for negligent performance of a service or breach of contract would be identical (*ibid.*). The trial judge agreed, finding that Livent's claim in contract "succeed[ed] . . . for the [same] reasons" as its claim of negligent performance of a service and that the elements of its claim in contract were "incorporated by reference to the finding of 'negligence'" (para. 243). Given the above, we would impose the same quantum of liability on Deloitte for the concurrent claim in breach of contract.

procès, Livent a reconnu que ses pertes attribuables à la prestation négligente d'un service ou à la violation de contrat seraient identiques (*ibid.*). Le juge de première instance a acquiescé et a conclu que la demande de Livent fondée sur le contrat était [TRADUCTION] « accueillie [. . .] pour les [mêmes] raisons » qu'il accueillait sa demande fondée sur la prestation négligente d'un service, et que les éléments de sa demande fondée sur le contrat étaient « incorporés par renvoi à la conclusion relative à la "négligence" » (par. 243). Compte tenu de ce qui précède, nous sommes d'avis d'imposer à Deloitte une responsabilité dans la même mesure pour la demande concurrente fondée sur la violation de contrat.

[115] Accordingly, the appeal is allowed in part. The amount of the trial award is reduced from $84,750,000 to $40,425,000. Livent shall have its costs throughout.

[115] En conséquence, le pourvoi est accueilli en partie. La somme de 84 750 000 dollars accordée en première instance est réduite à 40 425 000 dollars. Livent a droit à ses dépens dans toutes les cours.

The reasons of McLachlin C.J. and Wagner and Côté JJ. were delivered by

Version française des motifs de la juge en chef McLachlin et des juges Wagner et Côté rendus par

[116] THE CHIEF JUSTICE (dissenting in part) — Garth Drabinsky and Myron Gottlieb built a North American theatre empire that came to be known as Livent Inc. Seeking ever more spectacular success, they resorted to manipulating the company's financial records. When the scheme came to light, Livent collapsed. Its assets were liquidated. Drabinsky and Gottlieb went to jail.

[116] LA JUGE EN CHEF (dissidente en partie) — Garth Drabinsky et Myron Gottlieb ont édifié dans le domaine du théâtre un empire nord-américain qui s'est fait connaître sous le nom de Livent Inc. À la poursuite d'un succès encore plus fulgurant, ils ont recouru à la manipulation des documents financiers de l'entreprise. Lorsque le stratagème a été découvert, Livent s'est effondrée. Ses actifs ont été liquidés. MM. Drabinsky et Gottlieb ont été incarcérés.

[117] This is among the many lawsuits that followed. The courts below held that Deloitte & Touche, a firm of accountants and Livent's auditor, breached the duty of care it owed to Livent in failing to detect and expose Livent's fraud, as a result of which Livent was able to continue operations and continue losing money — money it now claims from Deloitte.

[117] L'affaire qui nous occupe compte parmi les nombreuses poursuites qui ont suivi. Les juridictions inférieures ont jugé que Deloitte & Touche, un cabinet de comptables et vérificateur de Livent, a manqué à l'obligation de diligence envers cette dernière lorsqu'elle n'a pas détecté et dénoncé la fraude commise par Livent, ce qui a fait en sorte que Livent a pu poursuivre ses activités et continuer à perdre de l'argent — argent qu'elle réclame maintenant à Deloitte.

[118] I agree with the courts below that Deloitte owed a duty of care to Livent, which it breached

[118] Je suis d'accord avec les juridictions inférieures pour dire que Deloitte avait une obligation

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when it failed to discover and expose Livent's fraud in the audited statements it prepared. However, I do not agree that Deloitte is liable for virtually all the loss that befell Livent as it pursued its precipitous decline into insolvency through doomed investments. I would allow the appeal.

de diligence envers Livent, obligation à laquelle elle a manqué lorsqu'elle n'a pas détecté et dénoncé la fraude commise par Livent dans les états financiers vérifiés qu'elle a préparés. Cependant, je ne suis pas d'accord pour dire que Deloitte est responsable de pratiquement toutes les pertes qu'a subies Livent alors qu'elle sombrait rapidement dans l'insolvabilité en raison d'investissements voués à l'échec. Je suis d'avis d'accueillir le pourvoi.

I. Facts

[119] The saga that led to these proceedings began in 1989 when two would-be entertainment moguls, Drabinsky and Gottlieb, launched a takeover bid of their employer, Cineplex Odeon Corporation. When the bid failed, the pair formed MyGar Partnership, which purchased all of the assets and some of the liabilities of Cineplex's live entertainment division. These included Toronto's Pantages Theatre and the rights to a wildly successful show, *The Phantom of the Opera*. MyGar carried on business through its nominee corporation, Live Entertainment Corporation of Canada Inc., and both entities were rolled into Live Entertainment of Canada Inc., or Livent Inc., in 1993. Livent made its debut in Canada's equity market with an initial public offering that year. By the end of 1995, Livent's shares were also listed on New York's NASDAQ exchange.

[120] Deloitte & Touche (now Deloitte LLP) became MyGar's auditor in 1989 and continued as auditors for MyGar and it successor Livent until 1998.

[121] Livent's strategy was vertical integration. Unlike other players in the live entertainment industry, it brought the entire enterprise, from production to performance, under one roof — a roof that Livent, as a proprietor of theatre properties, also owned. This was an immensely costly and risky undertaking. Livent invested in real estate in Toronto, Vancouver, New York, and Chicago. It produced and presented

I. Les faits

[119] La saga qui a mené à ces procédures a commencé en 1989, lorsque deux aspirants magnats du spectacle, MM. Drabinsky et Gottlieb, ont lancé une offre publique d'achat visant leur employeur, Cineplex Odeon Corporation. Lorsque leur offre a échoué, ils ont constitué la société MyGar Partnership qui a acheté tous les éléments d'actif et certains éléments de passif de la division des spectacles sur scène de Cineplex. Il s'agissait notamment du Pantages Theatre de Toronto et des droits sur un spectacle connaissant un incroyable succès, *The Phantom of the Opera* (*Le Fantôme de l'Opéra*). MyGar a mené ses activités par l'intermédiaire de sa société prête-nom, Live Entertainment Corporation of Canada Inc., et en 1993, ces deux entités ont fusionné pour devenir Live Entertainment of Canada Inc., ou Livent Inc. Livent a percé le marché boursier canadien en lançant la même année un premier appel public à l'épargne. À la fin de 1995, les actions de Livent étaient aussi cotées au marché d'actions NASDAQ de New York.

[120] Deloitte & Touche (maintenant Deloitte S.E.N.C.R.L./s.r.l.) est devenue le vérificateur de MyGar en 1989 et a continué d'agir à ce titre pour MyGar et son successeur, Livent, jusqu'en 1998.

[121] Livent a eu recours à la stratégie d'intégration verticale. Contrairement à d'autres acteurs de l'industrie des spectacles sur scène, Livent a regroupé l'ensemble des activités, de la production à la présentation des spectacles, sous un même toit, lequel appartenait d'ailleurs à Livent en sa qualité de propriétaire de théâtres. Il s'agissait d'un projet extrêmement coûteux et risqué. Livent a investi

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a string of spectacular (and therefore expensive) musicals. When its shows succeeded, Livent reaped all the rewards. When they did not, it bore the losses alone.

dans le secteur immobilier à Toronto, Vancouver, New York et Chicago. Elle a produit et présenté une série de comédies musicales spectaculaires (et par conséquent coûteuses). Lorsque les spectacles étaient couronnés de succès, Livent récoltait tous les fruits. Dans le cas contraire, elle assumait seule les pertes.

[122] Drabinsky and Gottlieb were determined to prove that their business model worked. To be sure it did, they and their associates cooked the books. They did so in four ways:

i. Drabinsky and Gottlieb pocketed some $7.5 million in kickbacks in the two years before Livent's initial public offering. These they secured by causing MyGar to pay false or inflated invoices to various contractors, who in turn directed funds to Drabinsky and Gottlieb personally or to another company they controlled. A substantial portion of the falsified expenses were booked as assets. Drabinsky and Gottlieb's balance sheets were thus infused with fantasy as early as 1991.

ii. Livent officers and employees distorted the company's financial records by shifting expenses between accounting periods and from one activity or production to another. They doctored Livent's accounting software to permit and conceal these manipulations.

iii. Livent overstated its bottom line by extending the time over which it amortized the costs of putting on its productions and, in some periods, by avoiding amortization altogether. This it did by transferring millions of dollars of "pre-production costs" from shows to fixed assets or from one show to another, and particularly to shows that had not yet opened.

[122] Messieurs Drabinsky et Gottlieb voulaient à tout prix démontrer que leur modèle d'entreprise fonctionnait bien. Pour y arriver, de concert avec leurs associés, ils ont falsifié les comptes, et ce, de quatre manières :

i. Messieurs Drabinsky et Gottlieb ont empoché quelque 7,5 millions de dollars en pots-de-vin au cours des deux années précédant le premier appel public à l'épargne de Livent. Ils y sont parvenus en faisant payer par MyGar des factures fausses ou gonflées à divers entrepreneurs, qui versaient en retour de l'argent à MM. Drabinsky et Gottlieb personnellement ou à une autre société que ceux-ci contrôlaient. Une partie importante des dépenses falsifiées étaient consignées comme des éléments d'actif. Les bilans de MM. Drabinsky et Gottlieb étaient donc truffés de faussetés dès 1991.

ii. Les dirigeants et les employés de Livent ont falsifié les documents financiers de l'entreprise en transférant les dépenses d'une période comptable à une autre et d'une activité ou production à une autre. Ils ont trafiqué le logiciel de comptabilité de Livent pour effectuer et dissimuler ces manœuvres.

iii. Livent a exagéré son résultat net en prolongeant la période d'amortissement des coûts de production de ses spectacles et, pour certaines périodes, en écartant complètement l'amortissement. À cette fin, elle a transféré des millions de dollars des « coûts préalables à la production » de ses spectacles vers des biens immobilisés ou d'un spectacle à l'autre et, en particulier, à des spectacles qui n'étaient pas encore présentés.

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iv. The company recorded imaginary revenue by entering into loan or financing agreements that it camouflaged as asset sales. Livent purported to sell various rights related to its productions and properties, but simultaneously entered into secret side agreements permitting purchasers to recover what they had paid. The revenue booked from such transactions ran well into the millions of dollars.

[123] Livent not only misled the markets, it also fooled its auditor. Deloitte never uncovered the company's schemes. Livent continued to raise investment capital and reinvest it in unprofitable theatre enterprises. Deloitte's auditors report for Livent's Fiscal Year 1997 did not disclose the fraud and, although Deloitte objected when Gottlieb presented a misleading quarterly financial statement to the Audit Committee in August 1997, it did not resign.

[124] The truth came to light in 1998. New equity investors appointed new management, who discovered "irregularities". Deloitte retracted its audit opinions for 1996 and 1997. A subsequent investigation and re-audit resulted in restated financial reports. Drabinsky and Gottlieb were suspended, fired, and convicted of fraud.

[125] Livent filed for insolvency protection in both Canada and the United States in November 1998 and sold its assets in August 1999. It went into receivership the following month. The trial judge found that Livent lost $113,000,000 between the time of Deloitte's negligent failure to end its relationship with Livent and Livent's insolvency. He reduced that amount by 25 percent for contingencies and awarded $84,750,000 in damages. Livent seeks to recover this loss from Deloitte.

iv. L'entreprise a enregistré des revenus fictifs en concluant des conventions de prêt ou des accords de financement qu'elle camouflait en ventes d'actifs. Livent a prétendu vendre différents droits afférents à ses productions et propriétés, tout en concluant en même temps des accords parallèles secrets qui permettaient aux acheteurs de recouvrer le prix payé. Les recettes inscrites aux livres provenant de ces transactions se chiffraient largement en millions de dollars.

[123] Livent a non seulement induit les marchés en erreur, elle a aussi trompé son vérificateur. Deloitte n'a jamais découvert les stratagèmes de la société. Livent a continué à réunir des capitaux d'investissement et à les réinvestir dans des projets de scène non rentables. Le rapport du vérificateur présenté par Deloitte pour l'exercice de 1997 de Livent n'a pas révélé la fraude, et même si elle a exprimé son opposition lorsque Gottlieb a présenté des états financiers trimestriels falsifiés au comité de vérification en août 1997, Deloitte n'a pas démissionné.

[124] La vérité a éclaté en 1998. De nouveaux investisseurs ont nommé d'autres dirigeants, qui ont découvert des « irrégularités ». Deloitte a fait une rétractation concernant ses opinions du vérificateur relatives aux exercices 1996 et 1997. Une enquête et une nouvelle vérification subséquentes ont donné lieu à des états financiers modifiés. Messieurs Drabinsky et Gottlieb ont été suspendus, congédiés et déclarés coupables de fraude.

[125] En novembre 1998, Livent a demandé la protection contre l'insolvabilité au Canada et aux États-Unis et en août 1999, elle a vendu ses éléments d'actif. Elle a été mise sous séquestre le mois suivant. Le juge de première instance a conclu que Livent avait subi des pertes de 113 000 000 de dollars entre le moment où Deloitte a négligé de mettre un terme à sa relation avec Livent et l'insolvabilité de Livent. Il a diminué ce montant de 25 pour 100 pour tenir compte des imprévus et a accordé des dommages-intérêts s'élevant à 84 750 000 dollars. Livent cherche à recouvrer ces pertes auprès de Deloitte.

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II. Judicial History

[126] Livent sued Deloitte for $450,000,000 and other relief. It advanced concurrent claims in tort and contract; the parties agreed that the damages under either head would be the same. Livent claimed that Deloitte was responsible for every dollar Livent lost from the date of Deloitte's breach of duty. Deloitte's defence was that most of the losses claimed were beyond the scope of Deloitte's legal responsibility. The courts below largely sided with Livent.

A. *Ontario Superior Court of Justice (Commercial List) (Gans J.), 2014 ONSC 2176, 11 C.B.R. (6th) 12*

[127] The trial judge held that Deloitte owed a duty of care to provide accurate information to Livent's shareholders. He held that the standard of care under this duty required Deloitte to take steps that would have effectively cut off Livent's access to the capital markets and forced it into formal insolvency as early as 14 months before it ultimately filed for insolvency protection. The trial judge concluded that Deloitte failed to meet this standard of care, either when it failed to discover the fraud and act on that discovery in August 1997, or when it signed off on Livent's 1997 financial statements in April 1998.

[128] The trial judge held that the measure of damages was the difference between Livent's value when the breach occurred, and Livent's value at the time of insolvency ($113,000,000). He reduced this by 25 percent to account for "contingencies" or "trading losses" sustained as a result of Livent's "unprofitable but legitimate theatre business" (paras. 324-26), which he held were too remote to make Deloitte liable.

II. Historique judiciaire

[126] Livent a poursuivi Deloitte pour 450 000 000 de dollars et demandé d'autres mesures de réparation. Elle a présenté des demandes concurrentes en responsabilité délictuelle et en responsabilité contractuelle; les parties ont convenu que, dans un cas ou dans l'autre, le montant des dommages-intérêts serait le même. Livent a soutenu que Deloitte était responsable de chaque dollar qu'elle a perdu à compter de la date du manquement, par Deloitte, à son obligation de diligence. Deloitte a plaidé en défense que la plupart des pertes alléguées échappaient à la portée de sa responsabilité juridique. Les juridictions inférieures ont tranché principalement en faveur de Livent.

A. *Cour supérieure de justice de l'Ontario (rôle des affaires commerciales) (le juge Gans), 2014 ONSC 2176, 11 C.B.R. (6th) 12*

[127] Le juge de première instance a conclu que Deloitte avait une obligation de diligence pour fournir des renseignements exacts aux actionnaires de Livent. Il a estimé que la norme de diligence en vertu de cette obligation exigeait que Deloitte prenne des mesures qui auraient effectivement privé Livent de l'accès aux marchés des capitaux et l'auraient obligée à déclarer faillite 14 mois avant que cette dernière demande finalement la protection contre l'insolvabilité. Le juge a conclu que Deloitte n'avait pas respecté cette norme de diligence, soit en août 1997, lorsqu'elle n'a pas découvert la fraude et n'a pas pris les mesures que cette découverte rendait nécessaires, ou en avril 1998, lorsqu'elle a approuvé les états financiers de 1997 de Livent.

[128] Le juge de première instance a conclu que le montant des dommages-intérêts équivalait à l'écart entre la valeur de Livent au moment où le manquement a eu lieu et la valeur de Livent au moment de l'insolvabilité (113 000 000 de dollars). De ce montant, il a retranché 25 pour 100 pour tenir compte des [TRADUCTION] « imprévus » ou des « pertes commerciales » attribuables aux « activités de scène non rentables mais légitimes » (par. 324-326) de Livent, qui, selon le juge, étaient trop éloignées pour que Deloitte puisse en être tenue responsable.

[129] The trial judge also rejected Deloitte's submission that Livent's recovery should be either barred by the defence of illegality, or reduced on account of contributory fault pursuant to s. 3 of the *Negligence Act*, R.S.O. 1990, c. N.1.

[129] Le juge de première instance a également rejeté l'argument de Deloitte selon lequel l'illégalité invoquée comme moyen de défense devait empêcher Livent de toucher une indemnité, ou le montant de cette indemnité devait être réduit pour cause de faute contributoire suivant l'art. 3 de la *Loi sur le partage de la responsabilité*, L.R.O. 1990, c. N.1.

[130] The trial judge consequently awarded damages to Livent for breach of its duty of care, and alternatively for breach of contract, in the amount of $84,750,000.

[130] En conséquence, le juge de première instance a accordé à Livent des dommages-intérêts s'élevant à 84 750 000 dollars pour manquement à son obligation de diligence ou, autrement, pour violation de contrat.

B. *Court of Appeal for Ontario (Strathy C.J. and Blair and Lauwers JJ.A.), 2016 ONCA 11, 128 O.R. (3d) 225*

B. *Cour d'appel de l'Ontario (le juge en chef Strathy et les juges Blair et Lauwers), 2016 ONCA 11, 128 O.R. (3d) 225*

[131] The Court of Appeal upheld the trial judge's award and dismissed both the appeal and cross-appeal.

[131] La Cour d'appel a confirmé la décision du juge de première instance et a rejeté l'appel et l'appel incident.

III. Analysis

III. Analyse

[132] The only issue on this appeal is whether Deloitte is liable for the lion's share of the loss Livent sustained after it failed to detect the fraud of the company's principals and report it in its audit statements (the total loss less a 25 percent discount for contingencies and Livent's improvident investments). Livent claims that if Deloitte had reported the fraud when it should have, it would have been put out of business, which would have saved it from the loss that it suffered thereafter. Instead, it was able to continue to raise more capital and spend it in ways that decreased Livent's net worth. Deloitte argues that it is not liable for the full extent of Livent's pre-liquidation loss because this loss falls outside the scope of Deloitte's duty of care, or is too "remote" from the legal cause.

[132] En l'espèce, la seule question en litige est de savoir si Deloitte est responsable de la majeure partie des pertes que Livent a subies après que Deloitte n'ait pas réussi à découvrir la fraude commise par les dirigeants de l'entreprise et à la signaler dans ses états financiers vérifiés (la perte totale diminuée de 25 pour 100 pour les imprévus et les mauvais investissements de Livent). Livent affirme que si Deloitte avait signalé la fraude au moment où elle aurait dû le faire, Livent aurait été forcée de cesser ses activités, ce qui lui aurait évité de subir la perte qu'elle a subie par la suite. Elle a plutôt continué à réunir des capitaux et à les dépenser d'une façon qui diminuait la valeur nette de Livent. Deloitte plaide qu'elle n'est pas responsable de la totalité de la perte subie avant la liquidation de Livent parce que cette perte échappe à l'étendue de l'obligation de diligence de Deloitte, ou parce qu'elle est trop « éloignée » de la cause juridique.

[133] The law of negligent misstatement has limited recovery of pure economic (financial) loss for two reasons. The first reason is that it may be unfair to hold a person who makes a negligent

[133] Le droit en matière de déclarations inexactes faites par négligence prévoit une indemnisation limitée des pertes purement économiques (financières) pour deux raisons. La première, c'est qu'il peut être

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misstatement liable for all loss incurred thereafter, where other decisions and acts contributed to that loss. This is referred to as the fair allocation of loss principle. The second reason is to avoid the spectre of indeterminate liability, which the law of negligence has never countenanced.

[134] These two reasons — one of principle and the other of policy — are complementary. They work together to ensure fair outcomes and promote predictability in the law.

[135] As Lord Bridge observed in *Caparo Industries plc. v. Dickman*, [1990] 1 All E.R. 568 (H.L.), at p. 576:

> To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J., to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" ([*Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444]), it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.

See also *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, at para. 18; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 31; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1137, per McLachlin J.; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 99, quoting *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 54.

[136] For these reasons, common law courts have rejected a simple "but for" test for recovery of economic loss for negligent misstatement: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 44; *South Australia Asset Management Corp. v. York Montague Ltd.*, [1996] 3 All E.R. 365 (H.L.) ("*SAAMCO*"), at pp. 369-72, per Lord Hoffmann; *Hughes-Holland v.*

injuste de tenir une personne responsable de la totalité des pertes subies en raison de sa déclaration inexacte, alors que d'autres décisions et actes ont contribué à ces pertes : c'est ce qu'on appelle le principe de l'attribution équitable de la perte. La seconde est qu'il faut éviter le spectre de la responsabilité indéterminée, que le droit de la négligence n'a jamais admise.

[134] Ces deux raisons — une de principe et l'autre de politique générale — sont complémentaires. Ensemble, elles donnent lieu à des résultats justes et favorisent la prévisibilité du droit.

[135] Comme l'a fait observer lord Bridge dans *Caparo Industries plc. c. Dickman*, [1990] 1 All E.R. 568 (H.L.), p. 576 :

> [TRADUCTION] Conclure que l'auteur de la déclaration a, quant à son exactitude, une obligation de diligence envers toute personne qui voudrait l'invoquer à quelque fin que ce soit signifie non seulement lui imposer, selon l'énoncé classique du juge en chef Cardozo, « une responsabilité pour un montant indéterminé, pour un temps indéterminé et envers une catégorie indéterminée » ([*Ultramares Corp. c. Touche*, 174 N.E. 441 (N.Y. 1931), p. 444]), mais aussi conférer à des tiers le droit tout à fait injustifié de tirer profit pour leur propre bénéfice des connaissances d'expert ou de l'expertise professionnelle attribuée à l'auteur de la déclaration.

Voir également *D'Amato c. Badger*, [1996] 2 R.C.S. 1071, par. 18; *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165, par. 31; *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021, p. 1137, la juge McLachlin; *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45, par. 99, citant *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537, par. 54.

[136] Pour ces raisons, les tribunaux de common law ont rejeté le critère simple du « facteur déterminant » pour l'indemnisation des pertes économiques causées par une déclaration inexacte faite par négligence : *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12, p. 44; *South Australia Asset Management Corp. c. York Montague Ltd.*, [1996] 3 All E.R. 365

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BPE Solicitors, [2017] UKSC 21, [2017] 2 W.L.R. 1029, at para. 38, per Lord Sumption; *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 57, 542 A.R. 289, at paras. 37-38, per Slatter J.A.

[137] A "but for" test, which asks only whether the loss would not have been incurred if the wrongful act had not been committed, casts the net of liability too widely. It would make auditors or advisors retained for limited purposes the insurers of the entire venture and all that flows from it. It would not matter that the loss would not have occurred but for other decisions (like Livent's ill-judged investment decisions in this case). Nor would it matter that the loss was the result of a complex web of decision making, months and years after the negligent misstatement was produced. All that would be required to recover all subsequent loss from the auditors would be to show that their misstatement played a role in launching the saga of subsequent loss. This is not fair; a person giving advice for one purpose should not be held liable for how other people use that information for other purposes, or be made to carry the entire loss. And, it would lead to indeterminate liability. An auditor giving advice would never know what its exposure might be, or whether its fee is adequate to cover the risk to which it exposes itself.

[138] Rejection of a "but for" test for assessing recovery of economic loss is cemented in the common law. But it is worth noting that Quebec civil law also recognizes the need to limit recovery of economic loss to losses that bear a sufficient connection to the wrongful feature of the defendant's conduct: see *Wightman v. Widdrington (Succession)*, 2013 QCCA 1187, at paras. 229-31 and 243-46 (CanLII); see also D. Jutras, "Civil Law and Pure Economic Loss: What Are We Missing?" (1987), 12 *Can. Bus. L.J.* 295, at pp. 308-9.

(H.L.) (« *SAAMCO* »), p. 369-372, lord Hoffmann; *Hughes-Holland c. BPE Solicitors*, [2017] UKSC 21, [2017] 2 W.L.R. 1029, par. 38, lord Sumption; *Hogarth c. Rocky Mountain Slate Inc.*, 2013 ABCA 57, 542 A.R. 289, par. 37-38, le juge Slatter.

[137] Le critère du « facteur déterminant », qui vise seulement à déterminer si la perte n'aurait pas été subie si l'acte fautif n'avait pas été commis, donne une portée trop large à la responsabilité. Il ferait en sorte que les vérificateurs ou les conseillers dont les services ont été retenus à des fins limitées deviendraient les garants de tout le projet et de tout ce qui en découle. Il n'importerait pas que la perte ne se serait pas produite n'eût été d'autres décisions (comme, en l'espèce, les décisions peu judicieuses de Livent en matière d'investissement). Il n'importerait pas non plus que la perte soit causée par un enchevêtrement complexe de prises de décisions, prises des mois ou des années après la production de la déclaration inexacte faite par négligence. Pour obtenir l'indemnisation de la totalité des pertes subséquentes auprès des vérificateurs, il suffirait de montrer que leur déclaration inexacte a joué un rôle en déclenchant la saga des pertes subséquentes. Cela est injuste : une personne qui donne un conseil pour une fin précise ne devrait pas être tenue responsable de la façon dont d'autres personnes utilisent ce renseignement à d'autres fins, et ne devrait pas non plus avoir à assumer la totalité de la perte. Aussi, cela donnerait lieu à une responsabilité indéterminée. Un vérificateur qui donne un conseil ne pourrait jamais savoir à quoi il s'expose, ou si ses honoraires sont suffisants pour couvrir le risque auquel il s'expose.

[138] Le rejet du critère du « facteur déterminant » pour évaluer s'il y a lieu d'accorder l'indemnisation d'une perte économique est ancré dans la common law. Cependant, il convient de signaler que le droit civil du Québec reconnaît aussi la nécessité de limiter l'indemnisation des pertes économiques à celles qui ont un lien suffisant avec la caractéristique du comportement du défendeur qui en fait un acte fautif : voir *Wightman c. Widdrington (Succession)*, 2013 QCCA 1187, [2013] R.J.Q. 1054, par. 229-231 et 243-246; voir aussi D. Jutras, « Civil Law and Pure Economic Loss : What Are We Missing? » (1987), 12 *Rev. can. dr. comm.* 295, p. 308-309.

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[139] Courts have given two doctrinal explanations for limiting recovery of economic loss following from a negligent misstatement. The first is to say that the *scope of the duty of care* of the advice-giver does not cover the loss claimed. The second is to say that the loss is *too remote* from the negligent act and thus was not legally caused by that act.

[140] While lawyers may argue over which approach is preferable, the fact once again is that they are complementary — two sides of the same coin. In fact, the inquiry into the duty of care and the inquiry into remoteness invoke similar considerations.

[141] The "scope of the duty of care" inquiry looks to the relationship between the defendant's advice and the plaintiff's loss. It asks if that relationship was "proximate". In cases of economic loss, it inquires into the purpose for which the advice was given and asks whether a reasonable person would have expected, or "foreseen", that negligent advice would lead to the loss in question by virtue of the plaintiff's reliance on the advice: *Hercules*, at paras. 24 and 41. Put simply: Did the loss flow from the advice, or from subsequent decisions and circumstances? Thus, in *Caparo*, at p. 581, Lord Bridge confirmed that the scope of the tort determines the extent of the remedy to which the injured party is entitled. See also *Platform Home Loans Ltd. v. Oyston Shipways Ltd.*, [1999] 1 All E.R. 833 (H.L.), at p. 847, per Lord Hobhouse.

[142] The "remoteness" approach looks at similar factors to the "scope of the duty of care" approach — all pointing to the wrongdoing and its proximity to the loss claimed. The factors to be considered are not closed. The advice-giver's knowledge of the claimant's circumstances, the reasonable expectations arising from the relationship, and the presence of intervening factors that led to the loss may figure in the analysis: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at paras. 12 and 14-16; *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46, [2007] 3 S.C.R. 373, at

[139] Les tribunaux ont donné deux explications théoriques pour limiter les pertes économiques indemnisables à la suite d'une déclaration inexacte faite par négligence. Selon la première, *l'étendue de l'obligation de diligence* de la personne qui donne le conseil ne couvre pas la perte alléguée. Selon la deuxième, la perte est *trop éloignée* de l'acte négligent et n'a donc pas été causée, en droit, par cet acte.

[140] Bien que les avocats puissent débattre de l'approche qui est préférable, le fait est que celles-ci, encore, sont complémentaires — deux côtés de la même médaille. En fait, l'analyse relative à l'obligation de diligence et celle relative au caractère éloigné suscitent des considérations semblables.

[141] L'analyse relative à l'« étendue de l'obligation de diligence » porte sur la corrélation entre le conseil du défendeur et la perte du demandeur. Il faut se demander si cette corrélation était « immédiate ». Dans les cas de perte économique, elle vise la fin pour laquelle le conseil a été donné, et il faut se demander si une personne raisonnable aurait pu prévoir que le conseil donné par négligence aurait causé la perte en question en raison du fait que le demandeur s'y soit fié : *Hercules*, par. 24 et 41. Autrement dit, est-ce que la perte découlait du conseil, ou des décisions et circonstances subséquentes? Ainsi, dans *Caparo*, p. 581, lord Bridge a confirmé que la portée du délit détermine la réparation à laquelle a droit la partie lésée. Voir aussi *Platform Home Loans Ltd. c. Oyston Shipways Ltd.*, [1999] 1 All E.R. 833 (H.L.), p. 847, lord Hobhouse.

[142] L'approche relative au « caractère éloigné » porte sur des facteurs semblables à ceux de l'approche relative à l'« étendue de l'obligation de diligence » — les deux visent l'acte fautif et sa proximité à la perte alléguée. La liste des facteurs devant être pris en considération n'est pas exhaustive. La connaissance de la situation du demandeur par la personne donnant le conseil, les attentes raisonnables découlant de la relation et la présence de facteurs intermédiaires ayant mené à la perte sont des facteurs qui peuvent être pris en compte dans l'analyse : *Mustapha c. Culligan du Canada Ltée*,

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para. 31; *Westmount (City) v. Rossy*, 2012 SCC 30, [2012] 2 S.C.R. 136, at para. 48.

2008 CSC 27, [2008] 2 R.C.S. 114, par. 12 et 14-16; *Citadelle, Cie d'assurances générales c. Vytlingam*, 2007 CSC 46, [2007] 3 R.C.S. 373, par. 31; *Westmount (Ville) c. Rossy*, 2012 CSC 30, [2012] 2 R.C.S. 136, par. 48.

[143] I agree with Lord Sumption's observation in *BPE Solicitors*, a recent decision from the United Kingdom Supreme Court, that however one looks at the matter — from the perspective of the scope of the duty of care or from the perspective of remoteness — one arrives at the same point. In his Lordship's words, "[w]hether one describes the principle . . . as turning on the scope of the duty or the extent of the liability for breach of it does not alter the way in which the principle applies": para. 38; see also L. N. Klar and C. S. G. Jefferies, *Tort Law* (6th ed. 2017), at pp. 565-66.

[143] Je suis d'accord avec lord Sumption qui fait observer, dans l'arrêt *BPE Solicitors*, une décision récente de la Cour suprême du Royaume-Uni, que peu importe sous quel angle on envisage l'affaire — que ce soit du point de vue de l'étendue de l'obligation de diligence ou de celui du caractère éloigné — on arrive au même point. Pour reprendre ses propres mots, [TRADUCTION] « [q]ue l'on décrive le principe [. . .] comme étant axé sur l'étendue de l'obligation ou sur la portée de la responsabilité pour manquement à celle-ci ne change pas la façon dont le principe s'applique » : par. 38; voir aussi L. N. Klar et C. S. G. Jefferies, *Tort Law* (6e éd. 2017), p. 565-566.

[144] For the purposes of these reasons, I will first consider whether the losses at issue fall within the scope of Deloitte's duty of care. This inquiry takes us to the two-part analysis for determining the existence of a duty of care and its scope prescribed in *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.) — does the relationship between the parties give rise to a *prima facie* duty of care to avoid the type of loss claimed, and, if so, is that duty negatived by policy considerations?

[144] Pour le besoin des présents motifs, j'examinerai tout d'abord si les pertes dont il est question sont visées par l'obligation de diligence de Deloitte. Cette analyse nous amène au critère en deux étapes visant à établir l'existence d'une obligation de diligence et son étendue, qui a été énoncé dans l'arrêt *Anns c. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.) — est-ce que la relation entre les parties donne lieu à une obligation de diligence *prima facie* d'éviter le type de perte alléguée et, dans l'affirmative, cette obligation est-elle écartée par des considérations de principe?

[145] Courts in the United Kingdom have resiled from a two-step *Anns* test, but continue to insist that the scope of the duty of care must be carefully limited having regard to the relationship between the defendant's conduct and the plaintiff's injuries, context and policy. They have insisted that there is no such thing as a duty of care in the abstract; the duty is always defined by its scope. As Lord Bridge stated in *Caparo*, at p. 581, "[i]t is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless": see also *BPE*

[145] Au Royaume-Uni, les tribunaux ont abandonné le critère en deux étapes énoncé dans *Anns*, mais ils ont continué à exiger que l'étendue de l'obligation de diligence soit soigneusement circonscrite eu égard à la corrélation entre la conduite du défendeur et les dommages du demandeur, le contexte et la politique générale. Ils ont insisté sur le fait qu'il n'existe rien de tel qu'une obligation de diligence dans l'abstrait; l'obligation est toujours définie par son étendue. Comme l'a dit lord Bridge dans *Caparo*, p. 581, [TRADUCTION] « [i]l ne suffit jamais de se demander simplement si A a une obligation de diligence envers B. Il est toujours nécessaire de

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Solicitors, at paras. 21-23; *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1 (H.C.), at p. 40, per Brennan J.; *Platform Home Loans*, at p. 847, per Lord Hobhouse, quoting *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.) ("The Wagon Mound No. 1"), at p. 425; *Candler v. Crane Christmas & Co.*, [1951] 1 All E.R. 426 (C.A.), at p. 436, per Denning L.J., dissenting.

[146] The first step of the *Anns* test asks whether there is proximity, or a sufficiently close relationship, between the parties. It focuses on the connection between the defendant's undertaking (the breach of which is the wrongful act) and the loss claimed. Did the defendant owe the plaintiff a *prima facie* duty of care to prevent the loss, having regard to, on one hand, the reasonably foreseeable consequences of the defendant's conduct given the proximity of the parties and, on the other hand, factors concerning the relationship between the parties that negate tort liability? (See *Cooper*, at paras. 30 and 34.) Questions of policy relating to the relationship between the parties should be considered at this step of the *Anns* analysis: *Cooper*, at para. 37.

[147] The purpose for which the statement was made (the undertaking) is pivotal in determining whether a particular type of economic loss was the reasonably foreseeable consequence of the negligence: *Hercules*, at paras. 37-40. Was it made to enable the company to raise capital? If so, a loss due to failure to raise capital may be recoverable. Was it made for the purpose of permitting shareholders to review the management of the company? If so, shareholders may recover for loss due to their inability to hold the company to account: *Hercules*, at paras. 51-57. In each case, one must determine the purpose for which the statement was made, and ask whether the loss in question is proximate, or closely connected to the failure of the defendant to fulfill that purpose.

déterminer l'étendue de l'obligation en fonction de la nature du préjudice contre lequel A doit exonérer B » : voir aussi *BPE Solicitors*, par. 21-23; *Sutherland Shire Council c. Heyman* (1985), 60 A.L.R. 1 (H.C.), p. 40, le juge Brennan; *Platform Home Loans Ltd.*, p. 847, lord Hobhouse, citant *Overseas Tankship (U.K.) Ltd. c. Morts Dock & Engineering Co.*, [1961] A.C. 388 (C.P.) (« The Wagon Mound No. 1 »), p. 425; *Candler c. Crane Christmas & Co.*, [1951] 1 All E.R. 426 (C.A.), p. 436, lord Denning, dissident.

[146] La première étape du critère établi dans *Anns* consiste à déterminer s'il y a proximité, ou une relation suffisamment étroite, entre les parties. Elle est axée sur le lien entre l'engagement du défendeur (dont la violation constitue l'acte fautif) et la perte alléguée. Le défendeur avait-il envers le demandeur une obligation de diligence *prima facie* consistant à empêcher la perte eu égard, d'une part, aux conséquences raisonnablement prévisibles de la conduite du défendeur compte tenu de la proximité des parties et, d'autre part, aux facteurs relatifs à la relation entre les parties qui annihilent la responsabilité délictuelle? (Voir *Cooper*, par. 30 et 34.) À cette étape de l'analyse retenue dans *Anns*, il faut examiner les questions de politique relatives au lien existant entre les parties : *Cooper*, par. 37.

[147] La fin pour laquelle la déclaration a été faite (l'engagement) joue un rôle capital pour établir si un type précis de perte économique était la conséquence raisonnablement prévisible de la négligence : *Hercules*, par. 37-40. A-t-elle été faite pour permettre à l'entreprise de réunir des capitaux? Dans l'affirmative, une perte causée par le défaut de réunir des capitaux pourrait être indemnisable. A-t-elle été faite pour permettre aux actionnaires d'examiner la gestion de l'entreprise? Dans l'affirmative, les actionnaires pourraient être indemnisés pour leur perte en raison de leur incapacité à demander des comptes à l'entreprise : *Hercules*, par. 51-57. Dans chaque cas, il faut établir à quelle fin la déclaration a été faite, et se demander si la perte en question est immédiate, ou étroitement liée au défaut du défendeur de mener à bien cette fin.

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[148] Where an auditor falsely or wrongfully represents that the audit statements are sound and can therefore be used for their intended purpose, this constitutes negligence, or wrongdoing. Economic loss tied to that particular wrongdoing is recoverable; other loss is not. Whether in the United Kingdom, Quebec or the common law provinces of Canada, courts focus on the precise nature of the wrongdoing to determine what loss is recoverable. As Lord Sumption explained in *BPE Solicitors*, to be a reasonably foreseeable consequence of the defendant's wrongdoing, the economic loss claimed must have "flowed from the right thing, i.e. from the particular feature of the defendant's conduct which made it wrongful": para. 38. Or as Lord Hoffmann said in *SAAMCO*, at p. 371:

> Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.

See also *Burns v. Homer Street Development Limited Partnership*, 2016 BCCA 371, 91 B.C.L.R. (5th) 383, at para. 106; *Hogarth*, at paras. 37-38, per Slatter J.A.

[149] Lord Sumption pointed out in *BPE Solicitors*, at para. 44, that the scope of the duty of care and the extent of the defendant's responsibility turns on the specific circumstances that inform the purpose for which the statement was prepared:

> A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann [in *SAAMCO*] called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the

[148] Lorsqu'un vérificateur déclare faussement ou à tort que les états financiers vérifiés sont valables et peuvent donc être utilisés pour les fins auxquelles ils sont destinés, cela constitue de la négligence ou un acte fautif. La perte économique liée à cet acte fautif précis est indemnisable; les autres pertes ne le sont pas. Que ce soit au Royaume-Uni, au Québec ou dans les provinces de common law du Canada, les tribunaux se concentrent sur la nature précise de l'acte fautif afin de déterminer quelle perte est indemnisable. Comme lord Sumption l'a expliqué dans *BPE Solicitors*, pour que la perte économique alléguée soit une conséquence raisonnablement prévisible de l'acte fautif du défendeur, elle doit avoir [TRADUCTION] « découlé de la bonne chose, soit de la caractéristique particulière qui fait du comportement du défendeur un acte fautif » : par. 38. Ou comme l'a affirmé lord Hoffmann dans *SAAMCO*, p. 371 :

> [TRADUCTION] Normalement le droit limite la responsabilité aux conséquences attribuables à ce qui fait en sorte que l'acte commis est fautif. Lorsque la responsabilité pour négligence découle du fait d'avoir fourni des renseignements inexacts, elle se rattache aux conséquences qu'entraîne l'inexactitude des renseignements.

Voir également *Burns c. Homer Street Development Limited Partnership*, 2016 BCCA 371, 91 B.C.L.R. (5th) 383, par. 106; *Hogarth*, par. 37-38, le juge Slatter.

[149] Dans *BPE Solicitors*, lord Sumption a signalé au par. 44 que l'étendue de l'obligation de diligence et la portée de la responsabilité du défendeur dépendront des circonstances précises qui éclairent la fin pour laquelle la déclaration a été préparée :

> [TRADUCTION] L'évaluateur ou le rédacteur d'actes translatifs de propriété, par exemple, ne communiquera que rarement plus qu'une partie précise des renseignements sur lesquels repose la décision de son client. De manière générale, il se limite à fournir ce que lord Hoffmann [dans *SAAMCO*] appelait de l'« information ». À l'autre extrémité du spectre, un conseiller en placements qui conseille un client au sujet de l'achat de certaines actions en bourse, ou un conseiller financier qui se prononce sur l'opportunité d'investir dans une rente des sommes détenues dans un fonds de retraite autogéré sont susceptibles,

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defendant assumed responsibility and no more exact rule can be stated.

See also *Aneco Reinsurance Underwriting Ltd. (in liquidation) v. Johnson & Higgins Ltd.*, [2001] UKHL 51, [2001] 2 All E.R. (Comm.) 929, at paras. 40-41, per Lord Steyn, and para. 66, per Lord Millett; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, at paras. 46-47 and 69-71; *Temseel Holdings Ltd. v. Beaumonts Chartered Accountants*, [2002] EWHC 2642 (Comm.), [2003] P.N.L.R. 27, at paras. 22-29 and 57-62.

[150] The purpose for which the audit report is provided is a matter of fact based on the evidence adduced at trial: *BPE Solicitors*, at para. 44; *Aneco*, at paras. 40-41, per Lord Steyn, and para. 66, per Lord Millett; *Canadian Imperial Bank of Commerce*, at para. 47; *Temseel*, at paras. 57-62. Legal obligations imposed by statute may be relevant: *Hercules*, at para. 49.

[151] Against this background, I turn to the question at hand: What was the scope of the duty of care owed by Deloitte to Livent? The key to answering this question is the purpose for which Deloitte prepared the statements, which in turn defines the wrongful act — the negligent failure to provide the correct information for the intended purpose.

[152] In this case, three purposes of Livent's audit statements are discernable: (1) to report accurately on Livent's finances and provide it with audit opinions on which it could rely for the purpose of attracting investment; (2) to uncover heretofore undetected errors or wrongdoing by Livent or its personnel for the purpose of enabling Livent itself to correct or otherwise respond to the misfeasance; and (3) to provide audit reports on which Livent's shareholders could rely to supervise the company's management (see e.g. Part XII of the *Business Corporations Act*, R.S.O. 1990, c. B.16; trial reasons, at paras. 89-96

selon le propos de lord Hoffmann, d'être considérés comme ayant fourni des « opinions ». Entre ces deux extrêmes, chaque cas dépendra probablement de la gamme de questions au sujet desquelles le défendeur a assumé une responsabilité, et on ne peut énoncer à cet égard une règle plus précise.

Voir aussi *Aneco Reinsurance Underwriting Ltd. (in liquidation) c. Johnson & Higgins Ltd.*, [2001] UKHL 51, [2001] 2 All E.R. (Comm.) 929, par. 40-41, lord Steyn, et par. 66, lord Millett; *Canadian Imperial Bank of Commerce c. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, par. 46-47 et 69-71; *Temseel Holdings Ltd. c. Beaumonts Chartered Accountants*, [2002] EWHC 2642 (Comm.), [2003] P.N.L.R. 27, par. 22-29 et 57-62.

[150] Les fins pour lesquelles le rapport du vérificateur est produit est une question de faits qui repose sur la preuve présentée au procès : *BPE Solicitors*, par. 44; *Aneco*, par. 40-41, lord Steyn, et par. 66, lord Millett; *Canadian Imperial Bank of Commerce*, par. 47; *Temseel*, par. 57-62. Les obligations qu'imposent les lois peuvent être pertinentes : *Hercules*, par. 49.

[151] Dans ce contexte, j'aborde maintenant la question qui nous occupe : quelle était l'étendue de l'obligation de diligence de Deloitte envers Livent? Pour répondre à cette question, il faut savoir à quelles fins Deloitte a préparé les déclarations, ce qui définira l'acte fautif, soit l'omission par négligence de fournir les renseignements exacts pour les fins visées.

[152] En l'espèce, on peut discerner trois fins auxquelles devaient servir les états financiers vérifiés par Livent : (1) présenter un état exact de la situation financière de Livent et lui fournir des opinions du vérificateur qu'elle pourra utiliser pour attirer des investissements; (2) découvrir des erreurs ou des actes fautifs commis par Livent ou ses employés jusque-là passés inaperçus, afin de permettre à Livent de corriger elle-même cette faute ou de prendre des mesures à cet égard; et (3) fournir des rapports de vérification qui serviraient à la surveillance de la gestion de l'entreprise par les actionnaires (voir p. ex. la partie XII

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and 280). Livent was entitled to recover for losses occasioned by its own or its shareholders' reliance on Deloitte's audit work for these purposes.

de la *Loi sur les sociétés par actions*, L.R.O. 1990, c. B.16; motifs de première instance, par. 89-96 et 280). Livent avait le droit d'être indemnisée pour les pertes occasionnées par le fait qu'elle-même et ses actionnaires se sont fiés aux rapports de vérification de Deloitte à ces fins.

[153] The scope of Deloitte's duty of care is defined solely by these purposes. Did its negligence prevent Livent from attracting investment? Did its negligence prevent Livent from uncovering undetected wrongdoing for the purpose of allowing Livent to correct the misfeasance? Finally, did its negligence prevent shareholders from supervising the company's management? Loss that results from inability to attract investment, from inability of Livent to correct undetected wrongdoing, or from inability of the shareholders to exercise their supervisory authority, may fall within the scope of Deloitte's duty of care.

[153] Ces fins seulement définissent l'étendue de l'obligation de diligence de Deloitte. Sa négligence a-t-elle empêché Livent d'attirer des investissements? Sa négligence a-t-elle empêché Livent de découvrir des actes fautifs passés inaperçus pour qu'elle puisse corriger la faute? Enfin, sa négligence a-t-elle empêché les actionnaires de surveiller la gestion de l'entreprise? Les pertes découlant de l'incapacité à attirer des investissements, de l'incapacité de Livent à corriger des fautes passées inaperçues ou de l'incapacité des actionnaires d'exercer leur pouvoir de surveillance, peuvent toutes être visées par l'obligation de diligence de Deloitte.

[154] The first possibility is that Deloitte's wrongful act deprived Livent of the ability to attract investment capital. Livent does not rely on this; in fact, Livent attracted a great deal of capital on the strength of Deloitte's statements. Indeed, that is the essence of its complaint — if it had not been able to attract this money, it would not have been able to spend it on new theatre ventures that failed and decreased Livent's worth. The company's assets were not diminished by an inability to attract investment, but by Livent's improvident management of those investments, revealed only on insolvency.

[154] La première possibilité est que l'acte fautif de Deloitte a empêché Livent d'attirer des capitaux d'investissement. Livent n'invoque pas cet argument; en fait, elle a attiré beaucoup de capitaux grâce aux déclarations de Deloitte. Il s'agit là de l'essence de sa plainte — si elle n'avait pas réussi à attirer ces capitaux, elle n'aurait pas pu les dépenser dans de nouveaux spectacles, qui se sont avérés des échecs et qui ont diminué la valeur de Livent. L'actif de l'entreprise n'a pas été diminué par son incapacité à attirer des investissements, mais plutôt par la gestion inconsidérée de ces investissements par Livent, révélée seulement lors de l'insolvabilité.

[155] The second possibility is that the wrongful act prevented Livent — the company itself — from detecting misfeasance in the company's management which Livent's officials would have corrected if they had known the true state of affairs. This possibility envisions the situation where a company's management, acting honestly and diligently, is unable to deal with internal misfeasance because the auditors negligently failed to reveal it.

[155] La deuxième possibilité est que l'acte fautif a empêché Livent — l'entreprise elle-même — de déceler dans la gestion de l'entreprise la faute que les dirigeants de Livent auraient corrigée s'ils avaient été au courant du véritable état des choses. Cette possibilité suppose une situation où la direction de l'entreprise, agissant en toute honnêteté et avec diligence, n'est pas en mesure de corriger la faute interne parce que les vérificateurs ont négligé de la révéler.

[156] This is not Livent's situation. Livent led no evidence that its management did not know of

[156] Telle n'est pas la situation de Livent. Livent n'a présenté aucune preuve que ses dirigeants

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Drabinsky's and Gottlieb's misfeasance; indeed, it likely could not have done so. Drabinsky and Gottlieb, the fraudsters, were themselves the management. Far from relying on the audited statements as assurance that everything was well with the company, Drabinsky and Gottlieb knew the audit reports were inaccurate. There is no evidence that anyone at a lower level of Livent management would have blown the whistle if Livent's statements had revealed the fraud at an earlier date.

[157] The third possibility is that Deloitte's wrongdoing prevented Livent's shareholders from exercising shareholder supervision in a manner that would have ended the corporation's loss-creating activities at an earlier date. Livent argues (and my colleagues Gascon and Brown JJ. accept) that it relied on Deloitte to produce a report on the basis of which its shareholders could discharge their supervisory function, which all agree was one of the purposes for which the audited statements were prepared. Livent argues, and my colleagues conclude, that all loss that shareholder supervision might have avoided is recoverable — including the decline in the value of the company.

[158] This proposition faces two difficulties. The first is that Livent never proved, nor did the trial judge find, the elements necessary to establish it. The second is a related policy concern: to allow recovery in the absence of the required proof would be to open the door to indeterminate recovery. I will consider each of these difficulties in turn.

[159] First, although the trial judge's reasons refer to Deloitte's duty to Livent's shareholders as established in *Hercules*, the factual basis for liability based on impaired shareholder supervision was lacking. Livent's theory of the case was simply that all loss as a result of improvident investments after the negligent audits was compensable, on a "but for" basis. Livent did not prove and the trial judge did not find that Livent's shareholders relied on Deloitte's negligent audit statements, or

n'étaient pas au courant de la faute commise par MM. Drabinsky et Gottlieb. En réalité, elle n'aurait pas pu le faire, puisque MM. Drabinsky et Gottlieb, les fraudeurs, étaient eux-mêmes les dirigeants. Loin de se fier aux états financiers vérifiés comme garantie que tout allait bien pour l'entreprise, MM. Drabinsky et Gottlieb savaient que les rapports du vérificateur étaient inexacts. Rien ne prouve que quiconque occupant un poste à un échelon inférieur de la direction de Livent aurait dénoncé la fraude si les déclarations de Livent l'avaient révélée plus tôt.

[157] La troisième possibilité est que l'acte fautif de Deloitte a empêché les actionnaires de Livent d'exercer leur surveillance d'une façon qui aurait mis fin plus tôt aux activités causant des pertes à l'entreprise. Livent soutient (et mes collègues les juges Gascon et Brown acceptent cet argument) qu'elle s'est fiée à Deloitte pour produire un rapport sur lequel ses actionnaires pourraient s'appuyer pour s'acquitter de leur fonction de surveillance, ce qui, de l'avis de tous, était une des fins pour lesquelles les états financiers vérifiés ont été préparés. Livent plaide, et mes collègues concluent, que toutes les pertes que la surveillance par les actionnaires aurait pu permettre d'éviter sont indemnisables, y compris la diminution de la valeur de l'entreprise.

[158] Cette proposition se heurte à deux difficultés. La première est que Livent n'a jamais prouvé les éléments nécessaires pour l'établir, et le juge de première instance n'a jamais conclu à leur existence. La deuxième est une considération de politique générale connexe : permettre l'indemnisation en l'absence de la preuve nécessaire reviendrait à ouvrir la porte à l'indemnisation indéterminée. J'examinerai ces difficultés l'une après l'autre.

[159] D'abord, bien que le juge de première instance mentionne dans ses motifs l'obligation de Deloitte envers les actionnaires de Livent telle qu'elle a été énoncée dans *Hercules*, il n'y avait pas de preuve de la responsabilité fondée sur le fait que la surveillance des actionnaires soit compromise. La thèse de Livent voulait simplement que, par application du critère du « facteur déterminant », toutes les pertes découlant des mauvais investissements postérieurs aux vérifications faites avec négligence

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that had they received and relied on accurate statements, they would have acted in a way that would have prevented Livent from carrying on business and diminishing its assets in the period between the issuance of the relevant statements and Livent's insolvency.

étaient indemnisables. Livent n'a pas prouvé, et le juge de première instance n'a pas conclu, que les actionnaires de Livent se sont fiés aux états financiers vérifiés de façon négligente par Deloitte, ou que s'ils avaient reçu des états financiers exacts et s'y étaient fiés, ils auraient agi d'une façon qui aurait empêché Livent de poursuivre ses activités et de diminuer ses actifs au cours de la période entre la production des états financiers en cause et l'insolvabilité de Livent.

[160] The trial judge, accepting Livent's theory of the case, held that the duty of care must be broad enough to catch all losses that would be captured by a "but for" test. He stated the following:

In my view, the ultimate issuance or withholding of a clean opinion is but one aspect of conducting an audit in accordance with [generally accepted auditing standards]. It is not close to being the complete embodiment of the duty of care. Indeed, if [the plaintiff's] argument were accepted, it would preclude the applicability of the "but for" test. Instead of asking whether damages would have been sustained but for the negligent failure to detect certain errors or fraud, one would be restricted to asking whether or not damages would have been sustained but for the provision of a clean opinion. [Emphasis added; para. 285.]

[160] Le juge de première instance, qui a accepté la thèse de Livent, a conclu que l'obligation de diligence doit être suffisamment générale pour englober toutes les pertes qui auraient été visées par le critère du « facteur déterminant ». Il a affirmé ce qui suit :

[TRADUCTION] À mon avis, la prestation ou la retenue ultime d'une opinion sans réserve n'est qu'un aspect de la conduite d'une vérification conformément aux [normes de vérification généralement reconnues]. Ce n'est qu'une petite partie de l'obligation de diligence. En fait, si l'argument [du demandeur] était retenu, il empêcherait l'applicabilité du critère du « facteur déterminant ». Plutôt que de se demander si les dommages auraient été subis n'eût été l'omission par négligence de détecter certaines erreurs ou la fraude, on pourrait seulement se demander si les dommages auraient été subis n'eût été la prestation d'une opinion sans réserve. [Je souligne; par. 285.]

[161] The broad view of the duty of care taken by Livent, and accepted by the trial judge meant that the trial judge failed to consider the parameters of the shareholders' reasonable and foreseeable reliance as required in *Hercules* when defining the scope of the duty of care with respect to losses stemming from impaired shareholder supervision. My colleagues conclude otherwise, noting that the trial judge believed that the shareholders were entitled to rely on Deloitte's negligent audits as an indication of Livent's health. Crucially, however, the trial judge did not ask whether the shareholders had in fact relied on the audits — a critical element to the cause of action. He did not ask whether, if they had relied, this reliance prevented them from taking steps to replace directors or officers or otherwise alter course. He did not ask whether this would have included shutting

[161] En raison de l'interprétation large de l'obligation de diligence adoptée par Livent et acceptée par le juge de première instance, ce dernier a omis de tenir compte des paramètres de la confiance raisonnable et prévisible des actionnaires, comme l'exigeait l'arrêt *Hercules* lorsqu'il a défini l'étendue de l'obligation de diligence en ce qui a trait aux pertes découlant du fait que la surveillance des actionnaires soit compromise. Mes collègues concluent autrement, en faisant remarquer que le juge de première instance croyait que les actionnaires pouvaient se fier aux états financiers vérifiés négligemment par Deloitte pour obtenir un indice de la santé de Livent. Un point essentiel toutefois, le juge de première instance ne s'est pas demandé si les actionnaires s'étaient effectivement fiés aux états financiers vérifiés — un élément crucial pour la cause d'action.

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down Livent on March 31st, 1998 (or at least earlier than when it was shut down in November 1998). Finally, he did not ask whether these actions, had they been taken, would have prevented the losses that Livent built up during the seven-month period in question. If the trial judge had asked these questions, he would have been obliged to answer them in the negative, since Livent offered no proof to support affirmative answers.

[162] I leave aside for the purposes of this case the difficulty that the shareholders, unlike in *Hercules*, are not parties to the claim or the action. Assuming this would not pose a problem, it is possible to speculate that the necessary facts could have been proven (although given the short time period, it seems unlikely). But the more fundamental point is that Livent did not prove these matters, and that as a result, the factual basis for establishing loss on the basis of shareholder supervision was entirely lacking. The hypothetical chain of events required to establish liability on this ground completely bypasses the complexity of shareholder decision making.

[163] Livent's position and the trial judge's approach collapse the distinction between shareholder decision making, for which an auditor provides information for one purpose — holding management accountable with a view to the best interest of the company — with management decision making, for which the auditor provides information for a different purpose — responding to error and wrongdoing. Conceiving liability in this way creates a misalignment between the scope of the duty of care, the type of loss that is therein contemplated, and the actual elements that must be proven in order to make a successful claim.

Il ne s'est pas demandé si, dans le cas où les actionnaires s'étaient fiés à ces états financiers, cette confiance les avait empêchés de prendre des mesures pour remplacer les administrateurs ou les dirigeants ou changer les choses autrement. Il ne s'est pas demandé si cela aurait inclus la cessation des activités de Livent le 31 mars 1998 (ou du moins avant qu'elle ne cesse ses activités en novembre 1998). Finalement, il ne s'est pas demandé si ces mesures, si elles avaient été prises, auraient empêché les pertes que Livent a accumulées pendant la période de sept mois en question. Si le juge de première instance avait posé ces questions, il aurait été tenu d'y répondre par la négative, puisque Livent n'a présenté aucune preuve à l'appui de réponses affirmatives.

[162] Pour les besoins de la présente affaire, je ne tiens pas compte du fait que les actionnaires, contrairement à ce qui était le cas dans l'affaire *Hercules*, ne sont pas parties à la demande ou à l'action. Dans l'hypothèse où cela ne poserait pas problème, il est possible d'avancer l'hypothèse que les faits nécessaires auraient pu être prouvés (bien que, compte tenu de la courte période, cela aurait été peu probable). Mais le point le plus fondamental est que Livent n'a pas prouvé ces éléments, et qu'en conséquence, aucun fondement factuel n'établissait une perte attribuable au manque de surveillance des actionnaires. La chaîne hypothétique des événements requise pour établir la responsabilité pour ce motif évite complètement la complexité du processus décisionnel des actionnaires.

[163] La position de Livent et l'approche du juge du procès font tomber la distinction entre le processus décisionnel des actionnaires, pour lequel le vérificateur fournit des renseignements à une seule fin — demander des comptes aux dirigeants dans l'intérêt de l'entreprise — et le processus décisionnel des dirigeants, pour lequel le vérificateur fournit des renseignements à une fin différente — prendre des mesures à l'égard des erreurs et des actes fautifs. Considérer la responsabilité de cette façon crée une discordance entre l'étendue de l'obligation de diligence, le type de perte qu'elle viserait et les éléments réels qui doivent être prouvés pour que le demandeur obtienne gain de cause.

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[164] The second and related difficulty the shareholder supervision argument faces in this case is that it would lead to unfair allocation of loss and indeterminate liability for auditors' statements, negating the duty of care: *Hercules*, at paras. 36-37.

[165] Livent's position — that Deloitte is liable for all loss without proof of the elements required to advance a case based on impaired shareholder supervision — would result in an unfair allocation of loss as well as indeterminacy of damages. On the shareholder supervision theory advanced by Livent, breach of a duty owed primarily to the collectivity of shareholders (who do not advance a claim) and only derivatively to the corporation, would result in liability for every dollar that Livent spent after the point in time the shareholders became entitled to rely on the statements. The auditor would be the virtual guarantor of everything Livent — not the collectivity of shareholders to which the duty was owed — did thereafter. This would not be a fair allocation of responsibility. The same scenario would raise the spectre of indeterminate liability. Auditors would be unable to reasonably predict when they are providing services to clients what their ultimate liability would be. It would be out of their control. No matter how bad the decisions made by the client thereafter, no matter how complex the web of dealings that led to the ultimate loss — things that cannot be foreseen in advance — the auditor would be liable for the total loss, on the basis that it would not have occurred "but for" the negligent act.

[166] For the foregoing reasons, I conclude that the losses at issue have not been shown to fall within the scope of Deloitte's duty of care. The first step of the *Anns* test is not established. It is unnecessary to go on to ask whether *prima facie* liability is negated by policy considerations unrelated to the relationship

[164] La deuxième difficulté connexe à laquelle se heurte l'argument relatif à la surveillance par les actionnaires en l'espèce est que cela aurait pour conséquence une attribution inéquitable de la perte et une responsabilité indéterminée pour l'auteur des déclarations du vérificateur, ce qui annihile l'obligation de diligence : *Hercules*, par. 36-37.

[165] La position de Livent — selon laquelle Deloitte est responsable de toutes les pertes sans qu'il soit nécessaire de prouver les éléments requis pour présenter une thèse fondée sur le fait que la surveillance des actionnaires soit compromise — donnerait lieu à une attribution inéquitable de la perte, ainsi qu'à un montant indéterminé de dommages-intérêts. En ce qui a trait à la théorie relative à la surveillance par les actionnaires soutenue par Livent, le manquement à une obligation, principalement envers les actionnaires collectivement (qui n'ont pas présenté de demande) et seulement de façon incidente envers l'entreprise, donnerait lieu à une responsabilité pour chaque dollar que Livent a dépensé après le moment où les actionnaires ont pu se fier aux déclarations. Le vérificateur serait pratiquement garant de tout ce que ferait par la suite Livent — et non les actionnaires collectivement, envers lesquels il a l'obligation de diligence. Cela ne constituerait pas une attribution équitable de la responsabilité. Le même scénario ferait naître le spectre de la responsabilité indéterminée. Les vérificateurs seraient incapables de prévoir raisonnablement quelle serait leur responsabilité ultime lorsqu'ils fournissent des services à des clients; cela serait hors de leur contrôle. Peu importe si les décisions prises ultérieurement par le client sont mauvaises ou si l'enchevêtrement des opérations ayant mené à la perte est complexe — des facteurs qui ne peuvent être prévus — le vérificateur serait responsable de la totalité de la perte, pour le motif que cette perte n'aurait pas eu lieu n'eût été l'acte de négligence.

[166] Pour les motifs qui précèdent, je conclus qu'il n'a pas été démontré que les pertes en question sont visées par l'obligation de diligence de Deloitte. La première étape du critère énoncé dans *Anns* n'a pas été franchie. Il n'est pas nécessaire de se demander si des considérations de politique générale

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between the parties. However, were it necessary to do so, the policy considerations of unfair allocation of loss and indeterminacy would preclude imposing liability on Deloitte.

non liées à la relation entre les parties annihilent la responsabilité *prima facie*. Cependant, s'il était nécessaire de le faire, les considérations de politique générale que sont l'attribution inéquitable de la perte et l'indétermination empêcheraient que Deloitte soit tenue responsable.

[167] I add a doctrinal side-note at this point. In *Hercules*, this Court, per La Forest J., held that the spectre of indeterminate loss might be a policy consideration negating liability of certain loss at the second step of the *Anns* test. However, since *Cooper* it has been clear that policy considerations relating to the relationship between the parties fall to be considered at the first step of *Anns.* It may not therefore be necessary to resort to the second step to consider the implications of indeterminate liability: see J. Blom, "Do We Really Need the *Anns* Test for Duty of Care in Negligence?" (2016), 53 *Alta. L. Rev.* 895, at pp. 906 and 908.

[167] J'ajoute à ce point une note théorique. Dans *Hercules*, le juge La Forest, écrivant au nom de la Cour, a conclu que le spectre de la perte indéterminée pourrait constituer une considération de politique générale écartant la responsabilité à l'égard d'une certaine perte à la deuxième étape du critère de l'arrêt *Anns*. Cependant, depuis *Cooper* il est clair que les considérations de politique générale relatives à la relation entre les parties doivent être prises en compte à la première étape du critère de l'arrêt *Anns*. Il ne serait donc pas nécessaire d'avoir recours à la deuxième étape pour examiner les répercussions de la responsabilité indéterminée : voir J. Blom, « Do We Really Need the *Anns* Test for Duty of Care in Negligence? » (2016), 53 *Alta. L. Rev.* 895, p. 906 et 908.

[168] It remains for future cases to explore the limits of an auditor's liability for impaired shareholder supervision. Short of finding that an auditor who provides information on which shareholders will exercise their oversight powers assumes responsibility for all of the potential consequences of carrying on business, the facts as found by the trial judge do not enable us to do so here.

[168] La jurisprudence aura à préciser les limites de la responsabilité d'un vérificateur du fait que la surveillance des actionnaires est compromise. En l'absence d'une conclusion selon laquelle le vérificateur qui fournit des renseignements sur lesquels se fonderont les actionnaires pour exercer leur pouvoir de surveillance assume la responsabilité à l'égard de toutes les conséquences éventuelles de la poursuite des activités, les faits constatés par le juge de première instance ne nous permettent pas de le faire dans la présente affaire.

[169] Livent's failure to prove that any of the loss it suffered can be attributed to its shareholders' reliance on the negligent 1997 year-end audit report for the purpose of corporate oversight is a sufficient basis on which to allow the appeal in its entirety. But there is further problematic aspect of the shareholder supervision theory on which Livent now seeks to rely. It is one of principle.

[169] Le défaut de Livent de prouver que toute perte subie peut être attribuée au fait que les actionnaires se sont fiés au rapport de vérification de fin d'exercice pour 1997 entaché de négligence aux fins de la surveillance de l'entreprise constitue un fondement suffisant pour accueillir le pourvoi dans sa totalité. Mais la thèse de la surveillance par les actionnaires que Livent veut maintenant invoquer comporte un autre aspect qui pose problème. Il s'agit d'une question de principe.

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[170] As explained above, an auditor that provides a year-end report for the purpose of enabling a company's shareholders to supervise management does not, absent proof, assume responsibility for what the shareholders decide to do with that information. The purpose of an annual audit report is to inform shareholder decision making, not to govern it. The auditor does not underwrite the entire risk associated with the shareholders' exercise of business judgment; it is liable only for exposing shareholders to the risk of the information it has provided being wrong. Even if the whole loss would have been avoided if the auditor had met the standard of care, the company may recover in damages only that part of the loss that may be attributed to the auditor's breach of its duty of care, which is restricted by the purpose or purposes for which it provided its opinion. The auditor is not liable for the indeterminate quantum of loss that the shareholders' course of action (or inaction) may trigger, since determining that course of action is beyond the auditor's undertaking of responsibility, and thus outside the scope of its duty of care. Similarly, loss that cannot be attributed to the auditor's breach will be too remote to recover.

[171] For this reason, the language of lost opportunity is unavailing. In any case concerned with the tortious provision of information, the plaintiff may claim that, had it only known the truth, it would have had the chance to make different choices than it ultimately did. Unless the provider of information has assumed responsibility not only for the information but also for the decision to be informed by it, what the plaintiff would have done differently if it had been provided with different information is immaterial. Rather, the question is the extent to which the loss that in fact resulted may be attributed to the wrongness (i.e., the tortious quality) of the information provided.

[172] On the trial judge's findings, Deloitte never assumed responsibility for any of the decisions —

[170] Comme je l'ai déjà expliqué, un vérificateur qui fournit un rapport de fin d'exercice en vue d'aider les actionnaires d'une société à surveiller la gestion n'assume pas, en l'absence de preuve, la responsabilité de ce que les actionnaires décident de faire avec ces renseignements. Le rapport annuel du vérificateur vise à éclairer la prise de décisions par les actionnaires, et non à dicter leurs décisions. Le vérificateur ne se porte pas garant de tous les risques associés à la prise de décisions d'affaires par les actionnaires; il est seulement responsable du fait d'avoir exposé les actionnaires au risque que les renseignements qu'il a fournis soient inexacts. Même si la totalité de la perte aurait été évitée si le vérificateur avait respecté la norme de diligence, la société ne peut se voir accorder des dommages-intérêts que pour la partie de la perte pouvant être attribuée au manquement par le vérificateur à son obligation de diligence, qui est limitée par la fin ou les fins pour lesquelles il a exprimé son opinion. Le vérificateur ne peut être tenu responsable du montant indéterminé de la perte susceptible de résulter des actes (ou de l'inaction) des actionnaires, puisque la détermination de ces actes échappe à la responsabilité du vérificateur, et elle échappe donc à l'étendue de son obligation de diligence. De la même façon, une perte qui ne peut être attribuée au manquement du vérificateur est trop éloignée pour être indemnisable.

[171] Pour ce motif, la notion de privation d'une occasion n'est pas utile. Dans toute affaire portant sur la fourniture délictuelle de renseignements, le demandeur peut faire valoir que, s'il avait seulement su la vérité, il aurait eu la possibilité de faire des choix différents de ceux qu'il a ultimement faits. À moins que la personne qui a fourni les renseignements ait assumé la responsabilité non seulement à l'égard des renseignements, mais aussi à l'égard de la décision que ceux-ci devaient éclairer, il importe peu de savoir ce que le demandeur aurait fait différemment si des renseignements différents lui avaient été fournis. Il faut plutôt déterminer dans quelle mesure la perte que cela a effectivement entraînée peut être attribuée à l'inexactitude (c.-à-d. le caractère délictuel) des renseignements fournis.

[172] Il ressort des conclusions du juge de première instance que Deloitte n'a jamais assumé la

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whether of Livent's management or of its shareholders collectively — that may be said to have occasioned Livent's loss. What Livent proved is that it relied on Deloitte's clean opinions to raise funds from third parties, and that it was successful in doing so. Deloitte is not liable to Livent for loss arising from Livent's use of these funds, even if certain of Deloitte's opinions were prepared for the purpose of *attracting* them, because Livent did not prove that Deloitte undertook responsibility for how Livent *spent* them.

responsabilité des décisions — que ce soit celles des dirigeants de Livent ou de ses actionnaires collectivement, — pouvant être considérées comme ayant causé la perte subie par Livent. Ce que Livent a prouvé, c'est qu'elle s'est fiée aux opinions sans réserve de Deloitte pour obtenir des fonds auprès de tiers, et qu'elle a réussi à le faire. Deloitte n'est pas responsable envers Livent de la perte découlant de l'utilisation de ces fonds par Livent, même si certaines des opinions de Deloitte ont été préparées dans le but d'*attirer* ces investissements, étant donné que Livent n'a pas prouvé que Deloitte a assumé une responsabilité quant à la façon dont Livent *a dépensé* ces fonds.

[173] The foregoing analysis is based on the scope of Deloitte's duty of care. The same result would follow on a remoteness approach to the question of liability for economic loss as a result of negligent misstatement. The question on this approach is whether the loss claimed is too remote from the wrongful act for the act to be the "legal cause" of the loss. The basic question is whether the loss is reasonably foreseeable, having regard to a variety of factors, including the relationship between the parties and the expectations that flow from it, the circumstances of the case, and other factors bearing on the connection between the wrongful act and the loss claimed including external or intervening influences. In the end, a close and proximate connection between wrongful act and the loss claimed must be established, having regard to all these things and to the purpose for which the information was furnished.

[173] L'analyse qui précède est fondée sur l'étendue de l'obligation de diligence de Deloitte. Le résultat serait le même si l'analyse avait été faite selon l'approche du caractère éloigné pour la question de la responsabilité à l'égard de la perte économique subie à la suite d'une déclaration inexacte faite par négligence. La question relative à cette approche est celle de savoir si la perte alléguée est trop éloignée de l'acte fautif pour que cet acte soit la « cause juridique » de la perte. La question fondamentale qui se pose est celle de savoir si la perte est raisonnablement prévisible, compte tenu de divers facteurs, y compris la relation entre les parties et les attentes qui en découlent, les circonstances de l'affaire et d'autres facteurs portant sur le lien entre l'acte fautif et la perte alléguée, y compris les influences externes ou intermédiaires. En fin de compte, il faut établir l'existence d'un lien étroit et immédiat entre l'acte fautif et la perte alléguée, compte tenu de tous ces facteurs et de la fin pour laquelle les renseignements ont été fournis.

[174] It follows that Livent cannot recover the losses it claims against Deloitte. The claim in tort must be dismissed. The result is the same with respect to Livent's action in contract; here too the losses would be too remote: see *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, at pp. 243-44, citing *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633; S. M. Waddams, *The Law of Damages* (5th ed. 2012), at §14.720. Given the trial judge's determination, at para. 243, that the elements of the action in contract were identical to

[174] Il s'ensuit que Livent ne peut recouvrer de Deloitte les pertes alléguées. L'action en responsabilité délictuelle doit être rejetée. L'action en responsabilité contractuelle de Livent aboutit au même résultat; dans ce cas également, les pertes seraient trop éloignées : voir *B.D.C. Ltd. c. Hofstrand Farms Ltd.*, [1986] 1 R.C.S. 228, p. 243-244, citant *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633; S. M. Waddams, *The Law of Damages* (5e éd. 2012), §14.720. Vu la décision du juge de première instance, au par. 243, suivant

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the elements of the action in tort, it follows that the trial judge's conclusion that there was a breach in contract is erroneous.

laquelle les éléments de l'action en responsabilité contractuelle étaient identiques à ceux de l'action en responsabilité délictuelle, il s'ensuit que le juge a commis une erreur en concluant à l'existence d'une violation du contrat.

[175] Although in many respects I agree with Gascon and Brown JJ.'s articulation of the general framework that governs this matter, I part company with my colleagues in two key respects. First, I take the view that, for Livent to make out its claim, it must prove on the evidence the elements required to establish Deloitte's liability on the basis of impaired shareholder supervision. My colleagues suggest that, had Deloitte provided sound audit reports, Livent's shareholders and management may have made decisions that would have limited the company's losses. While this may be true, it is not enough to rely on unproven assertions to define the scope of the duty of care and to subsequently demonstrate causation. My colleagues' approach suggests that an auditor will generally become the underwriter for any losses suffered by a client following a negligent audit report. This, notwithstanding subsequent decisions — reliant or capricious — made by the client's shareholders. I conclude, in contrast, that reliance cannot be presumed, but must be proved.

[175] Même si, à plusieurs égards, je suis d'accord avec la façon dont les juges Gascon et Brown formulent le cadre général qui régit cette question, je diverge d'opinion quant à deux aspects importants. D'abord, j'estime que, pour que Livent puisse démontrer le bien-fondé de sa demande, elle doit prouver les éléments requis pour établir la responsabilité de Deloitte fondée sur le fait que la surveillance des actionnaires est compromise. Selon mes collègues, si Deloitte avait présenté des rapports de vérification justes, les actionnaires et les dirigeants de Livent auraient pu prendre des décisions qui auraient limité les pertes de l'entreprise. C'est peut-être le cas, mais il ne suffit pas que l'on se fie à des affirmations non prouvées pour définir l'étendue de l'obligation de diligence et démontrer par la suite la causalité. L'approche de mes collègues laisse croire qu'à la suite d'un rapport entaché de négligence, un vérificateur deviendra généralement garant de toutes les pertes subies par un client. Et cela malgré les décisions subséquentes — conséquentes ou fantaisistes — prises par les actionnaires du client. Je conclus par contre que le caractère conséquent ne peut être présumé, mais doit être prouvé.

[176] Second, I take a different view of indeterminate liability than my colleagues. They assert that liability is not indeterminate where a reviewing court can set a value or time frame for a plaintiff's claimed loss *ex post facto*. However, the common law's policy against indeterminacy is directed at ensuring that auditors and other advisors can determine the scope of their liability at the time they take on an engagement and render their services. The question is whether an auditor or other advisor was able to gauge the scale of its potential liability — in terms of the types of losses for which it undertook responsibility — before embarking on a course of conduct. Although Deloitte might have been in a position to identify the total net value of Livent, Livent has not proved that Deloitte bore responsibility for the myriad ways that Livent could have gone about

[176] Ensuite, je ne partage pas l'avis de mes collègues concernant la responsabilité indéterminée. Ils soutiennent que la responsabilité n'est pas indéterminée lorsqu'un tribunal de révision peut après coup fixer pour la perte alléguée du demandeur une valeur ou un laps de temps. Cependant, le principe de la common law à l'encontre de l'indétermination vise à faire en sorte que les vérificateurs et les autres conseillers puissent déterminer l'étendue de leur responsabilité au moment où ils acceptent un engagement et rendent leurs services. La question est de savoir si, avant de poser un acte, un vérificateur ou un autre conseiller est en mesure d'évaluer l'ampleur de sa responsabilité éventuelle quant aux types de pertes pour lesquelles il se rend responsable. Bien que Deloitte ait pu être en mesure d'établir la valeur nette totale de Livent, cette dernière

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depleting its value after receiving the auditor's statements. This is what makes the liability identified by my colleagues indeterminate and therefore outside the scope of the duty of care.

n'a pas prouvé que Deloitte avait une responsabilité à l'égard de la multitude de façons dont Livent pouvait avoir diminué sa valeur après avoir reçu les états financiers vérifiés. Voilà ce qui rend indéterminée, et par conséquent, soustraite à l'obligation de diligence la responsabilité que retiennent mes collègues.

[177] Having concluded that Deloitte is not liable for the losses claimed, it is not necessary to consider the apportionment of damages under s. 3 of the *Negligence Act*, nor is it necessary to consider whether Deloitte can raise the defence of illegality against Livent.

[177] Puisque je conclus que Deloitte n'est pas responsable des pertes alléguées, il n'est pas nécessaire de procéder à la répartition des dommages-intérêts aux termes de l'art. 3 de la *Loi sur le partage de la responsabilité*, et il n'est pas non plus nécessaire d'examiner si Deloitte peut invoquer l'illégalité comme moyen de défense contre Livent.

IV. Disposition

[178] I would allow the appeal, with costs to Deloitte.

IV. Dispositif

[178] Je suis d'avis d'accueillir le pourvoi, avec dépens en faveur de Deloitte.

Appeal allowed in part with costs to Livent Inc. throughout, McLachlin C.J. *and* Wagner *and* Côté JJ. *dissenting in part.*

Pourvoi accueilli en partie avec dépens en faveur de Livent Inc. dans toutes les cours, la juge en chef McLachlin *et les juges* Wagner *et* Côté *sont dissidents en partie.*

Solicitors for the appellant: Lenczner Slaght Royce Smith Griffin, Toronto; Dentons Canada, Toronto.

Procureurs de l'appelante : Lenczner Slaght Royce Smith Griffin, Toronto; Dentons Canada, Toronto.

Solicitors for the respondent: Stikeman Elliott, Toronto and Ottawa.

Procureurs de l'intimée : Stikeman Elliott, Toronto et Ottawa.

Solicitors for the intervener the Canadian Coalition for Good Governance: McMillan, Toronto.

Procureurs de l'intervenante la Coalition canadienne pour une bonne gouvernance : McMillan, Toronto.

Solicitors for the intervener Chartered Professional Accountants of Canada: Borden Ladner Gervais, Toronto and Ottawa.

Procureurs de l'intervenante Comptables professionnels agréés du Canada : Borden Ladner Gervais, Toronto et Ottawa.

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CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONSC 1078
COURT FILE NO.: CV-12-9667-00CL
CV-11-431153-00CP
DATE: 20130320

2013 ONSC 1078 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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 SINO-FOREST CORPORATION, Applicant

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

AND:

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (FORMERLY KNOWN AS BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PŐYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA) IN., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LUNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC AND MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (SUCCESSOR BY MERGER TO BANC OF AMERICA SECURITIES LLC), Defendants

BEFORE: MORAWETZ J.

COUNSEL: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, and Jonathan Ptak, for the Ad Hoc Committee of Purchasers including the Class Action Plaintiffs

Peter Griffin, Peter Osborne, and Shara Roy, for Ernst & Young LLP

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John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.

Robert W. Staley, for Sino-Forest Corporation

Won J. Kim, Michael C. Spencer, and Megan B. McPhee, for the Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.

John Fabello and Rebecca Wise for the Underwriters

Ken Dekker and Peter Greene, for BDO Limited

Emily Cole and Joseph Marin, for Allen Chan

James Doris, for the U.S. Class Action

Brandon Barnes, for Kai Kit Poon

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Derrick Tay and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Simon Bieber, for David Horsley

James Grout, for the Ontario Securities Commission

Miles D. O'Reilly, Q.C., for the Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

HEARD: **FEBRUARY 4, 2013**

ENDORSEMENT

INTRODUCTION

[1] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

[2] Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

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[3] For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

FACTS

Class Action Proceedings

[4] SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

[5] SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

[6] All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

[7] Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

[8] Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

[9] The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

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[10] Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

[11] In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

[12] SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

[13] Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

[14] In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

[15] On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

[16] The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in

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the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

[17] Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

[18] The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

[19] Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to opt-out was required to be exercised.

[20] Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

[21] The opt-out made no provision for an opt-out on a conditional basis.

[22] On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

[23] In reasons released July 27, 2012 [*Re Sino-Forest Corp.*, 2012 ONSC 4377], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was

subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Re Sino-Forest Corp.*, 2012 ONCA 816].

Ernst & Young Settlement

[24] The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

[25] On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

[26] On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

[27] Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

(a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);

(b) the issuance of the Settlement Trust Order;

(c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;

(d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and

(e) all orders being final orders not subject to further appeal or challenge.

[28] On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the

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sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

[29] At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

[30] The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

[31] On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

[32] On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

[33] According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

LAW AND ANALYSIS

Court's Jurisdiction to Grant Requested Approval

[34] The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

[35] The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter.

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The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

[36] The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

[37] It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 [*Robertson*].

[38] As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[39] In this case, the notice and process for dissemination have been approved.

[40] The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

[41] In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

[42] In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

[43] Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

[44] The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial

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Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Re Nortel Networks Corp*., 2010 ONSC 1708, paras. 66-70 ("*Re Nortel"*)); *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99, para. 43 (Ont. C.J.)]

[45] Further, as the Supreme Court of Canada explained in *Re Ted Leroy Trucking Ltd. [Century Services]*, 2010 SCC 60, para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

[46] It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp*., 2008 ONCA 587 ("*ATB Financial*"); *Re Nortel, supra*; *Robertson, supra*; *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ontario S.C.J.) ("*Muscle Tech*"); *Re Grace Canada Inc*. (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J.); R*e Allen-Vanguard Corporation*, 2011 ONSC 5017].

[47] The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> 70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan …

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71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then – as was the case in T&N – there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed …

73. I am satisfied that the wording of the CCAA – construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation – supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

…

78. … I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

…

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> 113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[48] Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

Relevant CCAA Factors

[49] In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

> (a) whether the settlement is fair and reasonable;
>
> (b) whether it provides substantial benefits to other stakeholders; and
>
> (c) whether it is consistent with the purpose and spirit of the CCAA.

[50] Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the

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restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

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Counsel Submissions

[51] The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting third-party releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

[52] The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd*., 2012 ONCA 47, para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd*., (1998) 16 C.P.C. (4th) 165 38 O.R. (3d) 703 (Ont. C.J.)].

[53] Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

[54] Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the

circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

[55] Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

(a) class members are not releasing their claims to a greater extent than necessary;

(b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;

(c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and

(d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

[56] SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

[57] Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

[58] The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial, supra*, para. 70, as quoted above.

[59] In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

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[60] Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

[61] Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

[62] Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

[63] Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

[64] Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

[65] Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

[66] In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

[67] In *Re Nortel*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex

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litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

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[68] In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

[69] At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

[70] Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Re Nortel, supra*, paras. 73 and 81; and *Muscle Tech, supra*, paras. 19-21.

[71] Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

[72] I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

[73] Even if one assumes that the opt-out argument of the Objectors can be sustained, and opt-out rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into

account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

[74] Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

[75] Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

[76] The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

[77] It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Re Sammi Atlas Inc.,* (1998) 3 C.B.R. (4th) 171 (Ont. Gen. Div. (Commercial List)).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

[78] SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[79] Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

[80] Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice…to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc*. (2009), 85 C.P.C. (6th) 148, paras. 43-46 (Ont. S.C.J.); and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299.]

Miscellaneous

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[81] For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

DISPOSITION

[82] In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

MORAWETZ J.

Date: March 20, 2013

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2013 ONCA 456 (CanLII)

COURT OF APPEAL FOR ONTARIO

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONCA 456
DATE: 20130626
DOCKET: M42068 & M42399

MacFarland, Watt and Epstein JJ.A.

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

BETWEEN

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong

Plaintiffs

and

Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Poyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorported (successor by merger to Banc of America Securities LLC)

Proceedings under the *Class Proceedings Act, 1992*

Defendants

James C. Orr, Won J. Kim, Megan B. McPhee and Michael C. Spencer, for the moving parties, Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc.

Ken Rosenberg, Massimo Starnino, Jonathan Ptak, Jonathan Bida, Charles M. Wright and A. Dimitri Lascaris, for the *Ad Hoc* Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action

Benjamin Zarnett, Robert Chadwick and Brendan O'Neill, for the respondent *Ad Hoc* Committee of Noteholders

Peter R. Greene, Kathryn L. Knight and Kenneth A. Dekker, for the responding party DBO Limited

Robert W. Staley, Kevin Zych, Derek J. Bell, Raj Sahni and Jonathan Bell, for Sino-Forest Corporation

David Bish, John Fabello and Adam M. Slavens, for the Underwriters

Derrick Tay, Clifton Prophet and Jennifer Stam, for FTI Consulting Canada Inc., in its capacity as Monitor

Peter H. Griffin, Peter J. Osborne and Shara N. Roy, for Ernst & Young LLP

Heard in writing

On appeal from the orders of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated December 10, 2012, with reasons reported at 2012 ONSC 7050, and March 20, 2013, with reasons reported at 2013 ONSC 1078.

ENDORSEMENT

[1] Leave to appeal is denied.

[2] The test for granting leave to appeal in *CCAA* proceedings is well-settled. It is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining

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whether leave ought to be granted, this court is required to consider the following four-part inquiry:

- Whether the point on the proposed appeal is of significance to the practice;
- Whether the point is of significance to the action;
- Whether the proposed appeal is *prima facie* meritorious or frivolous; and
- Whether the appeal will unduly hinder the progress of the action.

See *Re Country Style Food Services Inc.* (2002), 158 O.A.C. 30 (C.A.).

[3] In our view the proposed appeals fail to meet this stringent test.

[4] These motions for leave to appeal relate to the supervising judge's approval of a settlement releasing Ernst & Young LLP from any claims arising from its auditing of Sino-Forest Corporation.

[5] The Ernst & Young settlement is part of Sino-Forest's Plan of Compromise and Reorganization ("the Plan") following a bankruptcy triggered by allegations of corporate fraud. The settlement has the support of all parties to the *CCAA* proceedings, including the Monitor, Sino-Forest's creditors and a group of plaintiffs seeking to recover their investment losses in a contemplated, but not yet certified, class action ("the Ontario Plaintiffs").

[6] These motions for leave to appeal are brought by a single group of Sino-Forest investors, collectively known as Invesco, who together held approximately 1.6% of Sino-Forest's outstanding shares at the time of its collapse. Invesco

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chose not to participate in any of the *CCAA* proceedings leading to the Ernst & Young settlement. It appeared for the first time at the hearing to sanction the Plan. Invesco objects to the Ernst & Young settlement because it wishes to preserve its right to opt out of any class proceedings and pursue an independent claim against Ernst & Young.

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[7] Invesco is represented by Kim Orr LLP, the firm that ranked last in a fight for carriage of the Ontario class action against Sino-Forest and its auditors and underwriters. In January 2012, Perell J. awarded carriage of that action to Koskie Minsky and Siskinds LLP, with the Ontario Plaintiffs as the proposed representative plaintiffs. No appeal was taken from the order of Perell J.

[8] There are two motions for leave to appeal before the court.

- **M42068** – Invesco seeks leave to appeal the supervising judge's order dated December 10, 2012, sanctioning a Plan of Compromise and Reorganization for Sino-Forest (the "Sanction Order")

- **M42399** – Invesco seeks leave to appeal the supervising judge's orders dated March 20, 2013, approving the Ernst & Young settlement and dismissing Invesco's motion for an order to

> represent all prospective class members who oppose the settlement (the “Settlement Order” and the “Representation Dismissal Order”).

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[9] By order of Simmons J.A. dated May 1, 2013, the motion for leave to appeal the Sanction Order was ordered to be consolidated and heard together with the motion for leave to appeal the Settlement Order and the Representation Dismissal Order.

[10] The motions for leave to appeal are opposed by Sino-Forest, the Monitor, Sino-Forest’s auditors and underwriters, the Ontario Plaintiffs, and a group representing Sino-Forest’s major creditors.

The Sanction Order

[11] The supervising judge dismissed Invesco’s arguments opposing the Sanction Order on the ground that, since the settlement was not part of the Plan at that point, its objections were premature. It could raise those objections when the court considered whether or not to approve the settlement.

[12] Invesco did not move to stay this order and the Plan has since been implemented. This proposed appeal is moot, and in any event, we see no basis to interfere with the supervising judge’s decision.

The Settlement Order and the Representation Dismissal Order

[13] In approving the settlement, the supervising judge applied the test set out in *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647. And because the proposed settlement provided for a release to Ernst & Young, he went on to consider the test prescribed by this court in *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp*., 2008 ONCA 587, 92 O.R. (3d) 513, leave to appeal refused, [2008] S.C.C.A. No. 337 (*"ATB Financial*"). He found that the proposed settlement met those requirements. He concluded that the Ernst & Young settlement was fair and reasonable, provided substantial benefits to relevant stakeholders and was consistent with the purpose and spirit of the *CCAA*.

[14] There is no basis on which to interfere with his decision. The issues raised on this proposed appeal are, at their core, the very issues settled by this court in *ATB Financial*.

[15] Having dismissed their objection to the settlement order, it follows that Invesco's motion for a representation order would also be dismissed.

[16] The motions for leave to appeal are dismissed.

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[17] Costs are to the responding parties on the motions on a partial indemnity scale fixed in the sum of $1,500 per motion inclusive of disbursements and applicable taxes.

"J. MacFarland J.A."

"David Watt J.A."

"Gloria Epstein J.A."

2013 ONCA 456 (CanLII)

Parsons v. Canadian Red Cross Society

Ontario Judgments

Ontario Superior Court of Justice

Winkler J.

Heard: August 19-21, 1999.

Judgment: September 22, 1999.

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

[1999] O.J. No. 3572 | 103 O.T.C. 161 | 40 C.P.C. (4th) 151 | 91 A.C.W.S. (3d) 351 | 1999 CarswellOnt 2932

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

(133 paras.)

Case Summary

Practice — Class proceedings — Settlements — Court approval.

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

HELD: Motion dismissed.

The settlement proposal was within the range of reasonableness having regard to the risks inherent in carrying the matter through to trial. The level of benefits ascribed within the settlement were acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighed any deficiencies which might have existed in the levels of benefits. However,

there were two areas which required modification in order for the settlement to receive court approval. The first area related to access to the fund by opt-out claimants, specifically, the benefits provided from the fund for an opt-out claimant could not exceed those available to a similarly injured class member who remained in the class. The second area related to the surplus provisions of the settlement proposal.

Statutes, Regulations and Rules Cited:

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

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

Counsel

Harvey Strosberg, Q.C., Heather Rumble Peterson and Patricia Speight, for the plaintiffs.

Wendy Matheson and Jane Bailey, for the Canadian Red Cross Society.

Michèle Smith and R.F. Horak, for Her Majesty the Queen in Right of Ontario.

Ivan G. Whitehall, Q.C., Catherine Moore and J.C. Spencer, for the Attorney General of Canada.

Wilson McTavish, Q.C., Linda Waxman and Marian Jacko, for the Office of the Children's Lawyer.

Laurie Redden, for the Office of the Public Guardian and Trustee.

Beth Symes, for the Thalassemia Foundation of Canada, Friend of the Court.

William P. Dermody, for the Intervenors, Hubert Fullarton and Tracey Goegan.

L. Craig Brown, for the Hepatitis C Society of Canada, Friend of the Court.

Pierre R. Lavigne, for Dominique Honhon, Friend of the Court.

Bruce Lemer, for Anita Endean, Friend of the Court.

Elizabeth M. Stewart, for the Provinces and Territories other than British Columbia and Quebec.

Bonnie A. Tough and David Robins, for the plaintiffs.

Janice E. Blackburn and James P. Thomson, for the Canadian Hemophilia Society, Friend of the Court.

WINKLER J.

Nature of the Motion

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

The Parties

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

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

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

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

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

Background

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

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

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

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

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

12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

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

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

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

(a) transmission through the blood supply if HCV infected donors are unaware of their infected condition and if there is no, or no effective, donor screening;

(b) an incubation period of 15 to 150 days;

(c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and

(d) no known cure.

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

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

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

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

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

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

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

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

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

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

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

The Claims

26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

27 The Ontario Transfused Class is described as:

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

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;

(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;

(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;

(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and

(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph

(a) who is or was infected with HCV by such person; and

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

28 The Ontario Hemophiliac Class is described as:

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

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;

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

(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec and who are or were infected with HCV;

(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and

(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph

(a) who is or was infected with HCV by such person; and

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

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

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;

(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;

(c) a former Spouse of an Ontario Transfused Class Member;

(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;

(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;

(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

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

The Proposed Settlement

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

31 The Settlement Agreement creates the following two Plans:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Class Members Surviving as of January 1, 1999

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

37 The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation

Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

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

(i) Level 1

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

(ii) Level 2

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

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 - $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 - $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of income or loss of services in the home, subject to a threshold qualification.

In addition, at this level, the class member is entitled to an additional $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or loss of services in the home, $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(v) Level 5

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

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis	$225,000 which consists of the $125,000 available at at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of

requiring dialysis; or (f) renal failure, he or she qualifies as a Level 6 claimant.	uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reiumbursement for costs of care up to $50,000 per year.

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

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

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

Class Members Dying Before January 1, 1999

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

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

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

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

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

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

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

Class Members Cross-Infected with HIV.

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

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

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

The Family Class Claimants

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

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000

Grandparent or Grandchild	$500

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

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

(a) all compensation payments to claimants who live in Canada will be tax free;

(b) compensation payments will be indexed annually to protect against inflation;

(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;

(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and

(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

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

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

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

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

(a) the Hemophiliac cohort size is approximately 1645 persons

(b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.

(c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;

(d) 990 singularly infected hemophiliacs are alive at January 1, 1999

(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 coinfected claimants will not have any losses in respect of income.

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

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

58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income". Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

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

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

The Thalassemia Victims

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

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

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

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

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

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

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

Law and Analysis

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

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

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

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

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

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

70 Sharpe J. stated in Dabbs v. Sun Life Assurance (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd 41 O.R. (3d) 97 (C.A.). leave to appeal to S.C.C. dismissed October 22, 1998, (Dabbs No. 2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

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

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

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

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

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

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

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not

> sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

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

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

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

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

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

(a) the adequacy of the total value of the settlement amount;

(b) the extent of compensation provided through the settlement;

(c) the sufficiency of the settlement Fund to provide the proposed compensation;

(d) the reversion of any surplus;

(e) the costs of administering the Plans; and

(f) the claims process applicable to Thalassemia victims.

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

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

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

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

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

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

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
>
> Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.
>
> HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.
>
> ...
>
> Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients .... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0. 133 units per year.
>
> ...

> Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may, still be normal even though there is fibrosis since there may, be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.
>
> A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.
>
> Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.
>
> Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
>
> ...
>
> The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety ...
>
> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess .... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

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

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

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

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

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

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

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

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

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

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

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

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

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of