

CITATION: Hollinger Inc. (Re), 2012 ONSC 5107
COURT FILE NO.: 07-CL-7120
DATE: 20120912

**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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
WITH RESPECT TO HOLLINGER INC., 4322525 CANADA INC., and SUGRA LIMITED,
Applicants

BEFORE: C. CAMPBELL J.

COUNSEL: Michael E. Barrack, Megan Keenberg, for Applicant
Earl A. Cherniak Q.C., Kenneth Kraft, Peter Howard, Maria Konyukhova,
Jason Squire, for Conrad M. Black and Conrad Black Capital
Corporation
J.L. McDougall Q.C., Norman J. Emblem, Matthew Fleming, for
KPMG LLP
Ronald Foerster, Christiaan Jordaan, for Torys LLP
Peter Griffin, Matthew Lerner, Monique Jilesen, for Ernst & Young Inc.,
Monitor
Paul D. Guy, Scott McGrath, for Daniel Colson
Sandra A. Forbes, Sarah Weingarten, for Outside Directors
Irwin G. Nathanson, Q.C., Geoffery B. Gomery, Q.C., for Radler
Respondents
Harry R. Burkman, for Argus Corporation Limited
G. Benchetrit, for Indenture Trustees
David Moore, for Catalyst Partners Inc.
Luisa Ritacca, for CIBC and Donald Fullerton

HEARD: April 19, 2012

REASONS FOR DECISION

[1] Two motions are before the court in respect of this CCAA proceeding.

[2] The first motion seeks approval of a settlement entered into between the Applicants, hereinafter collectively, referred to as Hollinger and its former auditors and lawyers.

[3] The second motion, which among other things, is dependent on the court having jurisdiction to grant the relief sought in the first motion seeks to compel Hollinger to file a CCAA Plan and put that plan to a vote of Hollinger's creditors. The second motion has yet to be scheduled for argument.

[4] The first motion raises serious issues regarding the conduct of litigation within the context of a CCAA regime and the court's ability, assuming jurisdiction, to manage the litigation having regard to the interests of creditors, the parties to the litigation and to the principles of proportionality which are now a much more significant and the important part of the Rules of Civil Procedure.

BACKGROUND

[5] The issues that form the foundation of the claims involved in the litigation now sought to be partially settled go back at least a decade and involve a company and subsidiaries and affiliates now familiar to many Canadians, collectively for this purpose, referred to as Hollinger Inc. which was up until 2007 the parent company of Hollinger International Inc. headquartered in Chicago, Illinois and with various other subsidiaries in Canada and the United States.

[6] The plaintiff in various actions, against various defendants principally its former Chairman and Chief Executive Officer Conrad Black and several former close associates. In these reasons I have used the surname Black as a collective reference to the various corporations owned or controlled by Mr. Black and his family. The reference to Black associates in this context is to the Non-Settling Defendants. Those appearing to oppose are David Radler and Daniel Colson but not all formally appeared to oppose the Hollinger settlement with Torys LLP and KPMG LLP.

[7] In 2004 a significant creditor of Hollinger, Catalyst Partners Inc., initiated an Application alleging oppression in respect of its rights as a creditor as a result of various alleged acts of misconduct by, among others, Black and his associates in respect to the operation of Hollinger. An Inspector was appointed under the *Ontario Business Corporations Act*.

[8] In August 2007 Hollinger applied for, and was granted, protection from creditors under the CCAA by order of this court and Ernst & Young Inc. was appointed Monitor in these proceedings.

[9] The stated purpose of this CCAA proceeding is to enable Hollinger to pursue claims in litigation to maximize estate assets with a view to eventual windup and distribution to creditors. Pursuant to the provisions of the Initial Order, the process requires court approval. This includes the settlements being the subject of this motion.

[10] By Order dated May 21, 2008 and amended July 3, 2008 this court approved what has been referred to as the Multi-Party Settlement Order. Among other matters, the Order appointed a chief restructuring officer of Hollinger (CRO), a Litigation Trustee and a litigation advisory committee consisting of a representative of Hollinger, the Litigation Trustee and the representative of Hollinger's largest note holders collectively referred to as the Indenture Trustee and a process for dealing with claims represented in the motion before the court and other claims.

[11] Five groups of claims which collectively comprise the Litigation Assets of Hollinger include claims against:

- (a) Hollinger's former counsel Torys LLP
- (b) Hollinger's former auditor, KPMG LLP
- (c) six of Hollinger's former independent (Outside) Directors
- (d) Hollinger's former inside directors and officers including Conrad Black and various associates as well as companies owned and controlled by them
- (e) members of Hollinger's former banking syndicate.

[12] The position of the Applicants is that the value of the Litigation Assets lies in their monetization either in the form of settlement proceeds or damage awards for the purpose of a liquidating CCAA proceeding.

[13] The Multi-Party Settlement Agreement which remains in force has created a court-approved mechanism for enhancing and monetizing the Litigation Assets by appointing the Litigation Trustee to administer them with a view to maximizing the net return to the Hollinger stakeholders which includes the company's various subsidiaries and its creditors and shareholders.

[14] The Indenture Trustee of Notes issued by Hollinger in 2003 and 2004 represents the largest creditors as they hold legal title to the notes issued by Hollinger pursuant to a financing of which Davidson Kempner Capital Management LLC (D. K.) is the beneficial owner of the majority of the notes. Both the Indenture Trustees and D.K. support the settlements in respect of which court approval is sought.

[15] It is to be noted that Conrad Black has filed a one paragraph proof of claim in the CCAA proceeding claiming damages for breach of contract and other relief and he asserts a claim to be the largest creditor of Hollinger. No further steps have been taken since 2008 to advance such claim.

[16] This motion concerns approval of settlements reached between Hollinger and Torys, KPMG, and the Outside Directors of Hollinger Inc. (collectively the Settling Defendants)

[17] Starting in 2005 Hollinger advised each of the potential defendants of the intention to commence legal proceedings against them, and entered into tolling agreements with, or commenced claims against, each of them.

[18] All of the defendants and potential defendants were advised of the possibility of Hollinger seeking third-party releases in favor of the Settling Defendants in exchange for financial contributions and/or cooperation agreements.

[19] Torys, KPMG, and the Outside Directors entered into a mediation process with Hollinger before George Adams Q. C. a former Justice of the Ontario Superior Court of Justice.

[20] As a result of the various mediations, Settlement Agreements have been concluded with all of the Settling Defendants. Some of the agreements have been approved; others are now before the court for approval.

[21] In each instance the Settlement Agreements provide for a monetary contribution by the respective Settling Defendants to Hollinger, the amounts of which will form part of the public record if all settlements are approved.

[22] In an earlier motion, various of the Black defendants took issue with the nondisclosure on the public record of the proposed settlement amounts prior to any approval. All parties who may be directly interested in the amounts of the various settlements were provided access to the details on signing a confidentiality agreement. Further objection even on this basis was not proceeded with and all Non-Settling Defendants have had access to settlement details.

OBJECTION TO SETTLEMENTS

[23] There are three basic grounds for the opposition put forward by the Non-Settling Defendants against the settlements.

1. that the court lacks jurisdiction to approve the proposed settlements without a detailed analysis of the nature of the claims, their possible success and whether the settlement amounts are reasonable given the claims remaining against the Non-Settling Defendants.
2. that the third party releases and Bar Orders that form an integral part of the settlements, if approved, would deprive the remaining defendants of substantial rights they would have for documentary production and oral discovery that the remaining defendants would have as entitled rights if the Settling Parties were to remain as defendants or be third parties in any action.
3. that the settlements, if approved, may deprive Conrad Black of rights he claims as a significant and perhaps the largest creditor of Hollinger by virtue of his claim for damages.

[24] In addition, the Non-Settling Defendants urge that in the event the settlements are approved that any order contain a protocol for production and examination of documents and the examination of witnesses that would provide the Non-Settling Defendants with the same opportunity for production, discovery and pre-trial and trial examination as if Torys and KPMG were to continue as defendants.

[25] It is to be noted that objections of the Non-Settling Defendants are only in respect of the settlements in respect of Torys and KPMG. No objection is taken with the terms of settlements reached with the Outside Directors and with CIBC and Mr. Fullerton, a former director of Hollinger.

[26] When this matter first came before the court on April 19, 2012 I expressed concern about the context of the proposed settlements.

[27] Each of the Settlement Agreements contain third-party releases in favor of the Settling Parties and are conditional upon the issuance of satisfactory Bar Orders giving effect to the third-party releases which in each case release the Settling Parties from claims advanced against them for contribution by any party in respect of Hollinger's settled claims.

[28] Hollinger has confirmed that the scope of the Third Party Releases and Bar Orders is limited to claims by Non-Settling Defendants for contribution and indemnity against Settling Parties in connection with claims brought by Hollinger in respect of damages claimed by Hollinger. Only the Hollinger initiated claims with the respective Settling Parties will be affected.

[29] The court has been advised that in one form or another various of the Non-Settling Defendants have asserted they intend to assert claims for contribution and indemnity against Torys and KPMG in respect of Hollinger's claims against those Non-Settling Defendants in which they allege Torys and KPMG may be jointly liable.

[30] The court has been further advised that none of the Non-Settling Defendants and no other person has asserted an independent cause of action against any of the Settling Defendants and that any claims now advanced would be statute barred.

[31] The court was apprised of a number of proceedings in which claims are made against Black and various associates and in which claims for contribution and indemnity have been made or asserted by Black and others against Torys and KPMG. These proceedings include an action commenced in Illinois by Hollinger International Inc. (now CNLC) and a claim by the Securities and Exchange Commission (SEC) of the United States. There has been some production of some documentation in those proceedings.

[32] The Litigation Trustee has confirmed that the Third Party Releases contained in the settlements in respect of Torsys and KPMG now before the court and the proposed Bar Orders giving effect thereto will not prevent the Non-Settling Defendants from asserting or pursuing claims for contribution and indemnity against Torsys and KPMG in any of the proceedings in the United States.

[33] In order to lessen the objection of the Non-Settling Defendants to the Third Party releases contained in the Settlement Agreements, Hollinger agreed to limit their recovery from a Non-Settling Defendant to his/her or its several liability only, provided that such Non-Settling Defendant's liability is demonstrably shared with a Settling Party against whom the Non-Settling Defendant successfully proves a claim for contribution and indemnity.

[34] The position of Hollinger adopts the Report to the Court of the Litigation Trustee, the Honourable John Ground Q. C. in the following extract:

“It is Hollinger's intention to make the settlements by Torsys and KPMG an economically neutral event for the Non-Settling Defendants...

Hollinger is prepared to waive its right to joint and several liability in respect of the liability between either Torsys, KPMG or other Settling Defendant on the one hand and a Non-Settling Defendant on the other. Hollinger proposes that settlement approval orders provide that if any Non-Settling Defendant would otherwise be able to establish a right of contribution and indemnity from Torsys, KPMG or other Settling Defendant, then the damage owing to Hollinger jointly and severally by any such Non-Defendant will be reduced by the degree in which Torsys and/or KPMG or other Settling Defendants are found to be at fault or negligent.

Therefore, while each Non-Settling Defendant will not have a claim for contribution and indemnity against KPMG, Torsys or other Settling Defendant for the amount which any of them might be found to be at fault or negligent, there will be no economic detriment because any such amount will not be sought from the Non-Settling Defendant if that defendant could have otherwise asserted such a claim.

Nothing in the settlement approval orders will prevent any Non-Settling Defendant from requiring the court to determine the degree in which any of KPMG, Torsys or other Settling Defendant is at fault or negligent with respect to any damages suffered by Hollinger. To the extent the court finds KPMG, Torsys or other Settling Defendant responsible for a proportionate share of those damages and the Non-Settling Defendant had a right of contribution and indemnity against either of them, then Hollinger will have no claim against any person in respect of the proportionate share. In such circumstances the settlements will be the total recovery available to Hollinger in respect of the Settling Defendants' are proportionate share of any damages suffered by Hollinger.”

[35] Hollinger asserts that the Non-Settling Defendants' procedural rights will not be prejudiced since Settling Defendants will not be exempt from giving evidence or serving as witnesses and if need be procedural orders may be issued by the court at any appropriate time.

[36] The position of the Non-Settling Defendants is that notwithstanding the limitation of liability against them, the Third Party Releases not only impede their procedural entitlements but affect substantive rights they enjoy as litigation defendants.

[37] In order to deal with the claims against the Non-Settling Defendants in context, the court asked for and received a Fresh as Amended Statement of Claim against the Non-Settling Defendants. This pleading provides the context for the approvals sought. No Statements of Defence have been delivered. That said, there have been a number of actions and regulatory proceedings both in Canada and the United States as well as in this court that have raised issues regarding the management of Hollinger in the period covered in the Amended Statement of Claim.

ISSUE 1

Does the Court have Jurisdiction under the CCAA to grant the approval sought?

[38] The position of Hollinger is that the claims it advances are litigation assets and therefore material assets of the estate which requires court approval for any compromise not unlike standard asset disposition in any other CCAA context. The position of Hollinger is supported by all of the Settling Defendants.

[39] The position of Black and associates on the issue of the court's jurisdiction is that within the CCAA regime and the Order sought here an Order should only be made if it can demonstrably facilitate corporate restructuring with a view to "enabling the Corporation to continue its business or to serving a similar broad public purpose such as the preservation of employee benefits".

[40] Paragraph 11 of the Black Factum asserts:

These proposed settlements fail to benefit all of Hollinger Inc.'s creditors generally. They are not part of a plan of compromise or arrangement and they do not pave the way for such a plan. The proceeds of these settlements are to be applied in whole or in part to the litigation against Mr. Black and other Non-Settling Defendants. Indeed, Hollinger Inc. has not made clear whether any part of the settlement proceeds will be distributed or whether they will be completely devoted to pursuing its claims against Mr. Black and the other Non-Settling Defendants. It may be inferred that the entirety of the settlement will be applied to a so-called "litigation reserve" and that nothing will be distributed to its

creditors, of whom Mr. Black may be at the largest. Any assertion that he is not assumes that his claims are invalid and that his positions in the various proceedings arising from the affairs of Hollinger Inc. litigation are unmeritorious.

[41] The position of Hollinger is that the settlement funds will be used in part to fund the litigation and that the supervision by the court with the assistance of the Litigation Trustee, the CRO, and the Monitor will enable the court to be satisfied that the litigation will be conducted for the benefit of all creditors and will enable a distribution to entitled creditors. This position is supported by creditors other than Black.

[42] Recent jurisprudence has confirmed the application of judicial discretion and flexibility of the CCAA to achieve a variety of corporate purposes including but not limited to the restructuring of the company. These have been reaffirmed in the decision of the Supreme Court of Canada in *Century Services v. A.G. Canada*¹ and include, in appropriate cases, the ability to effect a sale of assets and winding up or liquidation of a debtor company and its assets. Also see *Anil Range Mining Corp.*²

[43] What has been a feature of restructuring since the financial crisis of 2008 has been a variety of processes under the CCAA.

[44] The conclusion that I reach is that the court does have jurisdiction consistent with the principles of the CCAA to maximize the assets available to creditors as long as the process is not being used to further a collateral objective that, in the end, is not inconsistent with the ultimate goal of these CCAA proceedings. See *Houlden, Morawetz Sara*.³

[45] What is unusual in this instance is that the assets are the product of litigation. The court does need to be satisfied on an ongoing basis that the progress of the litigation is both timely and cost-effective in terms of its progress and will result in benefit to creditors.

[46] I am satisfied at this time that consideration of the settlements is an appropriate exercise of jurisdiction with the assistance of the aforementioned court officers. In particular, as noted, the litigation has the support of the major creditor group which advanced more than \$200 million to Hollinger and has not been repaid.

[47] I am cognizant of the position of Black who wishes to pursue a claim for damages against Hollinger and who claims, as a result, to be the largest creditor of Hollinger. Black is, in my view, at best a claimant creditor since his claim appears to be entirely in damages. He has not

1 [2010] 3 SCR 379 at para 56.

2 (2003) 34 CBR 4th 157.

3 Annotated *Bankruptcy Act* 2012 (Carswell) and reference to *Re Abitibi Bowater Inc.* (2009), 64 CBR 5th 189 at 1152.

advanced that claim which presumably, would in any event, form a counterclaim in the action in which he is the defendant. In addition, it is asserted by Black that he has a direct claim against Torsys for damages. Again, since, presumably, the facts, document production and discovery in any such action arise out of the Hollinger Litigation to the extent not covered in a counterclaim against Hollinger, it can be dealt with by a management judge.

[48] As in any CCAA proceeding, any affected party may apply to the court for directions in respect of the ongoing process that the court will continue to supervise.

[49] In the submission on behalf of Radler it was assumed that the litigation would not be managed and supervised on the Commercial List. Given the importance of the litigation in the CCAA process it would be appropriate that the litigation be managed by a judge of the Commercial List assisted where appropriate by a Master assigned to the Commercial List.

[50] The court has the obligation to ensure the integrity of the process which in the first instance is to protect the interests of creditors. A second important consideration is to ensure that the process is consistent with commercial efficacy and integrity and fairness. See *Royal Bank v Soundair*.⁴

[51] In *Nortel Networks Corp (Re)*⁵ Morawetz J. reviewed the duties of the Court in a proposed sale of assets in a CCAA context as follows:

- 1) it should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- 2) it should consider the interests of all parties;
- 3) it should consider the efficacy and integrity of the process by which offers have been obtained; and
- 4) it should consider whether there has been unfairness in the working out of the process.

I am of the view that these same principles should guide a CCAA court which supervises litigation as a major asset of the corporation with the modifications suggested by Hollinger to the process.

[52] I am satisfied that the process of maximizing assets for creditors can best be accomplished by the court which has jurisdiction over Hollinger under the CCAA. Management

⁴ (1991) 4 OR (3rd) 1 at para 43.

⁵ 56 CBR (5th) 224 at paragraph 35.

of the litigation will require regular reporting to the court by the Monitor and will enable any party affected by the process to seek direction.

ISSUE 2

Should the Court approve the requested settlement orders in respect of the Settling Defendants?

A Third Party Release – Pierringer Agreement

[53] Counsel for Hollinger submitted that the approval process before the court is no different than other “Pierringer Agreements” which have been approved by the courts in this province and elsewhere.

[54] *Pierringer* agreements (so-called after *Pierringer v. Hoger*⁶) permit some parties to withdraw from litigation, leaving the remaining defendants responsible only for the loss that they may be found to have actually caused, with no joint liability. As the remaining, Non-Settling Defendants are responsible only for their proportionate share of any loss, a *Pierringer* agreement can properly be characterized as a “proportionate share settlement agreement”.

[55] The Applicants in this case seek what they urge are very limited Third Party Releases and Bar Orders of the kind commonly ordered in connection with the *Pierringer* agreements in standard, multi-party litigation.

[56] The only third parties whose claims are being released and barred are the Non-Settling Defendants. No other parties are affected by them. There have been no independent claims launched by any person arising out of the dealings with Hollinger Inc. Hollinger submits that the facts in issue have been the subject of much publication and any limitation periods have expired. In addition, it is urged the only claims that are being released and barred are those that form part of the “Settled Claims” between the Settling Parties and the Applicants. Non-Hollinger claims are not being released or barred. Specifically, the Bar Orders sought would not prevent Black or others from pursuing claims for contribution and indemnity against Torys or KPMG in respect of the Illinois Action or the SEC Action or any other litigation outside Ontario. Those claims are classed as non-Hollinger claims.

[57] Section 11 of the *Courts of Justice Act* grants the Superior Court of Justice a wide jurisdiction, including “all the jurisdiction, power and authority historically exercised by the courts of common law and equity in England and Ontario”. The jurisprudence states that this jurisdiction is not to be displaced absent clear and unequivocal statutory language.

6 21 Wis. 2d 182, 124 N.W. 2d 106 (U.S. Wis. S.C., 1963).

[58] Hollinger asserts there is added safety for Non-Settling Defendants. Non-Settling Defendants who are found to be at fault will not be exposed to a greater apportionment of liability for the plaintiff's loss based on their joint liability with Settling Defendants, than would otherwise occur based on their own direct fault.

[59] Additional benefits are said to include reduced financial and opportunity costs related to complicated, protracted litigation, and conservation of court resources. This limitation of time and cost exposure is an essential term of the Settling Defendants' agreements.

[60] *Pierringer*-type settlement agreements have not been restricted to personal injury cases or cases of negligence. A fulsome description of the nature and implications of *Pierringer* Agreements is set out in an article by Peter B. Knapp, "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials"⁷. The article was written in the context of the jury system in the United States but is instructive in the context here in that it notes the importance of foreseeing trial issue difficulties before any agreement is approved.

[61] I accept the submission on behalf of Black and the other Non-Settling Defendants that the effect of these Orders sought may to some extent complicate the Non-Settling Defendants' position to deal with the issue of fault of the Settling Defendants.

[62] Where I differ with counsel for the Non-Settling Defendants is the attempt to raise a potential problem to the level of a substantive right which would have the effect in this case of rendering inoperative a settlement which has been negotiated at arm's length which has an essential term that the Settling Defendants no longer remain as parties to the action.

[63] Each case does have its own distinct features and the settlements here set out to minimize the effect on the Non-Settling Defendants. Given the background and history of events which give rise to the claims in the Statement of Claim including the documentary production made by various of the Settling and Non-Settling Defendants in investigation by a court appointed Inspector, regulatory, disciplinary and criminal proceedings as well as the CCAA all serve to limit the detriment to the Non-Settling Defendants.

[64] Canadian courts have acknowledged that *Pierringer* types of agreements have been increasingly utilized in Canada in a variety of litigation settings, including class actions as one example. See *Ontario New Home Warranty Program v. Chevron Chemical Co.*⁸ per Winkler J.

[65] As in the CCAA context, settlements in class actions must be approved by the courts. See *Osmun v. Cadbury Adams Canada Inc.*, 2001 (ABCA) 110 (CanLII)⁹

⁷ (1994) 20 Wm. Mitchell L. Review 1.

⁸ CanLII 15098 (ONSC), (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 (S.C.J.) at paras 40, 41, 75, 76.

⁹ 2010 ONSC 2643 at para 12, aff'd 2010 ONCA 841.

“The authority to make an order giving effect to a *Pierringer* agreement, referred to as a “bar order”, arises from s. 12 of the *Class Proceedings Act* (CPA), which provides that: “[T]he court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.” As well, s. 13 provides that “[T]he court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate”... It is well-settled that the bar order cannot interfere with the substantive rights of the Non-Settling Defendants: *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*”

[66] In this case, the Third Party Releases are rationally related to the resolution of the debtors’ claims which will benefit creditors generally, and are not overly broad, the effect of which is that the Settling Defendants have agreed to pay amounts to Hollinger in respect of their proportionate share of the plaintiff’s claims. No party in any way affected including the Non-Settling Defendants has opposed those settlements on the basis of the amounts involved. Black asserts that the *Pierringer* Agreements in issue may only bar claims for contribution and indemnity and cannot operate to bar independent claims that Black may have based on an independent duty owed by Torsys to Black. To date no actions involving claims of independent duty to Black have been brought to the court’s attention.

[67] By their very nature, *Pierringer* Agreements have the potential to prejudice the procedural rights of Non-Settling Defendants. As I explained in *Lau v. Bayview Landmark Inc.*:

As long as the Settling Defendants were in the action, the Non-Settling Defendants could rely on the focus the former would attract at trial in distinguishing their conduct from that of the Settling Defendants.

With the Settling Defendants absent from the trial in a meaningful way, the Non-Settling Defendants would be deprived of the benefits that would come from full discovery and evidence of those parties, which would be supportive of all Defendants vis-à-vis the Plaintiffs and of that evidence that would provide clear distinction between the Defendants. It would be a different case from the one in which all Defendants were fully participating. 10

[68] The release of Torsys by Hollinger is in the following language:

(i) Full and Final Release of Torsys by the Hollinger Releasors: Upon payment in full of the Settlement Amount, Hollinger, its past, present and future

10 *Lau v. Bayview Landmark Inc.*, [2006] O.J. No. 600 (S.C.J.) at paras 15-16.

subsidiaries and divisions (including, without limiting the foregoing, 432525 Canada Inc., Sugra Limited, DomGroup Ltd. and 10 Toronto Street Ltd., but not including the Sun Times Media Group, Inc. and its subsidiaries (collectively referred to as “STMG”), all partnerships in which Hollinger or a wholly-owned subsidiary of Hollinger is the general partner and any corporation owned by such partnership, for themselves, their employees, servants, agents, heirs, administrators, successors, assigns and on behalf of any party or parties who claim a right or interest through them (collectively, the “Hollinger Releasers”) do hereby fully, finally and forever, release, remise, acquit and forever discharge, without qualification or limitation, Torsys and its past, present and future partners, employees, directors, officers, affiliates, agents, advisors, insurers and reinsurers, and their predecessors, successors and assigns (collectively the “Torsys Releasees”), separately and jointly, of and from any and all rights, interests, obligations, debts, dues, sums of money, accounts, reckonings, damages, claims, actions, allegations, causes of action, counterclaims or demands whatsoever, whether known or unknown, in law or in equity, of whatever kind or character, suspected, fixed or contingent (collectively “Claims”) that have been, that could be, or that could have been asserted by the Hollinger Releasers from the beginning of time through the date hereof (including without limitation any claim for contribution, indemnification, reimbursement or any other forms of claims over related to the subject matter of the Settled Claims that could be asserted on or after the date hereof by the Hollinger Releasers based on events occurring prior to and through the date hereof) against the Torsys Releasees concerning (i) Torsys’ representation of the Hollinger Releasers or (ii) any allegations of injury to the Hollinger Releasers caused by Torsys including, without limiting the generality of the foregoing all claims raised or which could have been raised in the Intended Action (collectively the “Settled Claims”).

(ii) Unknown Claims: Without limiting the generality of paragraph 2 above, the Hollinger Releasers declare that the intent of the full and final release set out therein is to conclude all issues arising from the Settled Claims and it is understood and agreed that the release is intended to cover, and does cover, not only all known injuries, losses and damages, but all injuries, losses and damages not now known or anticipated but which may later develop or be discovered, including all the effects and consequences thereof. In addition, Torsys agrees that it has not filed, and will not file, any claims against the estates of any of the Hollinger Releasers.

(iii) Full and Final Releases of Torsys by Third Parties: It is the intent of the Parties that this Agreement and the terms of the Release Order will eliminate any basis for (i) any other party against whom any of the Hollinger Releasers has brought or in the future brings any Claims relating in any way to the subject matter of the Settled Claims; and (ii) any past or present shareholder, officer, director, creditor or subsidiary (other than STMG) of the Hollinger Releasers

(together the “Third Party Releasers”), from being able to claim contribution, indemnification, reimbursement or other forms of claims over from the Torys Releasees for such party’s liability to the Hollinger Releasers or from bringing claims against the Torys Releasees relating in any way to the subject matter of the Settled Claims (the “Third Party Releases”).

[69] I do not see from the above that any claim of Black with respect to a duty of Torys to him apart from duties to Hollinger are covered by the release language.

Bar Orders – Pierringer Agreements

[70] I agree that the general intention of a bar order is to preclude claims arising from the subject matter of the action in order to achieve finality for a partial settlement. Without the security provided by a bar order, partial settlement of litigation may be impossible. As has been said:

Any single defendant who refuses to settle, for whatever reason, forces all other defendants to trial. Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented.¹¹

[71] A properly crafted bar order therefore promotes an overriding public interest in resolving disputes and conserving judicial resources. The significance of these goals was recognized by the Ontario Court of Appeal in *M. (J.) v. Bradley*¹² as a powerful reason to support the implementation of *Pierringer* agreements:

This laudatory objective [of promoting settlement] has long been recognized by Canadian courts as fundamental to the proper administration of civil justice: see for example, *Sparling v. Southam Inc.* ... (Ont. H.C.), at 230, referred to with approval by the Supreme Court of Canada in *Sparling v. Southam Inc.* ... (S.C.C.) at para. 48; and *Ontario New Home Warranty Program v. Chevron Chemical Co.* ... (Ont. S.C.J.), at 147. Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation. As observed in *Amoco* at p. 677:

In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

¹¹ Re Nucorp Energy Securities Litigation, 661 F.Supp. 1403, as cited in *Garipey v. Shell Oil Co.*, 2002 CanLii 12911 (ONSC).

¹² (2004) 71 O.R. (3d) 171 at para 65-66.

[72] The basic position of the Non-Settling Defendants is that the settlements if approved would deprive them of procedural rights in respect of the ongoing litigation to production and discovery that would otherwise be available assuming Torys and KPMG remained as defendants.

[73] It should be noted that only the litigation involving the Non-Settling Defendants in Ontario would be subject to the Orders sought. Litigation in the United States in which Torys and KPMG are defendants is unaffected. Undoubtedly, there will be production and discovery in those actions that overlaps in the actions to be covered by these settlements.

[74] The position of the Non-Settling Defendants was simply put by counsel on behalf of Radler. The complaint is that the procedural rights to full production and discovery from Torys and KPMG are in effect substantial when the effect of the settlements is to prevent the advancement of a full defense to the claims of Hollinger that the Non-Settling Defendants would have had with Torys and KPMG continuing as defendants or third parties.

[75] The Non-Settling Defendants object to the Bar Order on the basis that only when they can assert liability attribution to the other defendants can they advance their own defence.

[76] It was with this position before the court that a request was made that the parties, with the assistance of the Monitor, consult to determine whether a protocol for production and discovery with respect to Torys and KPMG could be agreed to.

[77] It would appear that the position of the Non-Settling Defendants, at least at present, is that they do not see any issues with production or discovery from Outside Directors or other Non-Settling Defendants apart from Torys, KPMG and Hollinger.

[78] As originally put before the court, the Settling Defendants conceded and agreed that any approval the court might grant would recognize the rights of Non-Settling Defendants to seek production and discovery pursuant to Rules 30.10 and 31.10 of the *Rules of Civil Procedure*. Both Torys and KPMG have confirmed that they have taken steps to preserve documents that may be relevant and they recognize that witnesses may be required to give evidence pursuant to Rule 53.04.

[79] There is no question that settlement with some defendants as opposed to all defendants does interfere with what might otherwise be the procedural rights of remaining defendants and that more may be required by way of management than the simple application of rules 30, 31 and 53. I do recognize the potential detriment to defendants from *Pierringer* Agreements. Any detriment should be balanced against the benefit to Settling Defendants and to plaintiffs as well as the administration of justice as a whole on a case by case basis.

[80] Counsel for Radler sought to distinguish another decision which involved settlement in respect of some defendants in a class action in *Garipey v. Shell Oil*.¹³

[81] It is urged that the decision in that case of Nordheimer J. and his reasoning on the discovery point, that the claims against the Settling Defendants were not shown to be relevant to an assessment of the claims against the Non-Settling Defendants, was a particular feature of the particular case before him. In a case such as the case at bar, counsel submits, where the question is one of the apportionment of responsibility for a single pool of losses between the Settling and Non-Settling Defendants, the one cannot be determined without the other. They are two sides of the same coin. In such circumstances, Mr. Nathanson for Radler asserts the fault of the Non-Settling Defendants has to be considered at trial; reliance is placed on *M (J) v. Bradley*¹⁴, where Cronk JA stated:

[68] ... Kerr argued before this court that the trial judge in this action would be faced with a most difficult, if not impossible, task if required to determine the Non-Settling Defendants' several share of liability without being in a position to make the same determination concerning the responsibility, if any, of the Settling Defendants for the appellants' losses. Correspondingly, he asserted that the determination of his share of liability without regard to the Settling Defendants' contributory responsibility would be manifestly unfair.

[69] I agree with both of these submissions. ...

[70] ... [F]airness requires that Kerr's several share of fault or neglect not be determined in a vacuum, without consideration of the several liability of all other proven tortfeasors. Were it otherwise, Kerr could be exposed at trial to the potential risk of being required to pay damages to the appellants for part of the Settling Defendants' several shares of liability, claims to which, as Kerr properly points out, have been compromised and released by the appellants under the Agreements.

[82] The issue in *Bradley* was whether the court had jurisdiction under the *Negligence Act* to apportion fault against a former party who had settled. The court held that it had, and that a Settling Defendant under a *Pierringer* settlement need not continue as a party in the litigation. In *Bradley*, it is put forward by Black, that since the Settling Defendants in that case had consented

¹³ (2002) 26 CPC 5th 358 (OS CJ).

¹⁴ (2004) 71 OR (3d) 171 (CA).

to being examined for discovery there was no potential procedural unfairness to the Non-Settling Defendants.

[83] In the case at bar I accept that assessing the fault or neglect of Torsys, KPMG and the Outside Directors will be fundamental to the court's assessment of the claim against the Radler respondents and the other Non-Settling Defendants. By reason of this interrelationship of the claims, even at this stage it is clear that Torsys, KPMG and the Outside Directors are in possession of relevant evidence pertaining to their own responsibility for the losses suffered that can only be obtained by the Non-Settling Defendants through discovery which will primarily involve Hollinger.

[84] The question then is does the court simply say party discovery rights trump so that Settling Parties are subject to all of the obligations and costs they would have as if they were to remain defendants OR does the court say the process can be controlled through effective management particularly on the Commercial List. To say the former is to reject approval of an essential term of the settlements.

[85] In *Ontario New Home Warranty*, Winkler J.¹⁵ as he then was, said the following at paragraph 77:

“These terms, generally described, are that the non-settling defendants may, on motion to this court obtain:

1. documentary discovery and an affidavit of documents in accordance with the Rules of Civil Procedure from each of the settling defendants;
2. oral discovery of a representative of each of the settling defendants, the transcript of which may be read in at trial;
3. leave to serve a request to admit on each settling defendant in respect of factual matters;
4. an undertaking to produce a representative to testify at trial, with such witness to be subject to cross-examination by counsel for the non-settling defendants.

“78. In addition, the fact of the settlement, but not the terms thereof, shall be disclosed to the trial judge at the commencement of trial.

¹⁵ See footnote # 8 (supra).

“79. Furthermore, pursuant to its case management powers under the Act, this court shall maintain ongoing supervisory role in this action. In the event that any settling defendant fails to comply with an order of this court made pursuant to the above terms, the court may, in addressing any such failure, lift the stay of proceedings in respect of that defendant.”

[86] Part of the opposition by Black and others to the elimination of the Settling Defendants from the action is the prospect that Affidavits of Documents would not have to be produced. That is why the Non-Settling Defendants urge that even if the settlements are approved that at least Torys & KPMG be required to produce an Affidavit of Documents as if they remained as defendants.

[87] I do accept that Affidavits of Documents remain appropriate requirements in many civil cases. What is not apparent in most cases until after the fact is just how costly the production process can be including the full cost of preparation of an Affidavit of Documents in traditional form.

[88] A recent study published by the Rand Institute in the United States¹⁶ reveals that more than 70 cents of every dollar spent on producing documents goes to review largely issues of relevance and privilege.

[89] This study has brought even more focus on the importance of proportionality as an operative concept in civil litigation. The Non-Settling Defendants should have access to the documents they require for their defence, not necessarily every conceivably relevant document.

[90] This does not necessarily mean that they should be entitled as a right to production of all the documents that Torys & KPMG might be required to otherwise produce. Proportionately must have some rational meaning in civil litigation.

[91] In England, a new Practice Direction Part 31 of the Rules, will assist both parties and non-parties with disclosure obligations¹⁷ while adhering to the principle of proportionality.

[92] The focus of the above references is on the need for a different approach to discovery in many civil cases. Throughout the common law world there is a recognition of the need for an approach that goes beyond Rules of Civil Procedure even though rules remain a default position. If co-operation between parties cannot resolve discovery disputes the trend is toward assistive judicial management. It is with this background that I reach a conclusion that production and

¹⁶ The Rand Institute for Civil Justice “Where the Money Goes – Understanding Litigant Expenditures for Producing Electronic Discovery”, April 2012.

¹⁷ Part 31 Disclosure & Inspection of Documents – U.K. Rules of Civil Procedure.

discovery issues in this case, given the degree of expected co-operation from Torys & KPMG are not sufficient to reject the settlements reached.

[93] The 23rd report of the Monitor received August 17, 2012 reported on the consultation process the court directed to determine whether an agreement for a protocol for production and discovery could be reached between the parties. Despite the efforts of counsel for the Monitor, for which the court is grateful, no agreement was reached.

[94] Hollinger, Torys, KPMG and the other Settling Defendants were largely agreed. Attached as Appendix “A” is the KPMG proposed protocol. The Torys protocol is similar. The response by Black is as set out in Appendix “B” attached. The Black position gives no meaningful recognition to proportionality.

[95] The management of the discovery process in civil litigation, particularly complex civil litigation, has been of increasing concern to all who are involved in the administration of justice.

[96] If one were to go back 40 years, the parties to litigation and their counsel were largely responsible for managing production and discovery. In that bygone age there were often only 5 to 10 documents for production and less than a half a day for oral discovery.

[97] Parenthetically, most judges and many counsel report that at trial today there are rarely more than 5 to 10 documents that are truly determinative. However, in the last decade the world of documentary discovery has changed significantly.

[98] Typically there are thousands if not hundreds of thousands and sometimes millions of documents that have become part of the discovery process.

[99] This has given rise to the need for the court to participate in the process. In Ontario, it commenced with case management which has achieved significant success in Ottawa and Windsor but less so in Toronto.

[100] In 2003 the Task Force on Discovery in Ontario made various recommendations which took until 2010 Rule amendments to come into force. These are found in Rule 1.04.1 mandating proportionately and in Rule 29.1 requiring a Discovery Plan. Rules 30 and 31 with amendments form the basis for regulating documentary and oral discovery for non-parties.

[101] In the United States the Joint Task Force of the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers in 2009 recommended pilot projects to among other things place limits on discovery. Several pilot projects have been

implemented including in the Southern District of New York. Pilot Project Rules place limits on discoverable documents.¹⁸

[102] Also the Sedona Conference of the United States teamed with members of the Ontario Discovery Task Force and other lawyers and judges from across Canada to create the Sedona Canada Principles. The Sedona Canada Principles which include early consultation employing proportionately are now incorporated by reference in the Rule 29.1 amendments in 2010. In addition, Sedona Canada has published a commentary to add further guidance to the Principles.¹⁹

[103] In Ontario the process has gone further with the creation of the E. Discovery Implementation Committee sponsored by the Advocates Society and the Ontario Bar Association to provide precedents and guidelines to deal with discovery issues.²⁰

[104] The purpose of the above review has led me to conclude that the discovery process in the litigation that will be left as a result of the settlements in this case can be managed by judges of the Commercial List with the tools that are available to supplement the flexibility now provided for in the Rules.

[105] Two rules in particular are intended to be applied with the flexibility necessary to balance the interests of parties who might otherwise be inclined to resort to what used to be known as a “war of attrition”. Rule 29 and in particular rule 29.1.01 require the parties to agree on a discovery plan that is consistent with the Sedona Canada Principles. If the parties do not agree the court may intervene.

[106] Rule 1.04 (1), 1.1, and (2) while seemingly adding little by way of substance now operate as a strong signal for a change in culture. Parties cannot expect that the discovery process can with the passage of time and crippling cost destroy the prospect of a determination of legal issues on the merits. In recent years this has too often been the case.

[107] The Supreme Court of Canada has confirmed the application of the principle of proportionately in civil litigation in commenting on Quebec Civil Procedure Rule 4.2 (similar in wording to Ontario Rule 1.04) Madame Justice Deschamps speaking for the court in *Marcotte v. Longueuil* (2009) 43 at para. 67 said:

18 “U.S. District Court Southern District of New York-- In Re Pilot Project Regarding Case Management Techniques for Complex Civil Cases-- Oct.31,2011” and “ Institute for the Advancement of the American Legal System: Nov. 1, 2009, A Roadmap for Reform: Pilot Project Rules”.

19 See Ontario Bar Association website under Discovery or the website of the Sedona Conference “W6-7 – Sedona Canada”.

20 See website www.lexum.com/ediscovery.

“What is clear from these different sources is that the purpose of art. 4.2 C.C.P. is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter. At first glance, this case management function does not mean that it would be open to a judge to prevent a party from exercising a right. However, the judge must uphold the principle of proportionality when considering the conditions for exercising a right.”

[108] As noted above I am mindful that settlements assuming approval will interfere to some extent with what otherwise would have been the procedural entitlements of Black and other Non-Settling Defendants.

[109] I have concluded that this interference is not sufficient either to reject the settlement as a whole or to impose as a term that the parties conduct themselves as if Torys and KPMG remain as defendants. I do not accept the argument on behalf of Black and his associates that approval of the settlements should be rejected on the basis of failure of Hollinger to immediately bring the settlements before the court for approval. Not only are the facts in the case relied on, *Aecon Buildings v. Stephenson Engineering Limited* 21 readily distinguishable, there is no prejudice to the Non-Settling Defendants here. Indeed the pace of this litigation has in no small part awaited the final disposition of appeals from criminal convictions of Black and others in the United States on related matters. I am satisfied that disclosure of the settlements and the approval process has been reasonable.

[110] Consistent with the management that is envisaged with the application of the principle of proportionality and is available with the assistance of the procedures and judges of the Commercial List each of the production and discovery issues that form the objections of the Non-Settling Defendants can be addressed.

[111] I am satisfied that the court through management can balance the interests of the defendants with the entitlement of those parties who wish by settlement to be extricated from the process. I doubt that balance could be achieved if Hollinger had not agreed to limit its claims against the Non-Settling Defendants to each of their several liabilities.

[112] It would have been preferable to have the Settling Defendants and Non-Settling Defendants agree on a protocol, however, I am satisfied one can be fashioned following delivery of the Non-Settling Defendants' pleadings.

Conclusion

[113] On the material before me I am satisfied that the proposed settlements between Hollinger one side and each of Torys and KPMG be approved. The procedural entitlements of the Non-Settling Defendants can be achieved with active management on the Commercial List.

21 (2010) ONCA 898 at para 13.

[114] To the proposed settlement orders for Torys and KPMG I would add the following:

- 1) that at a minimum each of Torys and KPMG agree to be bound by their respective proposed protocols which should form the appendices to the orders.
- 2) that a term in each order provide that each of Torys and KPMG recognize and accept they will have ongoing obligations in the litigation as Non-Parties subject to management by the court.

[115] I note that no party objected to the form of Orders approving settlements with the other Settling Parties.

[116] The court may be spoken to if the parties cannot agree on the form of order and the issue of costs if that is necessary.

C. CAMPBELL J.

Released: September 12, 2012

CITATION: Hollinger Inc. (Re), 2012 ONSC 5107
COURT FILE NO.: 07-CL-7120
DATE: 20120912

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL)**

BETWEEN:

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 WITH
RESPECT TO HOLLINGER INC., 4322525 CANADA
INC., and SUGRA LIMITED

Applicants

REASONS FOR DECISION

C. CAMPBELL J.

Released: September 12, 2012

APPENDIX A

NON-PARTY PROTOCOL

This document production protocol is intended to describe the process for obtaining production of documents from KPMG LLP (“KPMG”) and Torys LLP (“Torys”) (collectively “the Non-Parties”) in the context of the proceeding commenced by Hollinger Inc. et al. against Conrad M. Black, F. David Radler et al. (collectively the “Parties to the Action”) in Ontario Superior Court of Justice, Court File No. 06-CL-6261 (“the Action”).

The protocol assumes that the settlements between Torys and Hollinger Inc. et al. and KPMG and Hollinger Inc. et al. will be approved by the Court, including the bar orders sought.

The Non-Parties have confirmed that to the best of their knowledge documents related to Hollinger Inc. in their power, possession and control as of October 2004, and in the case of the Non-Party Torys those documents that were not transferred in response to directions from Hollinger Inc., have been preserved and will continue to be preserved until the Action has been finally resolved.

Following the close of pleadings in the Action, the Parties to the Action will exchange documentary production in the ordinary course as required by the *Rules of Civil Procedure*. In the case of the plaintiffs, such documentary production shall include all relevant, non-privileged documents in the possession, control or power of the Chief Restructuring Officer or the Litigation Trustee appointed pursuant to the Order of the Court dated May 21, 2008 (the “Multi-Party Settlement Order”). For greater certainty, the documents in the control of the Chief Restructuring Officer or the Litigation Trustee include all documents that are currently in the possession of the plaintiffs' former counsel who acted for the plaintiffs or any of them in connection with the Litigation Assets as defined in the Multi-Party Settlement Order.

In the event the plaintiffs or any of them did not retain a copy of any of their aforementioned relevant documents ("Documents"), the plaintiffs shall write to Ernst & Young Inc. ("E&Y"), in its capacity as court-appointed Inspector, to determine and ask whether it has a copy of the sought after Documents. If so, the plaintiffs shall thereafter seek an order, in the Inspectorship proceedings to obtain copies of the Documents in the possession of the Inspector.

After the close of pleadings and the production of documents by the Parties to the Action, and in accordance with the timetable set out in the Discovery Plan (as set out in paragraph 6 below):

1. The Parties to the Action will identify the categories of relevant documents that they require from the Non-Parties with sufficient particularity regarding time period, document type and the transaction or issue(s) to which the requested documents are relevant all with the objective of making production proportionate and reasonable in the circumstances (for example, "all documents reflecting work done or advice given, as the case may be, by [the Non-Party] in relation to [name of transaction]");
2. To the extent that any list responsive to a request from the Parties to the Action exists, the Non-Parties shall produce such list (subject to editing for relevance and privilege) to assist the Parties to the Action to identify the available documents which may be relevant.
3. Relevance of the documents requested will be defined by the pleadings;
4. Subject to the principles of proportionality and reasonableness set out in paragraph 1, requested non-privileged documents relevant to any matter in issue in the action, shall be made available for

inspection and, if requested, copies shall be produced, all in accordance with paragraphs 5 through [8] hereof.

5. The Non-Party KPMG has advised E&Y in its capacity as Monitor that the documents KPMG has in its possession that may be related to the issues in the Action are not organized in an electronic document management database but are contained in paper files. The Non-Party Torys has advised E&Y in its capacity as Monitor that many of the documents it has in its possession that may be related to the issues in the Action are not organized in an electronic document management database but are instead contained in paper files, some of which are available on CD-ROM. Accordingly, the Non-Parties will separately make the categories of documents requested by the parties available for inspection, subject to any applicable solicitor-client privilege, at a mutually acceptable location at mutually accepted times. To the extent that documents are available electronically they shall be made available for inspection in that format, upon request;
6. KPMG and Torys shall be consulted about the proposed schedule for production and discovery with respect to productions pursuant to this protocol before the finalization of the Discovery Plan pursuant to Rule 29.1.03(1) of the Rules of Civil Procedure. KPMG and Torys shall thereafter make documents available for inspection in accordance with the established schedule. Any dispute with respect to the schedule as it affects the Non-Parties may be referred to the Court pursuant to paragraph 11 hereof;

7. The Parties to the Action will be permitted to access the aforementioned categories of documents for an agreed duration during which any such Party may request copies of them.
8. The Non-Parties will arrange for copies of the requested documents to be made and thereafter provided to, not only the Party to the Action requesting copies of the documents, but also every other Party to the Action. In the case of documents that are now in electronic form, production of such documents will be by electronic copies;
9. Any Party to the Action that requests copies of documents pursuant to paragraph 6 agrees to pay all reasonable expenses relating to the copying or scanning of the requested documents incurred by the Non-Parties (including the costs incurred as a result of a Non-Party retaining a third party vendor for such copying or scanning) for both the Party requesting the documents and all other Parties to the Action who are entitled to receive a duplicate copy, subject to the rights of the Parties to the Action to recover the same from the other Parties to the Action as costs in the Action. Nothing in this paragraph is intended to prevent the Parties to the Action from allocating the costs referred to among themselves in any way they agree is appropriate;
10. All other costs of the Non-Parties relating to the preparation for inspection and the production of documents shall be in the discretion of the Court pursuant to rule 30.10 of the Rules of Civil Procedure and s. 131 of the *Courts of Justice Act* and any Non-Party or Party to the Action may refer the issue of the responsibility

for payment of such costs to the Court pursuant to paragraph 11 hereof;

11. The Parties to the Action and the Non-Parties may enlist the assistance of the Court, in case managing or resolving any issues that may arise during implementation of the abovementioned document production protocol, including issues of the relevance of the documents requested, the proportionality and reasonableness of the request in the circumstances, the application and/or waiver of privilege and the responsibility for costs incurred by the Non-Parties referred to in paragraph 10 hereof. The plaintiffs acknowledge that they have waived privilege over documents arising from Torys' representation of the Plaintiffs, which documents are in the possession of the Non-Parties. For greater certainty, the waiver of privilege does not extend to materials exchanged in the mediations that took place between Hollinger Inc. and the Non-Parties, respectively, which mediation materials remain privileged and confidential;

12. The deemed undertaking, as described in Rule 30.1 of the Rules of Civil Procedure shall apply to all documents made available for inspection by the Non-Parties;

13. Nothing in this document protocol waives or prejudices the rights that the Parties to the Action and the Non-Parties might have pursuant to rules 30.10, 31.10 and 53.07 of the Rules of Civil Procedure and section 131 of the *Courts of Justice Act*.

Lisa C. Munro
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August 9, 2012

FILE NUMBER 51366-00006

VIA EMAIL

Monique Jilesen
Matthew Lerner
LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
130 Adelaide Street West
Suite 2600
Toronto, Ontario M5H 3P5

Dear Counsel:

Re: Conrad M. Black et al. ats Hollinger Inc. et al.

We set out here the Black parties' position on production and discovery issues in the current litigation, including the contribution and indemnity claims and the motions to approve the Torys LLP, KPMG LLP, and Hollinger Inc. settlements.

Our primary position on the settlement approval motions remains that they should not be approved on the terms put forward but, even if approved, Torys LLP and KPMG LLP should remain parties to the litigation so that Black's ability to defend the claims against him by Hollinger Inc. are not prejudiced by a bar order. This position is set out in detail in Black's factum and oral argument in response to the settlement approval motions.

However, if the court rules that Torys LLP and KPMG LLP are no longer to be parties to the litigation and a bar order is to issue, there are certain minimal requirements to reduce the prejudice to Black, while imposing reasonable requirements on Torys LLP and KPMG LLP. In essence, if a bar order issues dismissing Black's extant contribution and indemnity claims against Torys LLP and KPMG LLP, Black needs certainty now that he will have no lesser rights (nor is he asking for greater rights) than those to which he would be entitled if Torys LLP and KPMG LLP remained parties. He cannot agree that he, Torys LLP, KPMG LLP, and Hollinger Inc. may simply reserve their rights on these critical issues, since to do so will be certain to create uncertainty, increased costs, and delay.

Unfortunately, the parties have been unable to reach agreement on a protocol that will ensure that Black's rights will be protected, while also addressing the concerns of Torys LLP and KPMG LLP.

Our proposal is as follows:

- Issues relating to production and discovery in the main action will be pursuant to the Rules of Civil Procedure and determined by the case management judge, when one is appointed. These issues need not be further addressed at this time;
- Torys LLP and KPMG LLP each to provide a sworn affidavit of documents, including a detailed schedule B, listing all documents which are relevant to the issues raised in the pleadings;
- The settling parties to agree upon a reasonable cap for the costs to be incurred by Torys LLP and KPMG LLP associated with producing documents which are relevant to the issues raised in the pleadings and producing witnesses (both for examination for discovery and at trial) and funds to make those payments will be set aside, in trust, out of the settlement funds. The final arbiter of whether the costs incurred paid out of the fund were reasonable will be the CCCA case management judge; and
- Torys LLP and KPMG LLP to agree to cooperate in making available current members of their respective firms as witnesses, both for examination for discovery and at trial. Recognizing that Torys LLP and KPMG LLP cannot control former members of their firms, they must agree to cooperate in the efforts of counsel for the parties to the litigation to obtain the evidence of former members of their firms as witnesses at discovery and/or trial.

We think that this proposal addresses not only Black's concerns, but also the desire of Torys LLP and KPMG LLP to put an end to costs they must incur in respect of the action. It leaves the allocation of those costs between the parties to the litigation to be determined at the end of the litigation in the ordinary course.

This proposal and position is not without prejudice. It will be referred to, if necessary, when the matter comes on again before Justice Campbell. We ask that this letter be included in any report you prepare to Justice Campbell.

Yours truly,

Lisa C. Munro

LCM/emc/ra

cc: Service List
2144346.1

