The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund et al. v. SNC-Lavalin Group Inc. et al.

[Indexed as: Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.]

112 O.R. (3d) 569

2012 ONSC 5288

Ontario Superior Court of Justice,
Perell J.
September 19, 2012

Civil procedure -- Class proceedings -- Certification -- Plaintiffs moving to certify proposed class action under Part XXIII.1 of Securities Act -- Motion granted -- Plaintiffs properly pleading cause of action under Part XXIII.1 of Act and other certification criteria satisfied -- Securities Act, R.S.O. 1990, c. S.5.

Civil procedure -- Class proceedings -- Discontinuance -- Plaintiffs in proposed class action initially advancing common law claims for negligent misrepresentation and oppression remedy along with claim under Part XXIII.1 of Securities Act -- Plaintiffs moving for approval of [page570] discontinuance of common law claims -- Motion granted -- Class members not disadvantaged by discontinuance.

The plaintiffs in a proposed class action advanced a common law negligent misrepresentation claim, an oppression remedy

claim and a claim under Part XXIII.1 of the Ontario Securities Act for breach of the continuous disclosure provisions of the Act. They brought a motion for (1) leave under Part XXIII.1 of the Act; (2) approval of the discontinuance of the common law negligence and oppression claims; and (3) certification of the action as a class proceeding.

Held, the motion should be granted.

The plaintiffs had satisfied the test for leave under Part XXIII.1. They were bringing the action in the honest belief that they had an arguable claim and for reasons that were consistent with the purpose of the statutory cause of action.

From the perspective of establishing liability, there was no particular prejudice to the plaintiffs in abandoning the oppression remedy and the common law negligence claim. Those claims presented more difficulties or disadvantages than did the statutory claims under Part XXIII.1 of the Act. The main disadvantage of the statutory claim was that the damages might be limited or capped below what might be available under the common law. In the circumstances, however, it was unclear if the class members would be giving up much in the way of recoverable damages by forgoing their common law claims.

The plaintiffs had properly pleaded a cause of action under Part XXIII.1 of the Act, and the common issues, preferable procedure and representative criteria were satisfied.

Cases referred to

Coleman v. Bayer Inc., [2004] O.J. No. 1974, [2004] O.T.C. 403, 47 C.P.C. (5th) 346, 131 A.C.W.S. (3d) 413 (S.C.J.); Coleman v. Bayer Inc., [2004] O.J. No. 2775, [2004] O.T.C. 403, 47 C.P.C. (5th) 148, 132 A.C.W.S. (3d) 223 (S.C.J.); Dobbie v. Arctic Glacier Income Fund, [2011] O.J. No. 932, 2011 ONSC 25, 3 C.P.C. (7th) 261 (S.C.J.); Durling v. Sunrise Propane Energy Group Inc., [2009] O.J. No. 5969, 98 C.P.C. (6th) 48 (S.C.J.); Green v. Canadian Imperial Bank of Commerce, [2012] O.J. No. 3072, 2012 ONSC 3637 (S.C.J.); Logan v. Canada (Minister of Health) (2004), 71 O.R. (3d) 451, [2004] O.J. No. 2769, 188 O.A.C. 294, 47 C.P.C. (5th) 1, 132 A.C.W.S. (3d) 13 (C.A.), affg [2003] O.J. No. 418, 36 C.P.C.

(5th) 176 (S.C.J.); Pysznyj v. Orsu Metals Corp., [2010] O.J. No. 1994, 2010 ONSC 1151 (S.C.J.); Silver v. Imax Corp., [2009] O.J. No. 5573, 66 B.L.R. (4th) 222 (S.C.J.); Silver v. Imax Corp., [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.); Sollen v. Pfizer Canada Inc., [2008] O.J. No. 4787, 2008 ONCA 803, 63 C.P.C. (6th) 1, 305 D.L.R. (4th) 184, 171 A.C.W.S. (3d) 792, affg [2008] O.J. No. 866, 290 D.L.R. (4th) 603, 164 A.C.W.S. (3d) 748, 55 C.P.C. (6th) 340 (S.C.J.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44 [as am.]

Class Proceedings Act, 1992, S.O. 1992, c. 6 [as am.], ss. 5(1), 29

Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 [as am.]

Securities Act, R.S.O. 1990, c. S.5, Part XXIII.1 [as am.], s. 138.7

MOTION for leave under Part XXIII.1 of Securities Act for approval of the discontinuance of common law claims, and for the certification of the action as a class proceeding.

[page571]

Joel Rochon, Peter Jervis and John Archibald, for Brent Gray.

A. Dimitri Lascaris and Charles M. Wright, for the trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund.

James Hodgson and Steve Tenai, for SNC-Lavalin Group Inc., Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, Lawrence N. Stevenson and Pierre Duhaime.

Steven Sofer, for Pierre Duhaime.

Patricia D.S. Jackson and Andrew Finkelstein, for Michael Novak.

Clifford C. Lax and Paul Fruitman, for Gilles Larame.

PERELL J.: --

A. Introduction

[1] This is a proposed class action under the Class Proceedings Act, 1992, S.O. 1992, c. 6 for damages for alleged misrepresentations that affected the market value of the shares of SNC-Lavalin Group Inc. ("SNC"), which shares were traded on the Toronto Stock Exchange, among other exchanges. The plaintiffs are Brent Gray and the trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (the "trustees"). The plaintiffs advance a common law negligent misrepresentation claim, an oppression remedy claim and, most importantly, a claim under Part XXIII.1 of the Ontario Securities Act, R.S.O. 1990, c. S.5 (the "OSA") (and the analogous provisions of the securities legislation of the other Canadian provinces and territories) for breach of the continuous disclosure provisions of the Act.

[2] The defendants are SNC, Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, Lawrence N. Stevenson, Gilles Larame, Michael Novak, Pierre Duhaime, Riadh Ben Assa and Stphane Roy.

[3] The motion now before the court is an unopposed motion for (1) leave under Part XXIII.1 of the Ontario Securities Act; (2) approval of the discontinuance of the plaintiffs' common law negligence and oppression claims; and (3) certification of the action as a class proceeding.

[4] In order for leave to be granted under Part XXIII.1, the plaintiffs must demonstrate that the action is brought in good faith and that there is a reasonable possibility that the action [page572] will be resolved at trial in their favour: Silver v. Imax Corp., [2009] O.J. No. 5573, 66 B.L.R. (4th) 222 (S.C.J.); Dobbie v. Arctic Glacier Income Fund, [2011] O.J.

No. 932, 2011 ONSC 25 (S.C.J.); Green v. Canadian Imperial Bank of Commerce, [2012] O.J. No. 3072, 2012 ONSC 3637 (S.C.J.).

[5] In order for the court to approve the discontinuance of the plaintiffs' common law negligence and oppression claims, the plaintiffs must demonstrate that the interests of the class will not be prejudiced: Durling v. Sunrise Propane Energy Group Inc., [2009] O.J. No. 5969, 98 C.P.C. (6th) 48 (S.C.J.), at paras. 14-29; Sollen v. Pfizer Canada Inc., [2008] O.J. No. 4787, 2008 ONCA 803, affg [2008] O.J. No. 866, 290 D.L.R. (4th) 603 (S.C.J.); Coleman v. Bayer Inc., [2004] O.J. No. 1974, [2004] O.T.C. 403 (S.C.J.), at paras. 30-39; Coleman v. Bayer Inc., [2004] O.J. No. 2775, [2004] O.T.C. 403 (S.C.J.); Logan v. Canada (Minister of Health), [2003] O.J. No. 418, 36 C.P.C. (5th) 176 (S.C.J.), affd (2004), 71 O.R. (3d) 451, [2004] O.J. No. 2769 (C.A.).

[6] In order for the court to certify the action as a class proceeding, the plaintiffs must satisfy the criterion for certification set out in s. 5(1) of the Class Proceedings Act, 1992.

B. Factual Background

[7] The following findings of fact are made only for the purposes of the motions before the court and not meant to raise issue estoppels. The genuine merits of the plaintiffs' claims and the respective defendants' defences remain to be determined.

[8] Brent Gray is a resident of British Columbia. He purchased 600 shares of SNC between November 6, 2009 and February 27, 2012. Mr. Gray purchased those shares through 0793094 B.C. Ltd., a British Columbia corporation he owns with his wife. It is proposed that Mr. Gray will be removed and replaced by 0793094 B.C. Ltd. as a representative plaintiff.

[9] The Drywall Acoustic Lathing and Insulation Local 675 Pension Fund is a multi-employer pension plan with 4,236 active members, 7,781 inactive members, 1,132 pensioners and 42 deferred members. The trustees purchased 17,350 shares of SNC between November 6, 2009 and February 27, 2012 on the Toronto

Stock Exchange and continued to hold some of those shares on February 27, 2012.

[10] SNC is a Canadian-based engineering and construction company with global operations. It is organized and continued under the Canada Business Corporations Act, R.S.C. 1985, c. C-44. SNC is a "reporting issuer" in Ontario and in all other provinces of Canada. Its shares trade on the Toronto Stock [page573] Exchange among other exchanges. SNC is a reporting issuer in Ontario, and it is required to make disclosure in accordance with the continuous disclosure obligations of the Ontario Securities Act.

[11] Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal and Lawrence N. Stevenson were directors of SNC between November 6, 2009 and February 27, 2012.

[12] Gilles Larame is, and was between November 6, 2009 and February 27, 2012, an executive vice-president and the chief financial officer of SNC.

[13] Michael Novak is, and was between November 6, 2009 and February 27, 2012, an executive vice-president of SNC and the chairman of SNC-Lavalin International Inc., a wholly owned subsidiary of SNC.

[14] Pierre Duhaime was between November 6, 2009 and February 27, 2012 the chief executive officer and a director of SNC. He resigned from those positions effective March 26, 2012.

[15] Mr. Ben Assa was between November 6, 2009 and February 27, 2012 and until February 9, 2012, an executive vice-president of SNC. During that time, he was a member of SNC's "Office of the President", which SNC described as its "senior decision-making management group".

[16] Stphane Roy was between November 6, 2009 and February 27, 2012 and until February 9, 2012, a vice-president controller of SNC. He resigned from SNC on February 9, 2012.

[17] On February 9, 2012, SNC announced that Mr. Ben Assa and Mr. Roy were no longer employees of SNC.

[18] On February 28, 2012, SNC announced that its audit committee was investigating $35 million of payments made on certain construction projects.

[19] One month later, the audit committee reported that between November 6, 2009 and February 27, 2012, SNC had paid "agents" US$56 million. The payments violated SNC's internal policies, including its Policy on Commercial Agents/ Representatives and Code of Ethics and Business Conduct. The audit committee concluded that there had been numerous breaches of the agents policy, which sets out the rules governing the hiring and remuneration of commercial agents or representatives by SNC, and the code, which is designed to ensure that SNC's business is conducted in an ethical and lawful manner. The report of the SNC audit committee indicated that Messrs. Larame, Duhaime, Ben Assa and Roy had direct knowledge of, or involvement in the matters investigated. [page574]

[20] The interim CEO and the CFO concluded that the company's disclosure controls and procedures, as at December 31, 2011, were not effective to provide reasonable assurance that the CEO and CFO were advised about material information, particularly during the preparation of company's filings under securities legislation. The interim CEO and CFO also concluded that the controls over compliance with the code of ethics and the agents policy were ineffective. And they concluded that the company's internal control over financial reporting, as at December 31, 2011, was not effective to provide reasonable assurance regarding the reliability of the company's financial reporting and the preparation of its financial statements for external purposes in accordance with applicable accounting principles.

[21] As a result of the improper payments that were uncovered in the course of the audit committee investigation, SNC recognized a net loss of $35 million in the fourth quarter of 2011 related to payments made in that quarter, and SNC's 2010 results were adjusted by reducing net income by $17.9 million

to reflect the impact of payments of $20 million made in 2010.

[22] On March 1, 2012, a proposed class action was commenced in the Quebec Superior Court against all of the defendants except Novak.

[23] On May 9, 2012, Mr. Gray commenced a proposed class action in Toronto. The same day, the trustees commenced a proposed class action in Brampton. The plaintiffs agreed to co-operate and bring a single action. Their proposed class in the Ontario proceeding carves out the proposed class of the Quebec action.

[24] In their proposed class action, the plaintiffs allege that disclosure documents issued by SNC between November 6, 2009 and February 27, 2012 contained misrepresentations relating to, among other things, (a) the adequacy of SNC's internal controls; (b) the compliance of certain of SNC's financial statements with generally accepted accounting principles; and (c) the compliance of members of SNC's management with the code. The plaintiffs allege that, during the class period, SNC released annual and interim financial statements and accompanying MD&A, AIFs and management information circulars (all of which are "core documents" under Part XXIII.1 of the Ontario Securities Act) that contained misrepresentations.

[25] In particular, it is alleged that (a) SNC's representation that it had ICFR and DC&P that were properly designed and/or operating effectively was materially false and/or misleading; (b) SNC's representation that its business was conducted in compliance with the code was materially false and/or misleading; [page575] (c) SNC's representation that its "controls, policies and practices are designed to ensure internal and external compliance with" anti-bribery laws was materially false and/or misleading; (d) SNC's representation that it was a "responsible global citizen" and a "socially responsible company" was materially false and/or misleading; and (e) SNC's 2010 annual and interim financial statements and 2011 interim financial statements were materially false and/or misleading in that they did not comply with GAAP and were

materially misstated due to the failure to disclose SNC's illegal acts.

[26] The plaintiffs allege that these practices and activities were systemic at SNC and were carried out with the full knowledge of senior management, including members of the office of the president, as well as SNC's inside directors.

[27] With respect to Messrs. Larame and Duhaime, the plaintiffs allege that certifications given during the class period by them of SNC's annual and quarterly MD&As and financial statements and AIFs, including that such documents did not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, themselves contained misrepresentations.

[28] The plaintiffs allege that the truth was revealed on February 28, 2012, when SNC announced the audit committee investigation into the improper contracts, which resulted in the market price of SNC's shares collapsing from $48.37 to $37.40 on the TSX (or approximately 23 per cent) during trading on February 28 and 29, 2012.

[29] The plaintiffs allege that there was a further decline in the market value of SNC's securities during trading on June 25, 2012 as a result of the release of further corrective information that two former employees of SNC had been charged with criminal offences under the Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 relating to activities in Bangladesh. As a result, the market price of SNC's on the TSX fell from $38.56 to $37.48 during trading on June 25, 2012.

[30] The plaintiffs seek damages of $1 billion on behalf of the class. On the issue of damages, Professor Douglas Cumming estimates that the aggregate damages of the class are in the range of $700 million to $1.1 billion as a result of the misrepresentations.

[31] In June 2012, the plaintiffs served a motion for leave

and for certification.

[32] The defendants Ben Assa and Roy have ignored the proceeding to date. On June 25, 2012, I granted an order for [page576] substituted service on them of the pleadings and any motion materials through lawyers retained by them in respect of criminal and employment matters. The pleadings and all materials in respect of this motion for leave and certification have been served on them in accordance with this court's substituted service order. The motion is proceeding against them as an unopposed motion for leave and certification.

[33] As a result of arm's length, adversarial negotiations between counsel for the plaintiffs and all of the defendants, except Mr. Ben Assa and Mr. Roy, an agreement was reached to resolve the leave motion on terms that (1) the defendants will not oppose leave being granted under Part XXIII.1 of the Ontario Securities Act; (2) the plaintiffs will discontinue, with prejudice, the common law and oppression claims; and (3) [the] defendants will not oppose certification of the action as a class proceeding. The same agreement was reached with respect to the Quebec action.

[34] As part of the agreement as to the resolution of the leave and certification motions, the defendants, except Mr. Ben Assa and Mr. Roy, have agreed to pay the costs associated with disseminating the notice of certification and receiving any opt-outs from class members, which are estimated to be approximately $150,000.

[35] The defendants, except Mr. Ben Assa and Mr. Roy, have also agreed to pay to the plaintiffs the sum of $98,348.89 by way of reimbursement for the fees paid to Ken Froese and Professor Douglas Cumming, who swore affidavits in support of the plaintiffs' leave and certification motions.

[36] In support of their motion for leave and for certification, the plaintiffs rely in part upon the published findings and conclusions of SNC's audit committee, as described above. The plaintiffs have also filed the opinions of Mr.

Froese, an accounting expert, and Professor Douglas Cumming, a financial economist, who offered an opinion as to market efficiency, inflation and class damages.

[37] In their affidavit evidence, the plaintiffs stated that they commenced this action to recover compensation in relation to their purchases of SNC shares during the class period, as well as to ensure that the defendants are held accountable for their behaviour and to deter similar conduct by others. They also stated in their evidence that they have no ulterior motive, nor any improper or collateral purpose in commencing this action.

[38] The evidence of Mr. Froese is that (a) SNC's alleged illegal acts were material to SNC's financial statements for the year [page577] ended December 31, 2010 such that SNC's financial statements for the year ended December 31, 2010 did not comply with GAAP and were materially misstated; (b) SNC's quarterly financial statements for the applicable quarters in 2010 did not comply with GAAP and were materially misstated due to the failure to disclose the alleged illegal acts; (c) SNC's alleged illegal acts were material to SNC's financial statements in each of the first three quarters in 2011 such that SNC's financial statements for the quarters ended March 31, June 30 and September 30, 2011 did not comply with GAAP and were materially misstated due to the failure to disclose the alleged illegal acts; (d) it is reasonable to conclude that the material weaknesses in ICFR disclosed by SNC in March 2012 were present throughout the period from November 2009 to February 27, 2012; (e) it is reasonable to conclude that weaknesses in SNC's DC&P present in fiscal 2011 were present throughout the period from November 2009 to February 27, 2012; (f) Mr. Larame had professional responsibilities as a chartered accountant that included advising SNC's external auditors and/or audit committee or board of directors of the presumed agency transactions when he became aware of them and prior to issuing quarterly and annual financial statements in 2010 and 2011 containing the presumed agency transactions; and (g) it is likely that Messrs. Ben Assa, Novak and Roy played a role in the certifications related to the compilation of SNC's financial statements, MD&As and/or AIFs issued during the class

period.

[39] If leave and certification are granted, it is proposed that a single notice, approved by both this court and the Quebec Superior Court, will be issued to notify class members of the granting of leave and certification in the Ontario proceeding, and the granting of leave and authorization in the Quebec proceeding, among other matters.

C. Discussion

Leave under Part XXIII.1 of the Ontario Securities Act

[40] With respect to the test for leave to assert an action under Part XXIII.1 of the Ontario Securities Act, in order to demonstrate good faith, the plaintiffs must "establish that they are bringing their action in the honest belief that they have an arguable claim, and for reasons that are consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose". Based on the above evidence, I am satisfied that the plaintiffs bring their action in good faith. [page578]

[41] With respect to the test for leave, the questions with respect to the impugned documents are (a) whether there is "something more than a de minimis possibility or chance" that the plaintiffs will show, at trial, that SNC "release[d] a document that contains a misrepresentation"; (b) that the directors, Bourne, Goldman, Hammick, Lessard, Marcoux, Marsden, Mongeau, Morgan, Parker, Segal, Stevenson and Duhaime, were directors when such documents were released; and (c) that the officers, Larame, Novak, Ben Assa and Roy, "authorized, permitted or acquiesced in the release of the document".

[42] The defendants have tendered no evidence that could establish the due diligence defence under Part XXIII.1, which requires a defendant to "prove" that they "conducted or caused to be conducted a reasonable investigation" and that they "had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation".

[43] Based on the above facts, I am satisfied that the

plaintiffs have satisfied the test for leave under Part XXIII.1 of the Ontario Securities Act.

D. Discontinuance

[44] As noted above, the plaintiffs propose to discontinue their claims for an oppression remedy and for damages for common law negligence.

[45] Under s. 29 of the Class Proceedings Act, 1992, a plaintiff may not discontinue a claim in a proposed class action without leave of the court. The main question for the court in granting or refusing leave is whether the class members would be prejudiced by the discontinuance.

[46] Plaintiffs' counsel consider that it is in the best interests of the putative class members to agree to unopposed leave and certification of the Part XXIII.1 for the following reasons: (a) the certainty of leave and certification; (b) the expediting of the litigation, which enhances the plaintiffs' ability to litigate the case while the relevant evidence is relatively fresh, and which will hasten the recovery of compensation by the class members; (c) concerns about the ability of SNC to pay damages in the amount specified by Professor Cumming, especially if SNC's financial situation worsens as a result of issues related or unrelated to this litigation; (d) the potential issues with the recovery of damages in respect of the oppression and common law claims; and (e) certainty in resolving any limitations issues.

[47] Plaintiffs' counsel have considered whether the proposed agreement for an unopposed granting of leave and certification [page579] of the statutory claim is in the best interests of class members, notwithstanding that this could potentially limit class members' recovery. They submit that the agreed framework for the resolution of leave and certification is in the best interests of the proposed class. Class counsel recommend the agreed framework for approval. The plaintiffs believe that the agreement is in the interests of all putative class members.

[48] In my opinion, from the perspective of establishing

liability, there is no particular prejudice to the plaintiffs in abandoning the oppression remedy and the common law negligence claim. Practically speaking, the common law negligence claim and the oppression remedy claims present disadvantages or more difficulties to the plaintiffs than do the statutory claims under Part XXIII.1 of the Ontario Securities Act. For example, reliance is an element of the common law negligence claim and this element may make it more difficult to have the claim certified as a class action. Reliance is not an element of the statutory claim.

[49] The main disadvantage of the claim under Part XXIII.1 of the Ontario Securities Act is that the damages may be limited or capped below what might be available under the common law. Section 138.7 of the OSA states:

> 138.7(1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,
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> (a) the aggregate damages assessed against the person or company in the action; and
>
> (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.
>
> (2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

Thus, the Part XXIII.1 liability limit always applies to the

issuer, even in cases of fraud, whereas the liability limit of the issuer's directors and officers does not apply if they knew that the impugned disclosure document contained a misrepresentation. [page580]

[50] It is unclear, however, if the class members would be giving up much in the way of recoverable damages by forgoing their common law claims. Although the aggregate damages estimated by Professor Cumming might exceed liability limits, there is uncertainty as to whether damages in that higher amount could be proven if the plaintiffs asserted common law and oppression claims. Put simply, the calculation of damages caused by misrepresentations that influence the value of shares trading in a public market is highly contentious. Moreover, for the common law claims, if class members are required to show individual reliance, aggregate damages would be reduced to the extent that class members failed to proffer sufficient evidence of their detrimental reliance.

[51] With respect to the oppression claim, the jurisprudence is undeveloped and there is uncertainty as to whether or not the court would certify an oppression claim in these circumstances. With respect to the common law negligent misrepresentation claim, the jurisprudence is divided on whether this claim is amenable to certification. Given the state of the relevant jurisprudence, there is little question that any decision certifying these claims would be appealed.

[52] In the case at bar, the plaintiffs submit that the class members would not be prejudiced by the abandonment of the uncapped common law and oppression remedy claims and it is in the class member's best interest to pursue the statutory claim in circumstances where the defendants have agreed not to oppose leave and not to oppose certification of the action under the Class Proceedings Act, 1992.

[53] Speaking metaphorically, I agree that in the circumstances of this case, a cause of action in the hand is worth far more than two appealable causes of action in the bush. Accordingly, I grant leave to discontinue.

E. Certification

[54] Pursuant to s. 5(1) of the Class Proceedings Act, 1992, the court shall certify a proceeding as a class proceeding if (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[55] The only claim asserted by the plaintiffs is a statutory claim under Part XXIII.1 of the Ontario Securities Act and, if necessary, the equivalent provisions of the securities legislation [page581] of the other Canadian provinces and territories. The plaintiffs have properly pleaded a cause of action under those statutory provisions.

[56] There is an identifiable class, all of whose members have an interest in the resolution of the proposed common issues. The proposed class is defined as

> all persons, wherever they may reside or be domiciled, who acquired securities of SNC during the Class Period, except for: (1) the Excluded Persons; and (2) those persons resident or domiciled in the Province of Qubec at the time they acquired SNC securities during the Class Period, and who are not precluded from participating in a class action by virtue of Article 999 of the Qubec Code of Civil Procedure, RSQ, c C-25.

[57] Other than the exclusion of Quebec residents, the proposed class has no territorial limitation. The plaintiffs seek to certify a "global class". Global classes that include all persons no matter where they live that otherwise meet the class definition have been certified in similar situations. See Silver v. Imax Corp., [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.), at paras. 129 and 164; Pysznyj v. Orsu Metals Corp., [2010] O.J. No. 1994, 2010 ONSC 1151 (S.C.J.), at paras. 4 and 13-19; Dobbie v. Arctic Glacier Income Fund, supra, at paras. 198-208.

[58] In this case, approximately 67 per cent of the trading volume in SNC shares during the class period was over the Toronto Stock Exchange, which is located in Ontario, and approximately 99.5 per cent of the trading volume during the class period was over the Toronto Stock Exchange and other Ontario-based alternative trading platforms. In light of the very high proportion of trading that occurred over Ontario-based trading venues, and the fact that SNC is a reporting issuer in Ontario and, as such, filed the impugned documents with the Ontario Securities Commission, it is appropriate to certify a global class in this case.

[59] The proposed common issues are as follows:

Statutory Secondary Market Liability -- Impugned Documents

(a) Did the Impugned Documents contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim?

(b) If the answer to (a) is yes, then when and by what means were the misrepresentations contained in the Impugned Documents publicly corrected?

(c) If the answer to (a) is yes:

(i) did the defendants Gilles Larame ("Larame"), Michael Novak ("Novak"), Pierre Duhaime ("Duhaime"), Riadh Ben Assa ("Ben Assa") and Stphane Roy ("Roy"), or any of [page582] them, authorize, permit or acquiesce in the release of the Impugned Documents which contained one or more misrepresentations?

(ii) did Duhaime, Larame, Ben Assa and Roy actually know that the Impugned Documents contained misrepresentations at the time such documents were released?

(iii) if any of Duhaime, Larame, Ben Assa and Roy did not actually know that the Impugned Documents contained misrepresentations at the time such documents were released, then does

recklessness or willful blindness with respect to the misrepresentations suffice for purposes of the knowledge requirement of s. 138.7(2) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(iv) [if] the answer to clause (iii) above is yes, were Duhaime, Larame, Ben Assa and Roy, or any of them, reckless or wilfully blind as to the existence of the misrepresentations in the Impugned Documents at the time such documents were released?

Statutory Secondary Market Liability -- Certifications

(d) Did the Certifications contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim?

(e) If the answer to d) is yes, then when and by what means was the misrepresentation contained in the Certifications publicly corrected?

(f) If the answer to (d) is yes:

(i) did Duhaime and Larame, or either of them, authorize, permit or acquiesce in the release of the Certifications which contained a misrepresentation?

(ii) if the answer to clause (i) above is yes, with respect to Duhaime and Larame:

(1) did they actually know that the Certifications contained the misrepresentation at the time such documents were released?

(2) at or before the time the Certifications were released, did they deliberately avoid acquiring knowledge that the Certifications contained the misrepresentation? or

(3) were they, through action or failure to act, guilty of gross misconduct in connection with the release of the

Certifications?

(iii) if the answer to clause (i) above is yes, and if either of Duhaime or Larame did not actually know that the Certifications contained the misrepresentation at the time such documents were released, then does recklessness or willful blindness with respect to the misrepresentation suffice for [page583] purposes of the knowledge requirement of s. 138.7(2) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(iv) if the answer to clauses (i) and (iii) above is yes, was either of Duhaime or Larame reckless or wilfully blind as to the existence of the misrepresentation in the Certifications at the time such documents were released?

Due Diligence

(g) If the answer to (a) or (d) is yes:

(i) before the release of the Impugned Documents and Certifications, as the case may be, did the applicable Defendant conduct or cause to be conducted a "reasonable investigation" in accordance with s. 138.4(6) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(ii) at the time of the release of the Impugned Documents and Certifications, as the case may be, did the applicable Defendant have no reasonable grounds to believe that the documents contained the misrepresentations?

Assessment of Damages

(h) If the answer to (a) or (d) is yes, did the Class Members suffer damages caused by the misrepresentations and, if so, on what basis are the damages suffered by Class Members to be determined?

(i) For purposes of s. 138.5 of the OSA (and the

relevant provisions of the securities legislation of each other Canadian province or territory), what amount, if any, of the change in the market price of SNC's securities after the corrective disclosure and during the 10 trading days thereafter was unrelated to the alleged misrepresentations?

(j) What are the applicable limits on damages, if any, for each Defendant under s. 138.7 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

Proportionate Liability

(k) If the answer to (a) or (d) is yes, for each applicable Defendant found liable, what is that defendant's respective responsibility for assessed damages pursuant to s. 138.6 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

Administration Costs

(l) Should the Defendants pay any of the costs of administering and distributing the recovery? If so, which Defendants should pay, and how much should each such Defendant pay? [page584]

[60] I am satisfied that the common issues, preferable procedure and representative plaintiff criteria are satisfied in the circumstances of this case.

[61] In my opinion, the requirements of the Class Proceedings Act, 1992 have been met.

[62] Accordingly, I grant the plaintiffs' motion.

Motion granted.