IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Jeffery v. Nortel Networks,***
2007 BCSC 69

Date: 20070119
Docket: S015159
Registry: Vancouver

Between:

Janie Jeffery and Ronald Mensing

Plaintiffs

And:

**Nortel Networks Corporation, John A. Roth,
Frank A. Dunn, F. William Connor and Chahram Bolouri**

Defendants

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Groberman

Reasons for Judgment

Counsel for the Plaintiffs	David A. Klein Nicola C. Hartigan
Counsel for the Defendants	Gregory J. Nash David K. Yule Steve J. Tenai
Date and Place of Hearing:	November 27, 2006 Vancouver, B.C.

[1] This is an application to approve a settlement in proceedings under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

The Action

[2] In the action, the plaintiffs allege that the defendant Nortel Networks Corporation ("Nortel") issued press releases between the fall of 2000 and February 15, 2001, which were materially misleading, and which had the effect of inflating the price of its common shares. On February 15, 2001, after the close of trading, Nortel issued a further press release, which contradicted its earlier financial performance forecasts. On February 16, 2001, share prices for Nortel on the Toronto Stock Exchange dropped sharply, from $46 per share to $32 per share. The share price continued to drop thereafter, and within one month, a share was valued at only $24.

[3] The plaintiffs allege that they directly or indirectly relied on the company's press releases in purchasing Nortel shares, and that they suffered damages when they held those shares beyond February 15, 2001. They claim compensation for those damages against Nortel and against the defendants Roth, Connor and Bolouri, who were directors and officers of Nortel at material times. The action has been discontinued as against Dunn.

[4] On June 27, 2006, I conditionally certified the action for the purpose of considering the fairness of the proposed settlement.

[5] The class that has been certified is defined as follows:

> [A]ll persons and entities, except Excluded Persons who, while resident in British Columbia at the time, purchased Nortel common

> stock or call options on Nortel common stock or wrote (sold) put options on Nortel common stock during the … period [from October 24, 2000 to February 15, 2001, inclusive].

[6] For the reasons that I gave at the time of the conditional certification, I am satisfied that the class as defined is appropriate, and propose to consider the settlement on that basis.

[7] There are three parallel actions in other jurisdictions: ***In re Nortel Networks Corp. Securities Litigation***, Consolidated Civil Action No. 2001 Civ 1855 (RMB), proceeding in the United States District Court for the Southern District of New York; ***Frohlinger v. Nortel Networks Corporation***, No. 02-CL-4605 in Ontario's Superior Court of Justice; and ***Association de Protection des Épargnants et Investisseurs du Québec c. Corporation Nortel Networks***, No. 500-06-000126-017 (District de Montréal) in Quebec's Cour Supérieure. These four actions have been the subject of a joint settlement, which is conditional upon the approval of all four courts.

[8] Both the "worldwide" action in the U.S. District Court and the Canada-wide action in Ontario's Superior Court of Justice could potentially have included the class represented in the current action. Nonetheless, both because of concerns over the possibility that the other actions would not be certified, and to ensure that the British Columbia plaintiffs had recourse to an action in the event that they were dissatisfied with any arrangements made in other jurisdictions, the plaintiffs decided to initiate and continue the current action. The work of plaintiffs' counsel in British Columbia, however, has been much less than it would have been had the U.S. and Ontario

actions not been extant. While there has been work of considerable value done by counsel locally, the bulk of the counsel work has been performed elsewhere.

The Proposed Settlement

[9] On February 8, 2006, a conditional settlement was reached in the U.S. litigation, in a mediation process. Certain of the conditions were satisfied thereafter, and counsel in the other jurisdictions then participated in negotiating a settlement agreement settling all of the outstanding class proceedings.

[10] Pursuant to the settlement, Nortel and its insurers are to pay a total of US$431,667,428.48 to the members of the global class. The funds have been deposited in an interest-bearing trust account pending implementation of the settlement. In addition, Nortel agreed to provide free-trading common shares representing approximately 7.25% of the company's equity to members of the global class. The number of shares that were to be furnished in the settlement was initially 314,333,875, but as a result of a recent share consolidation, the number of new shares will be 1/10 of that number.

[11] The total value of the settlement will depend on the share price at the date of implementation, but is approximately US$1.16 billion. In addition to that amount, the plaintiff class will be entitled to receive 1/4 of any recovery that Nortel obtains in certain litigation against former senior corporate officers.

Plan of Allocation

[12] Because the settlement settles worldwide claims, it is not possible, at this time, to calculate the proportion of the settlement proceeds that will go to members of the British Columbia class. They will be treated the same as members of the worldwide, Ontario, and Quebec classes. The amount each receives will be based on the number of shares that they purchased during the relevant period, and the purchase price of those shares. The goal is to allocate the damages in proportion to the loss that each class member suffered.

[13] I need not detail all of the provisions in the settlement agreement. Among the key provisions are those that ensure that claimants will be entitled to a *pro rata* share of the damages, that no amount will be returned to the defendants, even if the take up rate of the settlement is lower than expected, and that "put" and "call" option holders will be compensated in a manner that attempts to ensure that their entitlement is proportionate.

Applications for Approval of the Settlement

[14] Courts in all four jurisdictions in which parallel class actions are proceeding have heard applications for approval of the settlement. The U.S. District Court has approved the settlement and plan of allocation in a decision of the Honourable Judge Berman pronounced December 26, 2006. I understand that the application for approval of counsel fees remains under reserve in that court.

[15] The application before the Ontario's Superior Court of Justice was heard by Winkler R.S.J. on November 6, 2006, and the application before the Quebec's Cour Supérieure was heard by Monast J.C.S. on November 16, 2006. Decisions as to whether to approve the settlement and plan of allocation are under reserve in those courts. The issue of approval of counsel fees has, I understand, been argued in the Ontario case, but was adjourned in the Quebec litigation.

[16] At the close of argument, counsel for the parties indicated that they had no objection to the judges in the four jurisdictions engaging in confidential communications that they considered necessary. Pursuant to that consent, I have engaged in limited confidential communications with both Mr. Justice Winkler and Madame Justice Monast.

Tests for the Approval of a Settlement

[17] Section 35 of the ***Class Proceedings Act*** provides that settlement of a class proceeding may only occur with the approval of the court. In determining whether a settlement should be approved, the court must determine whether the settlement is "fair and reasonable and in the best interests of the class as a whole". The court is not required to determine whether the settlement is the best that could possibly be achieved; what is required is that the settlement fall within a range of reasonableness (***Sawatzky v. Societe Chirugiale Instrumentarium Inc.*** (1999), 71 B.C.L.R. (3d) 51 (S.C.)).

[18] The factors to be considered in approving a class proceeding settlement are now well-established. In ***Haney Iron Works Ltd. v. Manufacturers Life Insurance***

Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.), Brenner J. (as he then was) quoted with approval the judgment of Sharpe J. (as he then was) in ***Dabbs v. Sun Life Assurance Co. of Canada***, [1998] O.J. No. 1598 (S.C.) setting out standards for approval. Both Sharpe J. and Brenner J. considered the eight factors set out in *Newberg on Class Actions* (3rd ed.) para. 11.43 to be apt in a Canadian context. The eight factors are as follows:

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

[19] In ***Fakhri v. Alfalfa's Canada, Inc.*** 2005 BCSC 1123, 20 C.P.C. (6th) 70 at para. 8, Gerow J. added two additional factors to this list:

9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation; [and]
10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

[20] In ***Reid v. Ford Motor Co.*****,** 2006 BCSC 1454, at paragraph 11, Gerow J. produced a slightly different list, this time adding the following as a factor:

> 11. if counsel fees were negotiated in the settlement, and if so, how big a factor are they; ...
>
> [This is actually the eighth factor in Gerow J.'s list in ***Reid***]

[21] The various factors considered in ***Dabbs***, ***Sawatzky***, ***Fakhri***, and ***Reid*** do not form an exhaustive list, nor will all of them be relevant in every case. It seems to me that the various factors can be subsumed into four categories.

[22] The court first looks at the process by which the settlement has been reached. A court does not conduct independent investigations into the adequacy of a settlement; rather, it depends on the evidence put before it by the parties. The court must, therefore, be able to assess the completeness and candour of the evidence presented. In order to do this, it must satisfy itself that the investigations leading up to the settlement have been adequate, and that the settlement itself is not collusive or motivated by improper considerations.

[23] I would describe the first category of considerations for the court as those dealing with the adequacy of the groundwork done by counsel before entering into a settlement. Has counsel of sufficient expertise performed sufficient work to give the court confidence that the settlement proposal is based on a proper appreciation of the background facts, and does not spring from ignorance of important details? Of the factors listed above, factors 2 and 4 go primarily to this question.

[24] The second category of considerations is also concerned with the settlement process. Is the court confident that the proposed settlement is the product of a reasonable negotiating process, in which the parties have reached an agreement

without collusion and without extraneous facts motivating the negotiators? Of the factors listed in para. 18 above, factors 8, 10 and 11 are examples of considerations that will assist the court in determining the adequacy of the negotiation process.

[25] If the court is satisfied that the process leading to settlement was satisfactory, it will be in a position to consider the third and most important category of considerations: the substance of the settlement. Does the proposal reflect an appropriate balancing of the costs and benefits of settlement? In other words, should the matter be settled on the proposed terms, or would the plaintiffs be better served by continuing the litigation. Of the factors listed above, numbers 1, 3, 5 and 6 are primarily concerned with this overall question.

[26] Even if the settlement appears to be acceptable, the court must be cognizant of the fact that it is dealing with the rights of the members of the represented class. Parties represented in a class action by the representative plaintiff may play very limited roles in directing the litigation, but it remains the fact that it is conducted for their benefit. There is, therefore, a fourth category of considerations, which concerns itself with the views of the class members. The court must consider whether class members have been adequately informed of the proposed settlement, and whether they have, for the most part, found it to be an appropriate one. Factors 7 and 9 in the above list are considerations that form part of this fourth category.

[27] If there is an indication that a large proportion of the class are not satisfied with the settlement, the court should be cautious in approaching the application for approval.

[28] In summary, then, the court must consider four broad questions before approving the settlement of a class actions:

- Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
- Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
- On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
- Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

Has Counsel of Sufficient Experience and Ability Undertaken Sufficient Investigations?

[29] Counsel for the plaintiffs in the various jurisdictions appear to be experienced in class proceedings, and to be recognized as skilled litigators. Certainly that is the case with the plaintiffs' British Columbia counsel.

[30] It appears that there have been very significant resources devoted to determining the facts underlying the claim, and to assessing the strength of the case. Substantial discovery processes have been undertaken, and experts have been engaged to analyse the issue of damages. Through discovery, expert analysis, and mediation, the plaintiffs have gained adequate knowledge of the financial position of the defendant. These procedures, along with meticulous legal research have allowed the plaintiffs to assess the strength of their case. I am

satisfied that both the skill brought to bear on the issues and the effort expended have been adequate.

Have Collusion or Extraneous Considerations Tainted the Negotiations?

[31] The settlement agreement is the product of a judicial settlement process undertaken before Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York. There is no suggestion that the negotiations were other than at arms length, or that any party was influenced by extraneous considerations. Indeed, the settlement appears to be the product of a gruelling negotiation process. I am satisfied that the result is a hard-fought compromise.

[32] The only extraneous factor that might be suggested is the interest of counsel in getting paid. I am satisfied, however, that counsel's desire for fees did not motivate them to accept a settlement offer that might otherwise be unacceptable. It should be noted that the settlement itself does not determine the amount of counsel fees that will be paid. Counsel's fees must be approved by the courts of the various jurisdictions. In any event, there is no reason to believe that counsel's interests in any way diverged from those of their clients. Counsel were aware that achieving the best settlement for their clients in this case would also enhance their own prospects of being well-remunerated.

[33] I am satisfied that no inappropriate considerations motivated counsel in negotiations.

Cost/Benefit Analysis

[34] In assessing whether the proposed settlement is within the range of those which are reasonable, the court must balance the amount of the settlement against the potential for greater compensation for the plaintiffs if the litigation is allowed to continue, on the one hand, and the costs and risks attendant on such litigation, on the other.

A. Potential Recovery

[35] There are difficulties in estimating the amount by which the price of Nortel shares was inflated by the alleged misrepresentations. The parties have placed before the court an estimate by Ms. Jane D. Nettesheim, a financial economist, and vice president of Stanford Consulting Group.

[36] The analysis is based on the decrease in value of Nortel shares on February 16, 2001. Ms. Nettesheim estimates the inflation caused by the misrepresentation as the difference between the diminution in value of Nortel common shares and the diminution in the value of other shares on the exchange on that day. In this way, she attempts to separate the factors unique to Nortel's share price collapse from more general market forces that were at work. Ms. Nettesheim estimates that the misstatements resulted in an artificial inflation of Nortel's share values by 27.5%, or a total of $7.1 billion.

[37] The plaintiffs have also filed an affidavit of Professor Ron Giammarino of the University of British Columbia Faculty of Commerce and Business Administration. Professor Giammarino endorses Ms. Nettesheim's approach.

[38] As I indicated to counsel during the hearing of this matter, Ms. Nettesheim's report appears to me to represent a significant simplification of matters, and without further evidence, it is difficult to know what weight should be given to it. In particular, it would have been helpful had she addressed questions such as the following:

- was the Nortel press release responsible for a general decline in investor confidence on February 16, such as to have been partially responsible for the drop in share prices for companies other than Nortel?
- on the other hand, did the sale of Nortel shares provide investors with capital that was invested elsewhere, thus dampening the decline in share prices for other companies?
- were there factors other than the Nortel press release that might have been at work – in particular, despite the market efficiency that is postulated, might there have been other bases for a correction in the price of Nortel common shares?
- was the effect of the February 15, 2001 press release fully reflected in the market on February 16, 2001, or did the losses on subsequent days also reflect a correction based on the press release?

[39] I have, as I have indicated, little evidence before me by which I can gauge the effect of these and other factors on Ms. Nettesheim's damage assessment. Based on what I do have before me, it appears to me that while the analysis of Ms. Nettesheim has some value as evidence, it represents a conservative estimate of the plaintiffs' losses.

[40] While there are many variables that will affect the actual recovery of class members, it appears that it will exceed 11% of the damages that they suffered based on Ms. Nettesheim's damage estimates. This recovery, while not insignificant, does not represent a particularly high rate of recovery.

B. Litigation Risks

[41] As the parties point out, there are a number of risks facing the plaintiffs in this case. First, there is the issue of certification. I have conditionally certified the class proceeding in this case, for the purpose of settlement. The certification is without prejudice to the defendants' right to revisit the issue if the settlement is rejected.

[42] There is some doubt as to whether the plaintiff class would be certified in the face of objection by the defendants. There are cases in which issues of concern to some investors have been found not to raise "common issues" and in which a class proceeding has been found not to be the preferable procedure (***Samos Investments Inc. v. Pattison***, 2003 BCCA 87, 10 B.C.L.R. (4th) 234 is an example). In the case at bar, there are significant differences among the members of the plaintiff class, in terms of the timing of their purchase and sale of shares, the representations that they were aware of at material times, and the nature of their purchases or sales (some of the class members dealt in call or put options rather than in shares *per se*). While I am disposed to think that these differences would not prevent certification of this matter, even in the face of objections by the defendants, I accept that the matter is not an entirely clear one. The plaintiffs face a risk, if not a particularly large one, that the matter might not be certified, or, if certified, might later

be decertified. Without certification, I have little doubt that many members of the plaintiff class would be unable to pursue any remedy.

[43] The plaintiffs also face potential difficulties in their claim of negligent misrepresentation, in that they must demonstrate reliance on the defendants' misrepresentations. Many of the members of the plaintiff class may be unable to demonstrate actual reliance on representations made in Nortel's press release. The settled law does not make it clear that investors in the stock market will succeed in an action for negligent misrepresentation when their reliance on a misrepresentation is only implicit or indirect. While I expect that such indirect or implicit reliance would be sufficient to found the cause of action, I accept that the plaintiff's face some risk in proceeding on that basis.

[44] Other potential difficulties facing the plaintiffs include proof of negligence (or fraud) by the defendants, and proof that their damages are causally related to that negligence (or fraud). While the material before me suggests that the plaintiffs have a fairly strong case on both of these issues, I accept that the risk of being unsuccessful on one or both of them is not negligible.

C. Nortel's Ability to Pay

[45] By far the biggest risk facing the plaintiffs is the risk that the defendants will be unable to satisfy any judgment that they obtain.

[46] The value of the defendant company has been notoriously volatile. It is reasonable to believe that the present litigation, and other litigation, has had and, if

not settled, would continue to have a destabilizing effect on the company. When that destabilizing effect is added to the volatility of the markets for Nortel's products and services, it leads to the very significant possibility that the plaintiffs would be unable to recover any award given them after trial.

[47] There is strong reason to believe that the plaintiffs will be best served if Nortel is allowed to remain as a viable enterprise. Many members of the plaintiff class still hold Nortel stock, and, under the proposed settlement, they will receive some compensation in Nortel stock.

[48] More importantly, the plaintiffs say that the settlement that has been reached represents the most the Nortel can reasonably pay in cash, and also includes shares that represent substantially all of Nortel's capacity to issue new common shares.

[49] While it is true that the plaintiffs might recover substantially more damages at trial than they will obtain under the proposed settlement, I am satisfied that the risks and costs of going ahead with the litigation are not justified by the potential gains. The proposed settlement passes the cost/benefit analysis.

Are the Class Members Adequately Informed, and Do they Object

[50] I turn, then, to the fourth category of considerations – the views of the class members.

A. Notice of this Application

[51] On June 27, 2006, the court made an order for publication of notice of the settlement application, and that order has been complied with.

[52] The efforts to give notice to potential class members in this case have been thorough. There has been a broad media campaign to publicize the proposed settlement and the court processes. There has also been a direct mail campaign directed at probable investors. I am advised that over 1.2 million claim packages were mailed to persons around the world. In addition, packages have been available through the worldwide web site *www.nortelsecuritieslitigation.com* on the internet. Toll-free telephone lines have been set up, and it appears that class counsel and the Claims Administrator have received innumerable calls from potential class members.

[53] In short, all reasonable efforts have been made to ensure that potential members of the class have had notice of the proposal and a reasonable opportunity was provided for class members to register their objections, or seek exclusion from the settlement.

B. Response of Class Members

[54] Class members had until September 19, 2006 to file objections to or to seek exclusion from the settlement, and until November 20, 2006 to file claims forms. Approximately 132,000 claimants have filed claims worldwide, approximately 5,000

of whom are potential members of the British Columbia class. Thirteen members of the British Columbia class have filed requests to be excluded from the settlement.

[55] Among persons who appear to be members of the British Columbia class, there has been only a single objection to the settlement that has been filed. The substance of the objection is as follows:

> If I correctly understand the papers outlining the distribution, the people who are suffering the effects of the inflated stocks will receive mere pennies for each stock they purchased. At the same time, those who are attempting to, in part "right the wrong", namely the attorneys and their respective companies, will not only be receiving payment for their "fees", at a very high rate per hour, but also for the "expenses". After reading the amounts requested by some of the firms one is tempted to believe this entire exercise is a farce! True consideration is not really being given to those who were deliberately misled. Rather, it is proposed that those with the most power benefit.
>
> While I recognize the extensive training and certain level of expertise the attorneys involved have, I would hope that someone with equal power would still have the decency to rule that those individuals actually losing money due to misrepresentation would be properly compensated.

[56] The objection can be fairly said to raise two issues. First, the objector considers the settlement amount to be too low. While she is not correct in suggesting that the settlement will amount to "mere pennies for each stock … purchased," it is the case that the settlement will compensate investors for only a fraction of their losses. I have taken the objector's views into account in the cost/benefit analysis referred to above.

[57] The other concern expressed is with respect to lawyers' fees and disbursements. To some extent, this concern may have been diminished by

counsels' decisions to reduce their fees from those originally authorized in the proposed settlement. However, I suspect that the fees that are claimed will remain upsetting to the objector. Her point is easily understood – the cost of complex litigation is exorbitant, and it must seem to many successful plaintiffs that the process of going to court has meant that a just resolution has come with a very high price tag.

[58] The appropriateness of lawyers' fees is not, however, a factor in determining the appropriateness of the proposed settlement here. Subject to what I have to say below on the subject of fees for lawyers in other jurisdictions, the court must determine the appropriateness of the fees separately from the appropriateness of the settlement. The lawyers will be entitled only to those fees that the court is convinced are reasonable in the circumstances.

[59] A small number of British Columbia residents who might be part of the plaintiff class have opted out of the settlement, presumably in order to be free to pursue their remedies individually. I am satisfied that the number is sufficiently small that it does not suggest any widespread dissatisfaction with the agreement among class members.

[60] In addition to the one objection from a British Columbia class member that I have mentioned, there have been thirty-five objections from persons who do not belong to the class. Some are not members of the plaintiff class in any jurisdiction, and complain that the class has not been defined broadly enough to include their potential claims. That does not appear to me to be an appropriate consideration at

this stage – I have already ruled on the appropriateness of the class definition in granting conditional certification of this action. As I have indicated, I am not persuaded that the certified class is in any way inappropriate.

[61] To the extent that members of the plaintiff classes in the Quebec, Ontario, or United States litigation have registered objections, it is my view that the substance of those objections can be (and has been) taken into account by the court in considering the cost/benefit analysis. They are, on the other hand, not relevant to the separate issue of whether there is significant dissatisfaction with the settlement among members of the plaintiff class. My jurisdiction extends only to approving or disapproving of the settlement in respect of persons represented by the representative plaintiff in the British Columbia litigation. It is dissatisfaction with the settlement within that class that I must be concerned about.

[62] The plaintiff class over which I have jurisdiction has been adequately informed of the proceedings and of the proposed settlement. There is very little objection to the proposed settlement among members of that class.

Acceptability of the Settlement - Summary

[63] The terms of the settlement itself are unexceptional. The compensation package is a large one, and I am convinced that the plaintiffs have succeeded in obtaining a settlement near the limits of Nortel's ability to pay. The plaintiffs will also retain certain rights to be compensated if Nortel succeeds in its actions against certain former directors and officers.

[64] The proposed claims administration process is an efficient one, and the settlement appears to me to be a fair and equitable one in terms of the distribution of settlement funds among the claimants. The court, of course, will have ongoing jurisdiction over issues that may arise regarding class membership and the administration of the settlement.

[65] I am therefore satisfied that the settlement is an appropriate one, and that it ought to be approved.

Fees

[66] Counsel for the plaintiffs in each jurisdiction worked together to achieve settlement, and they each seek payment of their fees out of the global settlement. U.S. counsel seek 8.5% of the total amount. Quebec counsel seek 0.45%. Ontario counsel seek $2.5 million, with the possibility of additional fees for work to be done after approval of the settlement. British Columbia counsel seek fees of $1,000,000, together with tax of $130,000 and disbursements of $21,434.13, for a total amount of $1,151,434.13.

[67] Section 38 of the ***Class Proceedings Act*** provides that the court must approve fees and disbursements to be paid to a solicitor.

[68] The fee agreement originally entered into by the representative plaintiffs and British Columbia counsel calls for a fee of 1/3 of the amount recovered by the plaintiff class. Section 38(2) of the ***Act*** provides that the agreement is not enforceable unless approved by the court. Counsel has chosen not to seek to

enforce the agreement. While the amount that will be recovered by the British Columbia class is uncertain, it is clear that the aggregate amount being sought for counsel fees will be far less than 1/3 of the total amount recovered.

[69] As counsel is not attempting to enforce the fee agreement, I am required, pursuant to s. 37(7) of the ***Class Proceedings Act***, to "determine the amount owing to the solicitor in respect of fees and disbursements." I will first address the issue of the appropriateness of the fees for British Columbia Counsel.

[70] British Columbia courts have considered a number of factors in assessing the reasonableness of the fees sought by counsel. The list includes:

a) the results achieved;

b) the risks undertaken;

c) the time expended;

d) the complexity of the matter;

e) the degree of responsibility assumed by counsel;

f) the importance of the matter to the client;

g) the quality and skill of counsel;

h) the ability of the class to pay;

i) the client and the class expectation; and

j) fees in similar cases

See, for example, ***Cardozo v. Becton, Dickinson and Co.***, 2005 BCSC 1612, 29 C.P.C. (6th) 112 at para. 25. A similar list appears in ***White v. Canada (Attorney General)***, 2006 BCSC 561 at para. 27.

[71] In the case at bar, the settlement achieved is a good one. The plaintiffs' counsel undertook significant risks in taking the case on. There was no assurance that the case would be certified, and once certified, there remained risks that it might not succeed.

[72] I am satisfied that the matter was complex, and that even though British Columbia counsel did not take on all of the responsibilities for the case, the time demanded of local counsel was very significant. While great care must be observed in making any use of "multipliers" in assessing the reasonableness of fee claims (see ***Endean v. Canadian Red Cross Society***, 2000 BCSC 971, 78 B.C.L.R. (3d) 28 (S.C.) at para. 19 *et seq.*) the base fee estimates put forward by counsel demonstrate that a huge amount of time has been expended on this case by local counsel. Given the complexities and the size of the class in British Columbia, it is not surprising that this is the case.

[73] British Columbia class counsel took on this case on a contingency basis, and faced a real risk of not being paid at all for their services. It is well recognized that when counsel assume a significant risk of not being paid, they are entitled to fees that exceed what would otherwise be reasonable when they succeed. The real risk of failure, with personal consequences to counsel cannot be ignored. An enhanced fee is appropriate.

[74] I am satisfied, in the circumstances, that the fees and disbursements now claimed by class counsel in British Columbia are reasonable.

[75] As I will indicate, because the fees and disbursements will be paid from a global settlement involving other jurisdictions as well as British Columbia, there is a potential that other jurisdictions will not share my view. Subject to what I will say about the need for approval of fees by other courts, I declare that a fee of $1,000,000 plus applicable taxes, and disbursements totalling $21,434.13 should be paid to British Columbia counsel.

[76] In my view, the ***Class Proceedings Act*** contemplates court approval of all aspects of a settlement, including all fees paid to lawyers and other professionals. It does not appear to me that the fees and disbursements of lawyers outside of British Columbia who have provided service to the plaintiffs in this proceeding are exempt from review by this court. Indeed, because the fees and disbursements of counsel in each jurisdiction will be drawn from the global settlement funds, each of the courts considering the settlement has jurisdiction to review the fees and disbursements claimed by all counsel.

[77] Multi-jurisdictional review of the fees and disbursements of all counsel presents practical difficulties. As K.J. Smith J. (as he then was) commented in ***Endean***, *supra*, at para. 30, “it cannot be forgotten that each province has its own laws and traditions in respect of solicitors' fees.” Review by each jurisdiction of the fees of counsel in other jurisdictions could result in an unfortunate duplication of efforts, and in significant uncertainty. More importantly, such review would fail to accord due respect to the courts of other jurisdictions, and thus fail to respect the concept of comity.

[78] The appropriate solution, in my view, is for each court to concentrate its review on the fees and disbursements of local counsel. While each court has the jurisdiction to review the fees and disbursements of counsel from other jurisdictions, as well, it is normally appropriate, as a matter of comity, for each to defer to courts in other jurisdictions to rule on the appropriateness of the fees and disbursements of their local counsel.

[79] In relying on the concept of comity, I do not suggest that it is appropriate for this court to abdicate its responsibilities under the ***Class Proceedings Act***. The court must be satisfied that given the fees that are claimed by all counsel from the global settlement, the amount left to be divided among members of the plaintiff class represents a reasonable settlement. I am satisfied that this test is satisfied in this case. Accordingly, the fees to be paid to Ontario, Quebec, and U.S. counsel is a matter on which I will defer to the courts of those jurisdictions. I am hopeful that they will take a similar approach to my ruling with respect to the fees and disbursements of British Columbia counsel.

The Order

[80] Aside from the issue of counsel fees, as discussed above, which may pose some difficulties in the wording of the draft order, there is one other difficulty. One provision of the draft states:

> THIS COURT ORDERS AND ADJUDGES that any appeal or challenge affecting the approval of the Plan of Allocation or this Court's approval of British Columbia Class Counsel fees shall in no way disturb or affect the balance of this Order and shall be deemed to be separate and apart from the balance of the Order.

[81] I believe that the plan of allocation and the approval of counsel fees are logically and practically severable from the approval of the amount of the settlement, and of the mix of cash and shares. I do not, however, have jurisdiction to bind the Court of Appeal in terms of the remedies that it considers to be appropriate on an appeal, or in terms of its interpretation of the scope of any appeal before it. I do not think that it is appropriate for this court to attempt, in an order, to in any way define or limit the jurisdiction of higher courts.

[82] I am therefore making an order in the form proposed by the applicant, with two exceptions. First, the order should reflect the limited nature of this court's approval of counsel fees and disbursements. Secondly, the paragraph referring to the effect of an appeal of the order will be excised. Should counsel wish to include a differently worded paragraph dealing with the severability of different parts of my judgment, but not purporting to limit the powers of an appeal court, I am prepared to consider their submissions on the matter.

"H.M. Groberman, J."
The Honourable Mr. Justice H.M. Groberman

January 24, 2007 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that in the second sentence of paragraph 24 should read as follows:

> Is the court confident that the proposed settlement is the product of a reasonable negotiating process, in which the parties have reached an agreement without collusion and without extraneous facts motivating the negotiators?

The fourth bullet in paragraph 28 should read as follows:

- Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

The last sentence of paragraph 68 should read as follows:

> While the amount that will be recovered by the British Columbia class is uncertain, it is clear that the aggregate amount being sought for counsel fees will be far less than 1/3 of the total amount recovered.

The second sentence of paragraph 71 should read as follows:

> The plaintiffs' counsel undertook significant risks in taking the case on.