COURT OF APPEAL

Between:

LAC LA RONGE INDIAN BAND

Appellant (Third Party)

And

HIS MAJESTY THE KING IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA

Respondent (Plaintiff)

And

APOTEX INC. and OTHERS

Respondents (Defendants)

WRITTEN ARGUMENT
(*Applications to Quash*)

Part 1: Facts

1. The appellant, Lac La Ronge Indian Band, responds to the applications to quash the appeals of the respondent His Majesty the King in Right of the Province of British Columbia **["HMTK(BC)"]** in CA48796 and CA48799. On February 3rd, 2023, HMTK(BC) filed the applications. On February 6th, the registrar referred them to a division. Purdue Canada offers additional grounds on HMTK(BC)'s applications to quash, but did not file its own applications. The appellant objects to any attempts to bootstrap additional grounds in reply to another's applications.

2. The appellant is one of the largest Indian bands in Canada with approximately 12,000 members.[1] The band (and others across Canada) have been particularly hard hit

[1] *Affidavit of Chief Tammy Cook-Searson* (02-12-2022) **("*Chief Cook-Searson Affidavit*")** [*Wozniuk* 087].

by the introduction of Purdue's OxyContin®,[2] and the resulting opioid crisis, as have Canadian municipalities (Vancouver in particular). The appellant is 1 of more than 600 other Bands who have had opioids-related addiction, gangs, homicides, malnutrition, and prostitution on their reserves.[3] As its Chief explained:

> 6. The abuse (and even use) of opioids has led to social problems on our reserves, including (but not limited to): abuse to self and others; prostitution of males and females; child neglect; family conflict and devastation; malnutrition; and physical, spiritual, mental, and emotional harm.... Band members have experienced loss of family support, loss of culture, language, and traditions, and many other issues.
>
> 7. The social costs of the opioid epidemic on our reserves are enormous. Many of our members have suffered overdoses. Many have been fatal. Each time we lose another community member, it devastates the friends and families in these small communities.
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> 8. Opioids have led to a loss of employment and a...reduction of funds that the Lac La Ronge Indian Band needs to build its communities and to support our members and their families.[4]

A. Orders Under Appeal

3. On May 17th, 2022, Purdue respondents to these appeals "made" a *Canadian Governments Opioid Health Care Costs Recovery National Settlement Agreement* **("*Settlement Agreement*")** with HMTK(BC), and other federal, provincial, and territorial governments.[5] §4.3 and Schedule "C" of the *Settlement Agreement* granted a security interest to those governments over all of Purdue Canada's present and future property:

> **4.3 Security Agreement**
> ...Purdue Canada shall deliver to the Canadian Governments:
> (a) a...**security agreement** substantially in the form appended hereto as

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[2] *Chief Cook-Searson Affidavit* (02-12-2022), ¶3 [*Wozniuk* 088].

[3] ***Chief Cook-Searson Affidavit* (02-12-2022), ¶3 [*Wozniuk* 089-90]:** ("5. Those who are **addicted** to opioids on our reserves have become desperate to obtain their next fix. This in turn has caused many to turn to **crime** to provide a means to support their constant cravings for opioids. (a) Many of our members have turned to **prostitution**, **theft**, **robberies**, and **break and enters**. Businesses and personal residences are being targeted for **thefts** more than ever before. This is leaving community members with feelings of fear and of being unsafe in their own homes. (b) ... Our communities have seen a tremendous increase in the number of **gangs** and gang members associated with the **opioid epidemic**. The illicit opioids trade fuels **gang violence**. **Gang violence** has resulted in a sharp increase in our **homicide** rate, as well as many **violent assaults**. ... 9.(a) Once addicted to opioids, individuals become extremely **malnourished**.... If given a choice to buy the opioid over food, they will choose the opioid to feed their **addiction...**").

[4] *Chief Cook-Searson Affidavit* (02-12-2022), ¶6-8 [*Wozniuk* 089-90].

[5] *Settlement Agreement* (17-05-2022) [*Wong #1* 001-080].

> Schedule C, granting to the Canadian Governments a **security interest** in **all** of Purdue Canada's present and future personal property, assets and undertaking. ...

("Security Interest").[6]

4. These appeals engage a review of the unfairness of that Security Interest to those affected by it. The unprecedented Security Interest compelled the appellant, as a Purdue creditor,[7] to both intervene and seek party status in the proceedings below. In addition to this class proceeding, there are others throughout Canada.

(a) On May 15th, 2019, on behalf of Canadians who were prescribed opioids and suffer from opioid use disorder, *Darryl Gebien* sued *Apotex Inc. et al* (including Purdue) in the Ontario Superior Court of Justice (CV-19-00620048-00CP). Mr. Gebien, like the appellant, asked to intervene to oppose the Security Interest, but in contrast to the appellant, Mr. Gebien did not seek party status and did not appeal.

(b) On June 3rd, 2020, on behalf of Canadian municipalities, *The City of Grande Prairie* sued *Apotex Inc. et al* in the Court of King's Bench of Alberta [2001-07073].

(c) On March 29th, 2021, on behalf of Canadian Indian bands, *Peter Ballantyne Cree Nation* and the appellant sued *Apotex Inc. et al* in the Court of King's Bench for Saskatchewan [QB 72/21].[8] On March 17th, 2023, with leave of the *CCAA* court,[9] they added Purdue affiliates.[10]

5. There are 2 orders under appeal,[11] arising from 2 reported reasons.[12] In one, because Justice Brundrett approved the Security Interest, he in effect allocated Purdue

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[6] *Settlement Agreement* [*Wong #1* 017, 063-77].

[7] *Affidavit of Allen J. Underwood II, Esq.* (29-11-2022) **("*Underwood Affidavit*")**, ¶12 [*Wozniuk* 046].

[8] *Chief Cook-Searson Affidavit* (02-12-2022), ¶12 [*Wozniuk* 092].

[9] *Order (Re: Lift Stay Motion of the Municipalities and Indian Bands* (06-01-2023), ¶1(ii) [*Wozniuk* 141].

[10] *Fresh as Amended Statement of Claim* (17-03-2023), Exhibit 13 [*Wozniuk* 148-90].

[11] *Order Made After Application (To Intervene)* (23-01-2023); *Class Certification and Settlement Approval Order (Purdue Canada Settlement Agreement* (30-01-2023). Each was filed with the Court of Appeal.

[12] *British Columbia v Purdue Pharma Inc.*: (Dec. 15th), 2022 BCSC 2343 (Brundrett J.) (to intervene); (Dec. 16th), 2022 BCSC 2288 (Brundrett J.) (settlement approval).

Canada's assets to federal, provincial, and territorial governments in priority to Indian bands and Canadian municipalities who have similar claims in parallel class actions arising from similar subject matter. As creditors of Purdue Canada, they have been adversely impacted by the Security Interest in the settlement approval order that is under appeal. In the other order under appeal, which denied the appellant party status, Justice Brundrett declined to allow the appellant to explain why the Security Interest is unfair and should not be approved as part of a reversionary opt in settlement class proceeding.

B. Purdue's International Insolvency

6. Because of Purdue Canada's perceived insolvency, the $150 million settlement of an $85 billion[13] claim is said to be desirable to HMTK(BC) in the context of Purdue's international insolvency. Purdue represented that its American Chapter 11 proceedings would be international in scope and would include all Canadian claimants, including HMTK(BC) and the appellant. Purdue specifically provided notice and advertising in Canada and other countries for claims filing.[14]

7. These appeals engage consideration of Purdue's Chapter 11 proceedings and appeals in the United States, and Canadian foreign recognition proceedings under the *Companies' Creditors Arrangement Act* **("*CCAA*")**. Each of HMTK(BC), Purdue Canada, and the appellant were engaged in these American and Canadian bankruptcy and insolvency proceedings. The procedural chronology that HMTK(BC) described in its settlement approval application, and in the supporting *Affidavit of Luciana Brasil* was incomplete; it prematurely ended on August 9th, 2021.[15] The appellant supplemented that chronology with evidence that Justice Brundrett declined to consider in his settlement approval reasons but that explains the unfairness of the approval process and its result.

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[13] ***Brasil Affidavit* (15-11-2022), ¶35 [*Wozniuk* 007]. || *Notice of Application (Purdue Settlement Approval* (15-11-2022) [*Wong #1* 165]:** ("34. ...the Canadian Governments filed...Proofs of Claim in the Purdue Bankruptcy, in the total amount of USD $67.3 billion (CAD $85,513,870,000).").

[14] *Underwood Affidavit*, ¶15 [*Wozniuk* 047].

[15] *Brasil Affidavit* (15-11-2022), ¶48 [*Wozniuk* 010].

8. On July 29th, 2020, HMTK(BC) filed *Proofs of Claim* in *In re: Purdue Pharma, LP* [Case No. 19-23649(SHL)] in the United States Bankruptcy Court for the Southern District of New York pursuant to Chapter 11 of Title 11 of the *United States Code* **("Foreign Main Proceeding")**. The appellant also filed a *Proof of Claim*, as did another Indian band and at least 3 Canadian municipalities.[16] The City of Toronto's *Proof of Claim* alone sought damages and abatement costs of $277,248,754.[17] In the spring of 2021, the US Debtors designated the appellant as a tribal class creditor and provided the appellant with a vote on the proposed Chapter 11 Plan.[18] That gave the appellant a belief that it would be equally treated with American tribal creditors under any confirmed plan.[19]

9. Purdue-affiliated Debtors in the Foreign Main Proceeding **("US Debtors")** crafted and propounded a proposed Chapter 11 disclosure statement and plan that went through at least 12 amended iterations **("US Plan")**. Undergirding the US Plan were numerous agreements, including a *Shareholder Settlement Agreement*, under which the US Debtors pledged the assets of its paradoxically-named "Independent Associated Companies" **("IAC's")** throughout the world (including Purdue Canada) to fund the US Plan:

> 23. Under the...*Shareholder Settlement Agreement*..., the Sacklers **pledged the assets** of IAC's (including those of **Purdue Canada**) to partially fund the US Chapter 11 Plan. The IAC's that **pledged their assets** to the Proposed US Chapter 11 Plan include...the **Purdue Canada** Defendants who are parties to the *Settlement Agreement* in British Columbia.[20]

10. In July of 2021, after realizing that they would not be afforded the same treatment under the US Plan as American states, municipalities, and tribes, the appellant and another Canadian band and Canadian municipalities filed an *Opposition to Plan Confirmation.* In August of 2021, they participated in a contested Plan Confirmation Hearing in the US Bankruptcy Court. In August of 2021, just before the hearing began,

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[16] *Underwood Affidavit*, ¶8-11 [*Wozniuk* 045-46].

[17] *Underwood Affidavit*, ¶13 and Exhibit 1 [*Wozniuk* 046, 053-57].

[18] *Underwood Affidavit*, ¶17 [*Wozniuk* 047].

[19] *Underwood Affidavit*, ¶18 [*Wozniuk* 048].

[20] *Underwood Affidavit*, ¶23 [*Wozniuk* 049].

HMTK(BC) withdrew its *Proofs of Claim*, subject to a **"Canadian Stipulation"**.[21]

11. In September of 2021, the Plan Confirmation Hearing resulted in a **"Plan Confirmation Order"**. The appellant, 9 States, the United States Trustee, and others, appealed the Plan Confirmation Order. On December 16th, 2021, the United States District Court for the Southern District of New York reversed the Plan Confirmation Order **("District Court Order")**.[22] The US Debtors and Sacklers appealed the District Court Order to the United States Second Circuit Court of Appeals, which the appellant opposed and cross-appealed.[23] Although all matters were briefed and argued on an expedited basis, the Second Circuit's decision still remains pending nearly a year later.[24]

12. As of today, the US Plan, including the underlying *Shareholder Settlement Agreement*, is not effective.[25] Its effectiveness depends upon the decision of the Second Circuit Court of Appeals. The Security Interest in the settlement approval order under appeal conflicts with the asset pledge in the US Plan. Justice Brundrett secured those same assets for Canadian federal, provincial, and territorial governments.

C. "Purdue Canada"

13. Purdue seeks to artificially parse the Canadian Purdue entities from their global partners and affiliates; but it is evident that they are engaged in the American bankruptcy. Critically, their assets have been pledged to fund the US Plan,[26] after payment of the settlement proceeds that are secured by the Security Interest. Purdue Canada is to be sold within 7 years.[27]

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[21] *Brasil Affidavit*, ¶43-47 [*Wozniuk* 009-10]. || *Underwood Affidavit*, ¶24 [*Wozniuk* 049].

[22] *Underwood Affidavit*, ¶28, Exhibit 3 [*Wozniuk* 050, 086].

[23] *Underwood Affidavit*, ¶29 [*Wozniuk* 051].

[24] *Underwood Affidavit*, ¶31 [*Wozniuk* 051]. || *Tanel Affidavit* (05-12-2022), ¶33 [*Wozniuk* 105].

[25] *Underwood Affidavit*, ¶32-33 [*Wozniuk* 051-52].

[26] *Underwood Affidavit*, ¶23 [*Wozniuk* 049].

[27] *Underwood Affidavit*, Exhibit 2, *Shareholder Settlement Agreement*, §3.01 [*Wozniuk* 079]. || *Tanel Affidavit* (05-12-2022), ¶27 [*Wozniuk* 104].

(a) The *Settlement Agreement* provides:

> 4.5 Sale of Purdue Canada (1) Nothing in this Settlement Agreement shall prevent...Purdue Canada from...selling...Purdue Canada..., provided...; ... (c) if any such sale...involves the sale...of the **assets...of Purdue Canada**..., Purdue Canada shall...pay to the Canadian Governments any portion of the Settlement Amount that remains outstanding....[28].

(b) In the Foreign Main Proceeding, the settlement of this class proceeding starts the time in which Purdue Canada must be sold:

> Section 3.01...(a) ...during the...**(7)-year period** commencing on the Plan Effective Date (the "Sale Period")..., the IAC Payment Parties shall: (i) ...sell or cause to be sold...the **assets of such IACs**; ...*provided, further* that...with respect to **Purdue Canada**, the **Sale Period** shall expire on the later of...**(7) years** after the Plan Effective Date and...(2) years after the...resolution of the claims asserted in *British Columbia v. Apotex Inc. et al, Registry No. S189395 (B.C.S.C. 2018)* is consummated.[29]

14. Despite its duty of full disclosure on a settlement approval hearing, Purdue Canada filed no affidavit on the hearing before Justice Brundrett. This information about the pledge of Purdue Canada's assets was put before him by the appellant, but Justice Brundrett declined to consider it on the settlement approval hearing. Purdue Canada did not attempt to place any value on the assets that were secured. It did not prove that there will be sufficient assets for other Canadian unsecured creditors (including the appellant) if and when the US Plan and the *Settlement Agreement* are approved and implemented. Purdue Canada essentially took the position that because the *appellant* had not proven that Purdue Canada was *in*solvent, it therefore must be solvent. Indeed, as explored below, there is a legitimate concern as to whether any funds would remain from Purdue Canada's assets for other Canadian unsecured creditors if the Security Interest is upheld. Because of the pledge of Purdue Canada's assets to the US Plan, it is likely that nothing will remain.

Part 2: Issues

15. Should the applications to quash be heard with the appeals? If not, should the applications to quash be dismissed?

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[28] *Settlement Agreement*, §4.5 [*Wong #1* 019]

[29] *Underwood Affidavit*, Exhibit 2, *Shareholder Settlement Agreement*, §3.01 [*Wozniuk* 079].

Part 3: Analysis

A. Should the applications to quash be heard with the appeals?

16. Rule 60(4) says that applications to quash are to be heard with appeals unless the registrar orders otherwise. The onus was therefore on HMTK(BC) (not the appellant) to upset this presumption. HMTK(BC) established no basis for upsetting the normal appeals process. It advanced 4 grounds to persuade the registrar to send these applications to this division before another division hears the appeals. Each will be addressed below.

17. Skolrood J. allowed the parties to re-address the registrar's sequencing decision with this division.[30] The appellant asserts that the appellate issues, including those raised by HMTK(BC), can not be efficiently and fairly presented on applications to quash the appeals. The appeals should proceed in the ordinary course, or on an expedited basis.

18. By alleging that the appeals lack merit, HMTK(BC) improperly invites this division to isolate only its position on the merits of the appeals, without considering the appellant's grounds of appeal. Primarily, it seeks to avoid this court's review of the gross unfairness that the Security Interest presents to the appellant and other litigation creditors of Purdue and the rash abuse of the class action legislation that HMTK(BC) and Purdue employed to get an (undeserved) stamp of judicial approval on their unprecedented settlement.

19. The registrar provided no reasons for referring the applications to this division in advance of the appeals. He alluded to no principles of law. There is no reasoned exercise of discretion to defer to. The new Rule 60(4) has not yet been considered by a division in a reported decision. Sequencing of class action interlocutory application decisions are informative by analogy, and list factors that may be considered. They were recently considered in this court's decision in this very litigation.[31] They engage 2 core values in

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[30] ***Lac La Ronge Indian Band v British Columbia*** **(March 3rd), 2023 BCCA 117 (Skolrood J.A.) (to cancel registrar's order), ¶21, 33, 37:** ("[37] ... ...it will be for the division hearing the applications to decide whether to permit them to proceed on a preliminary basis or to require them to be heard alongside the appeals.").

[31] *British Columbia v The Jean Coutu Group (PJC) Inc.* (June 4th), 2021 BCCA 219, [2021] 10 WWR 606 (Butler, Newbury, Goepel JJ.A.) (timing: certification vs. territorial jurisdiction).

civil procedure (time and money),[32] and can be extended by analogy to the within situation. Fairness and efficiency are also relevant in novel situations like this.[33] The registrar's sequencing decision has resulted in these applications to quash becoming a full-gowned 'dress rehearsal' for what will be properly presented on the actual appeals in factums.

1. Merit

20. HMTK(BC)'s first ground for asking that this division hear its applications to quash in isolation introduces some aspects of the merits of the appeals. HMTK(BC) proposes not to quash the appeals before they are heard, but to argue them as if they are being heard, except on an rushed basis without appeal books and without making the requisite request for expedited appeals under Rule 31. Notably, in *Coburn*,[34] the primary authority upon which HMTK(BC) grounded its applications, the standing issue and the merits of the appeal to the settlement approval order were both considered and addressed by a single division in the ordinary course; they were not bifurcated by prioritized applications to quash.

21. On February 3rd, 2023, HMTK(BC) applied to quash the appeals on a single statutory ground – section 20 of the new *Court of Appeal Act*, which addresses *only* lack of jurisdiction and "preliminary objections".[35] Its *Memorandum* confirmed that it is relying

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[32] ***Court of Appeal Act*****:** ("18(2) ...the practice and procedure of the court is to be regulated by analogy... (b) ...to...the *Rules of Court*...in the Supreme Court."). || ***Supreme Court Civil Rules*****:** ("1-3(1) The object of these...*Rules* is to secure the...**speedy** and **inexpensive** determination of every proceeding on its merits.").

[33] ***Western Canadian Shopping Centres Inc. v Dutton*** **(July 13th), 2001 SCC 46, [2001] 2 SCR 534 (McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour, LeBel JJ.) ("certification" granted):** ("[51] The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. ... Courts should approach these issues...seeking a balance between **efficiency and fairness**."). || ***Class Proceedings Act*****:** ("12. The court may...make any order it considers appropriate...to ensure its **fair and expeditious** determination...."). || ***Court of Appeal Act*****:** ("24(2) The court may...(c) exercise any original jurisdiction that may be...incidental to the hearing and determination of an appeal. (3) The court may exercise its powers ...(b) in favour of any person, **whether or not...a party** to the appeal.").

[34] *Coburn and Watson's Metropolitan Home v Home Depot of Canada Inc.* (Aug. 30th), 2019 BCCA 308, 438 DLR (4th) 533 (Harris, Hunter, Savage JJ.A.) (settlement approval) **("*Coburn*")**.

[35] ***Court of Appeal Act*****:** ("20(1) The court may...make any order...to give effect to a **preliminary objection** in relation to an appeal. (2) A justice may, on application, (a) **quash** an appeal on the basis that the court **lacks jurisdiction**..."). || **Section 20 was cited in combination with Rule 60:** ("60(1) This rule applies to an

only on section 20(1), "preliminary objection",[36] but the remedy of a "quash" is not expressly authorized under section 20(1), and Rule 60(1) distinguishes applications to quash from the raising of "preliminary objections".

22. On March 7th, 2023, HMTK(BC) attempted to rectify this problem with its applications. After receiving the appellant's submissions before Skolrood J.A., HMTK(BC) amended its applications to additionally rely on "inherent jurisdiction". That only created new problems. HMTK(BC) filed no amended *Memorandum* addressing this court's "inherent jurisdiction" which has likely been supplanted by section 21,[37] which deals with alleged lack of merit, and on which HMTK(BC) does not rely. As further described below, HMTK(BC)'s conclusion that the appeals lack merit is based on its first 3 grounds, none of which go to jurisdiction, and none of which are said to be a "preliminary objection".

23. In short, HMTK(BC)'s applications to quash cited only section 20(1) ("preliminary objection"), yet they argue only merits. Arguing that appeals lack merit is a request to *dismiss* appeals — not *quash* them. Section 20(2)(b)[38] specifically precludes the Court from dismissing an appeal for a "preliminary objection". In *Jardine v Hygiene*, Richards C.J.S. reviewed jurisprudence from across Canada,[39] including in British Columbia, where appellate courts considered whether merits can and should be addressed on applications to quash. He sagely cautioned that:

> [21] ...the Court must guard against being drawn into a practice where applications to quash become a substitute for hearing appeals on their merits. More particularly, the Court must be cautious about quashing an appeal in circumstances where the required assessment of

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application to...: (b) raise a **preliminary objection** to an appeal; (c) **quash** an appeal before it is heard.").

[36] *HMTK(BC) Memorandum* (03-02-2023), ¶1.

[37] ***Court of Appeal Act*****:** ("21(1) ...the registrar may refer an appeal to the court for **summary determination** if the...registrar considers that the appeal (a) is **frivolous** or **vexatious**,").

[38] ***Court of Appeal Act*****:** ("20(2) A justice may, on application, ... (b) make any order...to give effect to a **preliminary objection** in relation to an appeal, other than an order **dismissing** the appeal.").

[39] *Jardine v Hygiene*, 2018 SKCA 38, [2018] 7 WWR 713 (Richards C.J.S., Caldwell, Herauf JJ.A.), ¶16-21.

its merits involves being drawn into transcripts or other aspects of the evidence.[40]

24. That is exactly what has happened here. It is for that very reason that there *is* a presumption in Rule 60 that applications to quash should be heard with appeals. Every respondent alleges a lack of merit. There is nothing to distinguish HMTK(BC) and Purdue from the typical respondents. Every respondent alleges lack of merit, and every respondent (and their counsel on a contingency agreement) would prefer to be paid on an order or judgment without having to respond to an appeal.

25. Note also Richards C.J.S.'s reference at ¶17(b) of *Jardine v Hygiene* to the Ontario Court of Appeal's approach: it is "very difficult" to determine whether an appeal is devoid of merit without first hearing the entire appeal.[41] When a challenge to merits grounds an application to quash (as here), a division cannot hear some arguments without hearing them all. When they are all heard, it is a regular appeal, and merits should be prepared in the ordinary way with appeal records, books, and factums. In this case, merits of the appeals include those outlined in abbreviated form below. The division should neither hear nor decide merits on these applications before the appeals.

26. If this matter is before a division to consider merits, it should be done in the way prescribed by the rules, with the record that was before the chambers judge. HMTK(BC) has instead drawn this division into "aspects of the evidence" with a few snippets from the record below, as supplemented by fresh evidence (but without attempting to comply with the test for fresh evidence). There is *no* basis for upsetting the regular appeals process. If merits are to be decided, they should be done in the ordinary way, with appeal records

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[40] *Jardine v Hygiene*, 2018 SKCA 38, [2018] 7 WWR 713 (Richards C.J.S., Caldwell, Herauf JJ.A.), ¶21.

[41] ***Jardine v Hygiene*, 2018 SKCA 38, [2018] 7 WWR 713 (Richards C.J.S., Caldwell, Herauf JJ.A.):** ("[17](b) In Ontario,...the Court of Appeal has said an appeal may be quashed if it is "manifestly devoid of merit." The Court has also said this power will seldom be exercised as it is very difficult, in most cases, to reach the conclusion that an appeal is devoid of merit without first **hearing the entire appeal**. It has also indicated that only a minimal level of merit is needed to defeat a motion to quash an appeal because it is devoid of merit.").

and books that are limited to what was in the court below, presented in an orderly sequence, and not by affidavits *nouveau*.

2. Expense

27. As to HMTK(BC)'s second ground for arguing that the applications to quash should be heard before the appeals, the 55 respondents (other than HMTK(BC) and 2 Purdue respondents), took no position and played no role in the lower court hearing. HMTK(BC) essentially says it wants to avoid expense – for *other* respondents. Those other respondents have had no role on these appeals.

28. In this case, there are no costs savings in hearing the applications to quash first, nor in the assembly of quasi-appeal books that are split between affidavits from HMTK(BC) and the appellant and that contain fresh evidence that was not before Justice Brundrett. This procedure is therefore also unfair to the division who is asked to exercise an appellate function. Appeal books and records are a cherished and revered practice. They are the epitome of orderly. The record before this division is a cherry-picked, dieted compendium.

29. Then there is the extra expense if the quash applications are dismissed (as they should be), and the unfairness in giving HMTK(BC) '2 kicks at the can' on the merits of the appeals. By the time the proper appeals are heard, merits (but only some merits) will have been argued *at least 4 times*. So the parties are not going to avoid costs; the costs will be compounded. HMTK(BC)'s second ground for prioritizing its applications should therefore also be rejected. Ironically, HMTK(BC) proposed to save the expense of going to a division,[42] but now this matter is before one (for the first, but not last time).

3. Overlap

30. HMTK(BC) advanced "overlap" as a third ground for prioritizing its applications. The

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[42] ***Letter from Reidar M. Mogerman, KC to Registrar* (03-02-2023) [*Wong #2* 005]:** ("It is wasteful to require a **division** and counsel...to prepare for appeals that have no merit...").

requisite comparison would have required appellate pleadings and a record that the registrar did not have. The new *Notice of Appeal* Form 1 does not even allow a statement of the grounds of appeal to make such a comparison.

4. Prejudice

31. As to HMTK(BC)'s fourth ground, "potential"[43] (not actual) prejudice from delaying implementation of the settlement, there was no plan stated below nor in this court as to how the $150 million will be distributed. Appealing to notions of the public interest are misplaced where there is no jurisdiction in a class proceeding to do what Purdue and HMTK(BC) did here (a subject of the appeals), and where those affected by the Security Interest were given no notice, no vote, no chance to object, and no opportunity to opt out.[44]

32. HMTK(BC) says that it is prejudiced by mere "potential" delay in distributing the settlement funds. Before the registrar, then Skolrood J., and now this division, there was no stated plan for the use of the funds. They are to be distributed in unspecified divisions for unspecified purposes.[45] There is no basis to imply that they will be used for opioids treatment, for example, rather than to buy even more opioids from the defendant respondents for "safe supply" programs.[46] It is an unsubstantiated threat that governments will not provide services that they are statutorily obliged to provide.

33. HMTK(BC) and Purdue have made plain their intention to implement the settlement whether the appeals are allowed or not, as indicated in a third order (that is not under

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[43] ***HMTK(BC) Memorandum*** **(03-02-2023):** ("10. An outstanding appeal has the **potential** to hold up the implementation of the Purdue Canada Settlement... 50. These...appeals have the **potential** to obstruct payment of millions of dollars").

[44] **In contrast, see *Coburn*:** ("[60] ... The court gave all class members...an **opportunity to opt out** of the Canadian proceedings in conjunction with the approval of previous settlements.").

[45] ***Brasil Affidavit*** **(15-11-2022), ¶94 [*Wozniuk* 019]:** ("4. The Canadian Governments will distribute the settlement funds as amongst themselves in a manner to be agreed as between them.").

[46] *Wong Affidavit #1*, Exhibit B [*Wong #1* 082].

appeal).[47] If the appeals are allowed, the settlement should not be implemented at all.

34. As to the merits of such implementation, $150 million, divided 14 ways, is roughly $10 million for each government, but it is not all paid at once. Less than half is to be paid now.[48] After deducting presumptively reasonable legal fees, it is roughly $3 million per government. Their collective claims were at least *$85 billion*.[49] Their annual expenditures *each year* are in the billions.[50] The settlement proceeds are but one hair on the royal head.

35. This is not to argue that $150 million is inadequate (that is not under appeal), but is advanced in response to the suggestion that there is prejudice to HMTK(BC) if it is compelled to comply with the ordinary time lines for properly bringing appeals before a division. In that regard, the Court should consider what $150 million represents. The press described it as "such a small settlement"[51] that is "a tiny fraction"[52] of the $85 billion dollar claims. This is fresh evidence, and were it allowed, the division could also consider Dr. Michael Curry's complete reference to the settlement as "a very small amount of money...especially when you consider...".[53]

36. HMTK(BC)'s fourth ground for isolating its applications to quash should also be

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[47] ***Settlement Agreement* [*Wong #1* 014]:** ("2.3(1) In the event the Approval Order does not become Final within...18...months from the execution of this Settlement Agreement, HMQBC shall bring an application...to obtain the Dismissal Order acknowledging and **implementing the settlement** of all Released Claims...."). **|| *Order Permitting Application to Partially Dismiss Class Action* (08-02-2023) [*Wozniuk* 144-47].**

[48] ***Notice of Application (Purdue Settlement Approval)* (15-11-2022) [*Wozniuk* 031]:** ("73. ...$70,000,000, will be paid within thirty days after...the Purdue Canada Settlement Agreement are both approved...").

[49] ***Brasil Affidavit* (15-11-2022), ¶35 [*Wozniuk* 007]:** ("35. On July 29, 2020, the Canadian Governments filed ten separate timely Proofs of Claim, in the total amount of USD $67.3 billion (CAD $85,513,870,000).").

[50] ***Brasil Affidavit*, ¶13 (15-11-2022) [*Wozniuk* 004]. || Notice *of Application (Purdue Settlement Approval)* (15-11-2022) [*Wozniuk* 023]:** ("13. The Canadian Governments spend **billions** of dollars each year to fund health care services to Canadian residents...").

[51] *Wong Affidavit #1*, Exhibit C [*Wong #1* 095].

[52] *Wong Affidavit #1*, Exhibit C [*Wong #1* 094].

[53] *Wong Affidavit #1*, Exhibit C [*Wong #1* 122-23].

rejected. The appellant therefore asks that the appeals proceed under the ordinary timelines and procedures or as an expedited appeal in the alternative. Should the division be instead inclined to consider only HMTK(BC)'s arguments on the merits of the appeals, the appellant's response is as follows.

B. If not, should the applications to quash be dismissed?

37. The underlying appeals are very narrow. The settlement approval order is 94 pages, but the appellant primarily challenges only §4.3, the Security Interest that Justice Brundrett approved: without reasoned analysis; without full disclosure from Purdue; and without consideration as to how it impacts other Canadian and international creditors of Purdue in other proceedings in which Purdue Canada's assets have been pledged. The appellant sought leave to intervene as a party to explain why. Justice Brundrett denied leave, and therefore did not address the submissions on the Security Interest in approving the *Settlement Agreement*. He observed it in a single sentence.[54]

1. Standing

38. Standing to appeal class action settlement approval orders is an evolving issue.[55] HMTK(BC) posits that the appellant lacks standing to appeal.[56] The appellant applied for party status below and was a party to an order under appeal.[57] It is affected by both orders. There is no merit to the suggestion that a party who is named on an order, and who made the application for that order, has no standing to appeal it. No court has held

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[54] ***British Columbia v Purdue Pharma Inc.*** **(Dec. 16th), 2022 BCSC 2288 (Brundrett J.) (settlement approval):** ("[9] ... Purdue Canada has agreed to grant the Canadian Governments a **security interest** over its personal and real property as security for the payment of the settlement amount.").

[55] ***Home Depot of Canada Inc. v Hello Baby Equipment Inc.*** **(Jan. 14th), 2020 SKCA 7, 444 DLR (4th) 145 (Kalmakoff J.A., Richards C.J.S., Schwann J.A.) (to quash appeal):** ("[21] ...I do not intend here to comment or rule generally on the scope of rights of appeal in class proceedings. This case is concerned only with the question of whether class members who object to a settlement have a right to appeal a settlement order. Other issues must be left for other appeals.").

[56] *HMTK(BC) Memorandum* (03-02-2023), ¶6(a), 27(a), 29, 32, 47.

[57] ***Chippewas of Sarnia Band v Canada (Attorney General)*** **(April 4th), 96 ACWS (3d) 221 (C.A., Osborne A.C.J.O.) (to intervene):** ("[4] ...the moving parties ought to be permitted to intervene, **as parties**,...").

otherwise, not even on an appeal of a class action settlement approval order.

39. The jurisdiction to allow an appeal even by a non-party under section 24(2)(c) of the *Court of Appeal Act*, should it be engaged in any appeal, may be exercised by a division.[58] Since the appellant in this case is a "party to the order" under appeal, it obviously has standing, and section 9(3) is probably not engaged.[59] If it is, the test parallels that for whether to grant leave to intervene, which is a core issue on CA48796. The test in the Supreme Court below was specifically adapted from the test in this court.

40. Despite Purdue's bare conclusory submission otherwise,[60] the appellant is a "creditor" within the meaning of the *CCAA*.[61] Section 2 of the *Bankruptcy and Insolvency Act* **("*BIA*")**[62] defines "creditor" as a person who has a "provable claim", which section 121(1) defines as including both present and *future* liabilities respecting *any* obligation incurred *before* the date of bankruptcy. The *CCAA* defines "claim" to mean any "claim provable" within the meaning of the *BIA*. The appellant therefore has a "provable claim" under the *CCAA*, and is a "creditor", whether it had named Purdue or not (it did).

41. Thus, Justice Brundrett erred in finding that the appellant was not a "creditor",[63] and in holding that it had no interest in the Security Interest,[64] whether as a creditor or not.

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[58] ***Coburn*****:** ("[41] ... Section 9(3) of the CAA confers an original jurisdiction to permit an appeal by a person who is not **a party to the order**. This jurisdiction may be exercised by a division but not a single justice... ... [83] ... The leave issue before us is a different issue and one only a division can exercise under s. 9(3)....").

[59] Section 24(2)(c) was section 9(3) of the *Court of Appeal Act [Repealed]*, RSBC 1996, c 77.

[60] *Purdue Memorandum* (10-02-2023), ¶3(d).

[61] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

[62] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

[63] *British Columbia v Purdue Pharma Inc.* (Dec. 15th), 2022 BCSC 2343 (Brundrett J.) (to intervene), ¶11.

[64] *ibid*, ¶16, 28, 31.

Intervenors with a direct interest in the matter should be added as parties.[65] The appellant in this case has a direct interest in the settlement approval order that created a security interest over the assets of Purdue Canada who is common to its national class action in another province that arose from similar subject matter. Its interests (and those of other Canadian Indian bands and municipalities) are directly[66] and adversely affected by the certification and settlement approval order under appeal. In particular, the appellant is directly and adversely affected by §4.3[67] of the *Settlement Agreement* and §2.1[68] of the *General Security Agreement* that is attached as Schedule "C" thereto.

42. HMTK(BC) primarily relies on *Coburn* as its basis for quashing. *Coburn* was a different situation. *Coburn* concerned standing for *class members* to appeal. HMTK(BC) concedes that the appellant is not a class member.[69] The Court of Appeal has not previously addressed standing of *interveners* to appeal a settlement approval order. HMTK(BC) also accepts that.[70] The class members in *Coburn* merely made submissions below;[71] the appellant here made a formal application for party status. Class members in *Coburn* had a right to opt out – twice; the appellant here did not.

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[65] ***Monaco v Coquitlam (City)* (Sept. 17th), 2014 BCSC 2090, 30 MPLR (5th) 170 (Abrioux J.) (to intervene):** ("3. Intervenor status should not be granted where the applicant has a direct interest in the outcome of a specific action.... A person with such an interest **should be added as a party**:...").

[66] ***Li v British Columbia* (July 28th), 2020 BCCA 222, 491 CRR (2d) 243 (Groberman J.A.) (to intervene):** ("[10] ... Where a proposed intervenor can demonstrate that it will be **directly impacted** by an appeal, it will generally be granted intervenor status as a matter of fairness.").

[67] *Settlement Agreement*, §4.3 [*Wong #1* 017].

[68] ***Settlement Agreement*, Schedule "C" Security Agreement, *General Security Agreement* [*Wong #1* 066]:** ("2.1 Grant of Security As security for payment..., the Obligor grants...a continuing **security interest**...in and upon the Collateral whether now in existence or hereafter acquired....") || **The *Settlement Agreement* is attached as Schedule "A" to the *Class Certification and Settlement Approval Order (Purdue Canada Settlement Agreement* (30-01-2023) that is under appeal, and is a part of that order:** ("10. THIS COURT ORDERS that the Purdue Canada Settlement Agreement in its entirety is hereby approved...").

[69] *HMTK(BC) Memorandum* (03-02-2023), ¶16, 3. || *Purdue Memorandum* (10-02-2023), ¶4, 7-8, 12.

[70] *HMTK(BC) Memorandum* (03-02-2023), ¶32.

[71] ***Coburn*:** ("[2] ...Home Depot and Wal-Mart appeared at the application to approve the settlement. They were granted audience to **make submissions** opposing...the settlement. ... They had no other status at the hearing and **did not apply for any other status**....") || ***Purdue Memorandum* (10-02-2023), ¶7, 9**.

43. Even the presumptive rule in *Coburn* that *class members* can not appeal is subject to at least 3 expanding exceptions,[72] each of which is evident here.

44. First, breach of procedural fairness. Justice Brundrett declined to order notice to those affected by the Security Interest, and he refused to consider the appellant's submissions against it.[73] As to notice, Indian bands, municipalities, and personal injury claimants in other ongoing class action litigation against Purdue were not given the mandatory notice of certification.[74] Despite having "made" the settlement on May 17th, 2022, Purdue and HMTK(BC) waited until November 15th to apply for approval. When they finally got around to it, they gave no notice to those affected by the Security Interest. The appellant learned of it, and applied as soon as reasonably practicable – within 2 weeks.[75]

45. There was no delay by the appellant, but the lack of notice deprived the appellant of an appeal of the intervention order in isolation, as HMTK(BC) suggests should have happened. If its mootness argument (addressed below) has any traction on the basis that the appellant did not apply and appeal in advance of the settlement approval hearing,[76] the

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[72] ***Coburn*****:** ("[48] ...an order approving settlement may have been granted in circumstances that would justify this Court exercising its discretion to grant leave to an objecting class member to appeal the order. Without attempting to be exhaustive, those circumstances might relate to **breaches of procedural fairness** or possibly demonstrable **injustice** in the settlement approval order. What is required are special or extraordinary circumstances going **beyond the inherent procedures of the *CPA*** or orders made within the class proceeding that arguably amount to a **miscarriage of justice**."). || ***Macaronies Hair Club and Laser Center Inc. v BofA Canada Bank* (Feb. 4th), 2021 ABCA 40, [2021] 6 WWR 375 (Fraser, Khullar, Pentelechuk JJ.A.) (settlement approval):** (**"**[41] ...we accept, as did the British Columbia Court of Appeal..., that permission to appeal a settlement approval order may be granted to class members where, for example, the **settlement approval process was unfair** or otherwise amounted to a **miscarriage of justice**.").

[73] *BC v Purdue Pharma Inc.* (Dec. 16th), 2022 BCSC 2288 (Brundrett J.) (settlement approval), ¶8.

[74] ***Class Proceedings Act*****:** ("2(2) The member who commences a proceeding...**must**... (b) **give notice** of the application for certification to...(ii) the representative plaintiff for any proposed multi-jurisdictional class proceeding that has been commenced elsewhere in Canada and that involves...**similar** subject matter.").

[75] HMTK(BC)'s statement at ¶5 of its *Memorandum* that the appellant did not apply until December 2022 is one of the many errors in its *Memorandum*. The appellant's application was filed on November 29th, 2022.

[76] ***HMTK(BC) Memorandum* (03-02-2023):** ("42. Lac La Ronge could have brought its intervention application **in advance** of the settlement approval hearing, allowing it **time to appeal** an unfavourable result. ").

appellant was robbed of that chance by the mere month that HMTK(BC) and Purdue left between the filing of their application for approval and the hearing.

46. Section 2(2)(b)(ii) of the *Class Proceedings Act* required that notice of the certification hearing be given to representative plaintiffs in other class proceedings involving "similar" (but not identical) subject matter. In addition to the band, municipalities, and *Gebien* class actions, there were other class actions in Québec and in British Columbia that were filed in 2019.[77] Justice Brundrett dispensed with notice (in error) on the basis that 'all class members are here'.[78] Section 2(2)(b)(ii) required more.

47. Given the extraordinary Security Interest sought, a section 21[79] *non-class member* notice was further appropriate to "persons" affected by it. Notice obligations under the *Class Proceedings Act* are broader than merely providing notice to other class members, and Justice Brundrett did not consider that. Where (as here) HMTK(BC) secured Purdue Canada's assets in priority to other aboriginal[80] and municipal[81] governments without notice and consultation, it further disregarded the duty of honour the Crown owes to the aboriginal peoples of Canada, and the statutorily mandated consultations with municipalities.[82] Each

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[77] *Tanel Affidavit* (05-12-2022), ¶21(b)-(c) [*Wozniuk* 102].

[78] *BC v Purdue Pharma Inc.* (Dec. 16th), 2022 BCSC 2288 (Brundrett J.) (settlement approval), ¶8.

[79] ***Class Proceedings Act*:** ("21(1) At any time in a class proceeding, the court may order any party to give **notice** to the **persons** that the court considers necessary...to ensure the **fair conduct** of the proceeding.").

[80] ***Mitchell v M.N.R.*, 2001 SCC 33, [2001] 1 SCR 911:** ("[134] The Royal Commission.... ...recognized the challenge **aboriginal self-government** poses to the orthodox view that constitutional powers in Canada are wholly and exhaustively distributed between the federal and provincial governments...; ... The Royal Commission...states...that: ... ¶As with the federal and provincial governments, **Aboriginal governments** operate within **a sphere of sovereignty** defined by the constitution. ....¶ [135] ... ...Aboriginal peoples do not stand in opposition to, nor are they subjugated by, **Canadian sovereignty**. They are part of it.").

[81] ***Nanaimo (City) v Rascal Trucking Ltd.*, [2000] 1 SCR 342:** ("[31] ...municipalities exercise...legislative and executive powers.... ... Municipalities essentially represent delegated **government**. [32] ...municipalities are **political bodies**.").

[82] ***Community Charter*, SBC 2003, c. 26:** ("2(2) The relationship between municipalities and the Provincial government is based on the following principles: (c) **consultation** is needed on matters of mutual interest,...").
|| **Taylor Z, Dobson A. *Power and Purpose: Canadian Municipal Law in Transition*. 4-Feb-2020. Institute on Municipal Finance and Governance:** ("[page 13] ...British Columbia...have also legislated a

were among the governments in Canada most adversely affected by the opioid crisis that Purdue is pled to have engineered. Even if the appellant were not adversely affected by the Security Interest (it was), and had not applied to be a party (it had), the court would benefit from receiving the aboriginal viewpoint as a mere intervenor.[83]

48. The lack of notice was compounded by the lack of opportunity to oppose the extraordinarily atypical aspects of the class action *Settlement Agreement*. Justice Brundrett erred in not considering the appellant's submissions where there ultimately was no opposition by any party to the settlement.[84] The settlement approval application was brought on consent of Purdue Canada and 13 conditional opt in class members.[85] Where all proposed class members benefitted from the Security Interest, there were no class member objectors to provide meaningful assistance to the court in assessing the unfairness of the Security Interest on "those affected by it". The appellant was not a class member, and there was therefore no process for it to object;[86] however an intervention is broader than an objection and gives rise to separate rights of appeal that have not been considered in this (nor any other Canadian appellate) court in a settlement class context.

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duty on the part of the province to consult municipalities, individually or collectively, before making decisions that affect them. ... [page 61] ... Several provincial legal frameworks now recognize municipalities as "responsible and accountable" governments and **require the province to consult** with municipalities on actions that affect them. British Columbia...recognize municipalities as an "order of government," a term...reserved to the federal and provincial governments, and...Indigenous governments...").

[83] ***Tanchak v British Columbia*** **(March 21st), 2023 BCSC 428 (Norell J.) (standing - parallel class actions):** ("[45] ... the Varley Plaintiffs are uniquely situated, and the Court would benefit from their perspectives...and will ensure this Court is fully apprised of the impact that the continued prosecution...will have on the interests of Métis and Non-Status individuals.").

[84] *BC v Purdue Pharma Inc.* (Dec. 16th), 2022 BCSC 2288 (Brundrett J.) (settlement approval), ¶25.

[85] ***Wilson v Depuy International Ltd.*** **(May 17th), 2018 BCSC 854, 25 CPC (8th) 371 (Branch J.) (to intervene):** ("[14] The proposed position of the intervenors on these issues will differ from those that will be advanced by the present parties, who are obviously both supporting the proposed scope of the certification order. I find that such submissions by the intervenor will assist the court....").

[86] **Contrast with *McLean v Canada (Attorney General)* (April 25th), 2019 FC 511 (Phelan J.) (to intervene), ¶17-28:** ("[20] The...proposed interveners.... ... [21] ...are...**Class Members** in the McLean Action. As such, they **can raise their concerns** with the Settlement Agreement **in the objection process**...orally or in writing.... ... [24] ...the positions of these proposed interveners can be adequately advanced **in the objection process**. ... [28] ...she is **a Class Member** and **can use the objection process**.").

49. Second, lack of jurisdiction. The *Class Proceedings Act* has opt out classes only, but Justice Brundrett certified an *opt in* class, and a *reversionary* one. Class members opt in for the settlement funds, then opt back out. There is *no* jurisdiction to do that under the *Act*, and no jurisdiction to order a Security Interest that affects non-class members. In enacting opioids legislation, the Legislative Assembly did not authorize the creation of a security interest that would subordinate other pending claimants to the assets of any opioids manufacturer or distributor. The opioids legislation and the *Class Proceedings Act* are procedural. The settlement approval order conscripted procedural statutes to create substantive rights; and without need, where HMTK(BC) and Purdue say they are going to proceed with their settlement with or without the class action order under appeal.

50. The *CCAA* sets out limited circumstances in which a court will grant security interests,[87] and this case was not within the prescribed situations. Priorities are rarely, if ever, reordered in the manner prescribed in the settlement approval order. It is therefore doubtful that even the *CCAA* Court would have the authority to alter the relative priority of secured creditors in the unfair manner prescribed in the settlement approval order;[88] however, that determination in a settlement context can[89] and should[90] only have been

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[87] ***Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 11.2** (debtor-in-possession lender's charge, requiring the consideration of various factors including the value of the company's property and prejudice to other creditors), 11.4 (critical supplier charge), 11.51 (director and officer indemnification charge), 11.52 (administration charge).

[88] ***General Publishing Ltd. (Re) (In Bankruptcy)* (2003), 39 CBR (4th) 216:** ("[8] ...the court, in a CCAA proceeding, should interfere with **existing priority rights** only to the extent necessary...for the CCAA proceedings to continue and to provide the company with an opportunity to work out a restructuring....").

[89] ***Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp.* (March 20th), 2013 ONSC 1078, 100 CBR (5th) 30 (Morawetz J.) (partial settlement approval):** ("[37] ...**class proceedings** can be **settled in a CCAA proceeding**. ... [41] ...claims arising out of the class proceedings are claims in the CCAA process. ... [42] ...**these proceedings are the appropriate time and place** to consider approval of the...Settlement. This court has the **jurisdiction in respect of both** the *CCAA* and the *CPA*. ... [49] ...in assessing a **settlement within the CCAA context**, the court looks at the following three factors...: (a) whether the settlement is **fair and reasonable**; (b) whether it provides substantial benefits to **other stakeholders**; and (c) whether it is consistent with the purpose...of the CCAA.").

[90] The *ORDER (re: Motion for Lift Stay/Directions)* (issued 09-10-2022) directed an application for certification and settlement approval to proceed in British Columbia; however, the Ontario Superior Court expressly reserved (without limitation) the rights of "*any person*" to advance "*any argument* before the B.C. Court in

made (if ever) in the *CCAA* proceeding.

51. In the *Opioid Damages and Health Care Costs Recovery Act*, the Assembly passed an arsenal of legislative provisions that upset settled common law and statutory liability principles. Legislatures comprehensively eroded defence rights but chose not to erode plaintiff creditors' rights. Neither Parliament nor provincial legislatures chose to prioritize their own claims over those of other Canadian aboriginal and municipal governments. The Security Interest in this case was an excess of jurisdiction under the opioids legislation and contrary to the purposes of class proceedings.[91]

52. Justice Brundrett therefore did not have the jurisdiction to approve such a preference under a class proceedings settlement; or if he did, he should have declined to exercise it where *CCAA* proceedings involving Purdue Canada are pending in the Ontario Superior Court of Justice and where the Canadian assets in question were already pledged as security for the US Plan that remains on appeal in the United States.[92]

53. Justice Brundrett further erred in certifying a reversionary opt in class.[93] There is no constitutional nor statutory jurisdiction to include a class of Canadian provinces in a civil action for damages in the superior court of another province. As to the lack of constitutional jurisdiction, because of Crown immunity, a superior court in one province cannot assume jurisdiction over provincial governments from other provinces,[94] either as

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response to the OHCCRN Settlement Application."

[91] ***Epstein v First Marathon Inc.* (Feb. 16th, 2000), 41 CPC (4th) 159 Cumming J.) (settlement approval denied):** ("[72] This court has the authority under s. 29(2) of the *CPA* to reject any proposed settlement that constitutes an abuse of process or that is inconsistent with the **purposes of the legislation**.").

[92] *Underwood Affidavit*, ¶23 [*Wozniuk* 049].

[93] *BC v Purdue Pharma Inc.* (Dec. 16th), 2022 BCSC 2288 (Brundrett J.) (settlement approval), ¶22, 28.

[94] ***Fitter International Inc v British Columbia*, 2021 ABCA 54, 456 DLR (4th) 636:** ("[17] ... BC can be sued in the courts of BC; it does not follow that BC can be sued in the courts of another province. In law, the opposite is true. Hogg continues, at pp 485-486: ¶...Nor does...any province purport to confer jurisdiction on the province's courts over the Crown in right of any province other than the enacting province. Indeed, there

defendants or as non-party class members. The constitutional jurisdiction of superior courts cannot be expanded by access to justice concerns.[95]

54. There have been no previously certified class actions on behalf of provincial governments, and indeed few (if any) ordinary actions where a government has sued private defendants in another province's court, yet alone manufacturers and distributors of consumer products. Notably, the tobacco health care costs recovery litigation was pursued as individual actions in separate provinces. The *Opioid Damages and Health Care Costs Recovery Act* was based on the statute that gave rise to that litigation.[96]

55. Specifically with respect to opioids, the legislatures of many provinces and *all* territories have not authorized their governments to participate in a class proceeding in another province. Only 5 provinces have passed legislation addressing potential participation, and ambiguously so.[97] The constitutionality of those provisions has never been judicially reviewed. The *Opioid Damages and Health Care Costs Recovery Act*, s 11(1)(b)(i) is *ultra vires* the Legislative Assembly to the extent that it authorizes otherwise.

56. As to the lack of statutory jurisdiction, the *Class Proceedings Act* authorizes opt out classes, not opt in classes, and not reversionary opt in classes. The opt in process in the

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is even a basis for suggesting that such a grant of jurisdiction would be **unconstitutional**....").

[95] ***P.S v The Commissioner of Nunavut and Her Majesty the Queen in the Right of Ontario*, 2022 NUCJ 18:** ("[2] ... The plaintiff...argues...the strict rules relating to Crown Immunity should be relaxed to...ensure the respondent is not denied...**access to justice**". ... [8] Ontario can rely on the well-established legal principle relating to Crown immunity that serves to insulate a sovereign jurisdiction from facing legal action in another jurisdiction. ... This immunity cannot be...set aside because of **access to justice** concerns.").

[96] ***Valeant Canada LP/Valeant Canada SEC v British Columbia* (Nov. 2nd), 2022 BCCA 366 (Bauman CJ, Harris, Newbury JJ.A.) (to strike claim):** ("[77] The ORA is modeled after the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30....").

[97] **Alberta:** *Opioid Damages and Health Care Costs Recovery Act*, SA 2019, c 0-8.5, s 12. **Manitoba:** *The Opioid Damages and Health Care Costs Recovery Act*, SM 2020, c 24, s 11. **Ontario:** *Opioid Damages and Health Care Costs Recovery Act, 2019*, RSO 2019, c 17, Sch 2, s 11. **Nova Scotia:** *Opioid Damages and Health-care Costs Recovery Act*, SNS 2020, c 4, s 13. **PEI:** *Opioid Damages and Health Care Costs Recovery Act*, SPEI 2020, c 77, s 12.

order under appeal is *not* what the Assembly contemplated and prescribed in sections 8(1)(f) and 16 of the *Class Proceedings Act* and section 11(2) of the *Opioid Damages and Health Care Costs Recovery Act*. The conditional and reversionary opt in process ordered is contrary to the opt out procedure prescribed by the *Class Proceedings Act*, which provides *only* for an unconditional opt out process.[98] Justice Brundrett therefore lacked both the statutory and constitutional jurisdiction to certify an opt in class of federal and provincial governments, and *a fortiori*, a conditional, reversionary opt in class.

57. This 2 step line dance by 14 governments, is *not* a class action, or at least not a class action under British Columbia's legislation. In the settlement approval order, class members 'pop in' as opt ins to receive settlement proceeds, then 'pop out' as opt outs. The *Class Proceedings Act* does not authorize this 'jack-in-the-box' process. HMTK(BC) also popped in at the Foreign Main Proceeding by filing *Proofs of Claim*. It did not like result, so it popped back out. In that manner, it disrupted a global resolution that is intended to provide fairness to all of Purdue's international creditors. The process employed in this province was an abuse of process that was precipitated by Justice Brundrett's excess of jurisdiction in certifying a reversionary opt in class of provincial governments and in approving a Security Interest without jurisdiction to do so.

58. Third, injustice from the settlement approval order. The provinces were not the only ones affected by the opioids crisis. They were not even the *primary* ones affected. The order under appeal allowed HMTK(BC) to settle and secure all of Purdue Canada's property, with no regard for the litigation claims of anyone else, including the Indian bands

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[98] ***Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp.*** **(March 20th), 2013 ONSC 1078, 100 CBR (5th) 30 (Morawetz J.) (partial settlement approval):** ("[80] Finally, although the Objectors demand a right to **conditionally opt-out** of a settlement, **that right does not exist** under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create **a conditional opt-out**. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is **no provision** for a **conditional opt-out** in the CPA, and Ontario's **single opt-out regime** causes "no prejudice...to putative class members".").

to whom it owed a duty of honour, notice, and consultation. The appellant would not have applied for party status, nor filed these appeals, were it not for the Security Interest. They are adversely impacted by this 'wart of the order'.

59. The appellant does not challenge the inadequacy of the settlement on class members. It challenges the unjust impact of the Security Interest on Indian bands, municipalities, and others who are pursuing claims against Purdue. Toronto's claim is $277 million alone.[99] Vancouver's is likely more. Indian reserves have been impacted by the opioid crisis in multiples more than other Canadians.[100]

60. The settlement under appeal is $150 million. That small amount is said to be justified by Purdue Canada's insolvency. The *Affidavit of Luciana Brasil* explained:

> 85. Over the course of negotiation..., Purdue Canada produced...highly confidential financial documents and information, including audited and unaudited financial statements.
>
> 86. The documents and information allowed Class Counsel to conclude that...the face value of the claim against Purdue Canada **vastly exceeded** the value and resources of Purdue Canada.[101]

Such is a clear statement of insolvency, not an "unfounded and hypothetical concern".[102] The aggregate claims of bands and municipalities exponentially exceed $150 million.

61. Purdue Canada now diverts attention from their plausible insolvency by submitting through its counsel, but without an affidavit, that it is a "going concern".[103] They did not prove it, and the court should not assume it, particularly on a full disclosure settlement hearing where HMTK(BC) and Purdue did not provide the "financial documents and

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[99] *Underwood Affidavit*, ¶13 and Exhibit 1 [*Wozniuk* 046, 053-57].

[100] *Chief Cook-Searson Affidavit* (02-12-2022), ¶11, 13 [*Wozniuk* 091-94].

[101] *Brasil Affidavit* (15-11-2022), ¶85-86 [*Wozniuk* 016].

[102] ***HMTK(BC) Memorandum* (03-02-2023):** ("2. ... Its position is that the Purdue Canada Settlement should not receive court approval because of an **unfounded and hypothetical concern** that the settling defendants may be left with insufficient funds to satisfy a settlement or judgment...").

[103] *Purdue Memorandum* (10-02-2023), ¶3(a).

information disclosure" to which Ms. Brasil alluded. Whether Purdue is a "going concern" is immaterial, where the record showed the plan to sell Purdue Canada, going concern or not, after discharging the Security Interest. This class proceeding is expressly cited in the American *Shareholder Settlement Agreement* that the appellant provided to the court (but that Justice Brundrett would not consider). Where Purdue Canada's assets have been pledged to the US Plan,[104] it also makes no difference whether Purdue Canada is a "Debtor" in American or Canadian proceedings or not.[105]

62. Purdue's plan leaves virtually nothing left for Canadian bands and municipalities. Simply put, Purdue's documented plan is to pay the provinces pursuant to the Security Interest, then sell Purdue Canada and send anything left to the United States to fund Purdue's global bankruptcy. Those documents were put before Justice Brundrett, not by HMTK(BC) or Purdue, but by the appellant. In denying leave to intervene, he (in error) refused to consider them in his settlement approval analysis.

63. Where no notice was given to those affected by the Security Interest, where the settling parties had no impetus to appeal,[106] where objecting respondents withdrew after brokering additional relief on the day of the hearing, and where the other proposed intervenor (Mr. Gebien) did not set up his application with an intent to appeal and thus has not appeared in this court, it is left to a Saskatchewan Indian band whose reserves have been particularly hard hit by the opioids crisis to get this huge matter of public importance and its unprecedented Security Interest for review before the Court of Appeal.

64. Simply put, class action settlements are not immune from review. This foundation

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[104] *Underwood Affidavit*, ¶23 [*Wozniuk* 049].

[105] *HMTK(BC) Memorandum* (03-02-2023), ¶11. || *Purdue Memorandum* (10-02-2023), ¶3(b).

[106] ***Coburn and Watson's Metropolitan Home v Bank of Montreal* (Aug. 30th), 2019 BCCA 308, 438 DLR (4th) 533 (Harris, Hunter, Savage JJ.A.) (to approve settlement):** ("[25] ... Indeed, since parties to a settlement reach an agreement between themselves and seek court approval of their agreement, it would be peculiar for them to seek to appeal an order endorsing what they agreed to.").

of HMTK(BC)'s applications to quash is false, and they should be dismissed.

2. Moot

65. The appeals are not moot, as HMTK(BC) posits.[107] In one order, the appellant was not permitted to make submissions on settlement approval. As a result, Justice Brundrett did not consider those submissions in his second order nor did he reference them in his reasons. This further distinguishes *Coburn*.[108] The settlement approval hearing in this case lasted a half a day, and if the order is set aside on appeal (as it should be), any further hearing will be of no import, and certainly not of sufficient import to warrant depriving the appellant of its appeal rights. If the Security Interest is rejected on these appeals, a further hearing may be avoided altogether if HMTK(BC) is unwilling to settle without it. If Purdue and HMTK(BC) agree to settle without a Security Interest, they would be at liberty to submit a different settlement agreement at a second hearing at which the appellant is unlikely to appear. It is common for there to be multiple attempts to obtain settlement approval; indeed, it took Purdue multiple attempts to obtain approval of the Saskatchewan OxyContin® settlement where parties repeatedly failed to persuade 2 different Queen's Bench justices that the settlement was fair and reasonable.[109] Notably, the $20 million settlement that was ultimately approved had no such security interest.

66. HMTK(BC) and Purdue may alternatively decide not to submit a different settlement agreement below. In yet a third order from Justice Brundrett, they made it plain that they intend to proceed with their settlement,[110] regardless of the views of any court, just as Purdue is proceeding with this attempted distribution regardless of the pending views of

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[107] *HMTK(BC) Memorandum* (03-02-2023), ¶6(b), 27(b), 47. || *Purdue Memorandum* (10-02-2023), ¶13.

[108] ***Coburn*****:** ("[47] ... ...Home Depot and Wal-Mart...were represented at the approval hearing and made submissions opposing the settlement. ... ...the **reasons approving the settlement addressed their objections** in justifying the approval of the settlement. Accordingly, this is not a case where an interested person ought to have been, but was not, heard in the hearing that led to the order sought to be appealed.").

[109] *Perdikaris v Purdue Pharma* [(Sept. 22nd), 2017 SKQB 287, 14 CPC (8th) 402 (Ball J.); (March 15th), 2018 SKQB 86, 17 CPC (8th) 119 (Barrington-Foote J.) (settlement | fee approval)]

[110] *Coburn, ¶47.*

the Second Circuit. Where (as here) parties seek to employ the class action process to settle their claims, they abandon antiquated "freedom to contract"[111] in favour of fairness and reasonableness to those affected by it, after judicial review. Purdue attempted to put this *Settlement Agreement* through as fast as possible and HMTK(BC) sought to jump ahead of virtually every other global creditor of Purdue, without notice or consultation, and even while the Second Circuit has had the matter on reserve since April of 2022. There is no impropriety in reviewing that strategy in this Court of Appeal.

67. An application to stay was unnecessary in this particular case where the order itself contained its own stay of implementation,[112] and where both orders are under appeal. As HMTK(BC) observed, "The finality of the Purdue Canada Settlement remains in question until any appeal proceedings have been concluded".[113]

3. Leave

68. Orders denying leave to intervene and approving a class action settlement are clearly not among the list of "limited appeal orders" in Rule 11. HMTK(BC)'s position otherwise is frivolous. Even if this ground were a "preliminary objection", the court may make "any order",[114] but a "quash" is provided for only in relation to section 20(2)(a) that HMTK(BC) does not rely on. These applications are essentially functioning as applications for leave to appeal with their preliminary assessment of the merits of the appeals.

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[111] *Purdue Memorandum* (10-02-2023), ¶17.

[112] ***Settlement Agreement* [*Wong #1* 014]:** ("2.3(1) In the event the Approval Order does not become Final within...18...months from the execution of this Settlement Agreement, HMQBC shall bring an application before the Court to obtain the Dismissal Order acknowledging and **implementing the settlement**...."). **|| *Order Permitting Application to Partially Dismiss Class Action* (16-12-2022) [*Wozniuk* 146]:** ("1. in the event the Class Certification and Settlement Approval Order does not become Final prior to November 18, 2023, then HMKBC may, **notwithstanding any outstanding appeal** with respect to the...Settlement Approval Order, bring an application...to obtain the Dismissal Order agreed pursuant to subsection 2.3...").

[113] *HMTK(BC) Memorandum* (03-02-2023), ¶50.

[114] ***Court of Appeal Act*:** ("20(1) The court may...make **any order** the court considers appropriate to give effect to a **preliminary objection**....").

4. Merit

69. This ground is HMTK(BC)'s re-packaging of the previous 3 grounds. The 'lack of merit' ground is simply a (wrong) conclusion that HMTK(BC) invites this division to draw from the grounds advanced above without engaging the actual merits of the appeal as framed by the appellant. In addition to the assertions outlined above, the appellant intends to advance additional grounds of appeal, including (but not limited to) the following.

70. First, Justice Brundrett erred in his application of the full disclosure threshold on settlement approval applications and in not finding that the appellant had helpful evidence to contribute to the deficient record. The parallel proceedings (including the Second Circuit appeals) were not fully disclosed. The chronology of those proceedings, as explained in the *Affidavit of Luciana Brasil*, ended in August 2021 – *before* the *Settlement Agreement* was even made. The appellant explained what happened after; it was necessary evidence to consider the unfairness of the settlement on those affected by it.

71. Consistent with the lack of full disclosure, HMTK(BC) and Purdue omitted the appeal which overturned the entire US Plan, *including* the Canadian Stipulation that was the genesis of the settlement approval application below. Mr. Underwood's affidavit, which the appellant sought leave to file, picked up where Ms. Brasil's affidavit ended. She attached Judge Drain's decision as Exhibit J;[115] but did not explain that it was *specifically* overturned McMahon J.[116] She did not disclose that, and Justice Brundrett took no cognizance of it, because he failed (in error) to consider the appellant's evidence supplementing the record.

72. As such, Justice Brundrett erred in his approach to the full disclosure standard on settlement approval applications. That standard is a tenet of class action settlement procedure, but it was neither stated nor applied. As explained by Mr. Justice Bowden:

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[115] *Brasil Affidavit* (15-11-2022), ¶48 [*Wozniuk* 010].

[116] *Underwood Affidavit*, ¶25-28 and Exhibit 3 [*Wozniuk* 049-50, 086]. || *Tanel Affidavit* (05-12-2022), ¶31-32 [*Wozniuk* 105].

> [40] As settlement approval hearings are generally non-adversarial, the parties are expected to provide **full and frank disclosure** to the court, analogous to the disclosure requirements at an *ex parte* hearing.
> ...
> [45] … The settlement proponents "have an obligation to provide **sufficient information** to permit the court to exercise its function of independent approval": ... ..."the court must possess adequate information to elevate its decision above **mere conjecture**": ...".[117]

73. On the issues respecting the Security Interest and Purdue's international insolvency proceedings, Purdue Canada provided '*in*-sufficient information', not "full disclosure". It did not even file an affidavit, and HMTK(BC) relied on an affidavit from its own counsel, whose co-counsel advocated on it on a final application to resolve the merits of the claim.

74. Justice Brundrett did not require Purdue Canada to disclose proof of its solvency and to provide disclosure of the financial information upon which the $150 million was based and the ability of the Sacklers to contribute. The Sacklers were observed to "have significant personal wealth (measured in the billions of dollars)"[118] but they provided no evidence to Justice Brundrett as to their ability to contribute in exchange for the releases they obtained in the settlement approval order. The Sacklers in fact pledged an additional $4.3 billion in the United States to 'buy off' those who appealed their third party releases (which releases were ultimately overturned as without jurisdiction):[119]

> 30. Subsequent to the District Court Decision, the 9 US states who appealed the US Bankruptcy Court's Plan Confirmation Order to the District Court reached an additional and augmented settlement with the Debtors and Sacklers whereby the Sacklers agreed to contribute an additional amount of at least **$4.3 billion**...above and beyond the billions already committed under the disputed 12th Amended Plan, in exchange for the States' contingent release of claims and non-participation in the Second Circuit appeal.[120]

75. Winkler J. (later C.J.O.) rejected the tainted blood settlement where third party contributors who obtained releases (such as the Sacklers here) had not proven how much

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[117] *Jones v Zimmer GMBH* (Oct. 6th), 2016 BCSC 1847, 92 CPC (7th) 65 (Bowden J.) (to approve settlement).

[118] *Notice of Application (Purdue Settlement Approval)* (15-11-2022), ¶85 [*Wozniuk* 034].

[119] *Tanel Affidavit* (05-12-2022), ¶32 [*Wozniuk* 105].

[120] *Underwood Affidavit*, ¶30 [*Wozniuk* 051]. || *Tanel Affidavit* (05-12-2022), ¶26 [*Wozniuk* 104].

they could contribute in exchange for the releases.[121]

76. On a settlement approval of this scope with a Security Interest that adversely affects creditors across the continent, such disclosure was the minimum required. The Security Interest attaches property that was already pledged to the US Plan. Purdue Canada breached the "full disclosure" and "sufficient information" principles by, *inter alia*, not disclosing the following. What are the assets? How much are they worth? What will be left for anyone else (if anything)? Are the Sacklers contributing? If so, is the Security Interest even necessary? Are the Sacklers themselves taking a security interest that will in effect reverse any such contribution on their behalf?

77. Second, Justice Brundrett erred in finding a class action settlement approval hearing to be preferable to *CCAA* proceedings for determining whether the Security Interest was "fair and reasonable".[122] Remarkably, his certification analysis did not consider preferable procedure at all. There are a number of common law and legislated factors that he neither stated nor applied. As just one example, he failed to consider judicial economy. The preferable procedure for determining whether to re-order the rights of Purdue's unsecured creditors with the Security Interest,[123] and to commit to the sale of Purdue Canada's assets

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[121] ***McCarthy v Canadian Red Cross Society*** **(Feb. 20th, 2001), 8 CPC (5th) 341 (Winkler J.) (settlement approval denied):** ("[8] ...the CRCS is currently subject to a court supervised CCAA proceeding. The proposed partial settlement and its funding is a product of that proceeding. Accordingly, the plaintiffs move for approval of the partial settlement.... ... [20] The partial settlement purports to **release Plan Participants** fully from all claims by class members in exchange for...$8.975 million dollars. ....as for the contribution of the **Plan Participants**, **no evidence** has been proffered in respect of the claims against each...or the prospective liability that each may have to the class members. ...the **Plan Participants** are comprised of pharmaceutical companies, hospitals, insurers and individual physicians. ...it is **unlikely that their collective financial resources have been exhausted** by the proposed lump sum payment. Nonetheless, if **sufficient evidence** were provided to the court, it could well be the case that the settlement amount is **fair and reasonable**. The **determination cannot** however **be made** on the record as it exists.").

[122] *British Columbia v Purdue Pharma Inc.* (Dec. 15th), 2022 BCSC 2343 (Brundrett J.) (to intervene), ¶31.

[123] ***Menegon v Philip Services Corp.*** **(Aug. 27th, 1999), 11 CBR (4th) 262 (Ont. S.C.J. Blair J.) (partial settlement approval), in declining to approve a class action settlement agreement where there were pending *CCAA* proceedings:** ("It has frequently been noted that the full name of the CCAA is "An Act to facilitate compromises and arrangements between companies and their creditors." In the bare-knuckled ring of commercial restructuring negotiations, this cannot be accomplished if **one group of unsecured claimants**

within 7 years, is the *CCAA* proceeding that Purdue initiated.[124] There, those affected by the Security Interest can receive both appropriate (rather than *no*) notice[125] and the right to vote.[126] A certification and settlement approval application with no notice to (and no right to vote by) those adversely affected by the Security Interest is not a preferable procedure.

78. A process where Justice Brundrett was asked to decide whether the Security Interest is "fair and reasonable" could give rise to subsequently conflicting decisions (or would improperly pre-empt a determination) by the *CCAA* court on the same issues.[127] Class actions should avoid a multiplicity of proceedings. The settlement approval order would promote them with new spin off litigation to set the preference aside, including for reasons stated in Mr. Gebien's brief.[128] Justice Brundrett should have appreciated that the

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is given an **unwarranted advantage** over another.").

[124] ***Class Proceedings Act*, RSBC 1996, c. 50:** ("4(2) In determining whether a class proceeding would be the preferable procedure..., the court must consider...: ... (c) whether the class proceeding would involve **claims** that are...the subject of **any other proceedings**;"). || ***Arrangegement relatif à Bloom Lake*, 2017 QCCS 284, 45 CBR (6th) 110:** ("[29] In principle, all issues relating to a debtor's insolvency are decided before a single court.[19] This rule is based on the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse."[20] This public interest **favours a "single control" of insolvency proceedings by one court** as opposed to their fragmentation among several courts.[21] ... [32] There are **clear efficiencies** to having **a single court** deal with all of the issues in a single judgment.").

[125] **In *Robertson v ProQuest Learning & Information LLC* (March 15th), 2011 ONSC 1647 (Pepall J.) (partial settlement approval), and unlike the situation in this case, the judge who was asked to approve the *CCAA* plan was also the judge who was asked to approve the class action settlement agreement, on notice to those affected by it:** ("[11] ...the motion for an order approving **notice** of the settlement in both the class action proceeding and the *CCAA* proceeding was **brought before me** as the supervising *CCAA* judge. The **notice**...order required: 1) ...post...the settlement agreement...on...websites; ...; 3) ...press release...by Canadian Newswire Group for dissemination to various media outlets; and ....").

[126] ***Menegon v Philip Services Corp.* (Aug. 27th, 1999), 11 CBR (4th) 262 (Ont. S.C.J. Blair J.) (partial settlement approval)**: ("[42] The rights of creditors under the CCAA cannot be compromised unless, a) the creditor has been given a **right to vote**, in the appropriate class, on the proposed compromise; ... and, d) the Court has sanctioned the compromise on the basis that it is **fair and reasonable** (with considerable deference being given by the Court in this regard to the votes of the creditors).

[127] ***Epstein v First Marathon Inc.* (Feb. 16th, 2000), 2 BLR (3d) 30 (Cumming J.) (settlement approval denied):** ("[75] The court's duty to evaluate and rule upon the proposed settlement...is analogous to the court's duty....to evaluate a proposed plan...under the...*CCAA*.... ... In evaluating the plan...the plan should be **fair and reasonable**. These same principles, if one substitutes the *CPA* for the *CCAA*, offer some guidance as to the proper exercise of judicial discretion in the case at bar.").

[128] *Written Submissions of the Ontario Plaintiff, Darryl Gebien* (05-12-2022) [*Wozniuk* 109-26].

order was being pursued as part of Purdue's international insolvency plan. The preferable procedure to determine whether the Security Interest is "fair and reasonable" (it is not) is the *CCAA* proceedings, not the settlement approval application below.

C. Costs

79. No costs were sought nor ordered below. The appellant does not seek costs in this court. HMTK(BC) and Purdue made no submissions on costs, thus there is nothing to respond to. Costs are generally not awarded for nor against an intervenor,[129] and moreover, this was a no-costs certification application.[130] Costs should not be ordered.

Part 4. Order Sought

80. The appellant therefore asks that the applications to quash the appeals be dismissed, without costs.

Date: 27/03/2023

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[129] ***Good v Toronto Police Services Board*** **(Oct. 24th), 2011 ONSC 6290, 38 CPC (7th) 162 (Horkins J.) (costs of to intervene):** ("[10] ... It is the general rule that "intervenors are not awarded costs, nor are costs awarded against them"....").

[130] ***Class Proceedings Act*****:** ("37(1) ...neither the Supreme Court nor the **Court of Appeal** may award **costs** to any party to an application for certification...at any stage of the application....").

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