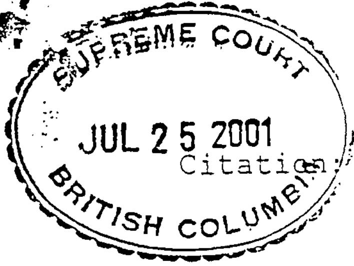

Citation: Pearson, Matus and Elliott v. Boliden Limited et al. 2001 BCSC 1054

Date: 20010725
Docket: C985348
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DONALD PEARSON, ELIZABETH MATUS and KENNETH ELLIOTT
as representative plaintiffs

PLAINTIFFS

AND:

BOLIDEN LIMITED, TRELLEBORG INTERNATIONAL BV, TRELLEBORG AB,
ANDERS BULOW, JAN PETER TRAAHOLT, KJELL NILSSON,
LARS OLOF NILSSON, ALEX G. BALOGH, ROBERT K. McDERMOTT,
ROBERT R. STONE, FREDERICK H. TELMER and NESBITT BURNS, INC.

DEFENDANTS

REASONS FOR JUDGMENT
(IN CHAMBERS)

OF THE

HONOURABLE MR. JUSTICE BURNYEAT

Counsel for Plaintiff	D.A. Klein J. Pearce and B.M.R. Nayer
Counsel for Defendants Boliden Limited, Trelleborg International, Trelleborg AB, Jan Peter Traaholt, Kjell Nilsson, Lars Olof Nilson and Robert K. McDermott	D.A. Webster, Q.C. E.M. Myers And D.A. Goult
Counsel for Defendants Alex G. Balogh, Robert R. Stone and Frederick H. Telmer	R.J.R. Hordo

Counsel for Nesbitt Burns Inc. D.G.S. Rae, Q.C. and A. Borrell

Date and Place of Hearing/Trial: Jan. 31, Feb. 1-3, 2000 Vancouver, BC

[1] This is an application pursuant to the ***Class Proceedings Act***, R.S.B.C., 1996, c.50 (the "***Act***") for certification of the action as a class proceeding against all of the Defendants. The Plaintiff Class claims damages for the breach of a statutory duty relating to a prospectus dated June 10, 1997 ("Prospectus") issued in connection with the initial public offering ("IPO") of shares of Boliden Limited. ("Boliden")

[2] The Defendants agree that the Plaintiff Class has met the minimum threshold requirements for certification contained in ss.4(1)(a) through (d) of the ***Act*** so this application dealt with the issues of how the subclasses would be defined. The common issues to be certified were as agreed by the parties.

[3] Under s.39 of the ***Act***, if an action is not certified, limitation periods continue to run. In this case, there was some danger that the claims of some members of the Plaintiff Class would expire. Accordingly, I made an Order on February 24, 2000 certifying the action as a class proceeding, dividing the Plaintiff Class into Resident and Non-Resident Subclasses, appointing Kenneth Elliott as the representative plaintiff for

all resident and non-resident subclasses and establishing the common issues for all Subclasses. The Order made is attached as Appendix "A". These Reasons set out the rationale for the Subclasses created and the common issues certified.

BACKGROUND

[4] Boliden is incorporated under the ***Canada Business Corporations Act***. The Common stock of Boliden is now traded on the Toronto Stock Exchange and the Montreal Exchange. Trelleborg International BV ("Trelleborg BV") is a company incorporated under the laws of the Netherlands with its principle corporate offices located in Trelleborg, Sweden. Prior to June 10, 1997, Trelleborg BV owned all of the acquired shares of Boliden.

[5] Trelleborg AB is a company incorporated under the laws of Sweden having its principal corporate offices located at Trelleborg, Sweden. Trelleborg AB owns all of the shares of Trelleborg BV.

[6] Anders Bulow was the President and Chief Executive Officer of Boliden. Jan Peter Traaholt was the Senior Vice President and Chief Financial Officer of Boliden. Kjell Nilsson was the President and Chief Executive Officer of Trelleborg AB as well as a member of the Board of Directors of

Boliden. Lars Olof Nilsson was Senior Vice President and Group Treasurer of Trelleborg AB and a member of the Board of Directors of Boliden. Alex G. Balogh was a member of the Board of Directors of Boliden. Robert K. McDermott was a Director and the Secretary of Boliden. Robert R. Stone was a member of the Board of Directors of Boliden. Frederick H. Telmer was the Chair of the Board of Directors of Boliden. Messrs. Bulow, Traaholt, Balough, McDermitt, Stone and Telmer are all residents of Canada. Messrs. Nilsson are residents of Sweden.

[7] The Plaintiff Class is composed of all of those who acquired Boliden shares pursuant to the IPO other than those defendants, members of the defendants' immediate families and any entity in which a defendant has a controlling interest who also required Boliden shares during the IPO.

[8] Nesbitt Burns Inc. ("Nesbitt Burns") is a Canadian Company and was the primary underwriter for the IPO.

[9] Boliden is a company engaged in the mining, processing and sale of metals and mineral products. Boliden Ipirsa SL ("Boliden SL") is a company incorporated pursuant to the laws of Spain and is a wholly owned subsidiary of Boliden. In 1987, Boliden SL acquired a mine in the south western part of Spain. By 1996, the zinc and silver production from that mine

was almost depleted. In 1988, Boliden SL discovered a further ore body approximately one kilometre to the east of the first mine. Boliden, Trelleborg BV, Trelleborg AB and Boliden SL placed this second mine into production in February, 1997 so it could replace the first mine.

[10] In order to operate the two mines, Boliden was required to maintain a tailings dam near the second mine (the "Tailings Dam"). The Tailings Dam was an earthen structure built to hold toxic bi-products created during the mining process. During 1996, the area around the two mines and the Tailings Dam experienced unusually heavy rain fall. The Plaintiff Class alleges that a number of the Defendants were advised by their engineering consultants and internal engineering staff that the heavy rainfall aggravated structural defects in the Tailings Dam. During 1996, the Tailings Dam suffered from what the Plaintiff Class refers to as "substantial structural infirmities". As a result, toxins leaked into the surrounding country side.

[11] The Plaintiff Class says that some of the Defendants realized or should have realized that closing the mine or properly accounting for its impaired value would severely impair the balance sheets of Boliden, Trelleborg AB and Trelleborg BV and that a "proper accounting" would also have

"derailed" the plans to sell Boliden shares to the public pursuant to the IPO. Despite what was known by some of the Defendants, the IPO proceeded.

[12] The purchase price for the shares under the IPO were payable in two instalments. The first instalment of $8.00 per share was payable upon closing and the final instalment of $8.00 per share was payable on or before June 17, 1998. Before full payment of the final instalment was received, the beneficial ownership of the shares was subject to a pledge of the shares in favour of Trelleborg BV, the selling shareholder.

[13] On the basis of the receipts received from the Ontario and Quebec Securities Commissions by 9:55 a.m. on June 11, 1997 and the receipts from the other provinces which were to be shortly received, Nesbitt Burns considered itself out of distribution. Nesbitt Burns then issued a telex to 11 members of the Investment Dealers Association advising them to that effect and wrote to the Canadian Depository for Securities ("CDS") to request that the CDS accept the Boliden offering for distribution utilizing the electronic transfer of securities between members.

[14] As lead underwriter, Nesbitt Burns obtained an instalment receipt in relation to 50,816,560 Common Shares of Boliden and

the subsequent delivery of these instalment receipts to the other underwriters was effected through CDS which allocated the instalment receipts to the underwiters on the basis of the allocations determined by Nesbitt Burns. The underwriters then allocated the shares to their respective clients.

[15] Because Nesbitt Burns had committed to distribute 60,917,216 instalment receipts but had only received 50,816,560, Nesbitt Burns took a short position in the instalment receipts which meant that they borrowed 10,118,656 instalment receipts. As part of the underwriting agreement, Nesbitt Burns had an "over-allotment option" which allowed them to purchase an additional 5,081,656 instalment receipts to cover over-allotments. As the short position was greater than the over-allotment option, Nesbitt Burns on behalf of the underwriters acquired additional instalment receipts in the market to make up the difference between 50,816,560 and 60,917,216. The short position was covered by a combination of market purchases of 6,016,900 instalment receipts and of the exercise of the over-allotment option for 4,083,756 instalment receipts.

[16] The trading records relating to instalment receipts show that approximately 67,000,000 instalment receipts were traded on the Toronto Stock Exchange and 9,400,000 instalment

receipts were traded on the Montreal Exchange between June 11, 1997 and April 24, 1998.

[17] The Distribution Certificate in relation to the IPO instalment receipts sets out the residence of the purchasers as follows:

(a)	British Columbia	1,383,700
(b)	Ontario	30,501,734
(c)	Quebec	5,720,900
(d)	All other Provinces	1,341,700
(e)	Europe/United States	21,969,182
	TOTAL	60,917,216

[18] On April 25, 1998, the Tailings Dam collapsed sending 7,000,000 cubic metres of toxic waste through a 15 metre breach in the reservoir wall and into the Spanish country side. As a result of the collapse of the Tailings Dam, approximately 10,000 hectares of land were contaminated by toxic waste.

[19] As a result of the collapse, the Plaintiff Class states that Boliden has created a reserve of more than $50,000,000 for remediation expenses beyond the amounts already paid by insurance carriers. The Plaintiff Class estimates that Boliden may have to spend up to $250,000,000 for remediation

efforts. As well, the Plaintiff Class states that, as a result of the collapse and the disruption of mining activities, Boliden has lost considerable production revenue.

[20] The shares purchased by members of the Plaintiff Class for $16.00 have lost considerable value and the Plaintiff Class states that members of the Plaintiff Class have suffered damages. At the close of trading on November 16, 1998, Boliden shares were trading at $5.35 on the Toronto Stock Exchange.

[21] The Prospectus to support the IPO was prepared pursuant to the following statutes: The ***Securities Acts*** of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, Prince Edward Island, Newfoundland and Quebec and the ***Securities Fraud Prevention Act*** of New Brunswick (collectively the "Securities Acts"). The Plaintiff Class says that the Prospectus contains statements indicating that (a) environmental protection and pollution prevention were priorities in all Boliden operations; (b) Boliden believed it would become the fifth largest zinc producer in the Western World once the new mine reached production of approximately 125,000 tons of zinc per annum in 1998; (c) the expected annual production from the new mine would be 4,000,000 tons of ore in 1998 increasing to approximately 4,200,000 tons of ore

in 2000; (d) the average ore grades would be approximately 3.8% zinc, 2.2% lead, .3% copper and 60 grams per ton silver; (e) the Prospectus constituted full, true and plain disclosure of all material facts relating to the Boliden shares; and (f) the Prospectus did not contain any misrepresentation likely to affect the value or the market price of Boliden shares.

[22] The Plaintiff Class says that these statements were misrepresentations at the time the Plaintiff Class and others purchased Boliden shares as the Prospectus omitted many negative material facts which were known or should have been known to some or all of the Defendants.

[23] Pursuant to the Securities Acts, the Prospectus was required to be accurate, contain no material or omissions or misrepresentations, and constitute full, true and plain disclosure of all material facts relating to Boliden shares. The Plaintiff Class says that the Prospectus did not meet these requirements in view of the misrepresentations alleged. The Plaintiff Class claims that they have suffered damages as a result of these misrepresentations.

[24] Each of Boliden, Trelleborg AB, and Trelleborg BV were issuers of Boliden shares, a selling security holder on whose behalf the distribution was made, and/or a signatory to the Prospectus. Accordingly, the Plaintiff Class says that they

have a right of action for damages against those defendants for breach of statutory duty. The Plaintiff Class says that the individual defendants as directors and/or officers of Boliden, Trelleborg AB and Trelleborg BV were personally aware of or had access to non-public information regarding Boliden, the new mine and the Tailings Dam, controlled the information contained in and omitted from the Prospectus and other corporate reports and filings used to sell Boliden shares to the public under the IPO and had the power to direct the course of action of Boliden, Trelleborg AB, and Trelleborg BV.

[25] As Nesbitt Burns was the primary underwriter of the IPO and was required to sign the certificate in the Prospectus pursuant to the Securities Acts, the Plaintiff Class says that they have a right of action for damages against Nesbitt Burns for the same breach of statutory duties owed by the other Defendants.

DISCUSSION AND CASE AUTHORITIES

[26] Under s.4(1) of the ***Act***, the court must certify a proceeding if the pleadings disclose a cause of action, there is an identifiable class, the claims of the class members raise common issues, a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and there is a representative plaintiff who

would fairly and adequately represent the interest of the class. The parties agree and I am satisfied that this proceeding should be certified as each of those requirements are met.

[27] In order to establish a common law claim for damages arising out of misrepresentations contained in documents such as this Prospectus, plaintiffs would have to prove that they relied on the misrepresentations and that their reliance caused them damages. However, the Plaintiff Class commences this action relying on the breach of a statutory duty and a statutory deemed reliance. In British Columbia, that statutory duty and deemed reliance is created by the following sections of the ***Securities Act***, RSBC, 1996, c.418:

> 1. "material fact" means, where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities;
>
> "misrepresentation" means
>
> (a) an untrue statement of a material fact, or
>
> (b) an omission to state a material fact that is
>
> (i) required to be stated, or
>
> (ii) necessary to prevent a statement that is made from being false or

misleading in the circumstances in which it was made;

63(1) A prospectus must provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed.

31(1) If a prospectus contains a misrepresentation, a person who purchases a security offered by the prospectus during the period of distribution

(a) is deemed to have relied on the misrepresentation if it was a misrepresentation at the time of purchase, and

(b) has a right of action for damages against

(i) the issuer or a selling security holder on whose behalf the distribution is made,

(ii) every underwriter of the securities who is required under section 69 to sign the certificate in the prospectus,

(iii) every director of the issuer at the time the prospectus was filed,

(iv) every person whose consent has been filed as prescribed, and

(v) every person who signed the prospectus

[28] The Plaintiff Class relies on similar although not identical provisions in the Securities Acts and submits that only two subclasses should be created: a Resident Class and a Non-Resident Class. The Plaintiff Class submits that the application of a provincial statute to a particular class member is dependant on a determination of the *lex loci delecti*

and that this determination may be decided on the bases of the place of residence of class members at the time of the purchase, the province in which the shares were purchased, the province where the Order was placed, or the place of residence of class members on the date of certification. Alternatively, as most of the directors and the lead underwriter were based in Ontario, it may also be that the principle activities which gave rise to the statutory breaches occurred in Ontario. The Plaintiff Class submits that it is inappropriate at this stage to exclude any class member on the basis of residence or place of purchase and that such determinations can and should be made at the trial of the common issues.

[29] The Defendants submit that the applicable provincial statute is from the province of the place of residence of class members at the time of the purchase. Because that is the lex loci delecti, the substantive laws of that province apply including any limitation periods which may be set out in the Securities Acts or in any other Acts of that province. The Defendants submit that there is no statutory cause of action of any nature provided under the securities legislation of New Brunswick, that the Quebec ***Securities Act*** contains no provision of "deemed reliance", and that all claims under the Alberta ***Securities Act*** are barred by the limitation period set

out in that Act. Accordingly, the Defendants submit that residents of those three Provinces should be excluded from any non-resident subclass.

[30] The Defendants also submit that there should be a non-resident subclass for each Province in which a cause of action exists as the relevant limitation provisions are different, the securities legislation in the Securities Acts are different and the jurisdiction in each Province with respect to both the statutory cause of action and the relevant limitation period will have to be proved.

[31] Section 6 of the ***Act*** states:

> (1)...if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who
>
> > (a) would fairly and adequately represent the interests of the subclass....
>
> (2) A class that comprises persons resident in British Columbia and persons not resident in British Columbia must be divided into subclasses along those lines.

[32] On the basis of s.6(2), it is therefore necessary to establish a British Columbia subclass as well as a subclass or subclasses of persons not resident in British Columbia. As to

the non-resident subclass category, the Plaintiff Class submits that the Act does not otherwise mandate the creation of subclasses except where the protection of the interests of the subclass requires that they be represented separately. The Plaintiff Class submits that there is no evidence here that there is a subclass whose members require the protection of separate representation.

[33] The Plaintiff Class cites the decision of McKenzie J (as he then was) in ***Harrington v. Dow Corning*** (1997), 29 B.C.L.R. (3d) 1988 (B.C.S.C.) where the court certified a single non-resident subclass notwithstanding that the court: "...would be required to apply the limitations and other substantive law of other jurisdictions in determining such claims." (at p. 91).

[34] The Plaintiff Class also relies on the decision of Montgomery J in ***Bendall v. McGhan Medical Corp.*** (1993), 14 O.R. (3d) 734:

> Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification. (at p. 747)
>
> The court maintains a supervisory role under the Act to ensure a fair and expeditous determination. Subclasses can be determined as the need arises. (at p. 747)

[35] The Plaintiff Class submits that, until the issues of substantive law and lex loci delecti are determined, it is not

appropriate to create further non-resident subclasses. Rather, those subclasses should be created subsequent to certification if creation of subclasses is appropriate at that time.

[36] I am satisfied that it would not be appropriate for all of the members of the Plaintiff Class who were not resident in British Columbia to be grouped into one non-resident subclass. It is important to note that s.6(1) of the Act requires a further subclass where common issues are raised which are not shared by all and the protection of the interests of those subclass members requires that they be separately represented. Where the financial resources of defendants may be limited, it may well be to the advantage of some members of a subclass to see that claims of other members of a subclass fail so that more resources will be available either to settle the claims of the remaining subclass members or to be sold if execution proceedings are necessary after a judgment is obtained. Because that is the case and because of the issues raised by the Defendants, I am satisfied that the protection of the interests of certain subclass members requires that they be separately represented in a separate subclass.

[37] The issues raised by the Defendants relating to members of the Plaintiffs Class who reside in Alberta, and New

Brunswick create common issues which would not be shared by class members who reside in other Provinces of Canada. While I do not accede to the submissions of the Defendants that subclasses be created for all Provinces, I am satisfied that the non-resident subclass should be further divided.

SHOULD THERE BE A SEPARATE ALBERTA SUBCLASS?

[38] The test for whether these pleadings disclose a cause of action is described in ***Abdool v. Anaheim Management Ltd.*** (1995), 21 O.R. 3rd ed. 453 (Ont. Gen. Div.):

> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
>
> (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed.

The "patently ridiculous or incapable of proof" test was adopted by Carthy JA on behalf of Court in ***Hollick v. Toronto (City)***, [1991] O.J. (Q.L.) No. 4747 (Ont. C.A.).

[39] Section 175 of the ***Securities Act*** of Alberta establishes a limitation period which is the earlier of 180 days from the day the Plaintiff first had knowledge of a misrepresentation or one year from the date of the transaction that gave rise to the cause of action. Assuming that this period began to run a few days after the Dam collapsed, the Defendants submit that the limitation period would have expired on June 17, 1998.

[40] It may well be that members of the Plaintiff Class who purchased common shares in Alberta, have lost their right to claim against the defendants. However, at this point I cannot come to the conclusion that the allegations of fact as it relates to those purchasers are "patently ridiculous or incapable of proof". In ***Endean v. Canadian Red Cross Society***, [1997] B.C.J. (Q.L.) No. 1209 (B.C.S.C.) K. Smith J noted:

> As well, the courts should not attempt to weigh the ultimate merits of the proposed common questions, but should merely ascertain whether they raise triable issues: ***Campbell v. Flexwatt Corp.*** (1996), 25 B.C.L.R. (3d) 329 at 343 (S.C.).

[41] In ***Campbell v. Flexwatt Corp.**, supra*, Hutchison J dealt with arguments raised that one of the defendants could not be held responsible for pure economic loss and concluded:

> I am satisfied that the arguments raised … are no more than that, arguments, not so compelling that certification should be denied. At this stage what must be determined are triable issues. It would be folly for the court to get into a careful analysis of the case law and its applicability to the issues at this preliminary point in the case at bar. (at p. 343)

[42] While Hutchison J did not say so, I am satisfied that the appropriate test would be in accordance with the decisions dealing with Rule 18 of the Rules of Court: is there a "bona fide triable issue": ***Estaban Mgmt. Corp. v. Eidelweiss Int. Hldg. Corp.*** (1990), 43 B.C.L.R. (2nd ed.) 235 (B.C.S.C.) at p.

339; ***Golden Gate Seafood (Vancouver) Company v. Osborn & Lange Inc.*** (1986), 1 B.C.L.R. (2nd ed.) 145 (B.C.C.A.); and ***Memphis Rogues Ltd. v. Skalbania*** (1982) 38 B.C.L.R. 193 (B.C.C.A.) or the decisions dealing with Rule 12(24) of the Rules of Court dealing with whether no "reasonable claim" is disclosed, a pleading is "frivolous or vexatious", or if a pleading is "otherwise an abuse of the process of the court".

[43] At this stage, I am satisfied that there is a triable issue relating to the claims of residents of Alberta. While the Defendants have raised the issue of s.175 of the ***Securities Act*** of Alberta, I am also mindful of the broader issue of where the purchase of Boliden Common Shares took place. While it may well be the case that Alberta purchasers will be deprived of a cause of action where the lex loci delecti rule establishes that the Alberta ***Securities Act*** applies, it is not clear that Alberta residents who purchased the Common Shares of Boliden from a seller in another provincial jurisdiction are disentitled to the statutory cause of action and deemed reliance which is set out in the Securities Act of that other jurisdiction. While it is clear that a non-resident class member who has no connection to British Columbia must have his or her claim determined by the law of a jurisdiction other than British Columbia, it is not

clear that the jurisdiction will necessarily be the province where that class member resides, ~~that the jurisdiction will necessarily be the Province where that class member resides,~~ where he or she placed the order or where the class member presently resides.

[44] In a tort action, the law to be applied is that of the place where the tort occurred: the *lex loci delecti*: ***Tolofson v. Jensen*** (1994), 120 D.L.R. (4th ed.) 289 (S.C.C.). However, it should be noted that La Forest J stated on behalf of the majority in that decision:

> There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or inter-provincial activity. There, territorial considerations may become muted; they may conflict and other considerations may play a determining role. (at p. 305)

[45] This is neither a tort action nor a breach of contract action. Rather, it is an action founded on the breach of a statutory provision which creates a deemed reliance on misrepresentations made in documents such as the Prospectus. It remains to be seen whether the "territorial considerations" noted by La Forest J "become muted" so that "other considerations may play a determining role".

[46] As well, both the ***Act*** and the various ***Securities Acts*** that create statutory causes of action and deemed reliance are remedial legislation. I specifically adopt the statement of Montgomery J in ***Bendall***, *supra*, in that regard:

> In my opinion, the court should err on the side of protecting people who have a right to access to the courts. This [the Ontario Class Proceedings Act] is remedial legislation and it should be addressed with a purposive approach. This is not inconsistent with the duty to look carefully at the facts to see if they meet the requirements of s. 5. (at p. 744)
>
> It is trite to say that remedial legislation must be given a broad and liberal interpretation. Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification.
>
> However, to deny certification at this juncture would, in my opinion, do a grave injustice to the nameless recipients of implants, who, according to the literature, have had implants removed, suffered complications or are otherwise genuinely worried about their long term health.
>
> Certification is the only way a large number of women can access a legal system that would otherwise be denied to them. The court maintains a supervisory role under the Act to ensure a fair and expeditious determination. Subclasses can be determined as the need arises. (at p. 747)

[47] The ***Act*** provides great flexibility about how common issues can be decided. While members of the Plaintiff Class who purchased common shares in Alberta share a number of common issues with all other non-resident subclass members,

the Defendants have raised an issue which is not common to all in the non-resident subclass.

[48] Because the ***Act*** is flexible, the issue of whether the claims of members of the Plaintiff Class who purchased common shares in Alberta are now statute barred can be best tried pursuant to the provisions of Rule 18A of the Rules of Court. Such an application should be set before me as soon as possible. Therefore, I order that the non-resident subclass will be further divided into the "Alberta Subclass".

SHOULD THERE BE A SEPARATE NEW BRUNSWICK SUBCLASS?

[49] The Defendents submit that persons who are found to have purchased their shares in New Brunswick at the time of the IPO and who purchased their shares in New Brunswick have no cause of action and must be excluded from the non-resident class as the causes of action pleaded by the Plaintiff Class are not available to them as no New Brunswick legislation creates a statutory cause of action and deemed reliance. The Defendants submit that the Statement of Claim only seeks damages for misrepresentations allegedly made in the Prospectus filed pursuant to the applicable Securities Acts. The non-resident subclass must be restricted to those persons who have claims under the legislation upon which the Plaintiff Class have relied, including the New Brunswick legislation.

[50] The Defendants point to the section of the Prospectus Plan of Distribution and the section entitled "Statutory Rights of Withdrawal/Recission" (at p. 82 of the Prospectus) and submit that these provisions all contemplate that the transactions in relation to any particular purchaser will be carried out in accordance with the laws of the place where the purchaser is resident at the date of purchase. Therefore, those who were resident in New Brunswick at the time they acquired securities pursuant to the IPO did not do so pursuant to the Prospectus upon which the statutory causes of action are based.

[51] At this stage, I am not satisfied that the Plan of Distribution under the Prospectus and the section entitled "Statutory Rights of Withdrawal/Rescission" are sufficient to establish that the residency at the time of purchase is the lex loci delecti as the Plaintiff Class argues. It may well be that the statutory breaches occurred in Ontario as that was the location of the principle activities which gave rise to the matters set out in the Statement of Claim. Similarly, it may well be that the statutory breaches occurred where the various underwriters actually allocated the Common Shares of Boliden to their customers. While I may have some doubts that the Plaintiff Class will be successful in advancing such

arguments, I cannot presently exclude the potential claims of those who purchased their shares in New Brunswick. As the claim advanced on their behalf is not "patently ridiculous or incapable of proof" or "frivolous and vexatious", I am satisfied that the Plaintiff Class has raised at least a bona fide triable issue.

[52] Accordingly, I am satisfied it would be appropriate for a separate subclass to be created for those who purchased Common Shares in New Brunswick so that the Defendants can fully argue the question of the entitlement of that subclass in an application to be brought before me pursuant to Rule 18A of the Rules of Court.

SHOULD THERE BE A SEPERATE QUEBEC SUBCLASS?

[53] The Defendants submit that the ***Quebec Securities Act*** does not contain a provision for "deemed reliance". Boliden further submits that, as actual reliance is not pleaded by the Plaintiff Class, the pleadings disclose no cause of action for any Quebec residents who purchased shares as reliance is an essential element of an action for misrepresentation: Linden, Canadian Tort Law, 6th edition, (Toronto: Butterworth's, 1997), at p. 445. In the alternative, even if actual reliance is later pleaded, it would be an issue which would require proof

on an individual basis so that class proceedings would be inappropriate.

[54] The Defendants also submit that the limitation period applicable in Quebec raises individual issues so that class proceedings would be inappropriate. The Defendants submit that ss.235 and 236 of the Quebec ***Securities Act*** create the issue of prescription depending on individual knowledge. Accordingly, the only common issue would be whether the defendants breached the Quebec ***Securties Act.*** Sections 235-236 of that ***Act*** state:

> 235. Any action for damages under this title is prescribed by the lapse of one year from knowledge of the facts giving rise to the action, except on proof that tardy knowledge is imputable to the negligence of the plaintiff.
>
> 236. However, the prescriptive periods under section 235 are subordinate to the following limitations:...
>
> > (2) three years from the date of the filing of the information document with the Commission.....

[55] The Plaintiff Class submits that this submission is "inaccurate" as ss.218 and 220 of the ***Securities Act*** of Quebec provide:

> 218. The plaintiff may claim damages from the issuer or the holder, as the case may be, whose securities were distributed, from its senior executives, or from the dealer under contract to the issuer or holder whose securities were distributed.

> 220. The defendant in an action provided for in sections 218 and 219 is responsible for damages unless it is proved that
>
> (1) he acted with prudence and diligence, except in an action brought against the issuer or the holder whose securities were distributed, or that
>
> (2) the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

[56] Accordingly, the Plaintiff Class submits that these sections create a "rebuttable presumption of reliance" in favour of a person who purchased a security offered by a prospectus and that this presumption can only be rebutted by proof that the purchaser had actual, prior knowledge of the misrepresentation.

[57] I am satisfied that it would be inappropriate to determine the entitlement of persons who purchased their Common Shares in Quebec on the basis of the materials which are presently before me. While I am not satisfied that it is appropriate for a Quebec subclass to be created at this time, the parties are at liberty to apply to create such a subclass and to then apply pursuant to Rule 18A of the Rules of Court to determine the questions which have been raised by the Defendants. Any applications regarding the Alberta and New Brunswick subclass or the potential of a Quebec subclass

should be set before me prior to any Notice being forwarded pursuant to s.19 of the ***Act.***

WHY A SEPARATE ONTARIO SUBCLASS?

[58] More than half of the IPO instalment receipts were distributed to Ontario residents (30,532,734 out of 60,917,216). As well, if the lex loci delecti subsequently established to be Ontario for all purchasers, then this subclass will have already been established. ~~As well~~, As well, if I am ultimately found to be incorrect in establishing more than one non-resident subclass, then the Ontario subclass can become the one subclass for all non-residents. I am satisfied that the protection of the interests of those who purchased their Common Shares in Ontario can be best protected if they are separately represented.

SHOULD EACH OF THE OTHER PROVINCES BE A SEPARATE SUBCLASS?

[59] Counsel on behalf of Boliden provided a table which assumes that each individual in a province had knowledge of the failure of the Tailings Dam by April 30, 1998, being a few days after the failure occurred. The part of that table which

[60] is reproduced here represents those provinces other than Alberta, New Brunswick and Quebec.

Jurisdiction	Limitation Period	Date of Expiry
Saskatchewan Securities Act, s. 147	earlier of one year after plaintiff first had knowledge, or 6 years after the date of the transaction that gave rise to the cause of action.	April 30,1999*
Newfoundland Securities Act, s.138	earlier of 180 days after plaintiff first had knowledge, or 3 years after date of transaction.	October 30, 1998*
Nova Scotia Securities Act, s. 141(4)	Three years after date of transaction.	June 17, 2000
Prince Edward Island Securities Act, s. 16.2	Earlier of 1 year after plaintiff first had knowledge, or three years after the date of the transaction.	April 30, 1999
Manitoba Limitation of Actions Act, s.2(1)(b)	2 years after the cause of action arose.	June, 1999** or April 25, 2000***

* these periods begin running from the assumed date of knowledge, being April 30, 1998, a few days after the dam failure

** 2 years from the filing of the prospectus or from the distribution of the instalment receipts

*** 2 years from the date of the dam failure.

[61] Boliden submits that the issue of knowledge is specifically raised in all of the provisions except Nova Scotia and Manitoba. As to Nova Scotia, the limitation period is calculated from the date of the transaction which Boliden submits would be June 17, 1997. For Manitoba, the limitation

period begins to run when "the cause of action arose" and Boliden submits that the decision in ***Weselak v. Beausejour District Hospital No. 29***, [1987] 1 W.W.R. 47 (Man. Q.B.) at pp. 49-51 stands for the proposition that a cause of action arises when all of the elements of the action are present, irrespective of whether the plaintiff has or ought to have discovered the facts upon which the case is based.

[62] Boliden also submits that the security legislation in various provinces is not identical. For instance, it submits that Manitoba has no provision that allows for an action for damages against a company as issuer although there is a provision that allows for an action against the directors as well those who signed the certificate in the Prospectus. Accordingly, this may allow an action against Trelleborg BV and Trelleborg AB but not against Boliden. As well, the Manitoba legislation does not use the term "misrepresentation" but rather provides for an action for damages based on a "material false statement" although that term is not defined under the Manitoba ***Securities Act***.

[63] At this point in the proceedings, I am not satisfied that the interests of the class members in other provinces are such that it is necessary to protect those interests by establishing further non-resident subclasses. I am satisfied

that all other non-resident members of the Plaintiff Class can have their interest protected under a subclass that I will designate as: "Remaining Non-Resident Subclass".

[64] While it would be necessary in due course to apply the limitation provisions and other substantive law of other jurisdictions in determining the claims of the members of that subclass once the lex loci delecti is determined, I am satisfied that it is not appropriate to determine those issues on the basis of the materials before me. It would be inappropriate to create further subclasses without making a determination that the common issues are such and that the interests are such that separate representation is required. This subclass can be redefined in due course if it is shown that the laws in other provinces are so different as to require further subclasses. It is also possible to decide a number of common issues before issues which are not common are determined for further non-resident subclasses. That can be done in due course. Such an application can be made with regard to those members of the Plaintiff Class who purchased their shares in Manitoba.

[65] A representative plaintiff must not necessarily have a cause of action against each defendant in order to certify a proceeding as a class proceeding: ***Campbell v. Flexwatt,***

supra. Accordingly, it is also the case that members of a subclass need not necessarily have a cause of action against each of these Defendants which may well be the case in Manitoba. Accordingly, Boliden or any of the other Defendants are at liberty in due course to apply for an Order that a Manitoba subclass be created and for a dismissal of any claim by that Subclass against Boliden. However, at this stage, I am satisfied that it would inappropriate to decide such issues on the basis of the materials which are presently before me.

CLAIMS OF THOSE RESIDING OUTSIDE CANADA

[66] 21,969,182 instalment receipts (approximately 33 per cent) were sold to purchasers resident in the United States and Europe pursuant to documents prepared in accordance with the laws of those jurisdictions. The Defendants submit that the statutory causes of action under the ***Securities Acts*** are not afforded in relation to any misrepresentation other than one contained in a "Prospectus" and only to those persons who purchased one or more of the securities "offered by" the Prospectus or "offered thereby". Specifically, the word "prospectus" in the **Securities Acts** cannot be taken to extend the cause of action in relation to the "Private Placement Memorandum" used in the United States nor the "International Prospectus" used elsewhere. Therefore, the Defendants submit

NOT IN BOLD

that purchasers where the lex loci delecti is established to be outside of Canada cannot avail themselves of the cause of action pleaded and must be excluded from the class.

[67] This may or may not be a case where "...territorial considerations may become muted" "they may conflict and other considerations may play a determining role" (per La Forest J in ***Tolofson***, *supra*, at p. 305). While it may be very difficult for the Plaintiff Class to establish the intention of Provincial Legislators to give protection to those where the lex loci delecti is shown to be outside Canada or even outside their own Province, I am presently not satisfied that this claim is so patently ridiculous that purchasers who purchased outside of Canada should be excluded from the "Remaining Non-Resident Subclass" at this time. I am also mindful of the potential claims of purchasers who reside within Canada but who may have purchased their shares within one of Canada's Territories.

[68] Accordingly, all non-resident members of the Plaintiff Class other than those who are in the Alberta Subclass, the New Brunswick Subclass, and the Ontario Subclass, will be added to a Remaining Non-Resident Subclass.

MUST THERE BE SEPARATE REPRESENTATIVE FOR EACH SUBCLASS?

[69] The question which arises is whether one representative Plaintiff can act as the representative Plaintiff for a number of subclasses. The Plaintiff Class submits that there is no requirement that separate representative plaintiff be appointed for each subclass unless, pursuant to s.6(1) of the Act, it is the opinion of the court that the protection of the interests of the subclass members require that they be separately represented. The Plaintiff Class submits that there is no requirement that representative Plaintiffs for each subclass be appointed as there is no evidence that Kenneth Elliott has interests which are in conflict with other members of the subclasses. In this regard, the Plaintiff Class relies on the decision in ***Anderson v. Wilson*** (1998), 37 O.R. (3d) 235 (Ont. Gen. Div.) where Campbell J stated:

> It is not necessary for the representative plaintiffs to share every characteristic of every member of the class or even to be typical of the class. Although the representative plaintiffs are infected claimants, there is at this stage no apparent conflict of interest between them and other members of the class and no error in the finding that they properly represent the proposed class. (at p. 251)

[70] The Defendants submit that, in accordance with s.6(1) of the ***Act***, the protection of the interests of individuals who purchased Common Shares in Boliden in jurisdictions other than British Columbia or Ontario requires that certification only

occur when there is a representative plaintiff, a representative plaintiff in place who meets the requirements set out in S.6(1) for each subclass other than the British Columbia and Ontario subclasses. Accordingly, the Defendants propose that there be no certification for subclasses other than British Columbia and Ontario until a representative plaintiff for each of those subclasses is identified.

[71] In the appeal in ***Campbell v. Flexwatt***, *supra*, the question of whether the plaintiffs were representative of the Plaintiff Class was dealt with by Cumming JA who gave judgment on behalf of the court. Cumming JA adopted the view of K. Smith J in ***Endean***, *supra*, about what were the two most important considerations in determining whether a representative plaintiff was appropriate:

> It has been established that there is a common interest and I can see no reason why the representative plaintiffs would not vigorously prosecute the claim. Any individual plaintiffs who feel that the representative plaintiffs would not represent them well may opt out of the class proceeding and pursue individual actions. (at p. 23)

[72] It is important to note that s.6 (1) of the ***Act*** only deals with the inability of the Court to certify the entire proceedings as a class proceeding rather than the inability of the Court to certify part of a proceeding but not another part

where the other part does not have a representative Plaintiff as yet. To acceed to the submissions of the Defendants would mean that there can be no certification at this stage.

[73] I am satisfied that this was not what was intended by either s.6 (1) or s.8 (2) of the ***Act***. Rather, I am satisfied that the intent of those two subsections is to prohibit any part of the proceeding as a class proceeding unless each of the subclasses has a representative plaintiff who can "fairly and adequately represent the interests of the subclass" and who does not have "on the common issues for the subclass, an interest that is in conflict with the interest of other subclass members." I am satisfied that it is not necessary for a separate representative plaintiff to be in place before each of the subclasses is established. The "representative plaintiff" who can "fairly and adequately represent the interest of the subclass" at this stage can be a person who is the same person as the "representative plaintiff for the class".

[74] While s.6(1) of the ***Act*** uses the words "in addition to" when referring to a representative plaintiff who would fairly and adequately represent the interests of the subclass, the section does not use the phrase "a different representative plaintiff". Accordingly, the representative plaintiff who

will represent the interests of the subclass must merely be a representative plaintiff who can "fairly and adequately" undertake that representation.

[75] I am mindful that it is not necessary that a representative of a subclass have "typical involvement" with the cause of action: ***Abdool**, supra* (1995), 21 O.R. (3rd) 453 (Ont. Gen. Div.). As O'Brien J stated in that decision:

> In my view the "representative plaintiff"...need not have typical experience with other plaintiffs. I think it sufficient that he has no conflict of interest and is shown to be an individual who will fairly and adequately advance the class claims. (at p. 465).

[76] I follow the practice adopted by Brenner J (as he then was) in ***Sawatzky v. Societe Chirurgicale Instrumentarium Inc.***, S.C.B.C. Action No. C954740 (Vancouver Registry) where a single representative plaintiff was appointed for three distinct subclasses.

[77] As I have invited counsel to bring on applications pursuant to Rule 18A for a summary determination of the entitlement of those who purchased shares in Alberta, New Brunswick, Quebec and outside Canada to remain members of non-resident subclasses, I am satisfied that it is appropriate for Mr. Elliott to instruct counsel to defend any applications to have those subclasses eliminated. I will rely on counsel for

Mr. Elliott to make any recommendations if satisfied that a potential conflict of interest between members of various subclasses has become an actual conflict of interest such that it is no longer appropriate for Kenneth Elliott to remain the representative Plaintiff for all subclasses. I am presently satisfied that Kenneth Elliott does not have such a sufficient conflict of interest that it will be necessary for representative plaintiffs to be in place prior to the certification of the various subclasses and, accordingly, Kenneth Elliott is appointed the representative plaintiff for all subclasses.

WHAT IS THE "PERIOD OF DISTRIBUTION"?

[78] The Defendants submit that the period most frequently specified in the Securities Acts refers to the "period of distribution" or the "period of distribution to the public". The Defendants submit that this period ended on June 17, 1997. Accordingly, no person should be a member of a class or subclass if they purchased their shares in the secondary market after June 17, 1997.

[79] The Plaintiff Class submits that Nesbitt Burns does not indicate when it completed the acquisition of the additional 10,118,656 installment receipts so that all commitments under the IPO could be met. As well, there is no evidence before

the Court when all of the shares were distributed under the IPO. The Plaintiff Class therefore submits that the date of closing of the offering is not clear so that the period of distribution is a matter of fact which must be determined and that this is a question of fact that should be deferred until the trial of the common issues.

[80] The Defendants submit that the description "during the period of distribution or distribution to the public" will be of no assistance to potential members of a subclass who are notified of these proceedings as this phrase involves "the use of legal terminology without any clear idea of what that terminology means". They also submit that a precise end date to the period of distribution should be set out in the definition of all subclasses to provide potential subclass members with a clear idea of whether or not they fit within that definition. They submit that all the facts which are required to identify that date as being June 17, 1997 are before the Court. The closing of the offering, which is when the shares were transferred from Trelleborg BV to Nesbitt, Burns when Nesbitt Burns distributed the instalment receipts, and when the first instalment was payable, was on June 17, 1997.

[81] I agree with the submission of the Defendants that the use of phrases such as "during the period of distribution" or "during the period of distribution to the public" would be of little or no assistance to potential members of the subclass who were notified of these proceedings. Accordingly, while the subclasses will initially be restricted to those who purchased Common Shares during "the period of distribution or distribution to the public", before a Notice is sent to members of all subclasses, a date is to be added to the requirements set out for each subclass.

[82] I am satisfied that the question of what constitutes the period of distribution or distribution to the public is a matter of fact but that this is a fact which can be dealt with pursuant to Rule 18A of the Rules of Court and is a matter which must be determined prior to a notice being forwarded to potential members of subclasses. Subject to the two exceptions noted below, I specifically reject the submission of the Plaintiff Class that purchasers in the "secondary market" should be included within the subclasses which I have established. Accordingly, the requirements of each of the subclasses are to be amended so that it is clear that only those who purchased Common Shares prior to a certain date are included within the subclasses.

[83] The Plaintiff Class submits that s.131 of the *British Columbia* ***Securities Act*** and similar provisions in the Securities Acts do not require the person who purchases the security to do so from an underwriter. Those provisions merely state that a person must purchase security offered by a prospectus "during the period of distribution". The Plaintiff Class submits that persons who purchased shares in the secondary market are able to seek the protection of s.131 of the *British Columbia* ***Securities Act.*** Alternatively, the Plaintiff Class submits that the right of secondary market purchasers to the statutory remedies is a common issue of law which should be determined at the trial of the common issues and that such a complex question of statutory interpretation should not be considered on the application for certification.

[84] The Defendants submit that secondary market purchasers are excluded for two reasons. First, the statutory remedies are not available to secondary market purchasers. Second, even if the statutory remedies were available to secondary market purchasers, none of those purchases were made during the "period of distribution".

[85] A purchase of securities on the secondary market does not fall within the definition of "distribution" as that term is defined in s. 1 of the ***Securities Act.*** While s. 131 of the

Securities Act creates a cause of action for damages in relation to a security offered by the prospectus during the period of distribution and against the issuer or selling security holder on whose behalf the distribution is made, the ***Securities Act*** only provides for continuing disclosure in relation to public traded securities but no statutory cause of action for the breach of the failure to provide continuing disclosure obligations. As well, even assuming secondary market purchasers could claim under s.131 or under similar provisions under the Securities Acts, those persons could only do so if they purchased during the period of distribution.

[86] From the definition of "distribution", it is clear that the purchases that Nesbitt Burns made in order to have available a further 10,118,656 instalment receipts would be part of the shares that were eventually purchased during the period of distribution as I am satisfied that these would be purchases "incidental to a distribution" (as set out in sub(f) of the definition). The instalment receipts which were purchased by Nesbitt Burns and then allocated to the other underwriters so that they would be available to be distributed under the IPO are shares purchased during the period of distribution. However, there were other shares purchased during the period of distribution.

[87] Trading in instalment receipts started as early as June 11, 1997. Accordingly, there may well have been purchasers other than Nesbitt Burns who were able to purchase instalment receipts prior to the period of distribution concluding. I have suggested a process whereby the last date of the period of distribution can be established. It will also be necessary to determine whether purchasers other than Nesbitt Burns who purchased instalment receipts between June 11, 1997 and the end of the period of distribution were purchasing pursuant to the distribution made under the IPO.

[88] I am satisfied that the Plaintiff Class has established a bona fide triable issue in this regard. Accordingly, there will be a determination pursuant to Rule 18A of the Rules of Court about whether such purchasers are to be included within a subclass because they purchased instalment receipts during the period of distribution even though they did not purchase them as a result of the distribution made pursuant to the IPO. However, those who purchased on the secondary market after the period of distribution ended will not be part of any subclass. Until an actual date is established and until the issue of whether a limited number of purchasers in the secondary market are to be included, the requirements of all subclasses will merely be that they purchased during a "period of

distribution" or a "period of distribution to the public". The issue of other purchasers in the secondary market is also a common issue which can be tried prior to the Notice being forwarded to all members of the Plaintiff Class.

SHOULD PERSONS WHO SOLD BEFORE APRIL 25, 1998 BE EXCLUDED FROM ALL SUBCLASSES?

[89] The Defendants submit that all persons who sold their shares prior to the failure of the Tailings Dam should be excluded from the class and they rely on the decision in ***Carom v. Bre-X Minerals Ltd.*** (1999) 44 O.R. (3d) 173 (Ont. Gen. Div.). In that case, Winkler J refused to include persons who had disposed of their shares prior to the disclosure of the alleged fraud because the losses they may have suffered did not arise from the fraud itself.

[90] The Defendants submit that the alleged misrepresentations did not become known in the market place until the Tailings Dam failed on April 25, 1998 so that anyone who sold their shares before the failure could not have suffered a loss as a result of the misrepresentations which are alleged. The Defendants rely on the decision in ***3218520 Canada Ltd. v. Bre-X Minerals Ltd. et al.*** (unreported endorsement, Dec. 6, 1999), 387/99) (Ont. C.A.) where the appeal from the judgment of Winkler, J was dismissed and the following comment was made:

> 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 an 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. (at p. 5)

[91] The Plaintiff Class submits that there are a number of reasons why the statements of Winkler J in the General Division decision in Bre-X do not apply in the case at bar. First, the Plaintiff Class relies on a number of misrepresentations including the stability of the Tailings Dam. Accordingly, the failure of the Tailings Dam was merely the catalyst for a review of the misrepresentations alleged in the Prospectus. Second, the Plaintiff Class submits, had the Prospectus revealed the true condition of the Tailings Dam, the shares would have commanded a price lower than $16.00. Accordingly, the Plaintiff Class submits that, even class members who sold their shares before the failure of the Tailings Dam paid too much for their shares. The Plaintiff Class submits that it cannot be determined at this stage whether the "early sellers" received more for their shares

than they would have if the Prospectus had contained a full disclosure.

[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 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.

FORM OF NOTICE UNDER DIVISION 3 OF THE ACT

[93] The parties will be at liberty to speak to the question of the form of Notice to be forwarded to members of the subclasses. At that time, the form of Notice, the party to pay for the cost of the Notice, the various dates to be

[94] completed within the Notice, and any deletions or additions of non-resident subclasses can be heard.

The Honourable Mr. Justice G.D. Burnyeat