COURT FILE NO.: 02-CV-241587CP
DATE: 20091204

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

R. CHARLES ALLEN

Plaintiff

- and -

ASPEN GROUP RESOURCES CORPORATION, JACK E. WHEELER, JAMES E. HOGUE, WAYNE T. EGAN, ANNE HOLLAND, RANDALL B. KAHN, LENARD BRISCOE, PETER LUCAS, LANE GORMAN TRUBITT L.L.P. and WEIRFOULDS LLP.

Defendants

Proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6

BEFORE: G.R. Strathy J.

COUNSEL: *Paul Bates* and *Jonathan Foreman*, for the Plaintiff/Moving Party

Joseph Groia and *Catherine MacInnis*, for the Defendants/Respondents, Aspen Group Resources Corporation, James E. Hogue, Wayne T. Egan, Anne Holland, Randall B. Kahn and Peter Lucas

Cecilia Hoover and *Sarah Shody*, for the Defendant/Respondent, Lenard Briscoe

Paul Tushinski, for the Defendant/Respondent, Lane Gorman Trubitt LLP

L.J. O'Connor, for the Defendant/Respondent, WeirFoulds LLP

DATES HEARD: September 21 and 22, 2009

REASONS FOR DECISION ON CERTIFICATION

[1] The plaintiff in this proposed class action claims damages or rescission on behalf of shareholders[1] as a result of alleged misrepresentations in a take-over bid circular. The plaintiff invokes the statutory cause of action contained in s. 131 of the *Securities Act,* R.S.O. 1990, c. S.5 and seeks to certify the action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*").

[2] The action arises out of the take-over of Endeavour Resources Inc. ("Endeavour"), by Aspen Group Resources Corporation ("Aspen"), pursuant to a take-over bid circular dated November 23, 2001 (the "Circular"). Most of the Endeavour shareholders accepted the offer and tendered their securities to Aspen, receiving securities in Aspen in return, in accordance with a stipulated transfer ratio. The securities of the remaining shareholders were acquired under the compulsory acquisition provisions of the Alberta *Securities Act*, R.S.A. 2000, c. S-4.

[3] Mr. R. Charles Allen, the proposed representative plaintiff, alleges that the Circular contained misrepresentations and failed to disclose that insiders of Aspen had engaged in improper self-dealing. He says that, as a result, Endeavour shareholders received Aspen shares that were over-valued and that they are entitled to invoke the statutory remedies of damages or rescission.

[4] For the reasons that follow, I will grant an order certifying this action as a class proceeding. My reasons begin with an overview of the take-over bid provisions of the *Securities Act*, followed by an outline of the events that give rise to this proceeding. I will then discuss the five part test for the certification of an action as a class proceeding under the *C.P.A.* and will apply that test to the facts of this case.

I. The take-over bid rules in the *Securities Act*

[5] The take-over bid rules in the *Securities Act* were introduced in Ontario as a result of the recommendations in the "Kimber Committee" report in 1965 (*The Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965)). The rules are designed to protect shareholders of the "target" company by ensuring that they are provided with full and timely disclosure of information to permit them to make an informed decision about the bid to purchase their securities.

[6] Under the *Securities Act*, a bidder (other than a bidder or transaction exempt from the statute) making a "take-over bid" (which includes various transactions in which an offeror proposes to obtain legal or *de facto* control of the target corporation) is required to follow a detailed set of rules to ensure that the shareholders of the target company receive equal treatment and sufficient time and information to assess the bid for their shares: see MacIntosh, Jeffrey G.

[1] The proposed class includes holders of both shares and warrants. For the sake of convenience, unless the context otherwise requires, I will use the words "shareholders" and "security holders" interchangeably, and "shares" or "securities" will included warrants.

and Nicholls, Christopher C., *Securities Law*, (Toronto: Irwin Law, 2002), p. 313. A formal bid document must be delivered to all the shareholders of the target company, who must also be provided with a disclosure document referred to as a "take-over bid circular". The bid must remain open for at least 35 days. If, before the expiry of the bid (or before the expiry of all rights to withdraw), there is a material change in the information contained in the circular or in the affairs of the offeror, the *Securities Act* requires the offeror to send a notice of the change "to every person or company to whom the bid was required to be sent and whose securities were not taken up before the date of change" (s. 98(2))[2].

[7] Where the bidder for the shares of the target is proposing to offer its own shares in return, the *Securities Act* requires that the offeror make a high level of disclosure, similar to the disclosure required in a prospectus for a public offering. Once the offeror's circular has been delivered to shareholders, the directors of the target are required to deliver a circular in response, setting out, among other things, their recommendation as to whether the offer should be accepted or rejected.

[8] The teeth of the take-over bid provisions are found in s. 131, which give the shareholders of the target company a civil remedy in damages, as well as a claim against the offeror for rescission, in the event of misrepresentation or non-disclosure in the take-over bid circular. The remedy can be exercised not only against the offeror corporation, but also against the directors or officers of the offeror who signed the circular, experts whose reports appeared (with their consent) in the circular, and those – such as auditors – who signed a certificate in the circular. There are defences available, including a defence that the shareholder had knowledge of the alleged misrepresentation. Significantly, it is not necessary for the shareholder to prove *reliance* on the misrepresentation: s. 131(2) provides that a shareholder is deemed to have relied on the misrepresentation and thus makes reliance irrelevant to the determination of liability. The circular must contain a statement of the shareholders' rights.

[9] A misrepresentation is defined as an untrue statement of material fact or the failure to state a material fact. A material fact is a fact that would reasonably be expected to have a significant effect on the market price or value of the securities. Materiality is determined by an objective standard: see *Skye Properties Ltd. v. Wu* (2008), 56 B.L.R. (4th) 68, [2008] O.J. No. 4349 (Sup. Ct.).

[10] Section 131, as it stood at the material time, is set out in Appendix A. The most important provisions, for present purposes, are s. 131(1) to (4):

> 131. (1) Where a take-over bid circular sent to the security holders of an offeree issuer as required by Part XX or any notice of change or variation in respect thereof contains a misrepresentation, every such security holder shall be deemed to have relied on the misrepresentation and may elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,

[2] This was the section in effect at the time. The current provision, in R.S.O. 1990, c. S.5, as amended, is s. 94.3(1).

> (a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;
>
> (b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and
>
> (c) each person who signed a certificate in the circular or notice, as the case may be, other than the person included in clause (a).
>
> (2) Where a directors' circular or a director's or officer's circular delivered to the security holders of an offeree issuer as required by Part XX or any notice of change or variation in respect thereof contains a misrepresentation, every such security holder shall be deemed to have relied on the misrepresentation and has a right of action for damages against every director or officer who signed the circular or notice that contained the misrepresentation.
>
> (3) Subsection (1) applies with necessary modifications where an issuer bid circular or any notice of change or variation in respect thereof contains a misrepresentation.
>
> (4) No person or company is liable under subsection (1), (2), or (3) if the person or company proves that the security holder had knowledge of the misrepresentation.

[11] Against this statutory framework, I will now describe the events that have given rise to this action.

II. Background

The Parties

[12] Endeavour, the target of the take-over bid, was a Calgary-based company, engaged in the exploration and development of oil and natural gas in Western Canada and parts of the United States.

[13] Mr. Allen owned Endeavour securities before the Aspen take-over. He had been a director of Endeavour from the early 1990s, but he verbally resigned that position in March 2001, some eight months before the take-over bid. He continued to own common shares and special warrants of Endeavour at the time of the take-over and tendered them in exchange for

common shares and warrants of Aspen. I will have more to say about Mr. Allen when I discuss his suitability as a representative plaintiff on behalf of the proposed class.

[14] Aspen, which acquired the shares of Endeavour pursuant to the take-over bid, is a Yukon corporation engaged in the acquisition, exploration, development and operation of oil and gas properties in North America. Its registered office is in Whitehorse and its head office is in Oklahoma City. Aspen is a publicly-traded company and its shares are listed on both the TSE and the NASD over-the-counter bulletin board.

[15] The defendant Lane Gorman Trubitt LLP (the "Auditors") is a certified public accounting firm located in Dallas, and was Aspen's auditor. The Auditors prepared and signed an auditor's report that was contained in the Circular.

[16] WeirFoulds LLP ("WeirFoulds") is a law firm that acted on behalf of Aspen and advised it in connection with the take-over bid. Wayne T. Egan is a Toronto lawyer and a partner in WeirFoulds. He acted as legal counsel for Aspen from February 1995, and was a director of Aspen between 1996 and the present, also serving on the board's compensation committee. As a partner in WeirFoulds, he advised Aspen concerning the take-over bid for Endeavour.

[17] The other individual defendants were officers and directors of Aspen, as follows:

(a) Jack E. Wheeler was the Chairman and Chief Executive Officer of Aspen until his resignation in October, 2002;

(b) Peter Lucas was a Senior Vice President and the Chief Financial Officer of Aspen;

(c) Anne Holland, Lenard Briscoe and James E. Hogue were members of the board of directors of Aspen and members of the compensation committee.

I will refer to Aspen and the defendant directors as the "Aspen Defendants". Although Mr. Briscoe was separately represented, his position on this motion was the same as the other directors.

[18] The proposed class members are all the holders of common shares and of Series I and Series II special warrants of Endeavour that were tendered and accepted by Aspen pursuant to the Circular and subsequent actions.

The take-over bid

[19] In about May, 2001, Aspen and Endeavour began negotiations with a view to the acquisition of Endeavour by Aspen. On October 23, 2001, they entered into a pre-acquisition agreement contemplating that a take-over bid would be prepared in "accordance with the requirements of the Securities Act (Ontario) and all other applicable securities legislation". The agreement contained other provisions to ensure that there would be no material changes in Aspen's capital or corporate structure during the take-over bid period.

[20] The document containing Aspen's offer and the Circular was lengthy and detailed. It contained information concerning the offer, including its purpose and the reasons for it, its terms and conditions, and information about how it could be accepted by a holder of Endeavour securities. The Circular portion of the document contained additional information, including detailed information about both Aspen and Endeavour.

[21] The Circular included consolidated financial statements for Aspen and an Independent Auditors' Report, dated August 10, 2001, prepared by the Auditors. It contained a statement that the board of directors of Endeavour had unanimously determined that the offer was fair to the holders of Endeavour securities and had unanimously recommended that the offer be accepted. The Circular also contained a certificate that the offer and Circular had been approved by Aspen's Board and continued:

> The foregoing contains no untrue statement of a material fact and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made. In addition, the foregoing does not contain any misrepresentation likely to affect the value or the market price of the securities which are the subject of the Offer.

[22] This certificate was signed by the defendants Wheeler and Lucas in their capacities as officers of Aspen and by the defendants Egan and Hogue on behalf of the board of directors of Aspen.

[23] On November 23, 2001, Aspen distributed the Circular to all Endeavour shareholders. The Circular offered shares and warrants in Aspen as consideration for the tendered shares and warrants of Endeavour. The offer provided for an exchange of securities based on the transfer ratio, which was said to have been established as a result of negotiations between Aspen and Endeavour.

[24] The offer was originally set to expire on December 31, 2001, but it was extended until January 31, 2002, by which time Aspen had control of a sufficient number of the Endeavour securities. On March 6, 2002, Aspen triggered the compulsory acquisitions provisions of the Alberta *Securities Act*, in order to acquire the small number of outstanding securities. In the result, Aspen acquired all the shares and warrants of Endeavour.

[25] I will discuss other provisions of the Circular and offer in more detail below.

The Alleged Misrepresentations and Liability of the Defendants

[26] The statement of claim sets out certain events that are said to have occurred following the acquisition of Endeavour by Aspen. After the closing of the acquisition, allegations surfaced concerning the management and financial reporting of Aspen. The President and CEO of Aspen resigned. The share price allegedly declined.

[27] The plaintiff claims that the Circular either failed to disclose, or misrepresented, the following allegedly material facts:

> (a) on November 14 2001, the Compensation Committee of the Board of Directors of Aspen had approved additional executive compensation for Mr. Wheeler, the CEO, and Mr. Mercer, the President of Aspen – Mr. Wheeler received a 2.5% overriding royalty on all of Aspen's US production and Mr. Mercer received a 1% royalty. These are alleged to have been in violation of the terms of Aspen's primary lending facility and contrary to the terms of the pre-acquisition agreement between Endeavour and Aspen;
>
> (b) Aspen was under an obligation, made in 2000, to issue 2.8 million shares to the defendant Holland, which would have the effect of diluting the value of Aspen's securities;
>
> (c) on December 31, 2001, during the currency of the take-over bid, Aspen had agreed to acquire certain oil and gas assets from the defendant, Wheeler, who was an insider;
>
> (d) Aspen's financial statements understated certain depreciation and depletion costs, ultimately resulting in a $4.5 million write-down in the statements;
>
> (e) a legal action had been commenced in September, 2000 by a former officer of Aspen against Aspen, Mr. Wheeler, and others, alleging a breach of a settlement agreement, pursuant to which Aspen and Mr. Wheeler were found jointly and severally liable in the amount of $385,000 plus $50,000 in legal fees; and
>
> (f) a legal action had been commenced against Aspen in January 2002, before the extended expiry date of the take-over bid, concerning a potential liability of $2.3 million under a guarantee.

This Litigation

[28] This action was commenced pursuant to a notice of action issued on December 30, 2002. Mr. Allen prepared the Notice of Action and Statement of Claim himself. The pleading has drafting deficiencies, as we shall see.

[29] The plaintiff alleges that Aspen and the defendant directors had a duty to make disclosure of all material facts and material changes in the Circular and offer, and that they are liable for these misrepresentations and non-disclosures under s. 131(1) of the *Securities Act.*

[30] The plaintiff pleads that the Auditors signed a certificate to the Circular pertaining to financial disclosure and that they had a duty to make disclosure of material facts and material

changes and that they are liable for any misrepresentation in the Circular under s. 131(1)(c) of the *Securities Act.*

[31] The plaintiff also pleads that, not only is Mr. Egan liable in his capacity as a director, but that his law firm, WeirFoulds, is liable as well. The basis for the alleged liability of the law firm is that Mr. Egan was acting in the ordinary course of the business of the firm, both in his capacity as a director of Aspen and in his work in the preparation of the take-over bid documentation.

[32] The plaintiff claims both damages and rescission. He claims the diminution in Aspen's share price between the closing of the take-over in January, 2002 and "approximately December 2002" by which time the plaintiff says the market had absorbed the full impacts of subsequent disclosure of the alleged misrepresentations. The statement of claim asserts that between January 31, 2002 and December 13, 2002, the share price of Aspen dropped from 60 cents per share to 10 cents per share, resulting in a net loss of 50 cents per share.

[33] I will discuss in more detail below the causes of action asserted against the individual defendants as well as the damages claimed.

[34] The progress of the action has not been exemplary. Mr. Allen eventually retained counsel in 2003 but was unable to come to a satisfactory fee arrangement with the lawyer. He had to borrow money, which he has since repaid, from another member of the proposed class in order to pay the lawyer. He retained another lawyer in 2005, but that lawyer had a conflict and could not continue. There appear to have been some discussions of settlement, but nothing came of them. In June, 2007, Mr. Allen retained his present counsel, Harrison Pensa. Since that time, this action has proceeded more expeditiously, with a fresh as amended statement of claim having been filed in March, 2008 and the certification record being served in December, 2008.

III. The Test for Certification

[35] Section 5 of the *C.P.A.* sets out the test for certification:

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

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[36] Section 6 of the *C.P.A.* states that certification of a class proceeding should not be refused on any of the following grounds:

> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different class members.
>
> 3. Different remedies are sought for different class members.
>
> 4. The number of class members or the identity of each class member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[37] The *C.P.A.* is to be given a broad and liberal interpretation. It should be construed generously in order to realize its objectives: access to justice, judicial economy and behaviour modification: see *Hollick v. Toronto,* [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, para. 14-16; *Cloud v. Canada* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.).

[38] A certification motion does not embark on an assessment of the merits of the action. I am not required to determine whether the plaintiff's claims are likely to succeed. The issue before me at this stage is simply whether the action can be appropriately prosecuted as a class action. The class representative is required to show "some basis in fact for each of the certification requirements set out in s. 5 of the Act", other than the requirement that the pleadings disclose a cause of action: *Hollick v. Toronto* at para. 25.

[39] I will now review the five questions the court must consider on a certification motion and address them in the circumstances of this case.

(a) Cause of Action

[40] The first question, under s. 5(1)(a) of the *C.P.A.*, is whether the statement of claim discloses a cause of action. The test is whether it is plain, obvious, and beyond doubt that the claim cannot succeed. Unless the court concludes that a plaintiff's action could not possibly succeed or that, clearly and beyond all doubt, no reasonable cause of action has been shown, a claim must be allowed to proceed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, at paras. 29-30.

[41] There are a number of causes of action asserted against various defendants.

The claim under s. 131 of the Securities Act

[42] I begin with the claim under s. 131 of the *Securities Act.* The pleading clearly discloses a cause of action against Aspen, the Auditors and the directors of Aspen, including the lawyer, Mr. Egan, in his capacity as a director. The standard of materiality is an objective "reasonable investor" standard – whether there is a substantial likelihood that the misrepresentation would have influenced the decision of a reasonable investor. Section 131(2) makes it unnecessary to examine the individual decision-making of each investor. Further, as Ground J. stated in *Maxwell v. MLG Ventures Ltd.*, [1995] O.J. No. 1136, 7 C.C.L.S. 155 (Gen. Div.) at para. 5, the merits of the allegations of misrepresentation are irrelevant at this stage of the inquiry. The pleadings of causes of action under s. 131 of the *Securities Act* meet the requirements of s. 5(1)(a) of the *C.P.A.*

[43] Counsel for the Aspen Defendants submits that the cause of action against the offeror for rescission, under s. 131(1) of the *Securities Act*, is fundamentally flawed because of s. 138, which provides as follows:

> Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,
>
> (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or
>
> (b) in the case of any action, other than an action for rescission, the earlier of,
>
> (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
>
> (ii) three years after the date of the transaction that gave rise to the cause of action.

[44] The "transaction that gave rise to the cause of action" in s. 131(1)(a) must refer to the transaction by which the security holder acquired the securities: see *Sternberg v. Boothe*, [1990] O.J. No. 2649 (H.C.J.).

[45] This action was commenced by notice of action filed December 30, 2002, which was more than 180 days after the completion of the acquisition of the Endeavour shares, but less than 180 days after the public disclosure of the alleged misrepresentations. Since no action was commenced by Mr. Allen within 180 days from the last day upon which Aspen acquired shares of Endeavor, the claim for rescission is statute barred and therefore fails to disclose a cause of action: see *Burke v. American Heyer-Schulte Corp.* (1994), 25 C.P.C. (3d) 177, [1994] O.J. No. 141 (Gen. Div.), aff'd (1997), 74 A.C.W.S. (3d) 285, [1997] O.J. No. 3925 (CA) and *Stone v. Wellington County Board of Education* (1999), 120 O.A.C. 296, 29 C.P.C. (4th) 320 (C.A.) leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 336. Had there been evidence that an action for rescission had been commenced by another class member prior to the expiry of the limitation period, it might have been appropriate to certify the claim for rescission, leaving the limitation period as an individual issue.

[46] There is also an issue as to whether the entire class described in the statement of claim – namely all former Endeavour shareholders – are entitled to assert the cause of action under s. 131 of the *Securities Act* or whether it is more narrowly circumscribed and only available to "Ontario" security holders. This issue was raised in the context of "identifiable class" requirement of s. 5(1)(b) and I propose to discuss it when I review that requirement.

[47] I now turn to the other causes of action asserted against the Auditors and WeirFoulds.

The claim against the Auditors

[48] As noted earlier, s. 131(1)(b) and (c) of the *Securities Act* provide that a security holder of the offeree has a right of action for damages against every person whose report has been used in the circular, with their consent, and against every person who signed a certificate in the circular. The plaintiff alleges in the statement of claim that the Auditors filed a consent with the Ontario Securities Commission for the use of its independent auditor's report in the Circular and signed a certificate in the Circular pertaining to financial disclosures. The plaintiff alleges that the Auditors are therefore liable to the class under s. 131(1)(b) and (c) of the Ontario *Securities Act.*

[49] In addition, the statement of claim alleges that the Auditors had a duty to make sufficient enquiries to ensure that all material facts had been disclosed in the take-over documents. It alleges that the Auditors ought to have known of the alleged misrepresentations and that they were negligent in failing to ensure that all material facts were disclosed.

[50] There was no submission made before me that the pleading did not disclose causes of action against the Auditors. In this case, while the pleading against the Auditors is sparse, I am satisfied that the statement of claim discloses causes of action against the Auditors under both s. 131 of the *Securities Act* and in negligence. A claim against accountants for negligence, negligent misrepresentation and fraudulent misrepresentation at common law, in relation to the secondary market, was allowed to proceed in *Mondor v. Fisherman* (2001), 15 C.P.R. (4th) 289, [2001] O.J. No. 4620 (Sup. Ct.). The proceeding was later certified as a class action and a

settlement was approved: *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 4621 (Sup. Ct.).

[51] As will be seen below, it is my view that the common issue concerning the Auditors requires minor clarification, but I am satisfied that the claims against the Auditors meet the "cause of action" test.

The claim against WeirFoulds

[52] The statement of claim alleges that Mr. Egan was a director of Aspen and served as Secretary of its Compensation Committee, and that he signed a certificate in the Circular on behalf of the Board stating that the Circular did not omit any material fact. It also alleges that he was "lead counsel to Aspen on securities matters, in particular with respect to the take-over bid circular and generally with respect to public securities disclosure issues as a partner in the Defendant, WeirFoulds LLP." The pleading also alleges that WeirFoulds was "at all material times, Canadian legal counsel to Aspen."

[53] The plaintiff also alleges that on November 14, 2001, nine days before publication of the Circular, the Compensation Committee of which Mr. Egan was a member and Secretary granted Mr. Wheeler and Mr. Mercer their over-riding royalties. The plaintiff says that the effect of this was to reduce the value of Aspen's shares and that this was not disclosed in the Circular or in a subsequent notice of change dated December 21, 2001, which extended the time for acceptance of Aspen's offer from December 31, 2001 to January 31, 2002.

[54] The plaintiff pleads that Mr. Egan and WeirFoulds drafted the Circular, that it failed to disclose the overriding royalty interests granted to Mr. Wheeler and Mr. Mercer, and that this was a failure to state a material fact and a breach of s. 131 of the *Securities Act.*

[55] There is no other allegation in the statement of claim that Mr. Egan was privy to any of the alleged misrepresentations or non-disclosures in the Circular. It is alleged, however, that he and the other directors were, or ought to have been, aware of the alleged misrepresentations and that they failed to ensure their timely disclosure to the putative class.

[56] Finally, the plaintiff makes the following broad allegation against WeirFoulds:

> The law firm Weir Foulds [sic] LLP drafted the take-over circular and offer presented to class members. The Defendant, Weir Foulds LLP had a duty to make appropriate enquiries and to ensure the disclosure of all material facts and material changes in the take-over documents. Weir Foulds LLP was or ought to have been fixed with knowledge of the alleged misrepresentations and was negligent in the preparation of documents delivered to the class members. The defendant Egan was at all material times a partner and agent of the defendant Weir Foulds LLP. Egan acted in the ordinary course of business between 1996 and the present as legal counsel, a member of the Board of Directors and as a member of various committees of Aspen. Egan acted as lead counsel to

> Aspen in respect of the take-over bid circular. Weir Foulds LLP is liable for the conduct of the defendant Egan.

[57] Mr. Egan has sworn an affidavit in response to the certification motion. It deals primarily with the defendants' complaint that the plaintiff has been dilatory in the prosecution of this action. Mr. Egan does acknowledge that he is a partner in WeirFoulds and that "through WeirFoulds" he acted as legal counsel to Aspen. He acknowledges that he advised Aspen concerning the take-over bid and that he was a member of the board of directors and served as Secretary to the Compensation Committee.

[58] The plaintiff has properly pleaded a cause of action pursuant to s. 131(1)(a) of the *Securities Act* against Mr. Egan in his capacity as a director of Aspen.

[59] There remain issues as to whether Mr. Egan and WeirFoulds have an independent common law liability to the class in negligence and whether any other causes of action against Mr. Egan and WeirFoulds have been properly pleaded. In this regard, it should be noted that s. 131(11) of the *Securities Act* provides that the remedies under that section do not derogate from the common law rights of security holders.

[60] There also remains the issue of whether WeirFoulds is responsible for Mr. Egan's statutory liability.

[61] In considering whether the pleading supports the cause of action, I am required to read the allegations in the statement of claim generously, with a view to accommodating any inadequacies of form due to drafting deficiencies: *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453, [1995] O.J. No. 16 (Div. Ct.) at p. 469. Keeping in mind that the pleading was initially drafted by Mr. Allen, and that any technical difficulties can be cured by either particulars or amendment, the allegations I have referred to above are broad enough to include a common law solicitor's negligence claim against Mr. Egan and WeirFoulds. The pleading is also broad enough to include a claim that WeirFoulds is vicariously liable for Mr. Egan's statutory liability. I turn then to the question of whether these claims are maintainable in law.

[62] There is precedent for a shareholders' class action claim against a law firm and one of its partners for common law negligence in the preparation of a prospectus. In *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 240, [2001] O.J. No. 4622 (Sup. Ct.), which was the same case referred to above, Cumming J. dealt with a motion to add a law firm and one of its lawyers to a class action arising out of the collapse of YBM Magnex. The lawyer had been responsible for the preparation of the prospectus. One of the directors of the company, already named as a party to the class action, was also a partner in the firm, but it was not suggested that the law firm had a liability by virtue of that partner's liability *qua* director. It was acknowledged that the non-director lawyer and the firm had no statutory liability. Cumming J. held that this did not preclude common law liability. He permitted the amendment of the claim to add the lawyer and the law firm as defendants: as it was not plain and obvious that the class members who purchased shares pursuant to the

prospectus did not have a common law claim against the lawyer and the firm for negligent misrepresentation.

[63] In addition, applying the principles set out in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51, and *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Cumming J. held that there were sufficient facts pleaded to support a claim of proximity between the class and the law firm to give rise to a *prima facie* duty of care. The question of whether there were policy considerations that ought to negative or limit the scope of that duty required a factual evidentiary record and could not be resolved at a preliminary stage on a pleadings motion.

[64] In the case before me there is no allegation of negligent misrepresentation, but there is an allegation of negligence against both Mr. Egan and WeirFoulds. While the pleading is broad and scattered, the essential elements of the cause of action are present.

[65] Insofar as the liability of WeirFoulds is concerned, both counsel have relied upon the provisions of the *Partnerships Act*, R.S.O. 1990, c. P.5 and the line of cases dealing with circumstances in which lawyers have been found to be acting within the ordinary course of business of their firms: *Public Trustee v. Mortimer et al.* (1985), 49 O.R. (2d) 741,16 D.L.R. (4th) 404 (H.C.J.); *Korz v. St. Pierre et al.* (1987), 61 O.R. (2d) 609, 43 D.L.R. (4th) 528 (C.A.); *McDonic Estate v. Hetherington (Litigation Guardian of)* (1997), 31 O.R. (3d) 577, [1997] O.J. No. 51 (C.A.); and *Ernst & Young Inc. v. Falconi et al.* (1994), 17 O.R. (3d) 512, [1994] O.J. No. 206 (Gen. Div.).

[66] Sections 6 and 11 of the *Partnerships Act* are also relevant:

> 6. Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member, bind the firm and the other partners unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.
>
> …
>
> 11. Where by any wrongful act or omission of a partner acting in the ordinary course of the business of the firm, or *with the authority of the co-partners*, loss or injury is caused to a person not being a partner of the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act. [emphasis added]

[67] The authorities referred to above support the proposition that the answer to the question of whether a partner's acts engage the liability of the firm requires an examination of the

business of the partnership, the nature of the acts carried out by the partner and a determination of whether those acts were within the ordinary course of business of a firm of that nature. The analysis may look at a variety of factors, including the extent to which the facilities of the law firm were used to perform the acts in question, and whether the revenues from the activities were treated as revenues of the firm.

[68] Depending on the circumstances, there can be no doubt that a lawyer preparing a prospectus on behalf of a corporate client could be acting within the ordinary course of business of a law firm so as to engage the liability of the firm for negligence in the performance of the work.

[69] The more difficult question is whether the lawyer's statutory liability as a director could engage the liability of the firm.

[70] On behalf of WeirFoulds, Mr. O'Connor submits that in signing the Circular in his capacity as a director Mr. Egan was not acting in his capacity as a lawyer or in his capacity as a partner in the law firm. He submits that "the law firm is a firm of lawyers practising law and not a firm of corporate directors running companies" and that the firm cannot have a liability for Mr. Egan's actions *qua* director unless, in carrying out his duties as a director, he was carrying on the usual and ordinary business of the law firm. Mr. O'Connor submits that to hold the law firm liable for the lawyer's actions as a director will have a chilling effect on the legal profession and will result in a nation-wide flood of resignations of directorships.

[71] It seems to me that it is arguable that a lawyer who, through his or her law firm, acts as external corporate counsel to a corporation and who also sits on the corporation's board, may well be acting in the ordinary course of the law firm's business when he or she takes a seat at the boardroom table. Indeed, such a relationship with the corporation may be encouraged by the law firm to strengthen the relationship with the client, to raise the profile of the lawyer and the law firm and to increase business. To the extent there are risks for the lawyer and the law firm, they undoubtedly can be offset by appropriate liability insurance.

[72] Recognizing that the inquiry at this stage is unrelated to the merits, I cannot say that the claim that WeirFoulds is liable for the actions of Mr. Egan, both as a director or for common law negligence, is unsustainable in law.

[73] Mr. O'Connor submitted that because WeirFoulds is a limited liability partnership neither the firm itself nor the other partners could have a liability for the actions of the individual partner. He relied in particular on the provisions of s. 10(2) of the *Partnerships Act*, but I will set out ss. (1), (3) and (4) as well:

> 10. (1) Except as provided in subsection (2), every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner, and after the partner's death the partner's estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

(2) Subject to subsections (3) and (3.1), a partner in a limited liability partnership is not liable, by means of indemnification, contribution or otherwise, for,

(a) the debts, liabilities or obligations *of the partnership* or any partner arising from the negligent or wrongful acts or omissions that another partner or an employee, agent or representative of the partnership commits in the course of the partnership business while the partnership is a limited liability partnership; or

(b) any other debts or obligations *of the partnership* that are incurred while the partnership is a limited liability partnership.

(3) Subsection (2) does not relieve a partner in a limited liability partnership from liability for,

(a) the partner's own negligent or wrongful act or omission;

(b) the negligent or wrongful act or omission of a person under the partner's direct supervision; or

(c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner's direct supervision, if,

(i) the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or

(ii) the partner knew or ought to have known of the act or omission and did not take the actions that a reasonable person would have taken to prevent it.

(3.1) Subsection (2) *does not protect a partner's interest in the partnership property from claims against the partnership respecting a partnership obligation*.

(4) A partner in a limited liability partnership is not a proper party to a *proceeding by or against the limited liability partnership* for the purpose of recovering damages or enforcing obligations arising out of the negligent acts or omissions described in subsection (2). [Emphasis added]

[74] It is clear that, as the words in italics indicate, s. 10(2), (3.1) and (4) differentiate between the liability of a partner in a limited partnership and the liability of the limited partnership itself. The *firm itself* can incur a liability, pursuant to s. 6 and s. 11, for the acts of a partner. In a limited liability partnership, however, the individual partners do not have a personal liability in excess of their respective interests in the partnership property. Thus, the limited liability partnership may be liable to the extent of its assets, but the personal assets of the partners, apart from their interest in the partnership, are protected.

[75] This conclusion is supported by the authorities. In J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, (Irwin Law, Toronto: 2003), the author states at p. 57:

> Under this special form of general partnership [limited liability partnerships for professionals] individual partners are not personally liable for the professional negligence of their partners or of employees or other persons unless the partner directly supervised them. *The firm remains liable*. Individual partners are liable for their own negligence. [emphasis added]

[76] The Report of the Alberta Law Reform Institute, *Limited Liability Partnerships* (Final Report No. 77, April, 1999), makes the same point, at p. 5:

> … the owners of a limited liability firm are not generally liable for the firm's obligations. Creditors of a limited liability firm can generally look only to the assets of the firm for satisfaction of their claims against the firm.

[77] I am therefore satisfied that, in relation to Mr. Egan and WeirFoulds, the pleading discloses a cause of action. As is the case with the Auditors, the common issue concerning Mr. Egan and WeirFoulds needs to be refined to properly differentiate between the plaintiff's statutory claim and the claims in negligence. This will be discussed further when I deal with the common issues.

(b) Identifiable Class

[78] In order to certify the proceeding, the Court must be satisfied that "there is an identifiable class of two or more persons" that would be represented by the proposed plaintiff. The description of the class is important because it identifies the persons entitled to notice of the proceeding, it identifies those who will be bound by the court's decision and, when relief is granted, it sets out the persons who are entitled to the relief. The class must be defined by objective criteria, so that a potential class member can know with certainty whether he or she is entitled to participate or to opt out.

[79] The plaintiff proposes that the class be defined as follows:

> All holders of the common shares, Series I special warrants and Series II special warrants of Endeavour Resources Inc. (collectively "Endeavour Securities") that were tendered and accepted by Aspen Group Resources Corporation ("Aspen") pursuant to Aspen's take-over bid dated November 23, 2001.

[80] In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, McLachlin C.J. discussed the "identifiable class" requirement, at paras. 38 and 40, as follows:

> … First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to

> relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria …
>
> …[W]ith regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[81] The class definition must also be connected to the common issues raised by the cause of action. As McLachlin C.J. said in *Western Canadian Shopping Centres Inc. v. Dutton*, at para. 39, "an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim."

[82] The plaintiff must show that the proposed class definition is not unnecessarily broad and, where the class can be defined more narrowly, the Court should either refuse certification or allow certification conditional on the class definition being amended: *Hollick* at para. 21.

[83] The plaintiff says that the proposed class is suitable for certification because it is objectively defined without reference to the merits of the claim. Any person whose securities in Endeavour were tendered and accepted by Aspen pursuant to the take-over bid will readily know that they are a member of the class.

[84] On its face, the class definition appears simple and unremarkable. The defendants object, however, that underneath the apparently innocuous definition lurk issues affecting certain members of the class that make the definition both too narrow and too broad. These objections can be broken down into three categories:

> (i) the "compulsory acquisition group";
>
> (ii) the "outside Ontario group"; and
>
> (iii) the "early sellers".

I will discuss these groups in turn to consider whether they should be excluded from the class definition.

(i) *The compulsory acquisition group*

[85] Counsel for the Aspen Defendants, whose submissions on this issue were adopted by counsel for the other defendants, submitted that the class definition is too narrow because it excludes the approximately 6% of Endeavour shareholders who did not tender their securities in response to the offer, but whose securities were ultimately compulsorily acquired under the Alberta *Securities Act.* In response, counsel for the plaintiff says that it was the plaintiff's intention to include this group in the class.

[86] Paragraph 3 of the statement of claim, which identifies the class, indicates that there were 39,718,942 common shares, 5,000,000 Series I special warrants and 3,750,000 Series II special warrants of Endeavour that were acquired by Aspen and converted to securities of Aspen pursuant to the take-over. These numbers match the numbers of shares and warrants identified in the Circular as the total outstanding securities of Endeavour.

[87] This issue can be addressed by amending the class definition by adding the words "or otherwise acquired", so that the definition will read:

> All holders of the common shares, Series I special warrants and Series II special warrants of Endeavour Resources Inc. (collectively "Endeavour Securities") that were tendered and accepted *or otherwise acquired* by Aspen Group Resources Corporation ("Aspen") pursuant to Aspen's take-over bid dated November 23, 2001.

[88] If there is any evidence that any of the security holders who did not tender their shares exercised their right under the Alberta *Securities Act* to apply to the court to fix the fair value of their securities, counsel may make submissions on whether that group should be excluded from the class.

(ii) *The outside Ontario group*

[89] Part XX of the *Securities* Act, which deals with take-over bids, regulates bids made to security holders who are "in Ontario" (s. 89). Under the statutory regime, take-over bid circulars are only required to be provided to shareholders "in Ontario." The submission on behalf of the Aspen Defendants is that the statutory cause of action in s. 131(1) of the *Securities Act* is not available to investors who were not "in Ontario" at the time they tendered their shares. They submit that, although these investors were provided with the Circular by Aspen, they did not obtain the Circular "as required by Part XX." The Aspen Defendants submit that there is no cause of action pleaded that would permit recovery of damage for these "non-resident" shareholders, a group that would include shareholders in other provinces as well as those out of the country.

[90] The submission is that the legislature of the Province of Ontario does not have the constitutional capacity to regulate securities transactions outside its territory and cannot confer a cause of action on non-resident shareholders. While these individuals may have causes of action based on their domestic legislation, no such causes of action have been pleaded and they may be out of time.

[91] The Aspen Defendants rely on the decision of the British Columbia Court of Appeal in *Pearson v. Boliden Ltd.* (2002), 222 D.L.R. (4th) 453, [2002] B.C.J. No. 2593, app. for leave to appeal dismissed, [2003] S.C.C.A. No. 29. In that case, a motion was brought to certify a proposed class action under the British Columbia statute for alleged misrepresentation and non-disclosure in a prospectus of a Canadian mining company. Several months after the public offering closed, there was a collapse of a tailings dam at a mine in Spain operated by one of the company's subsidiaries, resulting in massive pollution of the adjoining countryside and a potential liability of $250 million. It was alleged that the prospectus failed to disclose material facts about the construction of the dam and that the company knew that the dam was a ticking time bomb. The motion judge, in granting certification, divided the plaintiff class into resident and non-resident subclasses. There was a subclass of persons who had purchased their shares in the company in British Columbia as well as sub-classes for each of Alberta, New Brunswick and Ontario and a "remaining non-resident subclass" for shareholders who had acquired their shares in other provinces or outside Canada.

[92] The defendants appealed the description of the subclasses, arguing that as a matter of constitutional law, the British Columbia *Securities Act* could not confer a cause of action for a misrepresentation that took place outside the province. They said that persons outside British Columbia, whose domestic legislation did not confer a remedy for the misrepresentations, or whose remedies were time barred under their domestic legislation, could not rely on the statutory remedy created by the British Columbia legislation.

[93] The British Columbia Court of Appeal allowed the appeal on this issue, holding that each shareholder's remedy was governed by the law of the jurisdiction in which the shares acquired by him or her had been distributed. Newbury J.A., with whom Finch, C.J.B.C. and Saunders J.A. agreed, stated at para. 64 - 65:

> … courts are limited in exercising their powers (as to choice of law issues) to the same extent as the provincial legislatures. Thus, … I do not agree that it is open to a plaintiff, or a court of law, to choose to apply the Act of one province that will provide a cause of action in misrepresentation for a plaintiff who was solicited in and purchased his or her shares pursuant to a distribution in another province. Once the Act of a province applies to regulate (by means of a prospectus requirement) the "distribution" of securities taking placing within the province's boundaries, the same Act must surely be looked to for any statutory cause of action for misrepresentation contained in the document. Its form, contents and filing are all mandated by the Act; the creation of a right to civil damages for infringing the Act must also be found in that Act.
>
> … in respect of a misrepresentation contained in a prospectus circulated in a province and deemed to be relied on by a person in purchasing securities offered thereby, a court would in making a choice of law be bound to follow the constitutional principle that it is the province in whose territory the securities are distributed which has the jurisdiction (in

> the constitutional sense) to regulate the manner in which the distribution is carried out and to attach civil consequences to non-compliance.

[94] Relying on this authority, counsel for the Aspen Defendants submits that the class members outside Ontario cannot assert a cause of action under the Ontario *Securities Act* and no other extra-provincial causes of action have been pleaded.

[95] This submission, while sound in principle, is met by the plaintiff's response that Ontario law, and the jurisdiction of Ontario Courts, have been incorporated into the contract between Aspen and the former Endeavour security holders.

[96] On the first page of the Circular, the following language appears:

> *This document is important and requires your immediate attention. If you are in any doubt as to how to deal with it, you should consult your investment dealer, stockbroker, bank manager, lawyer or other professional advisor. No securities commission or similar authority in Canada has in any way passed upon the merits of the securities offered hereunder and any representation to the contrary is an offence.*

[97] The material terms of the offer are then set out. Then comes the following:

> **NOTICE TO UNITED STATES HOLDERS OF ENDEAVOUR SECURITIES**
>
> The Offer is made for the securities of an Alberta, Canada corporation and while the Offer is subject to the disclosure requirements of Canada, Securityholders should be aware that such requirements are different from disclosure requirements in the United States. Aspen is permitted to prepare the Offer and Circular in accordance with Canadian disclosure requirements. Financial statements included herein, if any, have been prepared in accordance with United States generally accepted accounting principles with the material differences, if any, between such principles and Canadian generally accepted accounting principles disclosed in the notes to such financial statements.
>
> Securityholders should be aware that the acquisition of the Endeavour Securities described herein may have tax consequences both in the United States and Canada. Such consequences for investors who are resident in, or citizens of, the United States may not be described fully herein.
>
> The enforcement by investors of civil liabilities under the United States federal securities laws may be affected adversely by the fact that Aspen is continued under the laws of the Yukon Territory, that some of the

> directors and officers of Aspen may be residents of Canada and that some or all of the Depositary and the experts named in the Offer or Circular may be residents of Canada and that all or a substantial portion of the assets of such person may be located outside the United States.
>
> …
>
> THIS TRANSACTION HAS NOT BEEN APPROVED OR DISAPPROVED BY ANY SECURITIES REGULATORY AUTHORITY IN CANADA OR THE UNITED STATES NOR HAS ANY SECURITIES REGULATORY AUTHORITY IN CANADA OR THE UNITED STATES PASSED UPON THE FAIRNESS OR MERITS OF SUCH TRANSACTION OR UPON THE ACCURACY OR ADEQUACY OF THE INFORMATION CONTAINED IN THIS DOCUMENT, ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

[98] Later in the body of the document, the terms of the offer are set out in more detail and the following language appears:

> 14. Other Terms of the Offer
>
> The Offer and all contracts resulting from the acceptance hereof shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. Each party to any agreement resulting from the acceptance of the Offer unconditionally and irrevocably attorns to the jurisdiction of the courts of the Province of Ontario and the courts of appeal thereof.

[99] The following language, which is a regulatory requirement, appears near the end of the Circular:

> **Statutory Rights**
>
> Securities legislation in certain of the provinces and territories of Canada provides the shareholders with, in addition to any other rights they may have at law, rights of rescission or to damages, or both, if there is a misrepresentation in a circular or a notice that is required to be delivered to the shareholders. However, such rights must be exercised within prescribed time limits. Securityholders should refer to the applicable provisions of the securities legislation of their province or territory for particulars of those rights or consult with a lawyer.

[100] The Aspen Defendants submit that these provisions are an explicit recognition of the applicability of the laws of other provinces and countries to the rights of shareholders in those

jurisdictions. They submit that the clause entitled "Statutory Rights" is an express recognition that the rights of shareholders out of Ontario are to be determined by their "home" jurisdiction.

[101] Plaintiff's counsel submits that clause 14, quoted above, entitled "Other Terms of Offer," is an "attornment clause" is therefore a complete answer to the submission of the Aspen Defendants concerning shareholders outside Ontario: not only do those shareholders agree to the jurisdiction of Ontario courts, but they also agree that Ontario law is to be applicable to their rights.

[102] I accept this submission. As a matter of contract law, it is open to the offeror under a prospectus or take-over bid circular to stipulate the law applicable to its offer and to choose a jurisdiction for the resolution of disputes. There is, moreover, no reason why the offeror cannot agree to extend to every offeree the rights and remedies conferred by the securities laws of a particular province. It seems to me that this is exactly what has been done by Aspen in this case. In stating that "[T]he Offer and *all contracts* resulting from the acceptance hereof *shall be governed by and construed in accordance with the laws of the Province of Ontario* and the laws of Canada applicable therein …" [emphasis added], Aspen has incorporated the statutory code contained in part XX of the *Securities Act* into its agreement with every class member. It would be entirely inconsistent with clause 14 to say that the rights and obligations of the parties are governed by Ontario law but that the remedies of shareholders are governed solely by their local laws. There may be an argument that the clause entitled "Statutory Rights" should be interpreted so as to recognize any additional rights given to security holders under their domestic law, but that clause does not preclude those security holders from relying on Ontario law.

[103] In this case, permitting out of province shareholders to sue under the *Securities Act*, the court is not making an impermissible choice of law in conflict with constitutional principles. The parties themselves have made the choice of law and the court is entitled to respect that choice.

[104] Simply put, this Court has jurisdiction over the claims of these out-of-province shareholders because they have contractually attorned to its jurisdiction. Moreover, those out-of-province shareholders have, through a choice of law clause, agreed to the application of Ontario law to their claims. As such, there is no issue of extraterritoriality, either with regard to the Court's jurisdiction or with regard to the application of Ontario securities legislation to out-of-province shareholders.

[105] For these reasons, I do not accept the objection to the "outside Ontario group" being included in the class.

(iii) *The "early sellers"*

[106] Counsel on behalf of the Aspen Defendants submits that the class definition is too broad because it includes former shareholders of Endeavour who *sold* their newly-acquired Aspen shares between the date of the Circular and December 16, 2002, when the misrepresentations and non-disclosures became publicly known. He submits that the class should be limited to those shareholders who tendered their Endeavour shares in exchange for Aspen shares and were still

holding those Aspen shares when the misrepresentations became publicly known and who thereby suffered a loss. As he puts it in his factum:

> Clearly, a plaintiff in an action for misrepresentation under the [*Securities Act*] cannot suffer damages for misrepresentations until those misrepresentations have been disclosed. Accordingly, persons who sell their shares before the misrepresentations became publically known suffered no loss that could be attributed to the misrepresentations."

[107] Counsel submits that these "early sellers" could not have suffered a loss attributable to the misrepresentation because no one knew about the misrepresentations at the time they sold their shares. Any loss they suffered must have been due to other circumstances. He submits that even if the former shareholders of Endeavour received "overvalued" shares of Aspen as a result of the misrepresentations, that overvaluation was carried forward in the market price until the misrepresentations became publicly known. If the shares were sold prior to that time, the shareholder received the benefit of the overvaluation. Counsel for the Aspen Defendants submits that investors who sold their shares before the misrepresentation became known fall squarely within the exception contained in s. 131(9) of the *Securities Act*, which provides that a defendant is not liable for damages that it "proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon."

[108] The plaintiff submits in response that in computing the "transfer ratio" in the offer – that is, the ratio under which shares of Aspen were exchanged for shares of Endeavour – the value of Aspen's shares was set without taking into account the alleged misrepresentations and non disclosures. The plaintiff's case is that, had those misrepresentations been known at the time of the calculation of the transfer ratio, the Aspen shares would have been ascribed a lower value, and each Endeavour shareholder would have received more Aspen shares. As a result, the plaintiff says, all shareholders of Endeavour got less value, in the form of fewer shares of Aspen, than they would have received had the shares been properly valued. The plaintiff says that all former Endeavour shareholders have a claim for damages and the point in time when disclosure of the misrepresentations were made is not determinative of the loss suffered.

[109] This issue was discussed by Winkler J., as he then was, in *Carom v. Bre-Ex Minerals Ltd.* (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (Sup. Ct.). In that case, the plaintiff proposed that the class be described as "all those persons in Canada who purchased shares of Bre-X from May 1, 1993 to March 26, 1997 and suffered a net loss as a result". The latter date was the date on which it became publicly known that there was no gold in the Busang properties. Winkler J. held that this definition was over-inclusive, since it included shareholders who sold their shares before the misrepresentations became known. He stated, at para. 18:

> Central to the allegations in this action is the element of fraud. The plaintiffs concede that this fraud was publicly disclosed on March 26, 1997. The stock prices plummeted as of that date culminating in the losses sought to be recovered in this class proceeding. The plaintiffs state that anyone purchasing shares after March 26 should be excluded from

> the class because anyone purchasing shares after that date did so when they knew or ought to have known of the fraud. However, those who purchased and sold the shares prior to the disclosure of the fraud, regardless of whether or not they suffered a loss, must also be excluded from the class. Their losses do not arise from the causes of action pleaded and, thus, they cannot be included in the class. Accordingly, the class description is amended to include, "all those persons in Canada who held shares in Bre-X as of March 26, 1997 and suffered a net loss as a consequence."

[110] The decision of Winkler J. was affirmed by the Divisional Court: *Carom v. Bre-Ex Minerals Ltd.* (1999), 46 O.R. (3d) 315, 1 C.P.C. (5th) 82. The Divisional Court held that there was no error in the temporal description of the class, stating, at paras. 21 - 24:

> It is no part of the plaintiff's case that the market price before March 26 1997 would have been any different if all the defendants' representations were true. It is common ground that those who sold before then could not have relied to their detriment on any representation. No shareholder loss before then could have been caused by any misrepresentation. Any loss before then was caused by the sale, not by the fraud.
>
> Winkler J. held that the losses did not arise from the delicts alleged in the causes of action pleaded, and therefore could not be included in the class.
>
> He correctly held that a Bre-X shareholder who sold her shares before March 26 1997 was always in the same identical position whether or not there was any gold.
>
> There is therefore no error in the temporal description of the class.

[111] The issue was also raised in *Kerr v. Danier Leather Inc.* (2001), 14 C.P.C. (5th) 293, [2001] O.J. No. 4000 (Sup. Ct.). In that case, Cumming J. certified a class action involving a claim under s. 130 of the *Securities Act* for misrepresentation in an initial public offering through a prospectus. The prospectus disclosed the company's financial condition and operating results for the first three quarters of its fiscal year, to March 29, 1998. The public offering closed in May, 1998 and it was alleged that the prospectus made misrepresentations concerning the forecast of revenues and earnings for the fiscal year ended June 27, 1998 and for the fourth quarter of 1998. Sales in May and June of 1998 did not meet the forecast, allegedly due to a prolonged period of unseasonably warm weather. The plaintiff alleged that the company failed to disclose that its actual sales were substantially under the forecasted projections and that it should have known that its estimates for the entire fiscal year would be less than forecast.

[112] The proposed class comprised all those persons who purchased shares through the IPO and who held the shares on June 4, 1998, the date on which the company announced a revised forecast of projected revenues for the fourth quarter. The plaintiff's claim was that damages were suffered on the date of closing of the IPO, on the basis that the shares were overpriced on that

date due to the undisclosed information. Cumming J. noted that there were problematic aspects to the plaintiff's characterization of damages on this basis. He noted, at paras. 45 and 46:

> The normative measure for the quantification of damages in tort for a negligent misrepresentation is to compensate for the loss resulting from change of position due to the reliance by the innocent victim upon the misrepresentation. That is, the reliance interest of the victim is protected. The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in that position he or she would have been in if the misrepresentation had not been made. [References omitted] …
>
> Section 130 of the Securities Act does not prescribe a measure of damages. *In my view, the measure for damages for a misrepresentation under s. 130 is of the same nature as a misrepresentation in tort. Thus, the question must be - what did a given shareholder lose by purchasing a share for a given price in the IPO premised upon a misrepresentation*? For example, an investor who purchased shares in Danier on May 20, 1998 and who then sold just after the June 4, 1998 Revised Forecast would have incurred a loss. Arguably, the loss due to the misrepresentation would be quantified as the fall in market price due to the corrected forecast for the fourth quarter. A share is a bundle of rights constituting a chose-in-action. The shareholder purchases an intangible property in becoming a shareholder. That property arguably had a lesser value as determined by the market when the facts contained in the Revised Forecast become public knowledge in the marketplace. [emphasis added]

[113] Cumming J. also noted the difficulty in determining the effect of the misrepresentation on the share price, particularly in the case before him where it was arguable that subsequent events redressed the effect of the misrepresentation. Moreover, he noted that the calculation of the issue price in the prospectus was dependent on a number of factors and it would be extremely difficult, if not speculative, to say what the offering price would have been had the projected forecast been taken into account.

[114] He concluded that while the damages issues were complicated and problematic, the issues should not be determined at the certification stage. He stated, at para. 56:

> While the damages issues that arise are complex and problematic, in my view there are common issues that arise in respect thereof, being:
>
> > (i) what is the measure of damages in respect of a breach of s. 130 of the Securities Act when there is a misrepresentation of material fact in a prospectus;

> (ii) whether those shareholders who purchased shares under the initial public offering and held those shares as of June 4, 1998 (the date of the Revised Forecast for the fourth quarter) but then sold the shares before the actual results for the fourth quarter were released to the public on July 6, 1998, suffered damages due to the alleged misrepresentation and, if so, what is the proper measure of those damages; and
>
> (iii) whether those shareholders who purchased shares under the initial public offering and continued to hold those shares after the actual results for the fourth quarter were released to the public July 6, 1998 are entitled to damages.

[115] And at paras. 58 and 60:

> **…** while I view the question of damages for some shareholders to be problematic, it cannot be said that it is plain and obvious that there is no cause of action on the basis that there are no damages arising from the alleged misrepresentation. This is a novel cause of action in that it raises an issue of first instance in litigation: the application of s. 130 of the Securities Act to a prospectus.
>
> **….**
>
> *There is an arguable issue in respect of damages that properly cannot, and should not, be determined at this point. This is an issue for the Judge that tries the common issues.* The CPA is sufficiently flexible such that if it is ultimately determined that the damages issues must be dealt with on an individual basis this can be done: see in particular ss. 10(1), 12, 14, 15(2), 18(1), 19(1), 24, 25 and 26. [emphasis added]

[116] Parenthetically, I might mention that at para. 57 Cumming J. observed:

> Counsel for the proposed representative plaintiffs advances a theory that where there is a misrepresentation as to the value of shares the measure of damages will be the purchase price paid less the actual value of the shares at the time the shares were allotted. He argues that the claim of a class member crystallizes at the point of discovery of the misrepresentation and that any decline or increase in value thereafter should not impact upon the claim. See generally J. Peter Williamson, Securities Regulation in Canada (Toronto: University of Toronto Press, 1960) at 139-140; Spencer, Bower, Turner and Handley, Actionable Misrepresentation, 4th ed., supra at pp. 130-133; 135-137; S.M. Waddams, The Law of Damages, loose-leaf edition, (Toronto: Canada Law Book Inc., 2000) 5.520 to 5.550.

[117] At the ultimate trial of the *Danier Leather* action, the wisdom of leaving the difficult questions of damages to the common issues trial was borne out: see *Kerr v. Danier Leather Inc.* (2004), 23 C.C.L.T. (3d) 77, [2004] O.J. No. 1916 (Sup. Ct.). As Lederman J. noted in that case, there are various ways of measuring damages in cases of this nature and while the *prima facie* measure of damages may be the difference between the price paid and the post-misrepresentation price (i.e., the price after the misrepresentation becomes known), this is not the invariable measure. There are, however, cases in which the market price of the share does not represent its "value." As well, there may be different dates on which the assessment of "value" should be made, including the date on which the shares are allotted or acquired and the date on which the disclosure is discovered. In the final analysis, Lederman J. concluded that s. 130 of the *Securities Act* left a discretion to determine damages according to the context – at para. 337:

> Section 130 by its silence confers discretion to determine damages contextually. The goal is to determine the real value of the shares at the time of purchase free of the misrepresentation. In this regard, the market reaction is important because it shows what the "consensus of buying and selling opinion of the value of the securities" is free of the misrepresentation.

[118] A similar issue arose in *McCann v. CP Ships Limited et al.*, an unreported certification decision of Rady J. of this Court (Action #46098CP, June 3, 2009). In that case, the plaintiff claimed for alleged misrepresentations in the company's financial statements, which allegedly resulted in the overstatement of the company's income. It was alleged that this caused the company's securities to trade at artificially inflated prices during the period, so that people who bought shares during this period suffered a loss when the share price fell after the company restated its financial statements. The proposed class was defined as all persons who acquired the company's securities during the class period. It was argued by the defendants that the proposed class definition was over-inclusive because it included persons described as "in-and-outs" – those who had bought and sold securities during the class period, prior to the restatement of the financials, with the result that they both purchased and sold at inflated prices. It appears that the class was certified to include the "in-and-outs," although the issue was not discussed.

[119] In *Pearson v. Boliden Ltd.*, referred to earlier, the defendants, relying on the decision of Winkler J. in *Caron v. Bre-Ex Minerals Ltd.*, above, argued that shareholders who sold their shares before the failure of the tailings dam should be excluded from the class, because the could not have suffered a loss as a result of the alleged misrepresentations. The plaintiff replied, among other things, that all class members "paid too much for their shares" as a result of the undisclosed misrepresentation and that the issue of whether they had suffered damages should not be determined at the certification stage. The trial judge accepted this proposition at (2001), 94 B.C.L.R. (3d) 133, [2001] B.C.J. No. 1525, at para. 92:

> It is not clear that the decision of Winkler J in *Bre-X*, supra, disposes of this issue or whether to exclude persons who sold their shares before April 25, 1998 [the date of failure of the tailings dam] is a question which should be deferred until the trial of the common issues. I have decided

> that the subclasses should not be limited to those who did not sell their shares before about April 25, 1998. First, I believe that the Plaintiff Class has established a triable issue regarding this point. Second, I believe it is appropriate to err on the side of protecting people who have a right to access to the courts. While the Defendants will be at liberty to bring on an application prior to any Notice under the Act being forwarded to members of the Plaintiff Class, initially there will be no limitation on the subclass based on those persons in the certified subclasses who still had all or some of their shares on April 25, 1998.

[120] The British Columbia Court of Appeal reversed the motion judge on this issue and excluded the early sellers from the class, at para. 92:

> The final group of persons sought to be excluded from the action are those who purchased in the distribution but sold their shares prior to the date on which the failure of the tailings dam was reported. On this point, I agree with the defendants that s. 131(10) of the British Columbia Act and its provincial counterparts preclude such persons from recovering, since it cannot be said that any "depreciation" of their shares "resulted from" the misrepresentation. As the Ontario Divisional Court stated in Bre-X, no shareholder's loss before the event could have been caused by any misrepresentation - any loss before then was caused by the sale, not the event. The fact that the failure of the tailings dam was the "catalyst" or "triggering event" for the misrepresentation action seems to me irrelevant to the operation of s. 131(10) and its counterparts. As for the argument enunciated by the Chambers judge that the "early sellers" may have paid too much for their shares, if that is correct then they also sold their shares for "too much".

[121] The provisions of s. 131(10) of the British Columbia statute are substantially identical to those of s. 131(9) of the Ontario *Securities Act* applicable to take-over bids, which provides:

> In an action for damages pursuant to subsection (1), (2) or (3) based on a misrepresentation affecting a security offered by the offeror company in exchange for securities of the offeree company, the defendant is not liable for all or any portion of such damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation.

[122] Subsection 131(9) requires a defendant to *prove* that the depreciation claimed is not the result of the alleged misrepresentations. Given this onus, and the complex legal and factual issues that will probably be involved in the resolution of value, depreciation and date of measurement, I prefer to follow the approach taken by Cumming J. in *Danier Leather*, rather than to prejudge those issues by excluding particular members of the class at this time. As

Cumming J. noted, and as the subsequent trial before Lederman J. demonstrated, the *C.P.A.* is sufficiently flexible to address these issues in an efficient manner.

[123] Moreover, the substantive rights of class members (or potential class members) should not be determined on this purely procedural motion other than on the *Hunt v. Carey Canada* standard under the cause of action test. Viewed under the rubric of the "cause of action" certification requirement, it is not plain and obvious that the claims of security holders who sold their securities before the misrepresentations became known are doomed to failure. This, in effect, is what the Aspen Defendants ask the court to find, albeit under the heading of the "identifiable class" requirement.

[124] It does seem to me that it may be appropriate to create a subclass with respect to the "early sellers" and to require that a representative be appointed for that subclass pursuant to s. 5(2) of the *C.P.A.* I suggest that counsel discuss the issue and proceed in the first instance by written submissions. If necessary a case conference can be arranged.

[125] I am satisfied that the class definition, as amended, is clear, objectively defined, reasonable in its scope and rationally connected to the common issues set out below.

(c) Common issues

[126] Commonality is integral to a class action. As the *Report on Class Actions* of the Ontario Law Reform Commission noted, "[B]y definition, a class action is a procedural means of disposing of the similar claims of numerous persons." (Vol. II at p. 340). As the Commission also observed, "[O]ne of the most persuasive arguments in favour of class actions is that grievances presenting legal or factual issues common to many persons can be resolved more efficiently in one class proceeding than in a series of individual actions." (at pp. 331-2). The Commission recommended that the goals of judicial economy and access to justice could best be met by a relatively low threshold, simply requiring the existence of common questions of fact or law. This requirement is set out in s. 5(1)(c) which requires that "the claims or defences of the class members raise common issues …".

[127] In *Western Canadian Shopping Centres Inc. v. Dutton*, McLachlin C.J. said, at para. 40, "… with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests."

[128] Section 6 of the *C.P.A.*, which I have set out in full above, makes it very clear that the entitlement of different members of the class to different remedies is not a barrier to certification, nor is the need for individual assessments of damages after the determination of the common issues.

[129] The common issues analysis begins with an examination of the claims of the class members to determine their components and to see whether they raise common issues. In

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2009), 70 C.P.C. (6th) 27, [2009] O.J. No. 1874 the majority of the Divisional Court (Swinton J. dissenting) stated, at para. 30:

> The proper approach to the common issues requirement is to analyze whether there are any issues necessary to the resolution of each class member's claim which are substantial ingredients of that claim. The underlying question is whether allowing the suit to proceed will avoid duplication of fact finding or legal analysis: *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at paras. 18-19.

[130] It has been repeatedly stated that the commonality requirement is not a high threshold. In *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, the majority continued, at para. 31:

> The common issues requirement is a "low bar". Common issues need not determine liability. They may make up a very limited aspect of the liability. *They need only be issues of fact or law which will move the litigation forward and avoid duplication. Many individual issues, including damages, may remain to be decided after the resolution of a common issues trial*: *Hollick, supra* at paras. 16, 18, 25; *Carom v. Bre-X Minerals Ltd.*, (2000) 51 O.R. (3d) 236 (C.A.), leave to appeal denied, [2000] S.C.C.A. No. 660 at paras. 40-41; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 52, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50. [emphasis added].

[131] In this case, the same Circular, containing the same offer, on the same terms, was sent to every member of the proposed class and it was accepted by every member of the class. The predominant cause of action is statutory. Each class member would be required to establish:

(a) that he or she was a security holder of Endeavour;

(b) that the Circular contained a "misrepresentation", as defined;

(c) that the defendants are parties subject to statutory liability under s. 131; and

(d) that he or she suffered damages.

The individual class member's reliance on the alleged representations is not an issue because of the deemed reliance provisions in s. 131(1) and (2). Individual defendants may be able to avoid liability if they can establish a defence under s. 131(5), (6) or (7). They may also be able to establish that all or a portion of the damages claimed "do not represent the depreciation in value of the security as a result of the misrepresentation", pursuant to s. 131(9).

[132] In an article written in 1994 in the *Canadian Bar Review*, entitled "Class Proceedings for Prospectus Misrepresentations" (1994) 73 *Can. Bar Rev*. 492, John J. Chapman noted: "[A]lthough a class action under section 130 would give rise to a mixture of common issues and individual issues, common issues would be at the heart of the claim. It makes eminent sense to deal with such common issues in a common proceeding first" (at p. 507).

[133] The defendants' submissions with respect to common issues are largely directed to the argument that shareholders who sold their shares prior to the disclosure of the misrepresentations have no cause of action. I have already dealt with this submission.

[134] The common issues proposed by the plaintiff in this proceeding are:

> 1. Did the defendant Aspen Group Resources Corporation and/or its defendant Directors breach s.131(1) of the Ontario *Securities Act* by:
>
> (a) Making misrepresentations in the TOB [take-over bid] circular or;
>
> (b) Failing to provide a notice of change or variation in respect of the TOB [take-over bid] Circular?
>
> 2. Is the defendant Weir Foulds LLP liable for any breach of s. 131(1) of the Ontario *Securities Act* by the defendant director Wayne Egan, or otherwise?
>
> 3. Is the defendant LGT [the Auditors] liable for breach of s. 131(1) of the Ontario *Securities Act* or otherwise?
>
> 4. If any or all of the defendants are liable to the class members, are the class members entitled to rescission and/or damages?
>
> 5. If damages are awarded, can they be assessed on an aggregate basis and in what amount?

[135] For the reasons expressed above, the claim for rescission is time barred and should not be included as a common issue. Apart from that, these common issues meet the requirements for certification – they are substantial ingredients of the claim of each class member and their resolution is necessary to resolve each claim. In *Kerr v. Danier Leather Inc.*, above, Cumming J. held that the alleged misrepresentation under s. 130 of the *Securities Act* was capable of being a common issue. In *Maxwell v. MLG Ventures Ltd.*, a case under s. 131 of the *Securities* Act, Ground J. held that there were common issues because "the same offer containing the same information was made to all members of the class" (at para. 7). Ground J. held that a potential defence to individual claims, based on alleged knowledge of individual class members, was not a bar to certification and could be addressed procedurally. In *Pearson v. Boliden Ltd.*, referred to earlier, the defendants acknowledged that the minimum requirements for certification had been

met, and the only contentious issue was the definition of classes and subclasses of plaintiffs based on the location of the purchasers of securities.

[136] As I noted earlier in these reasons, the common issues pertaining to the Auditors and WeirFoulds contain some ambiguity. The use of the expression “or otherwise” in relation to their liability is ambiguous and I would suggest that those words be deleted and that appropriate language be inserted to describe the additional common law claims against those parties. If wording can be agreed upon between counsel, it can be submitted to me for approval, failing which counsel may make written submissions on the issue.

(d) Preferable Procedure

[137] I must be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues. None of the defendants made submissions to the contrary. Nor has any alternative procedure been identified, other than individual litigation of claims.

[138] In *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321, [2007] O.J. No. 1684, Rosenberg J.A., giving the judgment of the Court of Appeal, summarized the principles applicable to the “preferable procedure” analysis at paras. 69 – 70:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
>
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.
>
> As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

[139] The same approach was followed by the Court of Appeal in the subsequent case of *Cassano v. Toronto-Dominion Bank* (2007), 47 C.P.C. (6th) 209, [2007] O.J. No. 4406 (C.A.); see also *Hollick v. Toronto*, above, at 27-29; *Cloud v. Canada*, above, at 84-85.

[140] The preferability of a class action in securities litigation was foreseen by Mr. Chapman in the *Canadian Bar Review* article referred to earlier. He noted, at p. 495, the substantial costs

and difficulties involved in such litigation, which is bound to involve high stakes and is likely to be vigorously contested:

> Expensive prospectus litigation only makes sense if at least one large investor who has suffered a large loss is willing to litigate or if effective class action procedures are available so that the smaller losses of a large number of investors can be dealt with in one proceeding. The paucity of section 130 actions in the past may be attributable to the fact that large institutional investors in Canada have been relatively less litigious than their American counterparts and that until recently it was uncertain whether one could commence a class action in Ontario based upon section 130. Although the former situation may continue to exist, the latter does not. The *Class Proceedings Act 1992* will allow class proceedings in relation to section 130 claims to be made and will provide a clear procedure for the prosecution of such actions. Class procedures may breathe life into what has been a dormant section of the *Securities Act.*

[141] Later in the same article, Mr. Chapman noted the practical constraints on bringing an individual civil action under s. 130, or joining multiple plaintiffs. His conclusion to the article stated, in part, at p. 514:

> The new *Class Proceedings Act* is a bold attempt to create a set of procedures which will make it practical for numerous claims involving common issues to be prosecuted in a single action. A statutory action based on prospectus misrepresentation is an ideal candidate for a class proceeding. The vital issues in such litigation will be common to all purchasers of securities. If the claims of all purchasers can be adjudicated together large sums of money will be involved. The amounts involved will justify the costs. Class proceedings thus create the possibility of recovery for injured small investors when none for practical purposes existed under previous procedures. Real risk of civil liability for misrepresentation might, on one theory of how the securities market works, be expected to result in better compliance with the requirement of 'full, true and plain disclosure' under the *Securities Act*, to the benefit of investors as a whole.

[142] In this case, the common issues are substantially determinative of the liability of the defendants to the class. While there is potentially a defence to individual claims under s. 131(4), based on the security holder's knowledge of the misrepresentation, this has not been advanced by the defendants as a real likelihood or as a reason against certification. If the issue is raised, it may well be possible to deal with it in a procedural way, following the example of Ground J. in *Maxwell v. MLG*, above.

[143] While individual determinations may have to be made as to the entitlement to damages, and as to the quantum of damages, section 6 of the *C.P.A.* expressly provides that these are not grounds to refuse certification. In any case, I am satisfied that these matters will be capable of efficient resolution following the common issues trial.

[144] Many members of the class will be smaller shareholders for whom individual actions would be impractical. Thus, a class action in this case facilitates access to justice. A class action also promotes the efficient use of judicial resources by making binding determinations resolving the rights of numerous security holders. Finally, a class action, coupled with the statutory remedy in s. 131 of the *Securities Act,* achieves behaviour modification, by holding corporations, and their officers, directors and advisors, accountable for representations made in take-over bid circulars.

[145] I am satisfied that a class action would be a fair, efficient and manageable method of advancing the claims of the former securities holders of Endeavour.

(e) Representative plaintiff – fair representation – litigation plan – no conflict

[146] The final requirement for certification is that there be a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a suitable litigation plan and does not have a conflict of interest, on the common issues, with other class members. The capability of the proposed representative to provide fair and adequate representation is an important consideration. The standard is not perfection, but the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interest of the class …": *Western Canadian Shopping Centres Inc. v. Dutton*, at para. 41.

[147] Mr. Allen is an investment banker. He was trained as a lawyer and did some corporate legal work before entering the business world. As I have noted, he owned securities of Endeavour that were traded for securities of Aspen. He was a director of Endeavour, but resigned prior to the take-over. He commenced this action of his own initiative and he has incurred, and paid, some legal fees in order to prosecute the action. His interest in the proceeding is genuine and palpable. He obviously has knowledge of the underlying factual issues and he is capable of assisting and instructing counsel in the prosecution of the claim. He appears to have taken a role in pursuing settlement discussions. He has expressed an appropriate understanding of his responsibilities as a representative plaintiff.

[148] The defendants have suggested, with varying degrees of enthusiasm, that Mr. Allen is not an adequate plaintiff.

[149] To begin with, the defendants assert that Mr. Allen has a conflict of interest with other class members, having served on the board of Endeavour and having formally resigned in August, 2001, only two months before the pre-acquisition agreement with Aspen. The defendants note that the Endeavour board unanimously recommended that the shareholders tender their shares to Aspen and they suggest that this taints Mr. Allen's independence and puts him in potential conflict with the class.

[150] Mr. Allen's evidence, which is not challenged, is that he actually resigned in March of 2001 and that his written resignation was a formality. He swears that he had no involvement in either the negotiations with Aspen or the take-over bid. This too is unchallenged. In sum, the allegation of conflict of interest is not supported by any evidence.

[151] The defendants' second criticism, made slightly more heatedly in the factum of counsel for the Aspen Defendants, is that Mr. Allen has not prosecuted the claim on behalf of the class in an expeditious manner. There is some merit to this criticism.

[152] Counsel for the plaintiff acknowledges that the action has not been prosecuted with dispatch. He attributes the delay primarily to Mr. Allen's lack of success in engaging counsel with expertise in class actions, until he retained the Harrison Pensa firm in 2007.

[153] It is not surprising that the proceeding languished without an appropriate arrangement with experienced counsel. Without experienced counsel, with the resources necessary to undertake the action, a class proceeding may well wither on the vine. This is why the experience and capability of proposed class counsel is an important factor in the court's assessment of the representative plaintiff. I am satisfied that a suitable arrangement with counsel is now in place and that, assisted by counsel experienced in class action and securities litigation, steps will be taken to ensure that the action proceeds with appropriate dispatch.

[154] The most forceful complaint was made by counsel on behalf of WeirFoulds, to the effect that Mr. Allen lacks the capacity to pay a costs award. He submits in his factum that "… this Plaintiff Allen is but a straw man, by his own admission, and without the substantial assets it would take to defray the defendants' cost collectively should he lose." Mr. O'Connor submits that the court should refuse to certify the action unless Mr. Allen is replaced by or joined with another plaintiff who has financial substance. He suggests that there are some substantial shareholders of Aspen in Alberta who, assuming they are within the class, would have the ability to pay a costs award.

[155] In the paragraph I have referred to above in *Western Canadian Shopping Centres Inc. v. Dutton*, Chief Justice McLachlin suggested that the capacity of the proposed representative to bear costs would be a relevant consideration on this inquiry – she stated, at para. 41:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).

[156] This observation was discussed by Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board* (2004), 4 C.P.C. (6th) 115, [2004] O.J. No. 4338 (Sup. Ct.), who held that, at the certification stage, a proposed plaintiff is not required to show that he or she has the ability to satisfy a costs award. He stated, at paras. 90 - 94:

> The statements in *Dutton* and [of Nordheimer J. in *Pearson v. Inco*] are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1)(e) of the CPA.
>
> …
>
> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class -- or the specific terms of section 5(1)(e) -- should be considered to require them to demonstrate this.

[157] These observations were endorsed by Rosenberg J.A., giving the judgment of the Court of Appeal in *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, [2005] O.J. No. 4918 at para. 95. He continued, at para. 96:

> If there are large costs orders outstanding when the certification motion is heard they can be taken into account by the motion judge. However, in this case the outstanding orders had been paid. I agree with Cullity J. that there is no requirement under our legislation for the plaintiffs to demonstrate that they have concrete and specific funding arrangements.

[158] I respectfully agree that a proposed representative plaintiff need not establish an ability to satisfy a potential and entirely hypothetical costs award as a condition of certification.

[159] The final requirement under this heading, set out in section 5(1)(e)(ii) of the *CPA*, is that the representative plaintiff produce “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”. The litigation plan serves at least three purposes. First, it ties into the “preferability” requirement by requiring the plaintiff to establish that a class proceeding not only theoretically possible but also practically “workable.” Second, it enables the court to assess whether the plaintiff and class counsel have indeed thought through the mechanics of proceeding with the litigation. Finally, it enables the judge who will be case managing the proceeding, if certified, to have an initial roadmap for the management of the proceeding, recognizing that the plan will likely be amended with input from the parties and the case management judge as the case progresses.

[160] In *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (Sup. Ct.), rev'd on other grounds (2009) 70 C.P.C. (6th) 27, [2009] O.J. No. 1874 (Div. Ct.), Perell J. summarized at paras 142 and 143 some of the requirements, neither mandatory nor exhaustive, of a proper litigation plan, referring to *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242, 19 C.C.L.I. (4th) 35 (Sup. Ct.), at para. 53; and *Poulin v. Ford Motor Co. of Canada*, [2006] O.J. No. 4625, 35 C.P.C. (6th) 264 (Sup.Ct.), at para. 100.

[161] It seems common to append a boilerplate litigation plan to the affidavit of the putative class representative or of class counsel. This practice is not helpful. It is important that the litigation plan be tailored to the particular circumstances and issues of the individual case. The failure to set out a bespoke litigation plan may lead the court to conclude that neither counsel nor the plaintiff have really thought out the "preferability" and "workability" of a class proceeding.

[162] Mr. Allen has attached a litigation plan to his affidavit. While it is general in nature, I am satisfied that it provides a reasonable initial roadmap for the litigation. It will be subject to ongoing review and refinement in the case management process. The litigation plan will be reviewed at an initial case conference following the release of these reasons and, with the input of counsel, a timetable will be established for the conduct of further proceedings. I would suggest that counsel attempt to agree upon a timetable for approval by the court.

IV. Conclusion

[163] I am satisfied that the plaintiff has established each of the requirements of s. 5 of the *C.P.A.* and the action will therefore be certified as a class proceeding, subject to any necessary amendments to conform with these reasons. The proposed notice and other procedural matters will be discussed at a case conference, to be arranged by counsel within the next 30 days. If the parties are unable to agree on the costs of the motion, they are to agree on a schedule for written submissions, which should be addressed to me, care of Judges' Administration, within 60 days.

_____

G.R. Strathy J.

December 4, 2009

Appendix A: Section 131 of the *Securities Act,* R.S.O. 1990, c. S.5, as amended and in effect in November, 2001

131. (1) **Liability for misrepresentation in circular** – Where a take-over bid circular sent to the security holders of an offeree issuer as required by Part XX or any notice of change or variation in respect thereof contains a misrepresentation, every such security holder shall be deemed to have relied on the misrepresentation and may elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,

(a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;

(b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and

(c) each person who signed a certificate in the circular or notice, as the case may be, other than the person included in clause (a)

(2) **Idem** – Where a directors' circular or a director's or officer's circular delivered to the security holders of an offeree issuer as required by Part XX or any notice of change or variation in respect thereof contains a misrepresentation, every such security holder shall be deemed to have relied on the misrepresentation and has a right of action for damages against every director or officer who signed the circular or notice that contained the misrepresentation.

(3) **Idem** – Subsection (1) applies with necessary modifications where an issuer bid circular or any notice of change or variation in respect thereof contains a misrepresentation.

(4) **Defence** – No person or company is liable under subsection (1), (2), or (3) if the person or company proves that the security holder had knowledge of the misrepresentation.

(5) **Idem** – No person or company, other than the offeror, is liable under subsection (1), (2), or (3) if he, she or it proves;

(a) that the take-over bid circular, issuer bid circular, directors' circular or director's or officer's circular, as the case may be, was sent without his, her or its knowledge or consent and that, on becoming

aware of it, he, she or it forthwith gave reasonable general notice that it was so sent;

(b) that, after the sending of the take-over bid circular, issuer bid circular, directors' circular or director's or officer's circular, as the case may be, on becoming aware of any misrepresentation in the take-over bid circular, issuer bid circular, directors' circular or director's officer's circular, he, he or it withdrew the consent thereto and gave reasonable general notice of the withdrawal and the reason therefore;

(c) that, with respect to any part of the circular purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, he, she or it had no reasonable grounds to believe and did not believe that there had been a misrepresentation or that such part of the circular did not fairly represent the report, opinion or statement of the expert or was not a fair copy of or extract from the report, opinion or statement of the expert;

(d) that, with respect to any part of the circular purporting to be made on this, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert, but that contains a misrepresentation attributable to failure to represent fairly his, her or its report, opinion or statement as an expert,

(i) that person or company had, after reasonable investigation, reasonable grounds to believe and did believe that such part of the circular fairly represented his, her or its report, opinion or statement as an expert, or

(ii) on becoming aware that such part of the circular did not fairly represent his, her or its report, opinion or statement as an expert, he, she or it forthwith advised the Commission and gave reasonable general notice that such use had been made and that he, she or it would not be responsible for that part of the circular; or

(e) that, with respect to a false statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document and he, she or it had reasonable grounds to believe and did believe that the statement was true.

(6) **Idem** – No person or company, other then the offeror, is liable under subsection (1), (2) or (3) with respect to any part of the circular purporting to be made on his, her or its own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation.

(7) **Idem** – A person or company, other then the offeror, is liable under subsection (1), (2) or (3) with respect to any part of the circular not purporting to be made on the authority of an expert and not purporting to be a copy of or an extract from a report, opinion or statement of an expert unless he, she or it,

(a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or

(b) believed there had been a misrepresentation.

(8) **Joint and several liability** – All or any one or more of the persons or companies specified in subsection (1), (2) or (3) are jointly and severally liable, and every person or company who become liable or make any payment under this section may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment provided that the court may deny the right to recover such contribution where, in all the circumstances of the case, it is satisfied that to permit recovery of such contribution would not be just and equitable.

(9) **Limitation of damages** – In an action for damages pursuant to subsection (1), (2) or (3) based on a misrepresentation affecting a security offered by the offeror company in exchange for securities of the offeree company, the defendant is not liable for all or any portion of such damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation.

(10) **Deemed take-over bid circular or issuer bid circular** – Where the offeror,

(a) in a take-over bid exempted from the provisions of Part XX by clause 93(1)(a); or
(b) in an issuer bid exempted from the provisions of Part XX by clause 93(3)(a),

is required, by the by-laws, regulations or policies of the stock exchange through the facilities of which the take-over bid or issuer dib is made, to file with it or to deliver to security the purposes of his section, to be a take-over bid circular or issuer bid circular, as the case may be, delivered to the security holders as required by Part XX.

(11) No derogation of rights – The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the security holder of the offeree issuer may have at law.

COURT FILE NO.: 02-CV-241587CP
DATE: 20091204

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

R. CHARLES ALLEN,

Plaintiff

and

ASPEN GROUP RESOURCES CORPORATION, JACK E. WHEELER, JAMES E. HOGUE, WAYNE T. EGAN, ANNE HOLLAND, RANDALL B. KAHN, LENARD BRISCOE, PETER LUCAS, LANE GORMAN TRUBITT L.L.P. and WEIRFOULDS LLP

Defendants

REASONS FOR DECISION
ON CERTIFICATION

Strathy, J.

Released: December 4, 2009