

COURT FILE NUMBER: 1501-00955

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, RSC 1985, c. C-36, as amended

APPLICANTS: LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH
COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING
AND SERVICES, ENCHARIS MANAGEMENT AND
SUPPORT SERVICES, AND LUTHERAN CHURCH –
CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT
INVESTMENTS LTD. (“DIL”)

DOCUMENT: **BRIEF OF THE RESPONDENTS MARILYN HUBER AND
SHARON SHERMAN REGARDING THE SANCTION
HEARING FOR THE ABC DISTRICT PLAN OF
COMPROMISE AND ARRANGEMENT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Allan Garber Professional Corporation Barristers & Solicitors #108 – 17707 105 Ave Edmonton, AB T5S 1T1 Tel: (587) 400-9311 Fax: (587) 400-9313 File No.: 156-2015AG Attention: Allan A. Garber
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**SCHEDULED TO BE HEARD BEFORE THE HONOURABLE MADAM JUSTICE
ROMAINE AT 9:00 AM ON FRIDAY, JULY 15, 2016**

I. INTRODUCTION AND BACKGROUND

1. Sharon Sherman and Marilyn Huber oppose the application for judicial sanction of the Fifth Amended Plan of Compromise and Arrangement of Lutheran Church – Canada, the Alberta – British Columbia District (“ABC District”), filed on June 10, 2016 (the “District Plan”) on the grounds that:

- (a) It fails to provide for a distribution on a *pro rata* basis;
- (b) It is unfair to large depositors;
- (c) The District engaged in deceptive practices prior to the CCAA proceedings and has not advanced the CCAA proceedings in good faith.

2. Sharon Sherman and Marilyn Huber are both depositors to the Church Education Fund (CEF).

Affidavit of Marilyn Huber filed March 3, 2016

Affidavit of Sharon Sherman filed March 3, 2016

3. Sharon Sherman’s mother Ruby Sherman is 94 years old. In 2007, she deposited \$295,286.00 with the CEF. Interest on her deposits was to be used to help pay for her accommodation charge at the Prince of Peace Manor.

Affidavit of Sharon Sherman filed March 3, 2016, paras. 10 – 12.

4. Mrs. Sherman was assured that her deposit was safe. She was advised “The fund has operated over 80 years and no investor has ever lost a penny.” She was also told “If you can’t trust the Lutheran Church, who can you trust?”

Affidavit of Sharon Sherman filed March 3, 2016, paras. 5 – 7.

5. Other CEF depositors received similar assurances. Georg Beinert, whose life’s savings were deposited in DIL and CEF, was told that his deposits were guaranteed by the ABC District and that this guarantee was “certain” – “more certain than the guarantee of a government.”

Affidavit of Georg Beinert filed July 7, 2016, paras. 26 and 27.

6. On June 30, 2014, the ABC District retained Deloitte to provide an evaluation of the debt structure of the CEF. On July 25, 2014, the ABC District retained Deloitte to act as a consultant regarding the informal or formal restructuring of its affairs.

Paragraph 6.3 and 6.4 of the “**Pre-filing report of the Proposed Monitor Deloitte Restructuring Inc.**” dated January 22, 2015 attached as Exhibit “C” to Affidavit of Aleana Sorensen filed July 7, 2016

7. The financial troubles of the ABC District were not disclosed to CEF depositors.
8. By letter dated December 1, 2014, Marilyn Huber received advice from the ABC District that her CEF deposit was maturing on January 29, 2015. She was told that absent instructions to the contrary, her investment would be renewed on January 29, 2015 for a 60 month term. She was given no warning that the CEF had suffered losses on its mortgages, loans and other investments, or that her deposits were at risk.

Affidavit of Marilyn Huber filed March 23, 2016, para. 7 and Exhibit "B" to Huber Affidavit.

9. Lorraine Giese received a letter dated November 28, 2014 from the CEF which contained the following deceptive statement:

"In the past few years, CEF has found that it was accumulating **excess funds** with very few ministry projects to fund." (emphasis added)

10. The letter also stated:

"Since our members require a return on their deposits, and without ministry projects to invest in, the possibility of providing a reasonable return has become scarcer. Therefore, CEF has decided that it cannot accept deposits until further notice, which is why I am sending you a cheque for your RRIF payment as opposed to depositing it in you CEF account."

Affidavit of Lorraine Giese filed June 27, 2016, paras 4 and 5 and Exhibit "A" to Lorraine Giese Affidavit

11. A little more than one month later, by letter dated January 5, 2015, CEF depositors were advised that a moratorium was being placed on withdrawals from the CEF because "a number of congregations and other ministries have been unable to pay their mortgages."

Affidavit of Marilyn Huber filed March 3, 2016, para. 10 and Exhibit "C" to Huber Affidavit

12. By letter dated January 26, 2015, CEF depositors were advised that on January 23, 2015, the ABC District had obtained an Order under the CCAA allowing it to restructure its affairs.

Affidavit of Marilyn Huber filed March 3, 2016, para. 24 and Exhibit "F" to Huber Affidavit.

13. Marilyn Huber and Sharon Sherman commenced a Class Proceeding under Alberta's

Class Proceedings Act on February 22, 2016. None of the named defendants in that action had sought CCAA protection. A similar action was commenced in British Columbia by Elvira Kroeger and Randy Kellen.

Affidavit of Marilyn Huber filed March 3, 2016 and Exhibit "A" to Huber Affidavit.

14. The Class Proceedings were stayed by Order of the Court filed March 22, 2016.
15. On March 18, 2016, the Court granted a Meeting Order for the ABC District. Pursuant to that Order, the ABC District and the Monitor have advanced a Plan which contains the following provisions:
 - (a) All depositors who have proven claims of \$5,000.00 or less will be paid in full;
 - (b) Depositors who have proven claims greater than \$5,000.00 will be paid:
 - i. A "Convenience Payment" of \$5,000.00 (Art. 4.2(a));
 - ii. *Pro rata* distribution of the proceeds of liquidation of the ABC District's Non-Core Assets, less a Restructuring Holdback and a Representative Action Holdback (Art. 4.2(c));
 - iii. *Pro rata* distribution of shares in newly incorporated for-profit corporation ("NewCo"). The Prince of Peace assets including the School and Church, the Harbour, the Manor and an undeveloped 55-acre parcel of adjoining land will be transferred to NewCo. (Art. 4.2(d));
 - (c) In addition, CEF depositors may elect to participate in a Representative Action provided they assign **all** of their procedural and substantive rights to pursue any and all legal causes of action for that part of their claims not paid by the Plan to a Subcommittee appointed by the District Creditors' Committee (Art. 5).

District Meeting Order filed March 22, 2016

16. Following the granting of the Meeting Order, Cameron Sherban, the Chief Restructuring Officer for the ABC District, began a telephone campaign targeted at larger CEF investors. In April of 2016, Mr. Sherban told Larry Giese and his wife Lorraine that there will be lots of investors who will want to buy their shares in NewCo, and that they will be able to sell their shares without any problems. Mr Giese later discovered that these statements were not true.

Affidavit of Larry Giese filed July 7, 2015, paras. 3-6.

17. On April 25, 2016, Cameron Sherban telephoned Georg Beinert to persuade Mr. Beinert to support the Plan. Mr. Sherban told Mr. Beinert that there was no point in suing the individuals who were responsible for the CEF problems in a class action because they would shelter their assets and make themselves judgment-proof.

Affidavit of Goerg Beinert filed July 7, 2016, paras. 81 – 87.

18. In April of 2016, the Monitor hosted Information Meetings for CEF depositors at various Lutheran Churches in British Columbia and Alberta. At the Information meetings held in Sherwood Park on April 25, 2016 and in Red Deer on April 26, 2016, attendees were invited by the Monitor to submit their election letters at the meetings.

Affidavit of Marilyn Huber filed June 27, 2016, para. 9

19. At the information meeting held in Red Deer, Alberta on April 26, 2016, an attendee indicated that:

- (a) A high density Master Site Development Plan (MSDP) had been filed with Rocky View County by the ABC District in December of 2012 in respect of the Prince of Peace Properties, and that there was no hope of finishing it because of the amount of money required to complete the infrastructure for roads, rights of way and utilities;
- (b) No development could occur until the infrastructure required by the MSDP was in place; and
- (c) The Conrich Area Structure Plan, which impacted the Prince of Peace Properties, was under appeal by the City of Calgary and the Town of Chestermere, and that no development could take place until the appeals were resolved.

Affidavit of Marilyn Huber filed June 27, 2016, paras. 15 - 18

20. This information had not been previously disclosed to the District Depositors by the Monitor or the Chief Restructuring Officer, even though both had been aware of the information since 2014 and April, 2015 respectively.

Affidavit of Marilyn Huber filed June 27, 2016, para. 26.

21. In response to the issues raised at the Red Deer Information Meeting, the Monitor sent further information about the Master Site Development Plan and the Conrich Area Structure Plan to depositors in a package postmarked May 3, 2016 from Calgary. The

package included a letter dated April 29, 2016 entitled “Future subdivision and development of properties within the Prince of Peace Development.”

Affidavit of Larry Giese filed July 7, 2016, Exhibit “B”

22. Mr. and Mrs. Giese did not receive this letter until May 9, 2016 at the earliest. By noon on May 9, 2016, the Monitor had received approximately 769 votes. This represents 59% of the total votes cast (1294).

Affidavit of Aleana Sorensen filed July 7, 2016, Exhibit “C”

23. The CEF creditors’ meeting was held in Calgary on May 14, 2016. On May 24, 2016, the Monitor mailed to the creditors a Notice dated May 20, 2016 that the Creditors’ meeting had been adjourned. The Notice stated that Depositors who had previously voted could change their votes by submitting an updated Election Letter by 5:00 p.m. on June 9, 2016. New or updated Election Letters were not provided.

Affidavit of Larry Giese filed July 7, 2016, paras. 10, 11 and Exhibit “B”.

24. The District Creditors’ Meeting was reconvened on June 10, 2016. Following the meeting, the Monitor reported the vote as follows: 83% of voting creditors (1076) representing 76% of dollar value of claims (\$65,000,000.00) voted in favour of the Plan. 17% of voting creditors (218) representing 24% of dollar value of claims (\$20,100,000.00) voted against the Plan.

Kroeger/Kellen Brief Tab B8 - Monitor’s 20th Report, p. 8

25. Of the 1,076 creditors who voted in favour of the Plan, 450 (42%) were creditors who had claims worth \$5,000.00 or less. The dollar value of their claims was only \$641,300.00, which is less than 1% of the value of the claims in favour (\$65,000,000.00).

Sorensen Affidavit filed July 7, 2016, Exhibit “A”.

26. 67 of the creditors who voted in favour of the Plan were congregations. The dollar value of their claims was \$9,916,700.00, or 15% of the value of the claims in favour.

Sorensen Affidavit filed July 7, 2016, Exhibit “A”

II. ISSUES

27. The Respondents Sherman and Huber agree with counsel for Mrs. Kroeger and Mr. Kellen that there are three issues on this application:

- (a) Does the District Plan conform to the statutory requirements, objectives and purposes of the CCAA?
- (b) Is the District Plan fair and reasonable to the District creditors, including the Depositors?; and
- (c) Is the District Plan appropriate and advanced with due diligence and in good faith?

III. ARGUMENT

A. Applicable Legislation

28. The Respondents Sherman and Huber refer to the brief of counsel for Kroeger and Kellen in this regard.

B. Applicable Principles of Law re Judicial Sanction of a Plan of Compromise and Arrangement

29. The Respondents Sherman and Huber endorse and support the submissions of counsel for Kroeger and Kellen in this regard.

C. Application of the Law to the Application for Judicial Sanction of the District Plan

(a) The District Plan is not Within the Scheme and Purpose of the CCAA

a. The Representative Action

30. The Respondents Sherman and Huber endorse and support the submissions made by counsel for Kroeger and Kellen regarding the pitfalls of the Representative Action.

31. The Respondents Sherman and Huber add the following submissions:

- (a) According to the proposed Plan, the Representative Action is to be directed by a subcommittee appointed by the CEF Creditors' Committee. There is no precedent for such a mechanism or procedure.
- (b) Pursuant to the *Class Proceedings* legislation in both Alberta and British Columbia, the court must be satisfied that the Representative Plaintiff - not a subcommittee - will fairly and adequately represent the interests of the class, and that the Representative Plaintiff has produced a plan that sets out a workable method of advancing the proceeding. Further, as part of the Certification Order, the court appoints a Representative Plaintiff to represent the class - not a subcommittee.

Class Proceedings Act, SA 2003, c. C-16.5, ss. 5(1)(e) and 9(1)(b) [Tab 1].

Class Proceedings Act, RSBC 1996, c. 50 ss. 4(1)(e) and 8(1)(b) [Tab 2].

- (c) Further, in both British Columbia and Alberta, class members have the right to opt out of a class proceeding. They can then pursue the legal remedies they deem appropriate, subject to the rules of court regarding the consolidation of actions.

Class Proceedings Act, SA 2003, c. C-16.5, s. 17(1) [Tab 1].

Class Proceedings Act, RSBC 1996, c. 50 s. 16 [Tab 2].

- (d) The “sole recourse” provision of the Representative Action is abusive and prevents depositors from seeking remedies even against entities who have not sought CCAA protection should they choose not to participate in the Representative Action. The “sole recourse” provision is a red flag which should alert the court to the fact that the architects of the Plan – themselves potential or actual defendants - have sought to protect their own interests and not the interests of the depositors.
- (e) According to the proposed Plan, the Representative Action will be directed by a subcommittee. A subcommittee has no liability for costs. In Alberta, the unsuccessful Representative Plaintiff faces that liability if the action is a class proceeding. In regular proceedings, the unsuccessful Plaintiff faces that liability. It is unconscionable that a subcommittee would direct the litigation but have no liability for costs.

Class Proceedings Act, s. 37 (Alberta) [Tab 1]

Alberta Rules of Court, Rule 10.29 [Tab 3]

- (f) In British Columbia, a representative plaintiff is not subject to an adverse costs award.

Class Proceedings Act, s. 37 (British Columbia) [Tab 2]

- (g) It is against conscience that the architects of the proposed Representative Action would strip the plaintiff in British Columbia of that valuable protection and foist liability for costs on the CEF depositors by way of the Representative Action holdback.
- (h) It is naïve to believe that the Subcommittee will act exclusively in the best interests of the depositors. The District has a vested interest in controlling the process. On March 23, 2016, Mr. Lademann, a member of the CEF Creditors' Committee, spoke to Mr. Georg Beinert, a large CEF depositor. In that conversation, Mr. Lademann described the District Plan as a “stay out of jail for free plan.”

Affidavit of Georg Beinert filed July 7, 2016, paras. 76-78.

- (i) While the District and its officers and directors may need a “stay out of jail for free” plan, the CEF depositors do not.
- (j) The so-called benefits of the Representative Action identified by the Monitor – a streamlined process and increased recoveries achieved by settling on a group basis – are equally applicable in class proceedings.

b. NewCo

32. The Respondents Sherman and Huber endorse and support the submissions made by counsel for the Respondents Kroeger and Kellen with respect to the shares in NewCo.
33. As noted by the Monitor, restrictions on the transferability of NewCo Shares are such that “the potential liquidity of the NewCo Shares is...unknown and there may be situations where NewCo Shareholders cannot sell their NewCo Shares as desired or at all.”

Kroeger and Kellen, Tab B3 - Monitor's First Report to District Creditors, p. 19

34. Many of the depositors are elderly. Shares of unknown liquidity – or potentially no liquidity – are of no value to elderly persons such as Mrs. Sherman and Mr. and Mrs. Giese.

(b) The District Plan has not been Advanced with Good Faith, Due Diligence and Full Disclosure

a. NewCo

35. The Respondents Sherman and Huber endorse and support the submissions of counsel for the Respondents Kroeger and Kellen on this regard.

36. The Respondents Sherman and Huber make the following further submissions:

(a) The Monitor sent limited information about the Master Site Development Plan and the Conrich Area Structure Plan (letter dated April 29, 2016)¹ after the development issues arising from the MSDP and the ASP were raised by an attendee at the Red Deer information meeting held on April 26, 2016.

(b) The Monitor's letter was postmarked from Calgary on May 3, 2016 (a Tuesday). It would not have been received by many depositors until May 9, 2016 (a Monday) or May 10, 2016 at the earliest. Georg Beinert did not receive the letter until May 12, 2016. Marilyn Huber's mother did not receive the letter until after May 14, 2016. However, by noon on May 9, 2016, the Monitor had already received 769 votes representing **59%** of the total votes cast (1294).

Affidavit of Aleana Sorensen filed July 7, 2016, Exhibit "B"
Affidavit of Larry Giese filed July 7, 2016 para. 7 and Exhibit "B"
Affidavit of Georg Beinert filed July 7, 2016, para. 89.
Affidavit of Marilyn Huber filed June 27, 2016, para. 27.

(c) This information would have been of no value to the depositors who had already voted.

(d) The Notice sent by the Monitor after the May 14, 2014 creditors' meeting advising depositors they could change their vote was too little too late. The Monitor did not even provide new or updated Election Letters which would enable depositors to change their vote.

Affidavit of Larry Giese filed July 7, 2016, paras. 10, 11 and Exhibit "B".

¹ Exhibit "B" of Affidavit of Larry Giese filed July 7, 2016.

- (e) The Monitor's failure to disclose was not due to ignorance. As stated previously, the Monitor knew about the MSDP and the ASP appeals by 2014. Mr. Sherban, the Chief Restructuring Officer, was aware of these issues by April, 2015.

Affidavit of Marilyn Huber filed June 27, 2016, para. 26.

- (f) The non-disclosure was deliberate. The Respondents submit that the Monitor disclosed the "opportunities" of developing the Prince of Peace Properties without disclosing the significant costs and risks in order to obtain the depositor's approval of the Plan. This approach is in keeping with the general approach of the Monitor whose representative, Vanessa Allen, conveyed the impression at the April information meetings that approval of the Plan was already a "done deal."

Affidavit of Marilyn Huber filed June 27, 2016 para. 7.

Affidavit of Georg Beinert filed July 7, 2016 para. 88.

(c) The District Plan is not Fair and Reasonable

a. The Majority Vote was Obtained Through Religious Influence

37. The Respondents Sherman and Huber endorse and support the submissions of counsel for Kroeger and Kellen and add the following additional submissions:

- (a) Georg Beinert is a faithful member of the Lutheran Church and has served the church for many years and in many capacities.

Affidavit of Georg Beinert filed July 7, 2016, paras. 14 – 20.

- (b) On April 17, 2016, Mr. Beinert attended the worship service at Christ Lutheran Church (Barrhead Congregation). The pastor of the congregation, Reinhard Dittmer, was aware of Mr. Beinert's opposition to the Plan. In communications prior to the April 17, 2016 service, Pastor Dittmer told Mr. Beinert that there would be an 80% return of deposits under the CEF Plan and 0% recovery in a class action.

Affidavit of Georg Beinert filed July 7, 2016, para. 79.

- (c) During the April 17, 2016 worship service announcements, Pastor Dittmer announced that a congregational meeting would be held after the service to vote on two issues, one being the District Plan. Mr. Beinert asked if he could attend the meeting. Pastor Dittmer then told Mr. Beinert that the vote on the Plan was being deferred and there was no point in him attending the meeting. Mr. Beinert

chose to attend the meeting. The Plan was discussed and voted on at the meeting. Pastor Dittmer had lied to Mr. Beinert.

Affidavit of George Beinert filed July 7, 2016, paras. 79 and 80.

38. The Respondents submit that this dishonest conduct, and the conduct described in the brief of counsel for the Respondents Kroeger and Kellen, should not be countenanced by the court. Such conduct calls into question the *bona fides* of the vote of the majority.

b. The Convenience Payment

39. 500 of the total votes cast (1,294) came from depositors with claims of \$5,000.00 or less. Not surprisingly, 90% of the small depositors (450 out of 500) voted in favour of the Plan. If the Plan is approved, their claims will be paid in full. Although they represent 42% of the total votes cast in support of the plan, the small depositors represent less than 1% of the dollar amount voted in favour of the Plan.

Affidavit of Aleana Sorensen filed July 7, 2016, Exhibits A and B

40. The issues surrounding the shares in NewCo and the Representative Action do not affect the small investors since they will be paid in full if the Plan is approved. Their interests are therefore in conflict with depositors who have claims greater than \$5,000.00.
41. Further, the distribution is not *pro rata* if small investors are paid in full in cash and large investors are forced to take shares in NewCo. Mr. Beinert cannot feed or educate his children with shares in NewCo. Ruby Sherman cannot pay her living expenses with shares in NewCo. Mr. and Mrs. Giese cannot support themselves in their retirement with shares in NewCo.
42. The Respondents submit that the \$5,000.00 convenience payment was calculated to buy the votes of the small investors at the expense of the large investors, and did so. As stated previously, 90% of the small investors, none of whom have a stake in NewCo shares or the proposed Representative Action, voted in favour of the Plan. Their vote represented 42% of the votes in favour of the Plan.

c. Conduct of the Applicants during the CCAA proceedings

43. The Respondents have described above the deceptive practices of the ABC District in the events leading up to the commencement of the CCAA proceedings.² Deceptive practices continued during the CCAA proceeding.

² See paragraphs 6 through 12, above.

44. Because no prospectus has been issued with respect to NewCo, it is essential that disclosure be full, fair and accurate.
45. As stated previously, the Monitor did not make full disclosure of the development issues arising from the MDSP and the Conrich ASP.
46. After the Meeting Order was granted, Mr. Cameron Sherban, the Chief Restructuring officer, embarked on a telephone campaign to persuade large investors to vote in favour of the Plan. He targeted large depositors.

Affidavit of Larry Giese filed July 7, 2016, para. 4.

Affidavit of Georg Beinert filed July 7, 2016, para. 81.

47. Mr. Sherban told Mr. and Mrs. Giese that there would be lots of investors who would want to buy their shares in NewCo, and they would have no difficulty selling their shares. That information was not correct. See paragraph 33, above.

Affidavit of Larry Giese filed July 7, 2015, paras. 3-6.

48. On April 25, 2016, Cameron Sherban telephoned Georg Beinert to persuade Mr. Beinert to support the Plan. Mr. Sherban told Mr. Beinert that there was no benefit in class action litigation since the individuals who were responsible for the CEF problems would shelter their assets and make themselves judgment-proof.

Affidavit of Georg Beinert filed July 7, 2016, paras. 81 – 87.

49. In an attempt to pump up the value of the shares in NewCo. Mr. Sherban also told Mr. Beinert that he was considering buying shares in NewCo and that Scott McCorquodale, the proposed President, CEO and Director of NewCo, was interested in buying shares in NewCo.

Affidavit of Georg Beinert filed July 7, 2016, para. 83.

50. Mr. Sherban asked Mr. Beinert not to vote on the Plan until he could speak with him again.

Affidavit of Georg Beinert filed July 7, 2016, para. 86.

51. This conduct, in combination with the conduct of the Monitor and Lutheran Church leaders, displays a pattern of behaviour that is dishonest, deceptive, manipulative and unfair.

IV. CONCLUSION

52. The Applicants and the Monitor have engaged in a pattern of deceit, non-disclosure and bad faith both before and during the CCAA proceedings. Their intent was to obtain the approval of the Plan at any cost. To the end, they:

- a) Bought the vote of small investors by promising to pay their claims in cash in full. 42% of those who voted in favour of the Plan were small investors. They represent less than 1% of the dollar amount of the vote in favour of the Plan;
- b) Targeted large investors and provided inaccurate information to them for the purpose of obtaining their vote;
- c) Used religious leaders to exert undue influence in order to obtain the support of their congregations and to silence dissent;
- d) Failed to disclose in a full and timely way the existence of the significant development problems associated with the Prince of Peace properties;
- e) Made the “re-vote” opportunity essentially meaningless by failing to provide new election letters.

53. The result is a Plan which is grossly unfair to those who have lost the most and are in need of their funds to live. Shares in NewCo will not:

- a) Help Mr. Beinert feed or educate his children;
- b) Pay for the living expenses of Mrs. Sherman and elderly depositors like her;
- c) Support Mr. and Mrs. Giese, and others like them, in their retirement

54. For all of the foregoing reasons, the Respondents submit that the Court should exercise its discretion and refuse to sanction the ABC District’s Fifth Amended Plan of Compromise and Arrangement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED:

July 2, 2015

A. Garber

Allan A. Garber

Counsel for Sharon Sherman and Marilyn Huber

LIST OF AUTHORITIES

1. *Class Proceedings Act*, SA 2003, c C-16.5
2. *Class Proceedings Act*, RSBC 1996, c 50.
3. *Alberta Rules of Court*, Rule 10.29(1)

Tab 1



Class Proceedings Act, SA 2003, c C-16.5

Current version: in force since Dec 17, 2014

Link to the latest
version: <http://canlii.ca/t/81xw>

Stable link to this
version: <http://canlii.ca/t/52d7k>

Citation to this version: Class Proceedings Act, SA 2003, c C-16.5, <<http://canlii.ca/t/52d7k>> retrieved on 2016-07-06

Currency: Last updated from the Alberta Queen's printer on 2016-06-28

CLASS PROCEEDINGS ACT

Chapter C-16.5

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

¹ In this Act,

- (a) “certification order” means an order certifying a proceeding as a class proceeding;
- (b) “certified”, in respect of a proceeding, means certified as a class proceeding;
- (b.1) “class” means 2 or more persons with common issues related to a cause of action or a potential cause of action;
- (c) “class member” means a person who is a member of a class on whose behalf a proceeding that is certified as a class proceeding is commenced or otherwise conducted;
- (d) “class proceeding” means a proceeding certified as a class proceeding under Part 1;
- (e) “common issue” means
 - (i) common but not necessarily identical issues of fact, or
 - (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

commenced elsewhere in Canada that involves the same or similar subject-matter.

(3) An application under subsection (2) must be made

(a) within 90 days after

(i) the day on which the statement of defence was served, or

(ii) the day on which the time prescribed by the Rules of Court for service of the statement of defence expires without its being served,

whichever is the later, or

(b) with the permission of the Court, within any other time prescribed by the Court.

(4) Notwithstanding subsection (2), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

(5) A person who may be both a member of a class and a member of a subclass is eligible to be appointed as a representative plaintiff for the class proceeding unless, in the opinion of the Court, it would be inappropriate in the circumstances.

(6) The Court may, where it considers it appropriate, appoint as a representative plaintiff a non-profit organization that is incorporated.

2003 cC-16.5 s2;2010 c15 s3;2014 c13 s19

Right to appear

2.1 A person who receives notice of an application for certification under section 2(2)(b) may make submissions at the application for certification.

2010 c15 s4

Defendant's class proceeding

3(1) A defendant to a proceeding may, at any stage of the proceeding, make an application to the Court for an order certifying the proceeding as a class proceeding and appointing a person who on certification will be a member of the class as the representative plaintiff, whether or not more than one proceeding has been commenced against the defendant.

(2) Notwithstanding subsection (1), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

(3) Section 2(5) and (6) apply to the appointment of a representative plaintiff under this section.

Certification re settlement of proceeding

4 Where a plaintiff has reached a settlement with a defendant in respect of a proceeding prior to the proceeding's being certified but certification of the proceeding as a class proceeding is being sought as a condition of the settlement for the purposes of imposing the settlement on persons who will be class members in respect of the proceeding if the proceeding is certified as a class proceeding, those persons, on the application for certification being commenced, constitute a settlement class with respect to the proceeding for which certification is being sought.

Class certification

5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

- (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
 - (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
 - (i) will fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.
- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
- (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
 - (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
 - (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
 - (d) whether other means of resolving the claims are less practical or less efficient;
 - (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
- (3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.
- (4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).
- (5) Notwithstanding subsection (3), where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement.
- (6) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of a proceeding being considered for certification under this section, the Court must determine whether it would be preferable for some or all of the claims or common issues raised by the prospective class members to be resolved in the proceeding commenced elsewhere.
- (7) When making a determination under subsection (6), the Court must be guided by the following objectives:
- (a) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration;
 - (b) ensuring that the ends of justice are served;
 - (c) where possible, avoiding irreconcilable judgments;
 - (d) promoting judicial economy.
- (8) When making a determination under subsection (6), the Court may consider any matter that the Court considers relevant but must consider at least the following:

- (a) the alleged basis of liability, including the applicable laws;
- (b) the stage each of the proceedings has reached;
- (c) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the prospective class members;
- (d) the location of the class members and representative plaintiffs in the various proceedings, including the ability of the representative plaintiffs to participate in the proceedings and to represent the interests of the class members;
- (e) the location of evidence and witnesses;
- (f) the advantages and disadvantages of litigation being conducted in more than one jurisdiction.

2003 cC-16.5 s5;2010 c15 s5

Certification application

6(1) The Court may adjourn an application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

Subclass certification

7(1) Notwithstanding section 5, if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the Court, the protection of the interests of the prospective subclass members requires that they be represented separately, the Court may, in addition to appointing the representative plaintiff for the class, appoint from among the prospective subclass members a representative plaintiff for the subclass who, in the opinion of the Court,

- (a) will fairly and adequately represent the interests of the subclass,
- (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and
- (c) does not have, in respect of the common issues for the subclass, an interest that is in conflict with the interests of other prospective subclass members.

(2) Where the Court is satisfied that more than one subclass meets the criteria under subsection (1) for a representative plaintiff to be appointed, the Court may appoint a representative plaintiff for each subclass.

(3) Repealed 2010 c15 s6.

(4) Notwithstanding subsection (1), the Court may certify a person who is not a member of the subclass as the representative plaintiff for the subclass in the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the subclass.

(5) Section 2(5) and (6) apply to the appointment of a representative plaintiff for a subclass under this section.

2003 cC-16.5 s7;2010 c15 s6

Certain matters not bar to certification

8 In determining whether a proceeding is to be certified as a class proceeding, the Court is not to refuse certification by reason only of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different prospective class members;
- (c) different remedies are sought for different prospective class members;

- (d) the number of prospective class members or the identity of each prospective class member has not been ascertained or may not be ascertainable;
- (e) the class includes a subclass where the prospective subclass members have claims that raise common issues not shared by all the prospective class members.

Certification order

9(1) Where the Court makes a certification order, the Court may include any provisions that it considers appropriate, but in its order the Court must at least

- (a) describe the class in respect of which the order is made by setting out the class's identifying characteristics;
- (b) appoint the representative plaintiff for the class;
- (c) state the nature of the claims asserted on behalf of the class;
- (d) state the relief sought by the class;
- (e) set out the common issues for the class;
- (f) state the manner in which and the time within which a class member may opt out of the proceeding.
- (g) repealed 2010 c15 s7.

(2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the Court, the protection of the interests of the subclass members requires that they be represented separately, the certification order must include in relation to the subclass the information that is required under subsection (1) in relation to the class.

(3) Where the certification order is made for the purpose of binding a settlement class, the Court may, as the Court considers appropriate, modify what is required to be included in the order under subsection (1) or (2).

(4) The Court may at any time amend a certification order on the application of a party or class member or on the Court's own motion.

2003 cC-16.5 s9;2010 c15 s7

Orders in multi-jurisdictional certification

9.1(1) The Court may, on application, make an order certifying a proceeding as a multi-jurisdictional class proceeding if

- (a) the criteria set out in section 5(1) have been satisfied, and
- (b) having regard to section 5(7) and (8), the Court determines under section 5(6) that Alberta is the appropriate venue for the determination of the proceeding.

(2) If the Court determines that the proceeding should proceed as a multi-jurisdictional class proceeding in another jurisdiction, the Court shall refuse to certify the proceeding as a multi-jurisdictional class proceeding.

(3) The Court may refuse to certify a portion of a proposed class if that portion contains members who may be included within a class proceeding, or a proceeding that is the subject of a certification application, in another jurisdiction.

2010 c15 s8

Refusal to certify

10 If the Court refuses to certify a proceeding as a class proceeding, the Court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the Court may do one or more of the following:

- (a) order the addition, deletion or substitution of parties;

15(1) The judge of the Court who makes a certification order is to hear all the applications in the class proceeding that take place prior to the trial of the common issues, but if that judge for any reason becomes unavailable to hear an application, the chief justice of the Court may assign another judge of the Court to hear the application.

(2) Except with the consent of all of the parties to a class proceeding, a judge who has heard an application in the class proceeding prior to the trial of the common issues is not eligible to preside at the trial of the common issues.

Division 2 Participation of Class Members

Participation of class members

16(1) For the purposes of ensuring the fair and adequate representation of the interests of the class or any subclass or for any other reason that the Court considers appropriate, the Court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding if, in the opinion of the Court, this would be useful to the class.

(2) Participation under subsection (1) must be in the manner and on the terms or conditions, including terms or conditions as to costs, that the Court considers appropriate.

Opting out

17(1) A person who meets the criteria to be a class member in respect of a class proceeding is a class member in the class proceeding unless the person opts out of the class proceeding.

(2) The Court may, in a certification order or at any time,

- (a) specify the manner in which and the time within which the members of a class, or any individual member of a class, may opt out of the proceeding, and
- (b) impose terms or conditions subject to which the class members or an individual member may opt out of the proceeding.

(3) A person who opts out of a class proceeding ceases, effective from the time the person opts out, to be a class member of the class proceeding.

(4) Notwithstanding anything in this section, where the Court certifies a proceeding pursuant to an application by a defendant, a class member is prohibited from opting out of the class proceeding other than with the permission of the Court.

(5) If the Court grants permission under subsection (4) for a person to opt out of a class proceeding, that person has, as a matter of right, the right to apply to the Court to be added, on any terms or conditions that the Court considers appropriate, as a named plaintiff for the purposes of allowing that plaintiff to conduct the plaintiff's own case.

(6) Notwithstanding anything in this section, the Court may at any time determine whether or not a person is a class member and may impose any terms or conditions the Court considers appropriate on the person's membership in the class.

2003 cC-16.5 s17;2010 c15 s9;2014 c13 s19

Transitional — opting in

17.1(1) In this section,

- (a) “former Act” means the *Class Proceedings Act* as it read before being amended by the *Class Proceedings Amendment Act, 2010*;
- (b) “non-resident” means a person who does not reside in Alberta.

(2) Section 17 of the former Act continues to apply to non-residents in respect of every proceeding that is certified as a class proceeding before the coming into force of section 9 of the *Class Proceedings Amendment Act, 2010*.

(3) Where a proceeding is the subject of an application for certification on the coming into force of section 9 of the

member, but only to the extent provided by the Court.

(7) In dismissing a proceeding or in approving the settlement, discontinuance or abandonment of a proceeding, the Court must consider whether notice should be given under section 21 and, if so, whether the notice should include any one or more of the following:

- (a) an account of the conduct of the proceeding;
- (b) a statement of the results of the proceeding;
- (c) a description of any plan for distributing any settlement funds.

(8) This section applies to a proceeding regardless of whether the proceeding is commenced before or after the coming into force of the *Class Proceedings Amendment Act, 2010*.

2003 cC-16.5 s35;2010 c15 s12

Appeals

36(1) Any party, without permission to appeal, may appeal to the Court of Appeal from any of the following:

- (a) an order certifying or refusing to certify a proceeding as a class proceeding;
- (b) an order decertifying a proceeding;
- (c) a judgment on common issues;
- (d) an order made under Division 2 of this Part, other than an order that determines individual claims made by class members or subclass members.

(2) A class member or subclass member, a representative plaintiff or a defendant may appeal to the Court of Appeal any order

- (a) determining an individual claim made by a class member or subclass member, or
- (b) dismissing an individual claim for monetary relief made by a class member or subclass member.

(3) If a representative plaintiff

- (a) does not appeal as permitted under this section within the time limit set under the Rules of Court for bringing an appeal, or
- (b) abandons an appeal commenced pursuant to this section,

any class member or subclass member for whom the representative plaintiff was appointed may apply to the Court of Appeal for permission to act as the representative plaintiff for the purposes of bringing or continuing an appeal or seeking permission to appeal.

(4) An application by a class member or subclass member for permission to act as the representative plaintiff under subsection (3) must be made within 30 days from the day of the expiry of the appeal period available to the representative plaintiff or by a later date as may be set by the Court of Appeal.

2003 cC-16.5 s36;2014 c13 s19

Part 4 Costs, Fees and Disbursements

Costs

37 With respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court.

Contingency fee agreements

38(1) A lawyer may in respect of a proceeding under this Act enter into a contingency fee agreement with a

Tab 2



Class Proceedings Act, RSBC 1996, c 50

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CLASS PROCEEDINGS ACT [RSBC 1996] CHAPTER 50

Part 1 – Definitions

Definitions

1 In this Act:

"**certification order**" means an order certifying a proceeding as a class proceeding;

"**class proceeding**" means a proceeding certified as a class proceeding under Part 2;

"**common issues**" means

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"**court**", except in sections 36 (4) and 37, means the Supreme Court;

"**defendant**" includes a respondent;

"**plaintiff**" includes a petitioner.

Part 2 – Certification

Plaintiff's class proceeding

- 2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.
- (2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.
- (3) An application under subsection (2) must be made
- (a) within 90 days after the later of
 - (i) the date on which the last response to civil claim was served, and
 - (ii) the date on which the period prescribed by the Supreme Court Civil Rules for service of the last response to a notice of civil claim expires without that pleading having been served, or
 - (b) at any other time, with leave of the court.
- (4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

Defendant's class proceeding

- 3 A defendant to 2 or more proceedings may, at any stage of one of the proceedings, make an application to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

Class certification

- 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
- (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
 - (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Certification application

- 5** (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.
- (2) A copy of the notice of application and supporting affidavit must be filed and
- (a) served by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding, and
 - (b) served by personal service on any other persons named in the style of proceedings.
- (3) Unless otherwise ordered, there must be at least 14 days between
- (a) the service of a notice of application and supporting affidavit, and
 - (b) the day named in the notice of application for the hearing.
- (4) Unless otherwise ordered, a person to whom a notice of application and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and serve a copy of the filed affidavit by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding.
- (5) A person filing an affidavit under subsection (2) or (4) must
- (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
 - (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
 - (c) provide the person's best information on the number of members in the proposed class.
- (6) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
- (7) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

Subclass certification

- 6** (1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who
- (a) would fairly and adequately represent the interests of the subclass,
 - (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and
 - (c) does not have, on the common issues for the subclass, an interest that is in conflict

with the interests of other subclass members.

(2) A class that comprises persons resident in British Columbia and persons not resident in British Columbia must be divided into subclasses along those lines.

Certain matters not bar to certification

- 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
 - (b) the relief claimed relates to separate contracts involving different class members;
 - (c) different remedies are sought for different class members;
 - (d) the number of class members or the identity of each class member is not known;
 - (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

Contents of certification order

- 8 (1) A certification order must
- (a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,
 - (b) appoint the representative plaintiff for the class,
 - (c) state the nature of the claims asserted on behalf of the class,
 - (d) state the relief sought by the class,
 - (e) set out the common issues for the class,
 - (f) state the manner in which and the time within which a class member may opt out of the proceeding,
 - (g) state the manner in which and the time within which a person who is not a resident of British Columbia may opt in to the proceeding, and
 - (h) include any other provisions the court considers appropriate.
- (2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the certification order must include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.
- (3) The court, on the application of a party or class member, may at any time amend a certification order.

Refusal to certify

- 9 If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may
- (a) order the addition, deletion or substitution of parties,
 - (b) order the amendment of the pleadings, and
 - (c) make any other order that it considers appropriate.

(2) Participation under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

Opting out and opting in

16 (1) A 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.

(2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.

(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

(5) If a subclass is created as a result of persons opting in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8 (2).

Discovery

17 (1) Parties to a class proceeding have the same rights of discovery under the Supreme Court Civil Rules against one another as they would have in any other proceeding.

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 6, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.

(3) In deciding whether to grant a defendant leave to discover other class members, the court must consider the following:

- (a) the stage of the class proceeding and the issues to be determined at that stage;
- (b) the presence of subclasses;
- (c) whether the discovery is necessary in view of the defences of the party seeking leave;
- (d) the approximate monetary value of individual claims, if any;
- (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered;
- (f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the Supreme Court Civil Rules as a party for failure to submit to discovery.

Examination of class members before an application

18 (1) A party must not require a class member, other than a representative plaintiff, to be examined as a witness before the hearing of any application, except with leave of the court.

(2) Section 17 (3) applies to a decision whether to grant leave under subsection (1) of this section.

Division 3 — Notices

Notice of certification

- (a) with the approval of the court, and
 - (b) on the terms the court considers appropriate.
- (3) A settlement under this section is not binding unless approved by the court.
- (4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.
- (5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include
- (a) an account of the conduct of the proceeding,
 - (b) a statement of the result of the proceeding, and
 - (c) a description of any plan for distributing any settlement funds.

Appeals

- 36** (1) Any party may appeal to the Court of Appeal from
- (a) an order certifying or refusing to certify a proceeding as a class proceeding,
 - (b) an order decertifying a proceeding,
 - (c) a judgment on common issues, and
 - (d) an order under division 2 of this Part, other than an order that determines individual claims made by class or subclass members.
- (2) If a representative plaintiff does not appeal as permitted by subsection (1) within the time limit for bringing an appeal set under section 14 (1) (a) of the *Court of Appeal Act* or if a representative plaintiff abandons an appeal under subsection (1), any member of the class or subclass for which the representative plaintiff had been appointed may apply to a justice of the Court of Appeal for leave to act as the representative plaintiff for the purposes of subsection (1).
- (3) An application by a class or subclass member for leave to act as the representative plaintiff under subsection (2) must be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the justice may order.
- (4) With leave of a justice of the Court of Appeal, a class or subclass member, a representative plaintiff or a defendant may appeal to that court any order
- (a) determining an individual claim made by a class or subclass member, or
 - (b) dismissing an individual claim for monetary relief made by a class or subclass member.

Part 5 — Costs, Fees and Disbursements

Costs

- 37** (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.
- (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding

- (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
 - (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
 - (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
- (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.
- (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

Agreements respecting fees and disbursements

- 38** (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must
- (a) state the terms under which fees and disbursements are to be paid,
 - (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and
 - (c) state the method by which payment is to be made, whether by lump sum or otherwise.
- (2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.
- (3) An application under subsection (2) may,
- (a) unless the court otherwise orders, be brought without notice to the defendants, or
 - (b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.
- (4) Interest payable on fees under an agreement approved under subsection (2) must be calculated
- (a) in the manner set out in the agreement, or
 - (b) if not so set out, at the interest rate, as that term is defined in section 7 of the *Court Order Interest Act*, or at any other rate the court considers appropriate.
- (5) Interest payable on disbursements under an agreement approved under subsection (2) must be calculated
- (a) in the manner set out in the agreement, or
 - (b) if not so set out, at the interest rate, as that term is defined in section 7 of the *Court Order Interest Act*, or at any other rate the court considers appropriate, on the balance of disbursements incurred as totalled at the end of each 6 month period following the date of the agreement.
- (6) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
- (7) If an agreement is not approved by the court or if the amount owing to a solicitor under an approved agreement is in dispute, the court may
- (a) determine the amount owing to the solicitor in respect of fees and disbursements,
 - (b) direct an inquiry, assessment or accounting under the Supreme Court Civil Rules to

Tab 3

- (a) confirm, vary or revoke the decision;
 - (b) revoke the decision and substitute a decision;
 - (c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;
 - (d) make any other order the judge considers appropriate.
- (2) If the amount of lawyer's charges payable pursuant to the decision of the review officer has been paid and, after payment, is reduced on appeal, the lawyer may be ordered to return the excess and, if the lawyer fails to do so, the lawyer, in addition to being liable for that amount, may be found guilty of a civil contempt.

AR 124/2010 s10.27;163/2010

Division 2 Recoverable Costs of Litigation

Subdivision 1 General Rule, Considerations and Court Authority

Definition of "party"

10.28 In this Division, "party" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award.

Information note

Party is defined in the Appendix [*Definitions*] as a party to an action. There are other Court proceedings that are not "actions" and so the definition of *party* is expanded to allow a costs award against anyone participating in an application or proceeding that is not an action started by statement of claim or originating application.

General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

- (a) the Court's general discretion under rule 10.31 [*Court-ordered costs award*],
- (b) the assessment officer's discretion under rule 10.41 [*Assessment officer's decision*],
- (c) particular rules governing who is to pay costs in particular circumstances,
- (d) an enactment governing who is to pay costs in particular circumstances, and