served Canlau with all updates to creditors including the Liquidator's Statement of Issues and Supplementary Statement of Issues by Liquidator.

39 In the opinion of the Liquidator, in order to effect a fair and orderly liquidation of Atlas, all creditors' claims and claims for property as against Atlas should be processed and adjudicated upon in the Supreme Court of the Turks and Caicos Islands.

40 On April 24, 2002, Canlau delivered its Reply to the Statement of Defence of Scott Turner in the within action to the offices of Jones, Rogers LLP. Paragraph twelve of the Reply states that, "There is no relationship between Canlau and Power except that Power was the mandator of the Canlau Account, authorized by Canlau to give instructions to Atlas regarding the Canlau Account".

The Issue

41 The issue is whether this Court has jurisdiction to hear the action which the plaintiff has brought against Atlas or whether the action ought to be stayed by reason of the liquidation proceeding in respect of Atlas which is being conducted in the Turks and Caicos Islands.

Analysis

Rule 17.02

42 In this case, the plaintiff relies on Rule 17.02(h) and Rule 17.02(o) which authorize service outside of Ontario without leave as follows:

> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process ... where the proceeding against the party consists of a claim or claims, [...]

> in respect of damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence wherever committed;
>
> [...]
>
> against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario.

43 For purposes of these reasons and in view of the analysis set out below, it is sufficient to assume without deciding that the service out of Ontario which has been affected by the plaintiff is valid in the sense that it is in fact authorized by Rule 17.02(b) and/or Rule 17.02(o).

Forum non Conveniens

44 The issue that needs consideration here is: what effect does the fact that Rule 17.02 is applicable have on the application of the principle of forum non conveniens for purposes of determining whether a stay of the proceedings in Ontario is in order.

45 The forum non conveniens principle addresses the question of which forum (in this case, Ontario or Turks and Caicos Islands)) is the more appropriate or suitable jurisdiction to hear and determine the matter.

46 The forum most suitable for the trial of the action is that with which the action has the most real and substantial connection. The "connecting factors" relied upon to establish the forum having the most real and substantial connection include factors affecting convenience and expense (such as the location and availability of witnesses) and factors such as the law governing the transaction in question and the places where the parties respectively reside or carry on business.

Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), 102 D.L.R. (4th) 96 at 108 and 111-12 (S.C.C.).

47 The plaintiff contends that the plaintiff has a prima facie right to have its case tried in Ontario if it demonstrates that its action falls within R. 17.02. This right can only be displaced by the defendant convincing the court that the balance of convenience requires that, in the exercise of judicial discretion, the plaintiff should be deprived of it.

Applied Processes Inc. v. Crane Co. (1993), 15 O.R. (3d) 166 (Gen. Div.).

Interim Projects Engineering Corp. v. Can. Co-op Implements Ltd. (1984), 47 C.P.C. 142 at 151 (Ont. Master).

48 The plaintiff in its factum submits the following as to the onus that must be met by the Liquidator in this case.

> The governing test in respect of a motion for a stay of proceedings on the ground of forum non conveniens has been settled authoritatively by the Supreme Court of Canada: The existence of a more appropriate forum must be clearly established before the forum chosen by the plaintiff will be displaced.

> The test for a stay is whether the forum chosen by the plaintiff is clearly inappropriate rather than whether there is another forum that is clearly more appropriate.
>
> The objective is to ascertain which jurisdiction has the strongest connection to the action and the parties. If there is any doubt about the correct forum, the plaintiff is to be allowed to choose the forum. The defendant disputing jurisdiction in Ontario has the onus to satisfy the court that there is a more appropriate forum in another jurisdiction.
>
> (Emphasis in original)

49 The Liquidator disputes that its onus is as exacting as the plaintiff's submission would suggest.

50 As noted earlier, the liquidation proceedings have been recognized by order of this court as a foreign proceeding for purposes of section 18.6 of the Companies Credit Act ("CCAA") and for Part XIII of the Bankruptcy and Insolvency Act ("BIA"). The Liquidator, as the recognized foreign representative, may apply to the court pursuant to S. 271(2) of the BIA, for a stay. Counsel submits that the court may properly take into account the provisions of s. 69(3) of the BIA which provides for a stay of proceedings against a trustee in bankruptcy and ought properly to regard the Liquidator as being in the same position in respect of Atlas as a trustee in bankruptcy would be in if the liquidation proceeding had instead been initiated in Ontario. The Liquidator's submissions on this point were not disputed by the plaintiff.

51 The Liquidator also relies, in respect of the effect of the applicability of Rule 17.02, on the fact that the plaintiff is a foreign person. This factor is of course one that is to be taken into account in a forum non conveniens analysis of relevant factors, as mentioned further below.

52 Rule 17.06(2)(c) provides that, where a party moves to set aside service under Rule 17.02 or for an order staying the proceeding, the court may make an order if it is satisfied that "Ontario is not a convenient forum for the hearing of the proceeding".

53 The Liquidator submits that the principles which state more satisfactorily the appropriate approach are as follows, as set out in the following paragraphs from its factum:

> In relation to establishing the appropriate forum based upon principles of forum non conveniens, Rule 17.06 is only of marginal significance and cannot be usefully resorted to as a means of altering fundamental principles upon which the doctrine in its broader scope should properly rest.
>
> Frymer v. Brettschneider (1994), 19 O.R. (3d) 60 (C.A.) at 84.
>
> The determination of the most appropriate forum for the trial of an action is premised upon a consideration of the relevant factors such that a Court will grant a stay where it is satisfied that a more appropriate forum exists in which the case can be tried based upon the interests of all the parties and the ends of Justice.

> Spiliada Maritime Corp. v. Cansulex Ltd., [1986] 3 All E.R. 843 (H.L.) at 854-856.
>
> The forum most suitable for the trial of the action is the one with which the action has the most real and substantial connection. The connections include not only factors affecting the convenience or expense with respect to witnesses but also other factors such as the law governing the relevant transaction and the places where the parties reside or respectively carry on business.
>
> Frymer v. Brettschneider (1994), 19 O.R. (3d) 60 (C.A.) at 66.
>
> When an issue of forum non conveniens is raised, the test will be the same whether service was effected ex juris or whether the defendant was served within the jurisdiction. In all cases, the test is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried.
>
> Amchem Products Inc. v. British Columbia (W.C.B.) (1993), 102 D.L.R. (4th) 96 (S.C.C.) at 111.

54 I am not persuaded that it is necessary for the present case to engage in an exhaustive analysis of the differences between the positions of the parties as reflected in the material they invoke in support. While some aspects of the question of onus may be disputable, it seems to be clear enough that the court will grant relief where it is established that a forum other than Ontario is a more convenient forum than Ontario, according to the principles and factors that are to be taken into account for the purpose.

Forum non conveniens: factors

55 The relevant factors to be considered in determining the appropriate forum are numerous and include the following:

* the location of the parties and key evidence;
* the location of key witnesses;
* geographical factors suggesting the natural forum;
* the avoidance of multiplicity of proceedings;
* the applicable law and its weight compared with the factual questions to be decided; and
* the location of the core of the action.

> MacDonald & Lasnier (1994), 21 O.R. (3d) 177 (Gen. Div.) at 184.
>
> ABB Power Generation Inc. v. CSX Transportation (1996), 47 C.P.C. (3d) 381 (Ont. Gen. Div.) at 390-391.

56 The plaintiff submits that the "connecting factors" are varied and will depend on the facts and circumstances of each case. In the present case, the plaintiff submits that the following con-

necting factors establish a real and substantial connection with Ontario and are indicative that Ontario is the forum conveniens:

* The key documentary evidence is located in Ontario. All of the key documentary evidence of Canlau is located in Ontario. Counsel for the Liquidator already has in Ontario all of the documentation relating to both the Canlau Account and the XXXXXXX Account (as was evident on the examination of Patrick Power in Ontario). It is clearly not the case that all of the operating records of Atlas are in the Liquidator's possession and located in Turks and Caicos. Even if certain of the documents are in Turks and Caicos, they can be easily shipped to Ontario for the purposes of documentary production. [Numbers replaced with X's by Quicklaw.]
* A preponderance of the key witnesses are located in Ontario and Canada, including the co-defendant Turner (Ontario); Power (Chelsea, Quebec, a municipality adjacent to Ottawa where the action was commenced); and Bahcheli (Alberta). The Liquidator was not involved with Atlas at the times material to the action and his evidence will be marginal to the issues in the action.
* Turner, a former officer and director of Atlas, who had all dealings regarding the Canlau Account, has filed a defence in the action in Ontario and has raised allegations regarding the XXXXXXX Account which he alleges is held beneficially for a Canadian, Bahcheli. [Numbers replaced with X's by Quicklaw.]
* Prior to its voluntary liquidation, Atlas carried on business, across international borders, in inter alia Canada, and specifically Ontario.
* Although the law of Turks and Caicos applies to the Canlau Account, evidence as to Turks and Caicos law can, if necessary, be adduced through expert testimony in Ontario.
* No proceedings in any other jurisdiction are currently dealing with the plaintiff's claim.
* The location of the parties does not establish a real or substantial connection with one forum over another: Canlau is a Barbados corporation; Atlas is a Turks and Caicos corporation. However, Power, a director of Canlau and mandator of the Canlau Account, is a resident of Chelsea, Quebec, a municipality adjacent to Ottawa and forming part of the National Capital Region.
* The geographical factors suggest Ontario over Turks and Caicos.

57 The plaintiff submits the following two further considerations.

58 The juridical advantage to the plaintiff (in this case, in having the action conducted under the case management rules in Ontario) is one of the factors to be taken into account in determining the appropriate form.

Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), 102 D.L.R. (4th) 96 at 110 (S.C.C.).

59 It will be more costly for the plaintiff to pursue an action against the Liquidator in Turks and Caicos than in Ottawa. Such additional costs are taken into account when determining the advantage of proceeding in the domestic forum.

1248671 Ontario Inc. v. Michael Foods Inc. (2000), 51 O.R. (3d) 789 at 798 (S.C.J.).

60 The Liquidator submits that, quite apart from the liquidation proceedings themselves, there are significant factors which give the action by the plaintiff a real and substantial connection to the Turks and Caicos islands rather than Ontario.

> the real defendant is the Liquidator who is an individual in the Turks and Caicos Islands appointed under the laws of that jurisdiction as the liquidator of Atlas, itself a Turks and Caicos corporation.
>
> the plaintiff is not an Ontario corporation but rather a Barbados corporation.
>
> the contract in question would have been made in Turks and Caicos as in Barbados.
>
> the contract was governed by Turks and Caicos law.

International Insolvencies

61 Part XIII of the BIA establishes a regime with respect for international insolvencies. The following provisions of Part XIII are relevant to the present case.

> Definitions - in this Part,
>
> > "debtor" means an insolvent person who has property in Canada, a bankrupt who has property in Canada or a person who has the status of a bankrupt under foreign law in a foreign proceeding and has property in Canada;
> >
> > "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;
> >
> > "foreign representative" means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the court.
>
> * Presumption of insolvency - For the purposes of this Part, where a bankruptcy, insolvency or reorganization or like order has been made in respect of a debtor in a foreign proceeding, a certified or exemplified copy of the order is, in the absence of evidence to the contrary, proof that the debtor is

insolvent and proof of the appointment of the foreign representative made by the order.

* Limitation on trustee's authority - Where a foreign proceeding has been commenced and a receiving order or assignment is made under this Act in respect of a debtor, the court may, on application and on such terms as it considers appropriate, limit the property to which the authority of the trustee extends to the property of the debtor situated in Canada and to such property of the debtor outside Canada as the court considers can be effectively administered by the trustee.
* Powers of court - The court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.
* Terms and conditions of orders - An order of the court under this Part may be made on such terms and conditions as the court considers appropriate in the circumstances.
* Court not prevented from applying certain rules - Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.
* Court not compelled to give effect to certain orders - Nothing in this Part requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.
* Foreign stays - A stay of proceedings that operates against creditors of a debtor in a foreign proceeding does not apply in respect of creditors who reside or carry on business in Canada with respect to property in Canada unless the stay of proceedings is the result of proceedings taken in Canada.
* Commencement or continuation of proceedings - A foreign representative may commence and continue proceedings pursuant to sections 43 and 46 to 47.1 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor, trustee, liquidator or receiver of property of the debtor, or the debtor, as the case may be.
* (1) Court may seek assistance from foreign tribunal - The court may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or written request or otherwise as the court considers appropriate.
* (2) Application for stays - On application by a foreign representative in respect of a foreign proceeding commenced for the purpose of effecting a composition, an extension of time or a scheme of arrangement in respect of a debtor or in respect of the bankruptcy of a debtor, the court may grant a stay of proceedings against the debtor or the debtor's property in Canada on such terms and for such period as is consistent with the relief provided for under sections 69 to 69.5 in respect of a debtor in Canada who files a notice of intention or a proposal or who becomes bankrupt in Canada, as the case may be.

Effect of the Liquidation Proceedings

62 A central consideration is the fact that Atlas, the named defendant in the action brought by the plaintiff, is the subject of liquidation proceedings in the Turks and Caicos Islands. In those proceedings the Liquidator has been appointed in respect of Atlas. By the order of Nordheimer J. of August 31, 2001, this court has recognized the foreign proceeding and has recognized the Liquidator as a foreign representative pursuant to s. 271 of the BIA.

63 That foreign proceeding is continuing. The plaintiff has submitted a proof of claim in the proceeding. That action would normally constitute an act of attornment to the jurisdiction of the court of the Turks and Caicos Islands in respect of the foreign proceeding. There is nothing before the court that would provide a basis for regarding it otherwise.

64 The plaintiff considers that it is being stonewalled by the Liquidator. However the plaintiff has not taken any proceeding in the Turks and Caicos Islands to dispute the manner in which the Liquidator is dealing with its claim. Instead it has initiated its action in this court based not on the conduct of the Liquidator but with respect to dealings between the plaintiff and the defendants, Atlas and Mr. Turner, and the conduct of those defendants.

65 In the order of Nordheimer J. a stay was granted under s. 271(2) for a period of time. That stay expired prior to the time the plaintiff commenced its action. As part of its present motion, the Liquidator seeks in effect to extend the stay. In principle, the stay would be in keeping with the regime which would apply by reason of s. 69 of the BIA if Atlas were instead the subject of a receiving order in Canada under the BIA, and the Liquidator were appointed the trustee in bankruptcy.

66 It is not disputed that the liquidation proceedings in the Turks and Caicos Islands were properly instituted there or that the Order of Nordheimer J. recognizing the Liquidator is a proper one.

67 So this court has already recognized the liquidation proceeding under s. 271 of the BIA. As a matter of comity, it would seem in principle that the Liquidator should be able to seek the aid and assistance of this court just as this court might request of a foreign court in other foreign proceedings as contemplated by s. 271(1) of the BIA.

68 If the action by the plaintiff were allowed to continue it might well result in a disposition of the claim of the plaintiff in a manner that would be inconsistent with determinations properly made in the course of the foreign proceeding. That would both circumvent and undercut the foreign proceeding.

69 It might be suggested that the existence of the liquidation proceeding should simply be regarded the same way as the possible initiation of litigation between the plaintiff and Atlas in the Turks and Caicos Islands for purposes of the forum non conveniens issue. The fact that the plaintiff could (were it not for the liquidation proceeding) bring an action against Atlas in the other jurisdiction would not necessarily be a factor of any greater significance to the analysis than the other relevant factors. Indeed to treat it as having special significance would border on allowing it to predetermine the issue. But the fact that the liquidation proceedings are under way introduces different considerations.

70 There are two decisions of this court dealing with international insolvencies which are relevant to the present case.

71 In Microbiz Corp. v. Classic Software Systems Inc., [1996] O.J. No. 5094 (Gen. Div.), the text of the reasons of Lederman J. of this court is self-explanatory.

> "MicroBiz is a New Jersey corporation with its headquarters in that State. It carries on business in the U.S. It carries on business in Ontario only through its distributor, Classic Software. MicroBiz has no assets in Ontario. When it file for bankruptcy in the U.S. on March 12, 1996 pursuant to the U.S. Bankruptcy Code, an automatic stay of all proceedings against it went into effect (as is the case under Canadian bankruptcy laws). MicroBiz's plan of reorganization was confirmed by judgment of Justice Winfield of the U.S. Bankruptcy Court on September 3, 1996. The plan of reorganization provides for distribution to all creditors whose claims are accepted, after adjudication if necessary, of 17.5% of their claims. There is no doubt that under the principles laid down in the Morguard Investments case, that judgment of the U.S. Court should be recognized in Canada as there is a real and substantial connection between the U.S. Court's judgment and the subject matter of the proceeding. More importantly, both Classic Software and Haggerty have recognized the judgment and in fact have filed Proofs of Claim in the U.S. proceeding to take advantage of the mechanism provided therein for adjudication of their claims and recovery to the extent of 17.5% of their proven claims. To participate in the U.S. proceedings is beneficial in that it allows Classic and Haggerty to prove their claims and obtain collection in one proceeding rather than obtain judgment on their claims in Ontario and in a separate proceeding in New Jersey seek to effect recovery against the estate of MicroBiz. By filing their Proofs of Claim, Classic and Haggerty have thereby attorned to the jurisdiction of the U.S. Court in New Jersey.
>
> Multiplicity of proceedings in two different jurisdictions should be avoided.
>
> Accordingly, there must be an order staying both the Haggerty action and the Classic action in Ontario until further order of the court.

72 In Re Matlack Inc. (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J.) Farley J. of this court considered and granted an application pursuant to s. 18.6 of the CCAA for recognition of the Chapter 11 proceedings in the U.S. Bankruptcy Court for the District of Delaware as a "foreign proceeding" for purposes of the C.C.A.A. and for a consequential stay of proceedings here. The applicant, Matlack Inc., was a Pennsylvania corporation which conducted the transport business in the U.S., Mexico and Canada. The following excerpts from the decision of Farley J. are relevant.

> "On March 29, 2001, Matlack and its affiliated applicants filed for relief under Chapter 11 and obtained relief precluding creditors subject to the U.S. Bankruptcy Court from commencing or continuing proceedings against the applicants. It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located. Harmonization of proceedings in the U.S. and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial supervision of all of Matlack's

assets and enterprise throughout the two jurisdictions. I note that a Canadian creditor of Matlack has recently seized some of Matlack's assets and intends to sell same in satisfaction of Matlack's obligations to it. It would seem to me that in the context of the proceedings, such a seizure would be of a preferential nature and thus unfair and prejudicial to the interests of Matlack's creditors generally.

Canadian courts have consistently recognized and applied the principles of comity. See Morguard Investments Ltd. v. DeSavoye (1990), 76 D.L.R. (4th) 256; Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.); ATL Industries Inc. v. Han Eol Ind. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div.) [Commercial List]; Re Babcock & Wilcox Canada Ltd. (2000), 18 C.B.R. (4th) 157 (Ont. S.C.U. [Commercial List]) at pp. 160-2.

In an increasingly commercially integrated world, countries cannot live in isolation and refuse to recognize foreign judgments and orders. The Court's recognition of a foreign proceeding should depend on whether there is a real and substantial connection between the matter and the jurisdiction. The determination of whether a sufficient connection exists between a jurisdiction and a matter should be based on considerations of order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction. See Morguard supra; Hunt v. T & N plc. (1993), 109 D.L.R. (4th) 16, [1998] A.J. No. 817 (Alta. Q.B.), at pp. 5-7 (A.J.):

> Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty.
>
> ... I find that common sense dictates that these matters would be best dealt with by one Court, and in the interest of promoting international comity it seems the forum for this case is the U.S. Bankruptcy Court. Thus, in either case, whether there has been attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding ... (emphasis added)

Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable property in Ontario of an American company which has become subject to a Chapter 11 order. See Roberts, supra: Borden & Elliot v.

> Winston Industries Inc., [1983] O.J. No. 970, (November 1, 1983), Doc. 352/83 (Ont. H.C.)
>
> Where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principle control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings. See Microbiz Corp. v. Classic Software Systems Inc., [1996] O.J. No. 5094 (Ont. Gen. Div.).

Conclusion

73 The liquidation proceeding in the Turks and Caicos is properly constituted there and properly recognized here. Accordingly, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in respect of Atlas, in the light of the principles of comity and to avoid a multiplicity of proceedings. No reason is established to support the making of an exception for the plaintiff's claim.

74 Based on the principle of forum non conveniens in the context of the present case and with particular regard to the liquidation proceedings in the Turks and Caicos Islands, the motions of the Liquidator is granted and the motion of Canlau is dismissed.

75 Counsel may consult me about costs.

SPENCE J.

cp/e/nc/qlhcc/qlkjg/qlltl

Tab 5

Case Name:

Nortel Networks Corp. (Re)

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

[2010] O.J. No. 1111

2010 ONSC 1304

65 C.B.R. (5th) 231

2010 CarswellOnt 1597

Court File No. 09-CL-7950.

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: February 25, 2010.
Judgment: February 26, 2010.
Released: March 18, 2010.

(47 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by the Monitor for a declaration the purported exercise of rights and commencement of proceedings by the U.K. Pensions Regulator was a breach of a stay period allowed -- The Pensions Regulator issued a warning notice which provided that default proceedings would be taken if no submissions were made -- The Pensions Regulator took steps in Canada in respect of a proceeding -- The Pensions Regulator was a person affected by the Initial Order, and it did not obtain consent or the leave of the court -- Companies' Creditors Arrangement Act, s. 11(3), s. 11(4).

Motion by the Monitor of the applicants for an order validating short service, declaring the purported exercise of rights and commencement of proceedings by the U.K. Pensions Regulator was a breach of the Initial Order and declaring that all acts taken by the Pension Regulator were null and void and to be given no effect in the proceedings. The Initial Order, granted January 14, 2009, provided no proceeding or enforcement process was to be commenced or continued against the Monitor or the applicants during a stay period until February 13, 2009 or such later date as the Court could order, and that all rights and remedies against Monitor or the applicants were also stayed. The Pensions Regulator issued a warning notice on January 11, 2010, which provided that default proceedings would be taken if no submissions were made by March 1, 2010. A warning notice was a mandatory step towards the Pensions regulator issuing a financial support direction.

HELD: Motion allowed. The Pensions Regulator took steps in Canada in respect of a proceeding. The Pensions Regulator was a person affected by the Initial Order, and it did not obtain consent or the leave of the court.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4)

Pensions Act 2004 (U.K.),

Counsel:

Fred Myers, J. Carfagnini and C. Armstrong, for Ernst & Young, Inc., Monitor.

Derrick Tay, Alan Merskey and Suzanne Wood, for the Applicants.

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

Arthur O. Jacques, for Nortel Canadian Continuing Employees.

Kevin Zych, for Informal Noteholder Group.

John Marshall and James Szunski, for The Pensions Regulator (U.K.).

Mark Zigler, for the Former and Disabled Canadian Employees.

William Burden and David Ward, for the UK Pension Trustee and the Pension Protection Fund.

M. Starnino, for the Pension Benefit Guarantee Fund.

Alex MacFarlane, for the Unsecured Creditors' Committee.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 Ernst & Young, Inc., in its capacity as Monitor of the Applicants (the "Monitor") brings this motion for an order:

(a) validating short service;
(b) declaring that the purported exercise of rights and the commencement of proceedings against the Applicants, Nortel Networks Corporation and Nortel Networks Limited, by The Pensions Regulator under the *Pensions Act 2004* (U.K.) amount to breaches of paragraphs 14 and 15 of the Initial Order;
(c) authorizing, directing and requiring the Applicants and the Monitor to refrain from participating in any proceedings commenced by The Pensions Regulator in breach of the Initial Order; and
(d) declaring that the for the purposes of these proceedings all acts taken by the U.K. Pensions Regulator in the purported exercise of rights and in commencing any proceedings against any of the Applicants, without the consent of those Applicants and the Monitor or without leave of this court having been first obtained, are null and void and should be given no force or effect in these proceedings nor otherwise recognized as creating or forming the basis of any valid or enforceable rights, remedies or claims against the Applicants or any of their assets, property or undertaking in Canada.

2 The motion was heard on February 25, 2010.

3 On February 26, 2010, the Record was endorsed: "The Stay applies. The relief requested in (a), (b) and (d) of the Notice of Motion is granted. No order in respect of (c). Reasons will follow".

4 These are those reasons.

FACTS

5 Paragraphs 14 and 15 of the Initial Order, granted January 14, 2009, provide as follows:

14. THIS COURT ORDERS that until and including February 13, 2009 or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced, or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the affected Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the affected Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.
15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the affected Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registra-

tion to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

6 The Pensions Regulator ("The Pensions Regulator") is the body charged with the enforcement of certain provisions of the *Pensions Act 2004* (U.K.) (the "U.K. Statute").

7 The U.K. Statute's objectives include protecting the benefits of employees in work-based pension schemes and promoting proper administration of those schemes. Under s. 96 of the U.K. Statute, the Regulator may determine whether or not to take regulatory action, which includes, *inter alia*, determining whether the applicable pension is underfunded, quantifying the deficit and holding the employer or a related party responsible for such deficit. The Determinations Panel, an internal group, determines whether the regulatory functions should be exercised.

8 On August 24, 2009, The Pensions Regulator advised the Administrators of the Nortel Networks UK Limited ("NNUK") (the "Administrators") Pension Plan that it was considering issuing a warning notice, a mandatory step towards issuing a financial support direction ("FSD"). A warning notice sets out the grounds for the potential issuance of an FSD, which is a direction requiring a party to put financial supports in place for an underfunded pension scheme. Any company that is an associate of or is otherwise connected with an employer may be issued an FSD.

9 On September 4, 2009, The Pensions Regulator wrote to Nortel Networks Corporation ("NNC") advising that it was considering issuing a warning notice seeking an FSD against NNC and other members in the Nortel Group.

10 On September 16, 2009, NNC wrote to The Pensions Regulator advising that because of the stay issued by this court under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA"), it could not consider individual potential claims.

11 On January 11, 2010, The Pensions Regulator issued a warning notice to NNC, NNI and 27 other companies in the Nortel Group (the "Notice"). The Notice was sent to Nortel Networks Limited ("NNL") and NNC in Canada.

12 The Pensions Regulator informed NNL and NNC that they had until March 1, 2010 to make submissions under the U.K. Statute, failing which default proceedings would be taken. The court was advised that the issuance of an FSD is subject to time limits and that the decision to issue an FSD must occur no more than two years after the "relevant time." The relevant time is designated by The Pensions Regulator in this case as June 30, 2008, such that any decision to issue an FSD in respect of this matter must be made by June 30, 2010.

ISSUE

13 By issuing the Notice, did The Pensions Regulator contravene the stay granted in the Initial Order?

POSITIONS OF THE PARTIES

14 Counsel to the Monitor submits that the issuance of the Notice constitutes the commencement of an enforcement process by a tribunal that is stayed by paragraph 14 of the Initial Order and an assertion of rights by a governmental body that is stayed by paragraph 15 of the Initial Order.

15 The Monitor takes the position that the Notice is effectively a pleading required under the U.K. Statute to enable The Pensions Regulator to make an FSD under the U.K. Statute. Such a de-

termination would cause foreign affiliates of NNUK, including NNL and NNC, to become liable to provide financial support for the pension plan maintained by NNUK.

16 The Monitor contends that in the Notice, The Pensions Regulator purports to exercise rights under the U.K. Statute including, without limitation, the commencement of proceedings to require NNL and NNC to pay up to GBP 2.1 billion (approximately CDN $4 billion) to fund the deficit in NNUK's pension plan. The Pensions Regulator also exercises purported statutory rights, such as deeming certain facts for the purposes of the U.K. Statute and demanding a response by a time limit under threat of default proceedings. Counsel submits that these exercises of rights without consent or leave are stayed by paragraphs 14 and 15 of the Initial Order.

17 Counsel to the Monitor further submits that if The Pensions Regulator is allowed to proceed under the Notice and the process described therein, the result would be extremely prejudicial to the Applicants' ongoing restructuring efforts and to their creditors generally because:

i. Management is fully engaged in the restructuring process and the Applicants cannot afford to sacrifice the time and resources required to participate in the complex process envisaged in the Notice.
ii. The restructuring would be disrupted and the progress already made therein, including the international efforts to negotiate the Allocation Protocol under the IFSA, would be threatened by The Pension Regulator's proceedings or its efforts to make determinations therein.
iii. This Court is the proper forum for proceedings to determine the validity of and resolve all claims against the Applicants at an appropriate time and in an appropriate manner.

18 Regarding forum, the Monitor submits that the issues put forth by The Pensions Regulator can only be properly determined under the CCAA. The NNUK Pension Trust Limited (the "Trustee") and the U.K. Pension Protection Fund (the "PPF") filed proofs of claim in accordance with the October 7, 2009 Claims Process Order (the "Claims Process Order"). The Trustee and the PPF claim "in the amount to be determined to be owing to [the Trustee and the PPF] pursuant to the Financial Support Direction Proceedings undertaken pursuant to the provisions of the [Pension Act]". Counsel to the Monitor submits that the filing under the Claims Procedure Order expressly raises the issues in the Notice.

19 The Monitor submits that there are extensive issues of fact and law for resolution in those proceedings. Moreover, there are issues as to whether any FSD determination can or ought to be recognized as a proper claim under the CCAA. Counsel submits that these are substantial issues upon which determination may or may not be required depending on the outcome of the Allocation Protocol negotiations, and regardless of when such issues may be resolved, there are issues that have been raised in these proceedings by the parties having the economic interest in the FSD claims and who have appeared before this Court and have filed proofs of claims under the Claims Process Order. Counsel argues that it is not efficient, reasonable or appropriate for the Applicants to proceed with massive litigation now in a severely compressed timeframe before a foreign tribunal with an expressed interest in benefiting one group of creditors.

20 At the very least, the Monitor submits that the Notice, having been issued in breach of the stay, should be declared null and void and of no force or effect due to the court's power to compel observance of its orders and to fulfill the purpose of the CCAA.

21 The Monitor also seeks a direction that it refrain from engaging in the proceedings commenced by The Pensions Regulator due to the prejudice caused by a diversion of resources.

22 The Applicants substantially adopt the Monitor's characterization of the Notice and the prejudice it would cause the parties.

23 The Applicants support the Monitor's request for an order declaring that any findings or claims emanating from the Notice and the associated process be null and void, and not recognizable or enforceable in this proceeding.

24 The position of the Monitor is also supported by counsel to the Noteholders, the Unsecured Creditors' Committee, the Former Disabled Canadian Employees and the Nortel Continuing Canadian Employees.

25 Counsel to the PPGF and the Board of Directors of NNL and NNC took no position.

26 The motion was opposed by counsel on behalf of The Pensions Regulator, which responds only to one of the heads of relief sought in the Monitor's Notice of Motion: whether the activities of The Pensions Regulator are a breach of paragraphs 14 and 15 of the Initial Order. The Pensions Regulator submits that the issue is whether this court has jurisdiction to make the order sought by the Monitor in relation to The Pensions Regulator.

27 The Pensions Regulator further submits that if this Court does have such jurisdiction, it should not be exercised in this case in any event.

28 Regarding the assertion by the Monitor and Applicants that the Notice is a pleading, Counsel for The Pensions Regulator took the position that that the Notice provides a standard procedure for determining, internally, whether The Pensions Regulator should commence proceedings to exercise its statutory powers (the "Standard Procedure").

29 Counsel to The Pensions Regulator submits that pursuant to the Notice, the Determinations Panel will consider exercising its powers to issue an FSD and that these powers have not yet been exercised and may never be exercised. A determination in this regard will not be made until the responding parties to the Notice have had an opportunity to make representations and those representations have been considered by the Determinations Panel pursuant to the Standard Procedure set out at sections 96(2)(b) and (c) of the U.K. Statute.

30 Counsel further submitted that the FSD powers which The Pensions Regulator is considering exercising will not result in additional *ex post facto* claims in the proceedings under the CCAA as the Monitor has alleged, as the activities of the Determinations Panel will not result in making The Pensions Regulator a creditor of the Applicants.

31 Counsel to The Pensions Regulators submits this court does not have jurisdiction to make, and/or ought not to make, the order sought by the Monitor for the following reasons:

(a) The Initial Order is of no effect in the UK;
(b) The Monitor has not sought to enforce the Initial Order in the UK by way of an application for a recognition order;
(c) Although it is speculative to predict whether a UK court would make a recognition order enforcing the Initial Order in the UK, a number of factors suggest that any such recognition would not stay the regulatory proceedings;

(d) The blanket request for aid and recognition in the Initial Order does not eliminate the need for an application for a recognition order and the inquiry by the UK court that would be triggered thereby; and

32 Counsel further submits that this court lacks the jurisdiction to make an order under the CCAA that purports to have an inherent effect in a foreign state.

33 Counsel to the Trustee of the NNUK Pension Plan also opposed the making of any order. In particular, counsel submitted that an FSD could assist this court in CCAA proceedings, as the Panel making the determination has expertise and operates in a similar legal system as Canada.

LAW AND ANALYSIS

34 The CCAA stay of proceedings has been described as "the engine that drives a broad and flexible statutory scheme": see *Re Stelco Inc.*, [2005] O.J. No. 1171, 2005 CarswellOnt 1188 at para. 36 (C.A.).

35 This court had the jurisdiction to make the Orders in paragraphs 14 and 15 of the Initial Order. Subsection 11(3) (with respect to initial applications) and subsection 11(4) (with respect to subsequent applications such as extensions of the initial stay) of the CCAA expressly empower the Court to make an order staying "any action, suit or proceeding" against the company on such terms as it may impose.

36 The court retains the ability to control its own process including litigation against CCAA debtors and claims procedures within a CCAA process. To ensure its effectiveness, s. 11, and in particular "proceedings" has been broadly interpreted to cover both judicial and extra-judicial proceedings which could prejudice an eventual arrangement.

37 In *Re Woodward's Ltd.*, (1993), 17 C.B.R. (3d) 236 (B.C.S.C.), the court found that "if a step must be taken vis-a-vis the insolvent company" for the creditor to enforce its rights, that step was a proceeding (at para. 27). The B.C. court looked to Black's Law Dictionary's definition of "proceeding" to base its finding:

> "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding.

38 In *Meridian Development Inc. v. Toronto Dominion Bank*, (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), Wachowich J. provided a helpful analysis of the breadth of the definition of "proceeding" at para. 27:

> ... I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term "proceedings" to those necessarily involving a court or court official, because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act ... (i)n

> the absence of a clear indication from Parliament of an intention to restrict proceedings" to "proceedings which involve either a court or court official", I cannot find that the term should be so restricted. Had Parliament intended to so restrict the term, it would have been easy to qualify it by saying for instance "proceedings before a court or tribunal".

39 It has also been established that the term "proceeding" may refer to any procedural step that is part of a larger proceeding. Delivery of a certificate to the debtor company as a prerequisite to drawing on a letter of credit has been stayed as a proceeding against a CCAA debtor: see *Re Woodward's Ltd.*, *supra*, at paras. 26-27.

40 It seems to me that, even though the Notice may be described as a warning shot across the bow, the effect of the Notice in this case is something far more significant. It clearly puts the Applicants and the Monitor on notice that there is a substantial claim that is being considered in the CCAA proceedings. At the present time, the claim as filed by the U.K. Pension Trustee makes reference to the FSD which may very well flow from the activities being undertaken by The Pensions Regulator. Having already set out the parameters of this claim in the proof of claim, the claim has to be considered a contingent claim in the CCAA proceedings. In my view, the issuance of the Notice is another step on the road to crystallizing the contingent claim.

41 The issuance of an FSD is a remedy created by a statute of the United Kingdom. Regardless of whether the U.K. Statute purports to extend its reach beyond the borders of the U.K., the Notice, naming the Applicants, NNC and NNL, as "target companies" affects these entities which are clearly within the jurisdiction of this Court. Moreover, The Pensions Regulator purported to deliver the Notice to NNL and NNC by sending it to them in Canada in purported compliance with the U.K. Statute. In my view, The Pensions Regulator took steps in Canada in respect of a proceeding. In this context, The Pensions Regulator is, in my view, a person affected by the Initial Order, with which it must comply when it takes any proceedings in Canada.

42 The Pensions Regulator did not obtain the consent of NNC and NNL or the Monitor, and did not obtain the leave of this court, before taking steps in Canada which affected NNC and NNL. In my view, the delivery of the Notice in Canada was in breach of the Initial Order. It follows that any continuation of these proceedings in Canada and attempted enforcement of rights in Canada will also be in breach of the Initial Order.

43 As such, section (b) of the relief requested by the Monitor should be granted.

44 It also follows that for the purposes of the CCAA proceedings, the actions taken by The Pensions Regulator, are null and void in Canada and are to be given no force or effect in these CCAA proceedings. Accordingly, section (d) of the requested relief should also be granted.

45 Having made this determination, in my view, it is not necessary to consider the arguments outlined at [17]. The points raised in [17] may be relevant to any motion to lift the stay, but that issue is not before the court.

46 The Monitor also requested an order authorizing, directing or requiring the Applicants and the Monitor to refrain from participating in any proceedings commenced by The Pensions Regulator. In my view, it is not necessary to comment further and provide directions with respect to a proceeding which, on its face, is null and void. The UK proceedings operate under UK law, and I de-

cline to make a declaration on their legitimacy or to provide direction to the Monitor and the Applicants on their obligations to attend.

47 An order shall issue to give effect to the foregoing.

G.B. MORAWETZ J.

cp/e/qlrxg/qljxr/qljyw/qlaxw/qljyw

Case Name:

Nortel Networks Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2010] O.J. No. 2648

2010 ONCA 464

67 C.B.R. (5th) 19

83 C.C.P.B. 52

2010 CarswellOnt 4112

Docket: C52117

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., K.N. Feldman and R.A. Blair JJ.A.

Heard: June 16, 2010.
Oral judgment: June 16, 2010.
Released: June 22, 2010.

(4 paras.)

Appeal From:

On appeal from the order of Justice Morawetz of the Superior Court of Justice dated February 26, 2010.

Counsel:

John D. Marshall and J. Szunski, U.K. Pensions Regulator.

B. Burden and D. Ward, Pension Protection Fund Trustee.

F. Myers, Jay Carfagnini and P. Kolla, for Monitor, Ernst & Young Inc.

A. Merskey, for the Nortel Companies.

M. Starnino, for the Superintendent of Financial Service.

Jonathan Bida, for Former Employees of Nortel.

Derek J. Bell, for Nortel Noteholders.

Alex MacFarlane, for Canadian Lawyers for the Official Committee of Unsecured Creditors.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- We agree with Morawetz J. that the service of the Warning Notice breached the stay provisions in the Initial Order. The service of the Notice is, therefore, a nullity for purposes of the *Companies' Creditors Arrangement Act* proceedings.

2 With respect to the remedy, we do not interfere with para. 3 of the order below subject to this clarification: Paragraph 3 should not operate so as to preclude the U.K. Trustee and/or the Pension Protection Fund from seeking to assert, by way of amendment of the Proof of Claim, if necessary, a claim in the *Companies' Creditors Arrangement Act* process for pension contribution shortfalls, including for the relief they assert they would have been able to establish in the U.K. Financial Support Direction process.

3 In the result, the appeal is dismissed.

4 We are only going to deal with the costs in this court. The costs of the proceedings below are left to the court below. We order the U.K. Pensions Regulator to pay the Monitor's costs fixed in the amount of $50,000 and the Nortel companies' costs fixed in the amount of $40,000. Both awards include GST and disbursements and cover the motion to expedite, the leave to appeal and today's appeal. No other costs are ordered.

D.R. O'CONNOR A.C.J.O.
K.N. FELDMAN J.A.
R.A. BLAIR J.A.

cp/e/qllxr/qljxr/qlana/qlhcs

Tab 6

Case Name:

Nelson Financial Group Ltd. (Re)

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement of Nelson Financial Group Ltd., Applicant

[2011] O.J. No. 2115

2011 ONSC 2750

79 C.B.R. (5th) 307

2011 CarswellOnt 3100

Court File No. 10-8630-00CL

Ontario Superior Court of Justice

G.B. Morawetz J.

Heard: April 20, 2011.
Judgment: April 21, 2011.
Released: May 6, 2011.

(39 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Sanction by court -- Motion to sanction Company's Plan of Arrangement allowed -- President resigned and Interim Operating Officer was appointed -- Plan gave creditors option of cash payment or mix of capital recovery debentures, special shares and common shares -- Creditors voted 96 per cent in favour of Plan -- Requirements strictly complied with and nothing done that was not authorized by CCAA -- While plan extinguished equity interests of shareholders, there was no economic value in shareholding in Company at this time -- Monitor approved of Plan and it was fair and reasonable.

Motion to sanction the Company's Plan of Arrangement. The Company had sold members of the public $80 million in term promissory notes and preferred shares. When the proceedings were commenced, over $37 million of the promissory notes were outstanding. The President resigned amidst concerns he was not acting in good faith. An Interim Operating Officer was appointed. The

Plan gave creditors several options. Creditors with claims for $1,000 or less would receive a cash payment for the full amount of their claims. Creditors with larger claims could elect to receive a cash payment or a mix of capital recovery debentures, new special shares and common shares. Creditors had voted 96 per cent in favour of the Plan.

HELD: Motion allowed. Since the Interim Operating Officer's appointment, the requirements had been strictly complied with and nothing had been done that was not authorized by the CCAA. The plan extinguished the equity rights of the shareholders, but there was no economic value in shareholding in the Company at this time. The Monitor approved of the Plan. The Plan was fair and reasonable.

Statutes, Regulations and Rules Cited:

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

Counsel:

Richard B. Jones and Douglas Turner, Q.C., Special Counsel to the Interim Operating Officer and to the Representative Counsel for Noteholders.

James H. Grout and Seema Aggarwal, for A. John Page & Associates Inc., Monitor.

Jane Waechter and Swapna Chandra, for the Ontario Securities Commission.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- The motion to sanction the Plan of Arrangement of Nelson Financial Group Ltd. ("Nelson") was heard on April 20, 2011.

2 On April 21, 2011, following consideration of the supplementary affidavit of Richard B. Jones, sworn April 20, 2011, the record was endorsed as follows:

> "Motion granted. The Plan is sanctioned. An order has been signed in the form presented, as amended, which includes sealing provision relating to Exhibit B to the Thirteenth Report of the Monitor. Reasons will follow."

3 These are the reasons.

4 At the outset, I note that this *Companies' Creditors Arrangement Act* ("CCAA") application proceeded in a somewhat unconventional manner. These reasons reflect the very specific facts of the application.

5 Nelson filed its application under the CCAA on March 22, 2010. Nelson had sold to members of the public some $80 million of term promissory notes and preferred shares. As of the date of filing, over $37 million of the promissory notes were outstanding. The sole director, voting shareholder and president of Nelson was Mr. Marc Boutet.

6 Under the Initial Order of March 23, 2010, A. John Page & Associates Inc. was appointed as Monitor of the Applicant (the "Monitor").

7 By order of Pepall J., made on consent of the Applicant and the Monitor on June 15, 2010, Douglas Turner, Q.C. was appointed as Representative Counsel for the holders of the notes issued by Nelson and Richard B. Jones was appointed as his Special Counsel.

8 The restructuring was commenced as an application made by Nelson under the direction and control of incumbent management and ownership.

9 Commencing in September 2010, Representative Counsel sought the replacement of management, as issues had been raised questioning the competency and *bona fides* of management.

10 In October 2010, the Representative Counsel's Noteholder Advisory Committee canvassed noteholders and obtained confirmation from more than two-thirds in claim amount that they would not support any plan of arrangement that continued the incumbency of Mr. Boutet.

11 On November 11, 2010, Mr. Boutet resigned all of his positions with Nelson, surrendered his shares for cancellation and released all claims against Nelson held by him or any of his associated corporations. In exchange, he was provided with a limited release. The arrangements in respect of his departure were approved by order of Pepall J. made November 22, 2010. In that same decision, Pepall J. appointed a substantial shareholder, Ms. Sherri Townsend, as the Interim Operating Officer ("IOO"). Under the terms of her appointment, the IOO was granted full powers as the Chief Executive Officer and was given particular authority to review the circumstances of the debtor company and its assets and, if practicable, to develop a plan for its restructuring.

12 Under the direction of the IOO, a business plan was developed and a Plan of Compromise and Arrangement was devised.

13 Counsel for the IOO takes the position that since the business of Nelson came under the authority and direction of the IOO, Nelson has conducted itself in full compliance with the requirements of the CCAA and of the court orders made in these proceedings. Specifically, counsel submits that the IOO has performed all of the duties and responsibilities placed upon her by the order of November 22, 2010 and by subsequent orders of the court.

14 Under the Plan, creditors have the following options:

(a) creditors with claims for $1,000 or less will receive a cash payment for the full amount of their claims (the "Convenience Class");
(b) creditors may elect to receive a cash payment of 25% of their claims in full satisfaction of their claims and all of their rights against the Applicant or any other person in respect of their claims (the "Cash Exit Option"); and
(c) creditors who are not in the Convenience Class and who do not elect the Cash Exit Option will receive:

(i) capital recovery debentures for 25% of their claim;
(ii) new special shares with a redemption price of 25% of their claim; and
(iii) one common share of the Applicant for each $100 of their claims (the "General Plan Option").

15 The Plan was substantially finalized on February 11, 2011.

16 The Plan Filing and Meeting Order was granted on March 4, 2011.

17 From and after the appointment of the IOO, the relationship as between the Monitor, the IOO and their respective counsel became strained, if not dysfunctional. Further details in respect of this relationship are set out in the materials served by the parties in the period leading up to the granting of the Plan Filing and Meeting Order on March 4, 2011.

18 Subsequent to the granting of the Plan Filing and Meeting Order, issues were raised by Ms. Brenda Bissell, in her capacity as power of attorney for Gloria Bissell, who holds promissory notes of Nelson in her own name and also in her capacity as the owner of Globis Administrators Inc. The concerns of Ms. Bissell are set out in her affidavit of April 12, 2011.

19 Ms. Bissell, through counsel, attended before Mesbur J. on April 13, 2011 in respect of a request for scheduling of a motion seeking to adjourn the meeting of creditors scheduled by the Plan Filing and Meeting Order for April 16, 2011.

20 The endorsement of Mesbur J. reads as follows:

> Brenda Bissell P.A. [Power of Attorney] for a noteholder wishes to move urgently to postpone the vote on the proposed Plan of Arrangement, etc. scheduled for Saturday, April 16, 2011. Essentially, she wishes the opportunity to communicate her position and information to the other Noteholders. A solution has emerged at this 9:30 that will avoid both an urgent motion and any necessity to delay the vote.
>
> On consent:
>
> 1. Special Counsel, Mr. Jones, will forthwith (i.e. today, as soon as possible) email all the Noteholders directing them to Ms. Bissell's motion materials posted on the Monitor's website, and suggesting they review the material before the meeting.
> 2. Mr. Page will provide Mr. Yellin today with a copy of the unredacted claims procedure memorandum: (done)
> 3. Mr. Yellin will provide Mr. Jones with an electronic copy of the communication his client wishes to send to the Noteholders and Mr. Jones will immediately email it to all the Noteholders, subject to the communication not containing defamatory, libellous or illegal statements.
> 4. If the plan is approved, Ms. Bissell's motion materials may be filed for the purposes of the sanction hearing and considered as a dissenting creditor's responding materials on the sanction hearing.
>
> "Mesbur J."

21 Counsel to the IOO stated that all required steps, directed by the court in the Plan Filing and Meeting Order, have been taken by the IOO and the Monitor.

22 About 93% of the creditor claims were voted and the Plan of Compromise and Arrangement including its technical amendments to April 12, 2011, was approved by over 96% of the creditors voting representing 94.9% of the claim value voted.

23 For a plan to be sanctioned, the application must meet the following three tests:

(i) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;
(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and
(iii) the plan is fair and reasonable.

Re Sammi Atlas Inc. (1998) 3 C.B.R. (4th) 171.

24 Counsel to the IOO submits that the circumstances of this case are atypical. Until late 2010, the Applicant was under the direction of Mr. Boutet who, counsel submits, appears to have committed a number of wrongful and fraudulent acts. The IOO, in her First Report dated February 18, 2011, set out some of those acts that had come to her attention. Counsel advised that there can be no assurance provided by the IOO or the Monitor that there was strict compliance with the court orders or the CCAA by the Applicant prior to the appointment of the IOO. Counsel submitted that in a case where the control of the debtor company is changed in the course of the CCAA proceedings, the tests of compliance must be applied with reference to the conduct of the persons who are directing the debtor company and the persons who will benefit from the exercise of the court's discretion at the time of the application for sanctioning.

25 In the circumstances of this case, I accept this submission and consider it appropriate to apply the test as set out in *Sammi Atlas,* in respect of compliance with statutory requirements and orders of the court, for the period subsequent to the appointment of the IOO.

26 Based on what was disclosed in the Motion Record filed April 19, 2011, the test as set out in *Sammi Atlas* would appear to have been satisfied.

27 However, it is also necessary to consider the Motion Record submitted by counsel on behalf of Ms. Bissell. In the hearing, I inquired as to whether counsel had any comment in respect of the materials filed by Ms. Bissell, as it was apparent that neither Ms. Bissell nor her counsel were in attendance.

28 In response to my inquiries, counsel advised that there had been the aforementioned attendance before Mesbur J. on April 13, 2011.

29 I find it surprising that the directions ordered by Mesbur J. were not placed in the materials put before the court. In submissions, Mr. Jones advised that there had been full compliance with respect to the directions issued by Mesbur J. He subsequently filed, in response to my request, his affidavit setting forth complete details of the steps taken to comply with the directions of Mesbur J.

30 Having had the opportunity to review the affidavit of Mr. Jones, I am satisfied that, in the period following the application of the IOO, there has been compliance with all statutory requirements and adherence to all previous orders of the court. Further, I am satisfied that it appears that there has been nothing done or purported to be done that has not been authorized by the CCAA.

31 With respect to the third part of the test, namely, whether the plan is fair and reasonable, the Plan does extinguish the equity interests of shareholders. Counsel to the IOO submits that this is just and equitable as the liquidation analysis of the Monitor, as set out in the Thirteenth Report as of April 6, 2011, confirms that there is no reasonable basis on which there is any economic value or interest in any shareholding of the Applicant at this time.

32 Further, the Monitor, in its Thirteenth Report, finds that the Plan is "fair and reasonable".

33 In addition, counsel to the IOO points out that the IOO and Representative Counsel provided an information circular to the creditors including specific information as to the business plan, financial projections and management of Nelson if the plan should be approved. Further, the circular was reviewed by the Ontario Securities Commission and was found to be unobjectionable.

34 Counsel also submits that the Plan proposed and approved by the creditors is fair and reasonable on its face and the only persons who receive any benefit under the Plan are the creditors and those benefits are strictly proportionate to the proven claim interests of each creditor.

35 In its Report, the Monitor makes a recommendation to the creditors and the court. The Monitor clearly states that the creditors of Nelson are faced with a choice. They could choose to approve the Plan which has both upsides and downsides. The upside is that if the new board of directors and new management can successfully carry on the business, then, in time, the creditors may recover the full amount of their claim and perhaps make a profit. However, the downside is that, if not successful, then the corporation may end up being wound up and creditors may recover less than the approximately 42% recovery over five years that is estimated by the Monitor in a bankruptcy or other form of liquidation at this time.

36 In this case, creditors had the benefit of the information circular and the supplementary materials posted on the website and voted overwhelmingly in favour of the Plan.

37 In determining whether a plan is fair and reasonable, the following are relevant considerations:

1. The claims must have been properly classified; there must be no secret arrangements to give an advantage to a creditor or creditors; the approval of the plan by the requisite majority of creditors is most important.
2. It is helpful if the monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy.
3. If other options or alternatives have been explored and rejected as workable, this will be significant.
4. Consideration of the oppression of rights of certain creditors.
5. Unfairness to shareholders.
6. The court will consider the public interest.

(See Ns. 45, The 2011 Annotated Bankruptcy and Insolvency Act (Houlden, Morawetz and Sarra)

38 I am satisfied that the foregoing considerations have been taken into account and, I am satisfied that, in these circumstances, the Plan can be considered fair and reasonable.

39 Accordingly, the motion is granted. An order has been signed approving and sanctioning the Plan and the Articles of Reorganization and providing for its implementation.

G.B. MORAWETZ J.

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