

JOINDER OF CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES

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The rules of civil litigation have liberal joinder provisions under which plaintiffs are given the right to join as a defendant any person who may have caused them harm. Recent case law indicates that plaintiffs are increasingly using these rules to join individual directors, officers and employees as defendants in an effort to increase the tactical pressures on corporate defendants to settle. Although our courts have decried this practice, they have not been particularly effective at sanctioning it. In this article the author discusses the practical reasons for expansive joinder, when such joinder might be considered to be overreaching and provides some suggestions as to how the court process might be more proactive in dealing with this issue.

Le droit de la procédure civile comporte des dispositions libérales sur la réunion d'actions en vertu desquelles les demandeurs ont le droit d'assigner comme défendeurs dans le même recours toute personne qui peut leur avoir causé un dommage. La jurisprudence récente montre que les demandeurs font de plus en plus usage de ces règles pour poursuivre comme codéfendeurs des directeurs, des administrateurs et des employés, dans un effort tactique d'augmenter la pression sur les compagnies défenderesses et de les amener à régler. Bien que nos tribunaux aient décrié cette pratique, ils ne se sont pas montrés particulièrement efficaces pour la sanctionner. Dans cet article, l'auteur discute des motifs pratiques d'une conception expansive de la réunion d'actions, quand la réunion d'actions pourrait être considérée comme excessive, et il offre quelques suggestions sur la manière dont le processus judiciaire pourrait être plus proactif dans cette question.

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I. Introduction

It is always of concern when the court is able to detect an apparent abuse of its processes but then is unable to take effective steps to prevent such abuse. For many practitioners and judges an increasing concern is the possibility that the cost of litigation can be driven up by parties taking undue advantage of the rules of procedure. In the modern, informational intensive age in which we live the civil litigation system can function only if the liberal rules dealing with pleading, joinder of claims, oral and documentary discovery and evidence at trial are applied in practice with at least some regard to the practical and cost effective administration of justice.¹ Permitting litigants to insist upon the black letter application of their procedural rights may end up threatening the very values the rules of procedure were designed to protect.²

These observations are prompted by a series of recent cases, usually at the pleadings level, dealing with instances where directors, officers or employees of corporations have been personally joined as co-defendants by parties having a grievance against the corporation.³ The decisions recognize that the adding

¹ See e.g., *Dufferin-Finch Investments v. J.D.S. Investments Inc.*, [1994] O.J. No. 3100 (Gen. Div.) at para. 11: "...enough dedicated plaintiffs pleading conspiracy in enough cases ... will bring the civil justice system to its knees..."

² In Ontario, Rule 1.04 of the Rules of Civil Procedure provides: "These rules shall be liberally construed to secure the just, *most expeditious and least expensive* determination of every civil proceedings on its merits" [emphasis added]. Federal Court Rule 3, British Columbia Supreme Court Rule 1(5) and Part 1 of The Civil Procedures Rules 1998 (England) are to the same effect.

³ The whole area has become somewhat of a cottage industry for commercial litigators. Notable cases include: *Adga Systems International Ltd v. Valcom* (1999), 41 B.L.R. (2d) 157 (Ont. C.A.), leave to appeal ref'd (2000), 254 N.R. 400 (note); *Aspiotis v. Coffee Time Donuts Inc.*, [1995] O.J. No. 419 (Gen. Div.); *Alper Development Inc. v. Harrowston Corp.* (1998), 38 O.R. (3d) 785 (C.A.); *Anger v. Berkshire Investment Group Inc.* [2001] O.J. No. 379 (C.A.); *Bakorp v. Pepsi-Cola Canada*, [1994] O.J. No. 873 (Gen. Div.); *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (Ont. C.A.); *Covia Canada Partnership Corp. v. PWA Corp.* (1993), 106 D.L.R. (4th) 608 (Ont. C.A.); *Craik v. Aetna Life Insurance* [1995] O.J. No. 3286, aff'd [1996] O.J. No. 2377 (C.A.); *Edgeworth Construction v. N.D. Lea & Associates*, [1993] 3 S.C.R. 206; *Foy v. Royal Bank* (1995), 37 C.P.C. (3d) 262 (Ont. Gen. Div.); *Meditrust Healthcare v. Shoppers Drug Mart*, [1999] O.J. No. 3243 (C.A.); *Millgate Financial Corp. v. BF Realty Holdings* (1995), 19 B.L.R. (2d) 271 (Ont. Gen. Div.); *Monogram Products v. 546332 Ontario Limited* (1996), 27 O.R. (3d) 335 (Gen. Div.); *National Trust Co. v. Furbacher* (1995), 59 A.C.W.S. (3d) 190 (Ont. Gen. Div.); *NBD Bank, Canada v. Dofasco* (1997), 34 B.L.R. (2d) 209, aff'd (1999), 46 O.R.

of individual defendants is increasingly being made for auxiliary tactical advantage and that "business cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business by the potential exposure to ill-founded litigation".⁴ Warnings are given that it is an abuse of process for individuals to be added as defendants "for purposes other than to ultimately establish their personal liability".⁵ At the same time, the appellate decisions have recognized that the status of being a corporate agent does not somehow exempt one from the liability which individuals normally have if they wrongfully harm another. Because of this, the strong trend of recent appellate authority has been to refuse to strike actions against directors, officers or employees if the plaintiff has put the right words in its pleading. This is the case even if the court strongly believes that some of the words used in a pleading are pure fiction or where it is likely that allegations of grave misconduct have been made with no factual foundation in the hope that something to support such allegations may surface in the discovery process. In the result, pleading for tactical advantage has been permitted and possible attempts to inconvenience, if not intimidate, corporate directors, officers and employees tolerated. The principal hope held out in recent case law to individual defendants who have been at the receiving end of such tactics is that at some point in the future there may be adverse cost consequences to the plaintiff.⁶

It is almost certainly the case that this problem is not amenable to any simple solution which can be applied to all cases. The most obvious solution — greater responsibility among counsel in avoiding shotgun pleadings and over-broad joinder of parties — cannot under our present rules of civil procedure be practically compelled by the courts. Cost sanctions on litigants often prove illusory.⁷ The reality is that if the economics of the litigation system reward

(3d) 514 (C.A.), leave to appeal ref'd (2000) 254 N.R. 400 (note); *Normart Management Ltd. v. West Hill Redevelopment* (1998), 37 O.R. (3d) 97 (C.A.); *Scotia McLeod v. People Jewellers Limited* (1995), 26 O.R. (3d) 481 (C.A.), leave to appeal ref'd (1996), 137 D.L.R. (4th) vi; *Spier v. Zurich Insurance* (1999), 45 O.R. (3d) 726 and related actions (plaintiffs' counsel commencing 66 actions against separate insurance companies and their employees alleging employees of 66 companies engaged in 66 separate conspiracies to deprive hundreds of different plaintiffs of no fault benefits).

⁴ *Adga Systems v. Valcom*, *supra* *ibid.* at 161. A. Peltomaa, *Annual Review of Corporate Law* 1996 (Toronto: Carswell, 1996) at 4: "the growing tendency of counsel to assert groundless claims against directors and officers personally".

⁵ *Budd v. Gentra*, *supra* note 3 at 44, the implication being that the individuals had been added for discovery or harassment purposes. The concern is not a new one. Lawyers have been seeking tactical advantages from broad joinder for over 100 years: *Wilson v. Church* (1878), 9 Ch. 552 (Eng. Ch. Div.).

⁶ See e.g., *Bakorp v. Pepsi-Cola Canada*, *supra* note 3: at para. 24 "...frequently allegations of conspiracy are made for nothing more than atmosphere or auxiliary tactical advantage...this would generally dictate the most severe of cost penalties against the infringing party".

⁷ The possibility of receiving a cost award against counsel is remote: *Young v. Young*, [1993] 4 S.C.R. 3 at 136.

litigants and their increasingly entrepreneurial counsel⁸ (through settlements influenced by cost and inconvenience considerations) for expansive joinder, such joinder will continue and increase unless the courts do something to curb the practice. What can be done? In the author's view it is unlikely that the remedy lies in some sweeping change in the substantive law dealing with the personal liabilities of directors, officers and employees. Such an approach is apt to distort the substantive framework of the law and leave some deserving plaintiffs without remedy. It is likely to do more harm to the justice system than the illness at which it is directed. Instead, if the problem is at its heart associated with an abuse of the wide joinder rules contained in the rules of civil procedure, partial solutions, whatever they may be, must lie in those rules themselves. We can be more imaginative than we have been to date in dealing with joinder abuse.

This article will be divided in four parts. First, there will be an overview of the practical advantages which plaintiffs seek to secure by adding directors, officers or employees as personal defendants. Second, there will be a discussion of the legal tools which the courts have used to date to deal with the individual liability of corporate agents. It will be suggested that despite the efforts in many cases by judges of first instance to limit on a substantive basis the scope of individual liability, the legal analysis used in recent Canadian appellate decisions which have afforded individuals acting in a corporate setting no special exemption from tort law has been a proper application of general principles. In the result, the recent appellate decisions have been "right" based on a parsing of the jurisprudence alone. At the same time, however, the restriction of the court's analysis to pure questions of substantive law raised in a pleadings context has rendered the courts practically unable to deal with the tactical abuses which are undoubtedly occurring. Something necessary has been missing from the analysis.

The present rules of the court will then be examined. It will be submitted that, although the courts may be unable to effectively deal with overly broad joinder by motions to strike out pleadings as disclosing no reasonable cause of action, another tool exists which, judiciously used, can be of assistance: the court has the ability to stay an action in whole or in part and to effectively deprive a party of any over-reaching tactical advantages it might seek to secure by over-broad joinder. In some instances it will be likely at an early stage that the joinder of individuals will be unnecessary to determine the central issues in the litigation or will be highly inefficient. In such cases the court may be well advised to stay such actions against individuals while allowing the action to proceed in the normal course against the corporation. Terms can be imposed as a condition of any such stay to ensure a reasonable balancing of the interests of plaintiffs and of individual defendants.

⁸ *Epstein v. First Marathon* (2000), 2 B.L.R. (3d) 30 (Ont. S.C.J.) at 41: "The inference may be made from the record that [the] class proceeding constitutes a so-called "strike action" that, in reality, was initiated by counsel simply for the benefit of counsel."

Lastly, possible reform of our present rules will be discussed. Reference will be made to rule amendments in England and in the United States which have been made in an effort to deter shot in the dark litigation.

II. Why Sue Directors, Officers and Employees?

A plaintiff has a claim against a corporation. Nevertheless, it proceeds to sue directors, officers or employees in addition to or in lieu of suing the corporation.⁹ It does so pursuant to liberal joinder rules which contain provisions giving plaintiffs a *prima facie* right to join¹⁰ multiple defendants if the claims arise out of the same transaction or series of transactions or harm has been caused to the plaintiff by more than one person.¹¹ Although these liberal rules were designed to ensure that all necessary and proper parties are before the court and to avoid the delay, increased expense and possible inconsistency in verdicts associated with the splintering of actions into multiple proceedings, an issue may exist as to whether undue advantage of the rules is being taken by joining multiple defendants. In order to determine what approach the court should take to joinder of individuals, it is necessary to look at why such joinder occurs. A number of practical reasons can be identified. Some raise concerns of possible abuse of the civil litigation process while others, although possibly raising troubling issues of substantive law, do not raise issues of the court's process itself being abused.

i) Avoidance of Limitation of Liability/Exclusion Provisions

A corporation is vicariously liable for the acts of its directors, officers or employees performed within the scope of their duties. As such, normally a corporation will be liable if its agents have committed a wrong. There may, however, be exceptions to this general proposition. Claims have been advanced against individuals in order to avoid limitations in liability or bars to claims against corporations as a result of contractual or statutory provisions. Well known recent examples include *Berger v. Willowdale AMC*¹² and *London Drugs Ltd. v. Kuehne Nagel International Ltd.*¹³

⁹ Although this article is confined to directors, officers or employees, other parties such as auditors or lawyers are often added, particularly in an insolvency.

¹⁰ See e.g., Ontario Rules, r. 5.01. Reference will be made throughout to the Ontario Rules. The rules of other provinces have similar provisions, e.g., Alberta Rules of Court, r. 36 and r. 46, British Columbia Supreme Court Rules, r. 5(6).

¹¹ Ontario Rules, r. 5.02(2).

¹² (1983), 41 O.R. (2d) 89 (C.A.), leave to appeal to S.C.C. ref'd (1983), 41 O.R. (2d) 89n.

¹³ [1992] 3 S.C.R. 299, (1992), 97 D.L.R. (4th) 261. See also *NBD Bank Canada v. Dofasco*, *supra* note 3 (claim against officer pursued when claim against corporate employer compromised as part of *Companies' Creditors Arrangement Act* R.S. 1985, c.C-36 (C.C.A.A.) proceeding).

In *Berger* the plaintiff was an employee of a small corporation. She had been injured in the workplace because a sidewalk had not been properly cleared of ice. The plaintiff could not sue her corporate employer or her fellow employees for negligence: the Ontario *Workers' Compensation Act* barred such tort claims. The plaintiff believed that a tort claim was a preferable route to the no-fault benefits under the *Workers' Compensation Act*. Faced with the absolute statutory bar of civilly suing the corporate employer or fellow employees, the plaintiff sued the president of the corporation on the basis that the president had been personally negligent in failing to instruct staff to clear the ice. The employee was successful in arguing before the Workers' Compensation Board that a loophole in the then Act did not specifically bar a tort claim against the president.¹⁴ With this decision in hand the employee successfully convinced the Ontario Court of Appeal that the president personally owed a common law duty of care to the plaintiff not to negligently cause her injury. The court thus allowed the plaintiff's action in tort.¹⁵

In *London Drugs v. Kuehne & Nagel*, the plaintiff's¹⁶ claim against the corporate defendant for \$34,000 worth of property damage was impacted by a contractual limitation provision which limited the plaintiff's claim to \$40. In order to avoid the contractual limitation provision, the plaintiff sued two employees of the corporate defendant who had caused the physical damage to its property. A finding of individual liability would expose the ordinary employees to a significant claim¹⁷ or have resulted in their employer indemnifying them for the loss and hence losing the benefit of the otherwise valid contractual limitation clause. The majority of the Supreme Court, while holding that the employees in question owed a duty of care in tort to the plaintiff,¹⁸ did not permit the plaintiff to circumvent the limitation of liability provisions to which it had agreed. By a modification of the third party beneficiary rule in contract, it was

¹⁴ The definition of "employee" for the purposes of the act excluded executive officers of an employer. The definition was apparently designed to make it clear that such personnel were not eligible for workers' compensation benefits but had the (inadvertent) effect of depriving them of the shield from tort claims which other employees had.

¹⁵ As the president almost certainly would have had indemnity arrangements in place with the corporation which would have resulted in the corporation (or its general liability insurer) reimbursing him for his liability, effectively the corporate employer was denied the protections of the *Workers' Compensation Act*. Although B. Welling, *Corporate Law in Canada*, 2d ed. (Toronto: Butterworths, 1991) at 148 says of *Berger* that "[t]he case makes neither tort nor corporate law sense", it may be more accurate to say the result is one of a flawed statute. The legislature amended the *Workers' Compensation Act* to avoid this result in the future.

¹⁶ Possibly, the plaintiff's property insurer would have commenced the action on a subrogated basis.

¹⁷ When viewed in the context of what a typical employee in the position involved would presumably earn.

¹⁸ *La Forest, J.* took a more aggressive approach, holding the employees had no duty of care in tort.

held that the two individual defendants could take the benefit of the limitation of liability clause.¹⁹

The claims in *Berger* and *London Drugs* involved the highly unusual situation where the legal liability of individuals acting in the course of their duties for a corporation was arguably wider than that of the corporation itself. Although claims advanced against individuals for the reason of avoiding legal limitations on liability of their corporate employers may have been doubtful as a matter of substantive law, the joinder of the individual defendants in *Berger* and *London Drugs* raised substantive questions as to the scope of the protection of the limitations of liability in question. The plaintiffs had the right to bring these issues to court for determination. The claims do not at their heart involve concerns that the civil dispute procedures of the court are being abused.

ii) Solvency Concerns/Insurance Considerations

A plaintiff who has been harmed and who has a claim for recovery against a corporation may have concerns about the corporation's ability to meet a judgment. There can be nothing more discouraging than to go through the time and expense of securing a judgment only to then find out that the defendant is insolvent. It is not surprising, therefore, that plaintiffs add individual defendants who have acted on behalf of the corporation in an effort to minimize the possibility of non-recovery due to corporate insolvency. Given that under the present law an individual tortfeasor who may bear only a small portion of fault will be jointly and severally liable for all of a plaintiff's loss,²⁰ there is a strong incentive to add any solvent person who may be even 1% at fault for a loss.²¹

¹⁹ A motivation similar to that in *London Drugs v. Kuehne & Nagel* can be seen in many misrepresentation claims. Such claims are advanced because the plaintiff is not content with the contractual rights it has secured with the corporate defendant: e.g., *Queen v. Cognos*, [1993] 1 S.C.R. 87. The advancing of a tort claim does not necessarily involve the joinder of directors and officers. Given that a successful misrepresentation claim against the corporation will avoid the contract, if directors and officers are also individually joined it is usually for one of the other reasons, such as solvency, expanded discovery rights or cost pressures, discussed below.

²⁰ E.g., *Ontario Negligence Act*, R.S.O. 1990, c. N.1, s.1. Some amendments to this rule have occurred in securities law in the United States by way of the *Private Securities Litigation Reform Act* of 1995 and have been proposed in Canada by the T.S.E. Committee on Corporate Disclosure (the "Allen Committee") in its Final Report.

²¹ W.E. Knepper & D.A. Bailey, *Liability of Corporate Officers and Directors*, vol. 2, 6th ed. (Charlottesville, Va.: Lexis Law, 1998) states at 258 that "[t]he threat of such exposures has been an important factor in triggering enormous settlements in cases where 'deep pocket' defendants were actually involved only to a minuscule extent with respect to liability". Even though the individuals so sued may themselves have limited personal resources it may be that their personal exposure would trigger liability of an insurer or of another solvent corporation such as the employer of a "nominee" director who serves on a board at his or her employer's request: e.g., *Kuwait Asia Bank v. National Mutual Life Nominees Ltd.*, [1991] 1 A.C. 187, where although the employer was not directly liable the employees may have had an indemnity claim against the employer.

The existence of directors and officers insurance also acts as an incentive for a plaintiff to add individuals as defendants.²² One obvious benefit is the indirect joinder of another potential deep pocket, the director and officer insurer, in the event that the corporation itself cannot meet any judgment against it. What little Canadian authority there is suggests that under many typically worded policies the insurer will bear most, if not all, of the exposure on any judgment or settlement for the risks covered by the policies up to its limits.²³ If a settlement within its limits is offered, an insurer runs the risk that any rejection of the offer may expose it to the possibility of a bad faith action by its insureds. All these factors in combination create a unique settlement dynamic. They also create a very strong incentive to add individuals as defendants when joinder will result in the addition of insurance coverage. The settlement proceeds from picking off insured directors and officers can be a valuable source of interim funding of fees to a plaintiff and permit the building of a war chest to allow the action to proceed against the main, and often the real, defendant.

Cases where additional parties are joined as a result of concerns as to the solvency of the main defendant involve conflicting considerations from the point of view of the efficient administration of justice. This is particularly the case in the context of the joinder of directors, officers or employees where the corporation will have acted through the individuals added as defendants and where the possible scope of liability of the individuals will be no greater than the liability of the corporation itself. If the corporation is willing to admit its responsibility for the actions of its agents and if it transpires that the solvency concern was unfounded, then considerable time, trouble and expense will have been caused in discovery, in the lengthening of trial and, possibly, in separate representation by counsel consequent upon joinder, often all for no real purpose. If a goal of our rules of civil procedure is truly the least expensive determination of civil proceedings on the merits, much might be said for doing something to avoid such unnecessary expense.

²² Corporations may purchase insurance for directors and officers against any liability save those relating to a failure to act honestly and in good faith with a view to the best interests of the corporation: *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, s.124(4). Similarly, the corporation can indemnify directors and officers from such liabilities: *Blair v. Consolidated Enfield*, [1995] 4 S.C.R. 5. Typically it will be the case that the corporation would not be an insured for the purpose of the policy unless directors or officers are sued and the corporation has an obligation to indemnify them.

²³ *Coronation Insurance Co. v. Clearly Canadian Beverage Corp.* (1999), 168 D.L.R. (4th) 366 (B.C. C.A.); *New Zealand Forest Products v. New Zealand Insurance Co.*, [1997] 3 N.Z.L.R. 1 (P.C.); R. Bird, "Directors & Officers Liability Insurance - Allocation of Loss" (1998) 77 Can. Bar Rev. 561, which may be contrasted with the different result in *Calvert Insurance Company v. Bionaire Inc.* (1998), 80 A.C.W.S. (3d) 1241. The somewhat curious result is that, at least where insurance limits are a substantial portion of the claim, corporations may actually benefit from insured officers and directors being sued as the insurer will end up paying a fair portion of what otherwise would have been solely a corporate obligation.

On the other hand, there is often no practical way at the commencement of litigation for a plaintiff to assure themselves as to the main defendant's solvency. Even if it could, solvency as at the commencement of litigation is no assurance of solvency after judgment. Delays until trial and the vast swings in business fortunes which result from the increasingly competitive and volatile marketplace mean that even the largest of corporations is not immune from economic misfortune. One need only pause to reflect upon the plaintiff in *Bell Canada v. Olympia & York*²⁴ which, after three years of trial and many millions of dollars in legal expenditures, was left with a claim against a corporation which filed for creditor protection and which eventually was determined to have unsecured or under-secured creditor claims in the several billions of dollars. No plaintiff should be put in the position where it is forced to sue defendants *seriatim* and prove and re-prove the underlying facts of its case until it finally secures a judgment upon which it can collect. If a plaintiff is truly interested in establishing the liability of an individual given a fear of corporate insolvency, the joinder of that individual as a party defendant is not abusive. Such joinder may be inefficient, if the corporation agrees it is responsible for the individual's actions and eventually is able to pay any judgment, but is not done to distort the rules of procedure for some tactical advantage in the litigation process itself.

iii) *Avoidance of Arbitration Provisions*

Clauses requiring the arbitration of disputes are common in commercial contracts. In theory, they allow the parties to avoid some of the less palatable features of the litigation process.²⁵ In disputes with an international aspect they avoid the possibility that the dispute resolution process will be tilted in one party's favour by having litigation in that party's domestic courts. When a dispute actually arises, however, the parties may try to jockey for tactical advantage. It may be perceived that arbitration provisions previously agreed to are now less favourable than once thought. In international disputes, there may be a desire to litigate in one's own domestic courts.

A frequent tactic used in an attempt to avoid the mandatory requirement to arbitrate is to commence litigation against third parties who are not parties to the agreement containing the arbitration provision.²⁶ Typically these parties will be persons who are alleged to have somehow participated in the breach of the

²⁴ (1994), 111 D.L.R. (4th) 589 (Ont. C.A.). A similar saga is evident in *Levy-Russell v. Tecmotiv* (1994), 13 B.L.R. (2d) 1 (Ont. Gen. Div.). After years of litigation and 77 days of trial the court awarded over \$5,000,000 against the main defendant. The main defendant promptly went bankrupt, spawning a second round of litigation against a new group of defendants in search of deep pockets to pay the judgment: *Levy-Russell v. Shieldings* (1998), 165 D.L.R. (4th) 183 (Ont. Gen. Div.).

²⁵ In practice domestic commercial arbitrations often mimic litigation with all its ills.

²⁶ Claims may also be made against the contracting party which are alleged to be outside the scope of the arbitration agreement.

underlying agreement. Claims against corporate officers and directors are often made on this basis. It is then argued that there is a right to sue the third parties as they are not party to the arbitration agreement, that the more comprehensive litigation should be allowed to continue and that the arbitration itself should not proceed in order to avoid a multiplicity of proceedings.²⁷ Despite its somewhat obvious transparency, this tactic used to have an enviable track record of success.²⁸ Of late, however, it has fallen into disfavour. The courts have recognized that in most instances it is highly likely that if an arbitration proceeds and resolves the main issues in dispute, there will be no need to ever deal with the claims against individuals in the court system. More modern rulings hold that such expansive joinder should not be used as a reason to halt the arbitration proceeding.²⁹ Further, in recognition that the claims against the individuals in the court context will probably never have to be proceeded with once the arbitration is determined, the courts have on occasion stayed such court proceedings against additional defendants pending the arbitration's determination.³⁰ In this, somewhat isolated, circumstance the courts have had some success in recognizing and dealing with the rather clear abuse of the rules dealing with joinder of individuals.

iv) *Expanded Discovery Rights/Increased Costs and Inconvenience*

Relatively little of a considered nature has been written in the Canadian case law about whether the costs of the present day discovery system justify the benefits which are said to flow from the system. To the extent our courts have become involved with the discovery process it is usually to hold, in something approaching a judicial leap of faith, that increased discovery rights will lead to early settlements and a reduction in the overall costs of litigation.³¹ To many

²⁷ *Ontario Arbitration Act*, S.O. 1991, c.17, s.7(5).

²⁸ E.g., R.H. McLaren & E.E. Palmer, *The Law and Practice of Commercial Arbitration* (Toronto: Carswell, 1982) at 33; *Alliance Cash Register Ltd. v. Tokyo Electric Co. Ltd.* (1980), 28 O.R. (2d) 122 (H.C.) (four directors and officers added in litigation in successful attempt to avoid arbitration clause).

²⁹ *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295 (Ont. H.C.); *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.*, [1994] 2 F.C. 662 (Fed. C.A.); *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 (Alta. C.A.), leave to appeal to S.C.C. ref'd (1992), 93 D.L.R. (4th) vii.

³⁰ *Boart Sweden AB v. NYA Stromes AB*, *ibid.* at 305: "...it would be mischievous to litigate, pending arbitration, matters which depend so much on the facts which form the basis for the arbitration ..."; *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.*, *supra* note 29; *Bakorp v. Pepsi-Cola Canada*, *supra* note 3; *Fibreco Pulp Inc. v. Star Shipping* (1998), 145 F.T.R. 125, aff'd [2000] F.C.J. No. 889.

³¹ E.g., *Ceci (Litigation Guardian of) v. Bonk* (1992), 7 O.R. (3d) 381 (Ont. C.A.). There are occasional exceptions: *Allarco Broadcasting Ltd. v. Duke* (1981), 34 B.C.L.R. (2d) 7 at 11 (S.C.): "Often transcripts of interminable examinations for discovery are never looked at during the trial. This expense should be saved if litigation, as we know it, is to survive the dangerous escalation of the costs of the trial process" and *Ontario (Attorney General) v. Stavro*, *infra* note 41 at 48.

involved on a day to day basis with discoveries these comments may appear to be somewhat divorced from reality, although it is no doubt the case that the often ruinous cost of modern discovery in commercial litigation does cause many cases to settle prior to trial.³²

In all common law provinces, save Nova Scotia and Alberta, the rules of court limit examinations for discovery to one employee, officer or director of the corporate defendant.³³ Additional persons can only be examined for discovery with leave of the court. The rules contain restrictive provisions as to when such leave will be granted.³⁴ As a practical matter, if only the corporation is sued a plaintiff will be left with a discovery process which consists of reviewing documents produced by the corporation and examining one representative of the corporation with information from other individuals at the corporation provided pursuant to the undertaking process.

Our rules of discovery contain hidden in them a substantial policy element. We have rejected the approach in continental Europe which generally sees no oral discovery prior to trial and which limits documentary production to the production of documents on which a party proposes to rely.³⁵ Our rules are wider than in England where, although there are documentary discovery rules similar to Canada,³⁶ oral discovery does not occur.³⁷ Our rules allow broad oral and documentary discovery of parties prior to trial on all matters touching the issues in question.³⁸ This broad discovery of parties is balanced by our rules with respect to discovery of non-parties. The model chosen in most Canadian

³² See G. MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 2nd ed., (Toronto: Thomson, 1999) at sections 2.4 and 4.6 for a discussion of modern discovery abuse.

³³ In Nova Scotia any person (including any non-party) can be examined for discovery (Rule 18.1). In Alberta more than one employee of a corporate defendant can generally be examined (Rule 200) but there are restrictions (Rule 214) on the use of the transcripts so generated.

³⁴ In the Ontario Rules, r. 31.03 gives the court the jurisdiction to order the examination of a second employee while r. 31.10 deals with the examination of non-parties.

³⁵ Thus allowing parties to not disclose harmful internal memoranda or communications.

³⁶ Part 31.6 of *The Civil Procedure Rules* 1998.

³⁷ The Civil Procedure Rules 1998. But note the general requirement to provide written statements of oral evidence to be led at trial, Part 32.4, 32.10. Although there is still an incentive to add individuals as defendants in England where solvency concerns exist, the lack of oral discovery of parties reduces the tactical advantages which are secured by joinder of individual corporate officers or directors as defendants. Perhaps for that reason there does not appear to be in England a volume of cases in this area comparable to that recently seen in Canada.

³⁸ The scope of discovery of parties has widened as a result of rule modifications relating to witness and expert information (e.g., Ontario Rules, r. 31.06(03)) and as a result of judicial decisions, e.g., *Perini Ltd. v. Toronto Parking Authority* (1975), 6 O.R. (2d) 363 (C.A.) (Party not allowed to conceal documents favourable to it until trial).

jurisdictions is a rejection of the U.S. model which sees the wide right of pre-trial discovery of any person having information relevant to the proceeding.³⁹ Our discovery system reflects the belief that there is a law of diminishing returns associated with the examination of too many witnesses prior to trial. It recognizes that in civil litigation the parties can only afford so much process and so much justice. No process designed to search out the truth can lead to perfect results and the process chosen in any jurisdiction involves a balancing of costs and benefits. Our rules reflect the balance we have chosen. Whether our discovery procedures should be altered in light of modern business realities can be the subject matter of debate. What should be clear is that litigants should not have a right to distort the process from the balance chosen in our rules.

The joinder of directors, officers or employees as defendants allows the number of persons to be examined for oral discovery to be increased. A party adding individual defendants for this purpose may have a variety of motives. First, it may believe that the usual court rules which provide for the examination of only one representative on behalf of the corporation are inadequate and that to get at the truth of what occurred oral examinations prior to trial of multiple corporate actors are needed. This motivation at its heart involves either an attack on the policies of limited discovery contained in our rules or a concern that the other side is not fully complying with its disclosure obligations under the rules and that it is therefore necessary to catch the other side in its lack of disclosure by getting the story directly from multiple witnesses. Although there is in the modern litigation world too often a basis for a concern that the rules in regard to disclosure are not being complied with,⁴⁰ in the author's view it is dangerous to allow plaintiffs, by adding additional parties, to effectively make the decision themselves that an unacceptable risk of rule violation exists. Instead, it is more appropriate to let the normal discovery process run its course and to seek better disclosure through the examination of an additional corporate representative or third parties⁴¹ if it can be established to a court that such is

³⁹ Our pleading rules also are more focussing than those of most jurisdictions in the United States. The pleadings define the issues for discovery. The relatively greater fact specificity required by our rules of pleading narrow the ambit of discovery. See generally, Sir J. Jacob & I. Goldrein, *Bullen & Leake & Jacobs Precedents of Pleadings*, 13th ed. (London: Sweet & Maxwell, 1990) at 71-78, 340.

⁴⁰ E.g., *International Corona Resources v. LAC Minerals* (1988), 66 O.R. (2d) 610 at 629-30 (H.C.): "LAC's conduct in shredding documents...denied the court access to documents. Corporate paranoia is too charitable an explanation...I am satisfied that [agents of LAC] have not produced some LAC documentation ...".

⁴¹ E.g., *Ontario (Attorney General) v. Stavro* (1995), 26 O.R. (3d) 39 (C.A.). It was widely reported in the press at the time that this successful motion to examine a non-party was one of the turning points in the litigation as the document discovery accompanying the examination was reported to have given the plaintiff support for a key element of its claim. More controversially, there may also be a residual power in the courts to order discovery of third parties prior to any action being commenced: *Kenney v. Loewen Inc.* (1999), 28 C.P.C. (4th) 179 (B.C. S.C.), *Straka v. Humber River Regional Hospital* (2000) 51 O.R. (3d) 1 (C.A.).

necessary. The adequacy of normal discovery rights should be squarely addressed instead of being camouflaged by over-broad joinder of defendants.

A plaintiff in joining multiple defendants may also be motivated by a desire over and above the securing of more complete information. Joinder may be motivated by a desire to make the litigation process more burdensome than it normally would be. The party may believe that if enough individuals in a corporation's decision-making structure can be inconvenienced by the necessity of preparing for and attending at pre-trial examinations, that there will be a tendency to throw money at a settlement in order to avoid the wasting of valuable executive time in the litigation process. Related to this can be an attempt to create internal corporate conflicts. Most decisions made by large corporate defendants are made by a relative few number of corporate executives. The executives involved in an initial decision which has led to litigation may be relatively unlikely to settle the litigation if the settlement contains some implicit admission that these individuals involved made a mistake. The plaintiff may feel that it is best off having someone other than the initial decision makers deal with the litigation on behalf of a corporation. Naming the initial decision makers as individual defendants may achieve this end. Finally, pure vindictiveness may have a role. A plaintiff aggrieved by a corporate decision may have a strong dislike for individual corporate actors and may wish to make the litigation personal.

The joinder of directors, officers or employees as defendants will result in a more expansive and expensive discovery process. It will often result in the retaining of multiple counsel. The retainer of more than one set of defendants' counsel will result in the defendants, as a group, having significantly larger legal costs than the plaintiff. Defendants will collectively have an incentive to offer a larger amount on a cost avoidance basis to settle litigation than would be the case if only one set of counsel were involved. If the plaintiff has greater economic resources it may be that by driving up litigation costs it will put the defendants in the position where the defendants have no practical alternative but to settle on the plaintiff's terms.

It is possible to estimate something of the additional costs of adding parties to moderately complex civil litigation. As a relatively recent example I have chosen *McKinlay Transport v. Motor Transport Industrial Relations Bureau*.⁴² There, the plaintiff was a trucking company. It had commenced action against the corporate defendant which was an industry organisation set up to represent the trucking industry in union negotiations. The plaintiff complained the corporation had not properly represented it and had caused it to be struck by its workers. The plaintiff also sued thirteen individuals who had been on the negotiating committee or who had been directors of the trade organisation alleging, amongst other things, that the individuals had conspired amongst themselves to put the plaintiff in the position where the plaintiff would suffer

⁴². (1996), 96 C.L.L.C. 210-021 (Ont. Gen. Div.). The author was one of the counsel in that action.

a strike. The individual defendants were mainly mid-level human resource managers. The defendants were represented by five separate groups of counsel. After protracted interlocutory proceedings involving multiple motions and many weeks of oral discovery, the trial involving liability took place over a period of thirty days. The trial took place 16 years after the events in question.⁴³ The claim was dismissed in its entirety. The collective legal costs of the defence were in the range of \$2,000,000.⁴⁴ Although most information with respect to the costs of civil litigation is, like the above, anecdotal there can be no doubt that the costs of modern commercial litigation can be astronomical and that the joinder of multiple defendants, particularly if it involves multiple counsel, can result in a substantial increase in costs.⁴⁵

There is a strong judicial consensus that a desire by plaintiffs to expand and compound the discovery process is a prime motivation for the joinder of directors, officers or employees in many cases and that something should be done to discourage, if not stop, joinder with this motivation. The challenge lies in finding the tools to do so.

III. *The Legal Framework of Liability*

So much has recently been written about substantive rules of law relating to liability of individuals acting in a corporate context that there is no need to engage in a detailed discussion of that issue here. Nevertheless, some general understanding of the framework of the law is of assistance in understanding under what legal theories directors, officers and employees are joined as defendants. In broad terms, most recent claims fall within the three categories set out below.⁴⁶ The précis below is descriptive rather than analytical.

⁴³ By the time of trial many of the personal defendants were retired and many of their corporate employers had gone bankrupt. There is often a significant personal price paid in worry and upset by ordinary employees exposed to years of litigation. Although the delay in *McKinlay* was extraordinary, suits against individuals can drag out for years. *Adga*, *supra* note 3, involved a situation where the individuals were added as defendants a number of years after the litigation commenced. As a result of the successful appeal from summary judgment the matter was remitted back for trial eight years after the action was initially commenced. Absent settlement, the suit will presumably be comfortably into its second decade before it is disposed of through the court system.

⁴⁴ Without any trial time on damage assessment given that issues of liability and damages had been ordered to be tried separately.

⁴⁵ See also *Millgate Financial Corp. v. BF Realty Holdings Ltd.*, *supra* note 3 (Ontario action commenced after \$1,000,000 had been spent pursuing similar claims in British Columbia).

⁴⁶ Claims made under statutes which create specific personal civil liability such as the various provincial *Securities Acts* have been omitted.

(i) *Involuntary Creditors*

This category typically involves tort claims⁴⁷ where the plaintiff is not in a consensual relationship with the corporation. The plaintiff claims that, in addition to there being corporate liability, there has been a breach of a duty of care directly owed by the individual defendant to the plaintiff. The courts have had no difficulty in dealing with tort claims arising out of physical damage to property or person. Understandably they have held that the fact that an individual is a corporate director, officer or employee does not invest that person with some immunity from tort law. We can all easily agree with this: if a truck driver negligently causes an accident the driver can surely not hope to escape personal liability by arguing that he incorporated his trucking business and was acting in the scope of his duties with that corporation when the accident occurred.⁴⁸

Equally clearly, if an individual commits a tort causing economic damage, no blanket immunity should attach as a result of the fact that the individual may have been acting in a corporate capacity. Corporate directors, officers and employees do not have any special right to libel, to steal trade secrets,⁴⁹ to breach⁵⁰ copyright, to induce others to breach trust⁵¹ or to damage others by illegal conduct.⁵² Victims of such actions will normally have no more agreed to limit their claims to claims against the corporate entity than have those hit by a company owned truck. In the absence of some private ordering imposing restrictions on its normal tort rights,⁵³ if a plaintiff can establish the constituent elements of a civil wrong as against an individual, it should be entitled to judgment for its damages, even if that individual was acting in a corporate context. Although in the mid-1990s there were a number of decisions of courts at first instance which had dismissed tort claims against officers and directors on the basis that they had been acting solely in the course of their corporate

⁴⁷ Participation in breach of trust or breach of fiduciary duty claims can also be made.

⁴⁸ *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at 189: "...it is always reasonable for a plaintiff to expect that a defendant will take reasonable care of the plaintiff's person and property"; *London Drugs v. Kuehne & Nagel*, *supra* note 13 at 407-08 (tort liability of employee for damage to a customer's property); *Berger v. Willowdale AMC*, *supra* note 12 (occupier's liability). Although there is little recent Canadian law in the area, this line of reasoning extends into the area of product liability if the officer, director or employee was personally involved in the negligent conduct complained of.

⁴⁹ *Apotex Fermentation Inc. v. Novopharm Ltd.* (1998), 162 D.L.R. (4th) 111 at 155-57 (Man. C.A.).

⁵⁰ *C. Evans & Sons v. Spritebrand*, [1985] 2 All E.R. 415 at 422 (C.A.).

⁵¹ *Air Canada v. M&L Travel Ltd.* (1993), 108 D.L.R. (4th) 592 (S.C.C.).

⁵² *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2000), 46 O.R. (3d) 760 (C.A.) (trial directed on issue of personal liability where allegation was that officer was personally involved in conspiracy to bribe a corporate employee).

⁵³ And in the absence of special policy reasons such as fear of unlimited liability to an unlimited class in certain misrepresentation allegations.

duties in performing the allegedly tortious acts, the correctness of recent appellate decisions such as *Adga v. Valcom*⁵⁴ upholding the longstanding rule that corporate agents have no special exemption from tort law cannot be doubted on the level of principle. The key in dealing with claims such as these is in recognizing that the individual's liability is not a function of the individual's status within the corporation but rather flows from what part he or she personally played in regard to the acts complained of.

ii) *Claims Relating to Internal Corporate Affairs*

These claims typically fall into two areas. The bulk of claims are claims by shareholders in private corporations where the majority shareholder actively controls the board and corporate management. In such an instance corporate actions which unfairly disregard the interests of minority shareholders usually result in a corresponding benefit to the controlling majority.⁵⁵ The economic foundation of such complaints is that value has been improperly shifted amongst shareholders in favour of the majority. The dispute is an internal one as amongst the shareholders. Although officers and directors may have caused the corporation to act improperly to assist them in shifting value to themselves, there seems to be no reason why they should have any immunity from personal liability for the harm they have caused others by such acts. Often the most suitable remedy is a buy-out of the minority's interest. Where the majority has imperilled such interest, an order that they personally have the obligation to purchase may well be appropriate. In broad terms there is symmetry in imposing personal liability upon those who sought to benefit personally by the shifting of stakeholder value by corporate misconduct. Recent authority⁵⁶ to this effect cannot be seriously criticized.

A second group of cases involving corporate oppression is where the plaintiff in its capacity as creditor alleges that an individual defendant has acted improperly to strip a corporate defendant of assets or otherwise render it judgment-proof. Orders imposing personal liability have been made on the

⁵⁴ *Supra* note 3. In the United States the same rule applies: Knepper, *supra* note 21 at vol. 1 at 211.

⁵⁵ For example, complaints of excessive remuneration, improper related party transactions, the appropriation of corporate opportunities or changes to capital structure.

⁵⁶ *Budd v. Gentra*, *supra* note 3, and the authorities therein cited. More difficult issues as to the personal liability under the oppression remedy of officers and directors to shareholders arise in public corporations. Directors or officers may have little to gain personally from any one corporate decision. A wide scope for personal civil liability may act as a disincentive to qualified persons acting in such roles to the detriment of society as a whole. Broad policy issues arise which need to be balanced. Although claims of this nature have been made in the ongoing Bre-X and YBM Magnex litigation there may be much to be said for dealing with many liability issues by specific statutory amendments such as those already contained in securities acts or as proposed by the Allen Committee, *supra* note 20.

basis that the director or officer, in rendering the corporation unable to meet its obligations, has induced the corporation to breach a contract⁵⁷ with the plaintiff or unfairly disregarded the creditor's interest by his or her operation of the business.⁵⁸ Properly analysed, it may be that these cases do not so much involve a claim of personal liability of the individual defendants to the plaintiff as they involve a claim that the individual defendants have breached an obligation to the corporate defendant and should be under an obligation to personally reimburse the corporate defendant for the harm caused to it. Such an order, if granted, would assist the corporate defendant to meet its obligations to all its creditors. In the absence of some conduct specifically impacting on the plaintiff in a manner different from creditors as a whole it is very possible, following *Hercules Management v. Ernst & Young*,⁵⁹ that these cases should more properly be brought by way of derivative action as they are effectively for breach of duty to the corporation.⁶⁰

Some would argue that properly recognizing these sorts of creditor claims as being derivative may also have an added advantage to the litigation system. First, there is something to be said for not allowing ordinary contract or debt actions by creditors to be transformed, at the creditors' election, into an oppression remedy action.⁶¹ Allowing creditors a blanket right to question the

⁵⁷ E.g., *Einhorn v. Westmount Investments Ltd* (1970), 73 W.W.R. 161 (Sask. C.A.); *McFadden v. 481782 Ontario Ltd.* (1984), 47 O.R. (2d) 134 (H.C.); *Kepic v. Tecumseh Road Builders* (1987), 18 C.C.E.L. 218 (Ont. C.A.).

⁵⁸ E.g., *Prime Computer of Canada Ltd. v. Jeffrey* (1991), 6 O.R. (3d) 733 (Gen. Div.); *Cdn. Opera Co. v. 670800 Ontario Inc.* (1989), 69 O.R. (2d) 532 (H.C.J.), aff'd (1990), 75 O.R. (2d) 720 (Gen. Div.); *PCM Construction Control Consultants Ltd. v. Heeger* (1989), 44 B.L.R. 289 (Alta. Q.B.); *Fogal Legwear of Switzerland Inc. v. Garoneli Fashions Inc.* (1995), 58 A.C.W.S. (3d) 406 (Ont. Gen. Div.); *Heap Noseworthy Ltd. v. Didham* (1996), 38 C.B.R. (3d) 94 (Nfld. S.C.); *Shillingford v. Dalbridge Group Inc.* (1996), 28 B.L.R. (2d) 281 (Alta Q.B.); *Gignac, Sutts and Woodall Construction Co. v. Harris* (1997), 36 B.L.R. (2d) 210 (Ont. Gen. Div.).

⁵⁹ *Supra* note 48. This is the approach in the United States: See: J.D. Cox et al., *Corporations* (New York: Aspen Law and Business, 2000) at s. 10.19; Knepper, *supra* note 21 at vol. 1 at 213, and in England: *Yukong Line Ltd. of Korea v. Rendsburg Investments Corp. of Liberia*, [1998] 4 All E.R. 82 (Q.B.).

⁶⁰ For that reason one might doubt the correctness of the remedy granted in the decisions at notes 57 and 58, save in instances where the plaintiff was the sole creditor of the corporation and the creditor therefore was the sole party with any true economic interest in the corporation. Although categorizing an asset stripping claim as "inducement of breach of contract" shows imagination in attempting to categorize a claim as being individual in nature, an individual unsecured creditor has no particular claim to any corporate asset and the harm done by the stripping of assets is done to the corporation (or its creditors) as a whole. In *Adecco Canada Inc. v. J. Ward Broome* [2001] O.J. 454 (Ont. Sup. Ct.), the remedy granted in an individual creditor's action was an order requiring reimbursement to the corporation for the eventual benefit of all creditors.

⁶¹ *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div.); *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Q.B.). The CBCA does not automatically give creditors the status of a complainant under the oppression remedy, although a creditor may qualify if the court in its discretion allows it

appropriateness of internal corporate management creates a floodgate concern. Leave from the court is necessary before a derivative action can be commenced.⁶² The necessity of leave permits the court to act as a filter.⁶³ The moving party will need to show that the action proposed is being brought in good faith and is in the best interests of the corporation. Effectively, this will allow the court at an early stage to weed out claims which, on a limited review of the evidence, appear to have no factual foundation.⁶⁴ It will avoid the possibility that claims by multiple creditors alleging corporate misfeasance may be brought forward thus necessitating multiple examinations of the impugned internal corporate decisions. It will ensure that claims which are truly to repair wrongs to the corporation will rebound to the benefit of all corporate stakeholders in accordance with their priorities set out by law. Although there are, in the author's view, compelling reasons to suggest that the derivative action approach is the appropriate procedure for pursuing claims of this nature it is likely that, until the law is clarified, creditors will continue to pursue direct actions given that such actions avoid a leave application and, if successful, may result in a greater recovery to the individual creditor than would an order which simply required the wrongdoer to reimburse his or her corporation for the harm done to it by the asset stripping or other wrongful conduct.

iii) *Claims Impacted by Contracts*

Difficult questions arise where the relationships of the parties are impacted by a contract. Frequent allegations are that individual defendants have induced the corporation of which they are a director, officer or employee to breach a contract with the plaintiff,⁶⁵ have made misrepresentations to the plaintiff as part of the process of contractual formation⁶⁶ (including misleading the plaintiff

to pursue such a claim. Although there is a strong interpretative argument that under the statute a creditor should in advance seek leave to commence an oppression remedy action, later cases have held that this issue should be determined on the return of the application or at trial, e.g., *A.E. Realisations (1985) Ltd. v. Time Air Inc.* (1994), 17 B.L.R. (2d) 203 (Sask. Q.B.); *Alpha Tire Corp. v. South China Industries (Canada)*, [2000] O.J. No. 212 (S.C.J.); *Levy-Russell v. Shieldings*, *supra* note 24.

⁶² E.g. *CBCA* s.239.

⁶³ See generally J.G. MacIntosh, "The Oppression Remedy: Personal or Derivative?" (1991) 70 Can. Bar Rev. 29 and *Cinapri v. Guettler* (1997), 33 B.L.R. (2d) 289 (Ont. Gen. Div.). On an insolvency of the corporation the decision to proceed will be made by the trustee. For a contrary view see E. Iacobucci & K.E. Davis, "Reconciling Derivative Claims and The Oppression Remedy" (2000), 12 S.C.L.R. (2d) 87.

⁶⁴ *Re Marc-Jay Investments Inc. v. Levy* (1974), 5 O.R. (2d) 235 (H.C.); *Samuel Manu Tech Inc. v. Redipac Recycling Corp.* (1998), 9 C.B.R. (4th) 291.

⁶⁵ *Supra* note .

⁶⁶ E.g., *Corfax Benefit Systems Ltd. v. Fiducie Desjardins* (1997), 37 O.R. (3d) 50 (Ont. Gen. Div.) (alleged misrepresentation as to quality of software).

as to the corporation's solvency at the time of the extension of credit),⁶⁷ or that the individual has participated in a fraud by causing the corporation to incur liability to the plaintiff when the individual knew the corporation could not meet its liabilities.⁶⁸ Frequently complaints allege conduct which in some manner impacts the plaintiff differently than creditors as a whole. They often involve conduct directed specifically at the creditor. These complaints will give rise to personal claims and will not be in substance derivative. Such claims will, if successful, effectively make individuals responsible for the plaintiff's loss in connection with the contract.⁶⁹

After some missteps the courts have done a relatively good job with certain of these claims. They have recognized that to hold officers and directors personally liable under the tort of inducement of breach of contract for decisions which they make to cause corporations to breach contracts would undermine the doctrine of separate corporate existence which underpins our corporate law. Such claims have been confined to a narrow ambit.⁷⁰ The exact scope of personal immunity in a contractual matrix is, however, still uncertain. Troubling areas include claims that directors, officers and employees may be personally liable for misrepresentation or may be personally liable for unfairly disregarding a creditor's reasonable expectations in contract formation or performance. The consensual aspects of the plaintiffs' relationships with the corporations lead to a concern that plaintiffs are, in such claims, attempting on an after the fact basis

⁶⁷ *Scotia McLeod v. People's Jewellers*, supra note 3. *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (1991), 4 B.L.R. (2d) 220 (Ont. Div. Ct.); *Baltimore Aircoil of Canada v. Process Cooling Systems Inc.* (1993), 16 O.R. (3d) 324 (Gen. Div.), rev'd (1996), 30 O.R. 159 (C.A.) (alleged fraudulent misrepresentation); *NBD Bank Canada v. Dofasco* (C.A.), supra note 3 ("egregious" negligent misrepresentation); *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 12 B.L.R. (2d) 274 (Ont. Gen. Div.) (fraudulent misrepresentation); *Island Getaways v. Destinair Airlines Inc.* (1996), 29 B.L.R. (2d) 298 (Ont. Gen. Div.) (fraudulent misrepresentation); *Triax Resource Limited Partnership v. Research Capital Corp.*, [1999] O.J. No. 1920, 96 O.T.C. 290 (S.C.J.).

⁶⁸ *Canbook Distribution Corp. v. Borins* (1999), 7 C.B.R. (4th) 121 (Ont. Div. Ct.) at 127 (allegation against directors); *Green Bay Packaging v. Meco Group Inc.*, [1999] O.J. No. 3120 (S.C.J.).

⁶⁹ But note a commonplace provision in proposals under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.-B-3 (BIA) or arrangements under the CCAA is that the plan, if accepted, will also serve as a bar to claims against officers, directors or shareholders of the debtor for all acts relating to the debtor's business, e.g., *Coopers & Lybrand Ltd. v. Canadian Imperial Bank of Commerce* [1999] O.J. No. 4274 (S.C.J.). Although such provisions are commonplace they may be legally suspect. Section 5.1(2) of the CCAA and S.C. 1997, c.12, s.122 and section 50(14) of the BIA both provide that a compromise of claims may not include claims against directors relating to misrepresentations or wrongful or oppressive conduct. See *NBD Bank Canada v. Dofasco Inc.*, supra note 3 (plan provision not effective to bar misrepresentation claim against officer).

⁷⁰ The *Said v. Butt* exception to personal liability is discussed at 166-170 in *Adga v. Valcom*, supra note 3. Similarly, claims that the directors had conspired amongst themselves or with others to cause the corporation to breach a contract have often been unsuccessful: *Normart Management Ltd. v. West Hill Redevelopment Co.*, supra note 3. Personal liability

to reallocate a risk of corporate non-performance that was voluntarily assumed in light of their decision to contract with the corporation.⁷¹

Although the courts have been sensitive to this issue, other competing concerns arise in the context of misrepresentations. Contracts are the means by which parties allocate risk. But they do so against the background of the facts which are known to exist at the time of formation. If an individual has as a result of a misrepresentation caused a contracting party to be materially misled as to a risk, it may not be fair to restrict the misled party to its contractual rights.⁷² The court may have an understandable sympathy for a vulnerable party that relied upon a negligent mis-statement by an individual and a natural inclination to hold that individual personally liable for the damage caused by his or her carelessness. The challenge in misrepresentation cases has been in articulating circumstances under which a personal duty of care will be imposed on a corporate agent for his or her statements. The requirements for a successful misrepresentation claim against an individual now require a "special" or "sufficiently close relationship"⁷³ between the representor in his or her personal capacity and the representee (or as more narrowly stated in England, a "personal assumption of responsibility")⁷⁴ and the absence of policy concerns, such as indeterminate liability, which might negate liability. Despite the Supreme Court of Canada decision in *Edgeworth Construction v. N.D. Lea & Associates*,⁷⁵ which seemingly signalled a narrowing of the scope for individual liability for mis-statements made on behalf of a corporation, more recent Canadian cases suggest a significant ambit of personal civil liability for mis-statements in a corporate context.⁷⁶ Many of the cases are in the context of misleading representations as to the corporation's creditworthiness where there may be

will exist if the officer or director was not acting *bona fide* in the best interests of the corporation: see *supra* note 56. It is suggested at Section III(ii) above that such claims are usually more properly derivative claims.

⁷¹ *E.g., Williams v. National Life Health Foods Ltd.*, [1998] 2 All E.R. 577 (H.L.) at 580-83.

⁷² *Queen v. Cognos*, *supra* note 19. J. Blom, "Case Comment" (1994) 73 Can. Bar Rev. 243.

⁷³ The special relationship requirement may now have replaced the previous test of proximity. Proximity has fallen out of favour as it was subject to the criticism that it expressed "a conclusion, a judgment, a result, rather than a principle" or even "vacuous": *Canadian National Railway v. Norsk Pacific*, [1992] 1 S.C.R. 1021 at 1178; *Hercules Management v. Ernst & Young*, *supra* note 48 at 87-88; B. Feldthusen, *Economic Negligence The Recovery of Economic Loss*, 4th ed. (Scarborough, Ont.: Carswell, 2000) at 16. It is not clear that the special relationship qualification is any less subject to the same criticism.

⁷⁴ Which may often amount to a claim that there is a relationship "equivalent to contract".

⁷⁵ *Supra* note 3, followed by the House of Lords in *Williams v. National Life Health Foods Ltd. & Mistlin*, *supra* note 71 at 583-84. See generally J.P. Lowry & R. Edmunds, "Case Comment" (1998) 77 Can. Bar Rev. 467, C. Gosnell, "English Courts: The Restoration of a Common Law Approach of Pure Economic Loss" (2000) 50 U.T.L.J. 135.

⁷⁶ *Scotia McLeod v. Peoples Jewellers Limited*, *supra* note 3, and authorities at note.

much to be said for imposing personal liability.⁷⁷ It is not clear that outside of this sub-category personal liability for misrepresentation should exist short of the corporate agent knowingly participating in a fraud⁷⁸ or in the presumably extremely rare circumstance where there is a clear assumption of personal responsibility and it is reasonable for the plaintiff to rely upon the personal liability of the individual representor.⁷⁹ The courts clearly have the ability to limit, under the flexible special relationship doctrine, personal liability in misrepresentation cases falling outside of these sub-categories⁸⁰ but have yet to do so in a coherent fashion.

The law relating to creditor claims under the oppression remedy for wrongs done to individual creditors is even less well defined. Again, the status of being a director or officer at the time the oppressive conduct occurred is not enough. Nor is simple participation in a corporate decision which is later found to be oppressive. There must be something in the conduct of an individual defendant which makes it just for that defendant to be personally liable for the plaintiff's loss. There is some suggestion that in order to found personal liability on an individual it will usually be the case that the individual must have personally been enriched from the action complained of,⁸¹ although it may be questioned whether that test will eventually be an all encompassing one.

⁷⁷ R.A. Posner, *Economic Analysis of Law*, 4th ed., (Boston: Little, Brown, 1992) at section 14.5; P. Halpern, M. Trebilcock & S. Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 U.T.L.J. 117 at 148; F. H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass.: Harvard University Press, 1991) at 58-59; *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 27 C.P.C. (3d) 104 (Ont. C.A.) at 109-10.

⁷⁸ An analogy might be drawn to assistance in breach of trust. See *Re Air Canada v. M&L Travel*, *supra* note 51 at 617 (knowing assistance in fraudulent design necessary to make director personally liable for corporate breach of trust). Fraudulent misrepresentation raises different considerations from personal liability for negligent misrepresentation. There is no reason why one should protect any individual from fraudulent acts, including fraudulent misrepresentations. It is not clear that there is any policy reason why directors and officers should be given civil immunity for lying. Individuals also have personal exposure to criminal sanctions under s. 380 of the *Criminal Code* and s.s. 198(1)(e) and 204 of the *BIA*.

⁷⁹ As possibly in *Kuwait Bank v. National Nominees Ltd.*, *supra* note 21 at 219 (certificates signed by individual directors certifying truth of statement).

⁸⁰ See La Forest, in dissent, in *London Drugs*, *supra* note 13 at paras. 285-86, as to the policy reasons why one might wish to limit such personal liability, especially if there are contractual overtones.

⁸¹ *Sidaplex-Plastic Supplies Inc. v. Elta Group Inc.* (1998), 162 D.L.R. (4th) 367 (Ont. C.A.); *Budd v. Gentra*, *supra* note 3; *Irwin v. GST Telecommunications Inc.*, [1999] B.C.J. No. 2221. Again, an analogy may exist to the breach of trust cases where there is a greater scope for personal liability if there has been an enrichment (by means of receipt of trust property) by the defendant rather than simple assistance: *Citadel General Assurance v. Lloyd's Bank of Canada*, [1997] 3 S.C.R. 805. In the misrepresentation context the existence of an economic interest by the representor is one of the factors which impacts on the duty of care issue: *Hercules Management v. Ernst & Young*, *supra* note 48 at 201.

IV. *The Response to Joinder to Date*

The rules of practice have as their eventual goal the securing of due process to both plaintiffs and defendants at a reasonable cost and within a reasonable time. There are checks built into the system for early dismissal of cases which are demonstrably without merit. These rules have, however, been of limited utility in dealing with abusive or inefficient joinder.

i) *Summary Judgment*

Once a plaintiff has joined multiple defendants in an effort to secure some or all of the advantages referred to above, defendants must make a decision as to what will be done to resist any attempt to procedurally overreach. In the all too frequent case where there is a concern that a shotgun pleading with little or no factual foundation has been made, a natural reaction would be to go to court on an early basis and tell the court the true facts. Indeed, the provincial rules of civil procedure were modified in the 1970s and 1980s to permit (if not encourage) litigants to do just that. The summary judgment rules⁸² or summary trial rules⁸³ allow courts on a summary basis to dismiss an action if it is apparent to the court on a review of affidavit and other evidence that no reasonable issue exists for trial. On a first reading of the rules alone, it might seem that this summary judgment procedure is the natural way to deal with unmerited joinder.

Unfortunately, the summary judgment approach is not as straightforward as one might hope. The bringing of a summary judgment motion will entail the preparation of affidavit material by the defendant explaining why there is no factual basis for any claim against it. The filing of this affidavit may, in turn, lead to a blizzard of response affidavits and cross-examinations. A plaintiff resisting a summary judgment motion will have the ability to compel the attendance of third parties as witnesses on a pending motion. There is a risk that the motion can degenerate into a wide ranging examination of all individuals having any connection with the underlying proceeding in an effort to detect some evidence, however slim, that an individual defendant has personally committed some wrong. Skilful counsel for the plaintiff can use the process of examining witnesses on a pending motion to effectively widen the scope of oral discovery to include non-parties.⁸⁴ In the result, although the order to dismiss as against individuals may be granted, it may only occur after the plaintiff has

⁸² *E.g.*, Ontario Rule 20.

⁸³ *E.g.*, British Columbia Rule 18A and Alberta Rule 261(2) which also allow *viva voce* evidence. In Ontario summary trials are effectively limited to actions involving \$25,000 or less.

⁸⁴ The scope of the examination of the witnesses on the pending motion is restricted to matters touching on issues relevant to the motion. However, in many summary judgment motions there will be a substantial overlap between the issues relevant on the motion and those in the action.

effectively secured the very tactical advantages it initially sought from the over-broad joinder.

Success on a summary judgment motion is also by no means certain. Mustering the facts and applying the facts to that law may be a formidable task. Motion judges on such motions are often left with the unenviable task of determining whether somewhere in a mountain of materials a triable issue exists.⁸⁵ A party considering a motion for summary judgment must also consider the risks associated with the recent legal reasoning of appellate courts as to when summary judgments can be secured. Initial hopes that the courts would, in taking a "good hard look on the merits"⁸⁶ use the summary judgment procedure in an aggressive manner to weed out weak claims have been undermined by a later series of appellate cases which suggest that a judge in hearing a summary judgment motion has no ability to draw inferences of fact from underlying uncontested fact.⁸⁷ The only thing that is certain is that if the plaintiff on a motion for summary judgment can create sufficient smoke, there is a reasonable possibility that a judge at first instance will decline to take a good hard look at whether the smoke has any real basis given that such a process usually involves some consideration of what inferences should be drawn from primary facts or some filtering out of alleged issues of credibility. For these reasons, summary judgment is often only a practical alternative where it is apparent that the factual claims are entirely fictitious or where there is a likelihood that a plaintiff, although willing to spend a few thousand dollars on an incendiary pleading, does not have the financial wherewithal to pursue litigation and will throw in the towel when faced with the prospect of spending significant money in opposing a summary judgment motion.

⁸⁵ *Dufferin Finch Investments v. J.D.S. Investments*, *supra* note 1; *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.) at 216-217.

⁸⁶ *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 at 238 (Gen. Div.): "The court may, on a common sense basis, draw inferences [of fact] from the evidence."; *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *MacMillan Bloedel Ltd. v. B.C. Hydro & Power Authority* (1992), 98 D.L.R. (4th) 492 (B.C. C.A.) at 508-9: "...it is appropriate to draw evidentiary inferences from clear primary facts."

⁸⁷ *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Kilpatrick v. Peterborough Civic Hospital* (1999), 174 D.L.R. (4th) 435 (Ont. C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.). A similar reticence may be emerging in British Columbia: *Cannaday v. McPherson* (1998), 44 B.C.L.R. (3d) 195 (C.A.). The situation has been further confused by later appellate decisions denying that any change in the law relating to the availability of summary judgment has occurred: *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank* (1999), 173 D.L.R. (4th) 468 (Ont. C.A.) at 482 and by the possibly more aggressive approach to the issue of summary judgment by the Supreme Court of Canada: *Hercules Management v. Ernst & Young*, *supra* note 48, *Guarantee Co. of North America v. Gordon Capital* (1999), 49 B.L.R. (2d) 68 (S.C.C.) at 80 (summary judgment upheld as undisputed facts lent strong support for initial judge's inference).

ii) *Motions to Strike*

Having regard to the tactical difficulties posed by summary judgment motions, defendants have usually dealt with joinder concerns by bringing pleadings motions to strike on the basis of no reasonable cause of action.⁸⁸ Here, they have been met with equally formidable procedural barriers. On such motions it is assumed that the facts as pleaded can be proven at trial. The jurisdiction to strike can only be exercised in the "clearest of cases".⁸⁹ The threshold for the sustainability of pleadings is very low.⁹⁰ Pleadings are to be read generously with due allowance for drafting inadequacies.⁹¹ In order to meet these onerous tests, defendants have been forced to argue that there are areas of conduct by individuals in a corporate context which are entirely exempted from the normal law of obligations. Motions of this nature often became enmeshed in metaphysical analyses about the nature of corporate existence, the policy bases for our present tort, corporate and contract law, whether these policies can be reconciled in the context of claims against corporate agents and, if they cannot, how one is to decide which policy or branch of law is to hold a trump in a particular fact situation. Arguments carving out areas of immunity from personal liability were met with significant sympathy by judges of first instance in the mid-1990s who, given their day to day involvement with file management, had a practical disposition toward making decisions which would facilitate a resolution of the file before them on its true merits. However, they have been rebuffed at appellate courts, given their somewhat different role in protecting the integrity of legal principles of broad application.⁹² Legal logic has won out over experience.

Recent cases where directors, officers or employees have been successful in striking out claims against them as disclosing no reasonable cause of action tend to involve instances where the pleading contains no specifics of actual misconduct by individual defendants and where, as a result, the material facts necessary to establish that an individual defendant has committed a tort, unfairly disregarded the plaintiff's interest or committed some other wrong for which the individual should be personally liable are absent.⁹³ In such cases the pleading

⁸⁸ In Ontario r. 21, British Columbia r. 19(24), Alberta r. 129. In Ontario no evidence is admissible on such a motion without leave of the court, although documents referred to in the pleading may be reviewed as they are taken to be incorporated in the pleading: *Web Offset Publications Limited v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.) (resolving previous conflicting authority on this issue).

⁸⁹ *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 977.

⁹⁰ *Normart*, *supra* note 3.

⁹¹ *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 455.

⁹² Many of the cases cited at note involve appellate reversals of lower court decisions on motions to strike.

⁹³ E.g., *Budd v. Gentra*, *supra* note 3; *Normart Management Ltd. v. West Hill Redevelopment*, *supra* note 3 and, at trial, *Immocreek Corp. v. Pretiosa Enterprises Ltd* (2000), 1986 D.L.R. (4th) 36.

has been struck, not because the individual could not at law be liable for the loss, but because there were no facts alleged which could lead a court to find liability against the individual in the case before it.⁹⁴ At the same time the court has been helpless in the face of fictionalized pleadings containing adequate particulars. The requirement that factual allegations of a specific nature be made against individual officers and directors has often resulted in pleadings containing a laundry list of allegations, including claims of fraud,⁹⁵ in the hope that the allegations may withstand a pleadings motion by individuals seeking to strike the action as against them. In the result a clever pleader, if left unrestrained by any requirement to have a factual foundation for a pleading, can usually invent enough allegations to pass muster on a motion to strike.

V. Other Possible Approaches to Joinder Abuse

The approaches to joinder outlined above focus on the potential legal merits of the plaintiff's claim against an individual defendant. Save for passing comments by judges, they do not deal with the process used by the courts to adjudicate disputes or on the need to apply those processes in a way which truly advances the goal of the most expeditious and least expensive adjudication on the merits. Confined as they are to arguments of whether there is any possibility of individual liability at trial, they do not directly address what power the court may have to balance these values in considering questions of joinder.

i) *The Stay Power*

Until about the 1970s the rules of court, although seemingly liberal with respect to the joinder of different causes of actions and different defendants in one proceeding, were often restrictively interpreted. It was not unusual for courts to order different causes of actions to be dealt with separately or for separate actions to be brought against different defendants even when the claims had some significant factual connection.⁹⁶ There was a whole series of cases

⁹⁴ Arguably, the courts have reacted against the tendency to add officers and directors by more strictly looking at pleadings against them and more rigidly enforcing of pleading rules relating to the inclusion of particulars. Easy to allege but hard to prove claims, such as conspiracy, have especially high pleading hurdles, perhaps because courts suspect that they are often entirely without merit. Some cases hold that if the facts necessary to support an allegation of this nature are not known at the time of pleading it is inappropriate to make the allegation: *J.G. Young v. TEC Park Ltd* (1999), 48 C.P.C. (4th) 67 (Ont. S. Ct.); *Private Equity Management v. Vianet Technologies Inc.* (2000), 48 O.R. (3d) 294 (Ont. S.C.J.).

⁹⁵ *Corfax Benefit Solutions Ltd. v. Fiducie Desjardins*, *supra* note 66 at 61: "...alleging fraudulent misrepresentation has become a boiler plate in breach of contract pleadings".

⁹⁶ In Ontario, see the case law cited in G.S. Holmsted & G.E. Gale, *Ontario Judicature Act and Rules of Practice* (Toronto: Carswell, 1983) under old Rules 66, 67 and 73.

dealing with when joinder of claims or of defendants was permissible and when it was not.⁹⁷ If such a motion to sever was successful, the practical result was often that the plaintiff did not bother to pursue its more nebulous claims and that one proceeding alone, dealing with the real issues, went forward. The practical impact of such motions was often to focus the issues at an early stage, although it must be admitted it did so in a somewhat artificial manner. The balance with respect to joinder shifted appreciably in the 1970s and early 1980s with the fundamental rule becoming that, as far as possible, all matters in controversy should be determined in one proceeding in order to avoid the wasted costs and possibility of inconsistent results arising out of multiple proceedings.⁹⁸ The new rules introduced throughout Canada accelerated this judge-made tendency toward comprehensive joinder.

Reflecting this philosophy, our present court rules give plaintiffs a very wide latitude in the framing of their cases, including the joinder of defendants. At the same time, the court has the power to govern its own procedure and to prevent its process from being overreached. A question which arises is the court's power outside of the rules previously discussed in regard to abusive or manifestly inefficient joinder. In the author's view, the stay power can be of assistance. Provincial statutes creating the superior courts give the courts a wide statutory jurisdiction to stay any proceeding on such terms as are considered just.⁹⁹ Actions may also be stayed if they are frivolous or vexatious or are otherwise an abuse of process.¹⁰⁰ In the specific context of joinder of multiple parties, the rules give specific powers to the court. Ontario Rule 5.05 is illustrative¹⁰¹:

Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may . . .

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just.

⁹⁷ The precedent was not always clear or consistent and, to a certain extent, may have been a throwback to the practice in the 19th century.

⁹⁸ *E.g., Clough v. Greyhound Leasing & Financial of Can. Ltd.* (1979), 26 O.R. (2d) 590 (H.C.).

⁹⁹ In Ontario, see s.106 *Courts of Justice Act*.

¹⁰⁰ In Ontario, Rule 21.01(d). The power under this rule has most often been exercised when issues of estoppel or *res judicata* exist.

¹⁰¹ Federal Court Rule 106 is effectively the same. The other provinces have slightly different wording, *e.g.* British Columbia r. 5(6) (ability to sever if the joinder would "unduly complicate or delay the trial... or is otherwise inconvenient").

There does not appear to be much doubt that many of the cases joining officers and directors which have drawn judicial criticism involve joinder which might unduly complicate or delay the hearing or cause undue prejudice to a party. One need only look at *Budd v. Gentra*, where 42 individuals were joined as defendants and would have each been potentially the subject of many weeks of oral discovery dealing with the failure of Royal Trustco, to realize the possible scope for beneficial application of the rule. The object of avoiding wasted costs, far from favouring joinder, points away from it. As importantly, the rule conditions a stay against an individual defendant upon that defendant agreeing to be bound by the findings in the main proceeding. In the typical situation, officers and directors seeking a stay of an action against them pending the determinations in the action against the corporation would only be able to do so on the basis that they would be bound by the findings of fact against the corporation. The possibility of inconsistent findings is eliminated.¹⁰²

In the author's view the combination of the general stay power under the constituent statutes and the specific stay power on the terms contained in Rule 5.05 provide a more than adequate jurisdictional foundation to allow courts to stop actions against corporate directors, officers or employees if the court believes that such actions are primarily being pursued for auxiliary tactical advantage such as expanded discovery rights or even when such joinder, although not an abuse, is demonstrably inefficient. There is a line of case law which does just that. As noted,¹⁰³ in the arbitration context court actions against persons who are not parties to the arbitration agreement have been stayed pending the determination in the factually intertwined arbitration. The application of the stay power has not been confined, however, to protecting the integrity of the arbitration process. In the *Bre-X* litigation, the litigation was stayed against two relatively minor players, the spouses of two of the directors of *Bre-X*, given that before the issue of their personal liability could be addressed it would be necessary to make factual determinations and liability determinations on a number of other issues.¹⁰⁴ In a somewhat different context, claims by plaintiffs against solicitors for negligence have been stayed pending the prosecution by plaintiffs' claims against defendants which would determine whether the

¹⁰² This valuable aspect of Rule 5.05 is commented on in G.D. Watson, "Joinder of Defendants Sued in the Alternative: Solicitors as Co-defendants" (1981) 2:4 Adv. Q. 365 at 376, and was inspired by *Birtles v. Commonwealth of Australia*, [1960] V.R. 247. In other provinces, although the rules do not impose being bound to the findings in main proceeding as a specific pre-condition of granting a stay, the courts would normally have the general power to impose terms as part of any stay order. Indeed, in extraordinary circumstances the courts have even held parties bound by determinations in proceedings to which they were not parties: *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div.), aff'd (1997), 151 D.L.R. (4th) 574 (Ont. C.A.).

¹⁰³ Cases at note 30.

¹⁰⁴ *Carom v. Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4th) 163 at 183-84 (Ont. Gen. Div.). The general stay power was used rather than Rule 5.05. See also, *Millgate Financial v. BF Realty Holdings*, (1998) 28 C.P.C. (4th) 72 at 88-89 (action against defendant directors effectively stayed pending determination of preliminary issue against corporation).

plaintiffs had suffered any damage as a result of alleged negligence of the solicitors.¹⁰⁵ Although these decisions have arisen in a variety of factual contexts, they appear, at their heart, to have a common thread: as a practical matter it has appeared to the court that the plaintiff's main claim was against other defendants; that after a determination of the plaintiff's main claim it might well be unnecessary to determine the fault of other actors; and that unnecessary costs should be avoided.

There is much to be said for vigorous use of the stay power where over-broad joinder occurs. Although the plaintiff would retain its *prima facie* right to join individual defendants and although those defendants would bear the burden of demonstrating the application of at least one of the criteria in Rule 5.05, the tactics or inefficiencies of joinder are sufficiently obvious in a wide enough subset of cases so as to permit some significant application of the stay power.¹⁰⁶ How aggressive courts of first instance are in utilizing the stay power may well, at the end of the day, depend upon the "felt necessities of the time":¹⁰⁷ the judicial perception as to how widespread the problem of over-broad joinder is in a corporate context; on how comfortable judges are in being able to detect abuse or inefficiency caused by such joinder; and on how necessary they believe it is to stop it by activist judicial intervention. Whatever approach is taken, it is not likely that a more activist use of stay power will by itself be sufficient to deal with all situations of over-broad joinder. Further stay motions themselves are apt to be expensive. Ideally something should be devised which, in advance, would deter unnecessary joinder.

¹⁰⁵*Rade v. Rade* (1983), 45 C.P.C. 186 (Ont. Div. Ct.); *Thames Steel Construction Ltd. v. Portman* (1980), 28 O.R. (2d) 445 (Div. Ct.) (convenience test to be applied under old rules with respect to joinder of alternate defendants); *Contra: 1175777 Ontario Ltd. v. Magna International Inc.* (29 October 1997) (Ont. Gen. Div.). See also *Foy v. Royal Bank supra* note 3 at para. 31 (*dicta* to the effect that on a motion to amend a pleading to add officers and directors as defendants the court may refuse the motion to amend if it is purely a tactical move) and *Diamond v. Kingbeach Corp.* (1996), 5 O.T.C. 152 (Gen. Div.).

¹⁰⁶Even if the entire action is not stayed, the court in Ontario (under Rule 31.03(9)) has the power to limit examinations for discovery of "multiple parties who are of the same interest" if the examinations would be "oppressive, vexatious or unnecessary". In provinces without this specific provision a similar power may exist under the court's inherent jurisdiction: *Kay v. Posluns*, [1993] O.J. No. 188 (Ont. Gen. Div.). Unlike staying the entire action under the stay power, application of this rule would not deal with the inefficiencies of individual defendants having to be represented at trial when their possible personal liability would often only arise as an issue once findings had been made in the proceeding against the corporation.

¹⁰⁷*La Forest J. in London Drugs Ltd. v. Kuehne & Nagel Int'l Ltd.*, *supra* note 13 at 267 (D.L.R.), quoting Oliver Wendell Holmes.

ii) Possible Rule Amendments

An unease permeates many of the cases cited in this article. The unease stems from the concern that many judges have that the court system is being abused by litigants and, on occasion, by their counsel. Such concerns are, of course, not limited to the narrow area of excessive joinder which is the focus of this article. They exist in some measure throughout the civil litigation system.¹⁰⁸ Although the occasional comment by the occasional judge can be shrugged off by practising lawyers as simply a venting of judicial frustration, the chorus of comments in the case law is not so easy to ignore.¹⁰⁹ If there is something wrong of a systemic nature there may be a need for systemic treatment. In particular, if the adversarial system is being misused by fictionalized or over-broad pleadings, we may need to take a look at the rules which impact on the drawing of pleadings. One possibility would be for the relevant rules committees created by the legislation governing the civil litigation system to propose amendments if it is believed misuse of a systemic nature exists.¹¹⁰ Two possibilities can be identified: the imposition of restraints which bind litigants or more controversially, at least to lawyers, the imposition of restraints which impact on the role of counsel.

Under our present system there are, aside from costs, no practical restraints on litigants on what they can allege in a pleading. Pleadings are subject to absolute privilege. On the prevailing view, no suit for abuse of process can be brought if a civil litigant confines its activities to the court process itself.¹¹¹ There are no sanctions aside from costs which can be imposed on a litigant who commences proceedings without a reasonable foundation for its claims. Indeed, it seems that no sanctions aside from costs can be imposed even if the litigant

¹⁰⁸ MacKenzie, *supra* note 32 at 2.3 provides a depressing list: "Forensic excesses that are features of litigation in an adversarial system include frivolous lawsuits, shotgun pleadings, tactical counterclaims, delay tactics..."

¹⁰⁹ E.g., *Dallas/North Group Re* (1999), 46 O.R. (3d) 602 at 612: "More disturbing is the fact that this campaign was carried out using the court system as a vehicle and that lawyers participated in this scheme. Members of the Bar are not mere hand maidens to, or mouthpieces for, their clients. ... The court must demonstrate its disapproval of such abuse of process, and the participation of members of the Bar in such abuse, in the strongest possible terms". Other recent notable criticisms, explicit or implicit, of counsel or the practice generally include: *Sterling Rubber Ltd. v. Canadian Imperial Bank of Commerce*, [1991] O.J. No. 1022 (Gen. Div.) and *Marchand v. Public General Hospital Society of Chatham* (1998), 16 C.P.C. (4th) 201 (Ont. Gen. Div.), *aff'd* (2000) 51 O.R. (3d) 97 (C.A.) (inefficient trial/uncivil behaviour of counsel); *Scintilore Explorations Ltd. v. Larche* (1999), 48 B.L.R. (2d) 248 (Ont. S.C.J.) at 288-89 (questionable trial tactics); *Epstein v. First Marathon*, *supra* note 8 ("strike litigation").

¹¹⁰ Another possibility would be for reform to be imposed by the judges through the case law. On balance, it is suggested, rules committees are the proper forum for any reform.

¹¹¹ J. Irvine, "The Resurrection of Tortious Abuse of Process" (1989) 47 C.C.L.T. 217; J.G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 675, 687-88.

knew that the allegations made in a pleading were false or was reckless as to their truth. Cost sanctions themselves have limits given issues of collectibility against plaintiffs who either cannot or will not pay cost awards against them.

Our rules of ethics¹¹² do provide certain prohibitions with respect to the conduct of adversarial proceedings by counsel. Some of these may impact indirectly on the drawing of pleadings. A lawyer's duties include a duty to the court with respect to its processes. The commentaries to the rules recite familiar prohibitions on knowingly instituting malicious proceedings, suborning perjury, knowingly leading false testimony, or otherwise knowingly misleading the court.¹¹³ Arguably the prohibitions in place are wide enough to catch such misconduct as a lawyer who issues a pleading which contains factual allegations which he or she knows is not true. It is doubtful, however, whether any of the specific prohibitions in the various Canadian codes apply in the context of drawing pleadings with no reasonable factual foundation¹¹⁴ or to the overbroad joinder of defendants for tactical advantage. It may be necessary to better articulate specifics of impermissible conduct by counsel in light of modern needs. In this regard, it is worthwhile to note the ethical rule in England is that an allegation of fraud should not be made in a pleading unless counsel at the time of pleading has clear and sufficient evidence to support it.¹¹⁵ The rule in Australia is the same. Although there are also statements to this effect in

¹¹²References are to the Canadian Bar Association *Code of Professional Conduct* (the "Code"), 2nd ed., (Ottawa: Canadian Bar Association, 1988). The Code (and the various Law Society Rules of Professional Conduct) are not exhaustive as to the requirements of conduct. The obligation of a lawyer is a very broad and general one: not to engage in professional misconduct or conduct unbecoming. A lawyer can be sanctioned even if his or her conduct is not contrary to any specific commentary and it would seem from the *Lang Michener* case, although somewhat unfairly, even if it is in accord with the commentary.

¹¹³Code, Chapter IX, Commentary 2.

¹¹⁴M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright, 1957) at 80 states that before instituting proceedings it is "the duty of a lawyer to ascertain all the facts ... and whether there is a reasonable expectation that the suit will have a successful outcome...". However, the statement is made in the context of the lawyer's duty to the client.

¹¹⁵*Associated Leisure Ltd. v. Associated Newspapers Ltd.*, [1970] 2 Q.B. 450 at 456; *Saif Ali v. Sydney Mitchell & Co.*, [1978] Q.B. 95 at 103 (C.A.), rev'd on other grounds, [1980] A.C. 198 (H.L.). The English Law Society's Code for Advocacy, *Guide to the Professional Conduct of Solicitors* [Annex 21A], 8th ed., (London: Law Society Publishing, 1999) provides specific direction on this issue:

6.6 Advocates...must not draft any originating process, pleading ... containing:

(a) any statement of fact or contention (as the case may be) which is not supported by the client or by their brief or instructions;

(b) any contention which they do not consider to be properly arguable; (or)

(c) any allegation of fraud unless they have clear instructions to make such allegation and have before them reasonably credible material which as it stands establishes a *prima facie* case of fraud; ...

Canada,¹¹⁶ there is little demonstrable evidence that this rule is followed to any great extent in practice in Canada, perhaps because it is not clearly articulated in our rules of conduct and may thus not be widely known to those who draw pleadings.

Although the ethical requirement in England that counsel have a reasonably credible basis for claims of fraud before alleging it in a pleading is a laudable one, one might ask a wider question: "Shouldn't there be some substantial factual basis for all claims contained in a pleading before it is issued?" With the cost and inconvenience of modern litigation can litigation which is a fishing expedition, in the sense that there is no reasonable factual foundation for the claim at the time litigation is commenced, be tolerated? Can the system afford shot in the dark litigation? As always, the need to balance arises. Having too high a requirement of advance knowledge of the merits of a claim may leave plaintiffs who have truly been wronged in the position where they cannot even seek redress because they do not have enough knowledge to plead.¹¹⁷ Conversely, not having any requirement that there be some factual basis for a pleading leads to the possibility of pleadings becoming works of fiction, in that allegations are raised to conform with pleading requirements when there is no reasonable basis for believing that the factual allegations are tenable.¹¹⁸ The time and expense taken up in dealing with such cases in the publicly financed court system may impair the system's ability to focus on cases of real merit.

The rules of other jurisdictions may provide some guidance on how to balance these concerns.¹¹⁹ In England the new *Rules of Civil Procedure* 1998 require for the first time that a "statement of truth" accompany a statement of case and any particulars.¹²⁰ The requirement was designed to lessen the likelihood of speculative and fanciful allegations being made. The statement of truth contains a verification that the litigant believes the facts in the pleading to

¹¹⁶ *Doyle Construction v. Carling O'Keefe Breweries* (1988), 27 B.C.L.R. (2d) 81 (C.A.) at 85; *Carter v. Leahey* (1994), 134 N.S.R. (2d) 93 at para. 42; *Corfax Benefit Solutions*, *supra* note 66 at 61; W.B. Williston & R.J. Rolls, *The Conduct of An Action* (Toronto: Butterworths, 1982) at 184: "fraud or other quasi-criminal conduct".

¹¹⁷ *Jacob & Goldrein*, *supra* note 39 at 77-78.

¹¹⁸ Such as the current boilerplate practice of alleging that a corporate officer was acting outside the scope of his or her duty as an officer or not in the best interests of the corporation in order to avoid the *Said v. Butt* rule referred to at note . The recent tendency has been to tolerate what might be considered to be fishing expeditions, given a concern that a plaintiff not be foreclosed from pursuing its case: *Curry v. Vancouver (City of)*, [1996] B.C.J. No. 625; *Magnotta Winery Ltd. v. Ziraldo* (1995), 25 O.R. (3d) 575; *Temelini v. Ontario Provincial Police* (1990), 73 O.R. (2d) 664 (C.A.), *ref'd* leave to appeal [1990] S.C.C.A. 364. Nine years later the plaintiff in *Temelini* was still at the discovery stage trying to prove his case: *Temelini v. Ontario Provincial Police (Commissioner)* (1999), 44 O.R. (3d) 609 (C.A.).

¹¹⁹ Some may also believe that mandatory mediation and/or compulsory case management may lessen the problem.

¹²⁰ A statement of case is the new terminology employed in England for our statement of claim. Statements of truth are also required for responses (defences).

be true. Given that verification is required of particulars and as particulars are required in claims of fraud, misrepresentation, breach of trust or wilful default, the factual particulars of many claims will have to be verified by the party.¹²¹ A party who verifies a pleading without an honest belief in its truth is subject to contempt proceedings.¹²² Presumably counsel will be obliged to inform a client of this potential sanction before issuing a pleading, ensuring at least some possibility of reflection by clients before making serious allegations without believing that they are true.

In the United States verification of pleadings has been a common procedure for many years.¹²³ The 1938 codification of the *Federal Rules of Civil Procedure* required attorneys to certify that to the best of their knowledge, information and belief that there were good grounds to support a pleading. However, that procedure alone was not enough to winnow out speculative claims. There was a concern that the low fact pleading requirements under American notice pleading had led to "a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed and the unscrupulous" that threatened to "undermine the ability of the judiciary to efficiently administer the press of cases properly before it".¹²⁴ Rule 11 of the *Federal Rules of Civil Procedure* was thus amended in 1983 to impose an objective standard of verification of a pleading.¹²⁵ Under the amendment attorneys have an obligation to make reasonable inquiry to ascertain that a reasonable basis exists for allegations.¹²⁶ In the context of claims which must be pled with particularity¹²⁷ such as fraud, more specific information is needed than if he or she were commencing an action where such particularity was not required. Rule 11 is the "major provision in the Federal Rules insuring that notice pleading does not result in

¹²¹ *Civil Procedure*, 2d ed. (London: Sweet & Maxwell, 1999) at Part 16, Practice Direction and Part 18.

¹²² Rule 32.14. Contempt proceedings are normally to be brought by the Attorney General although an aggrieved litigant may be granted leave by the court to bring an application.

¹²³ It is important to note that the U.S. "notice" pleading provisions typically require less specificity than do pleadings in Canada. The function of pleadings under the Federal Rules of Civil Procedure is to give notice of the occurrence with respect to which the claim is being made. All "material facts" do not need to be pled under the rules, leaving open a greater possibility of unspecific pleadings.

¹²⁴ *Lepucki v. Van Wormer*, 765 F. 2d 86 at 87 (7th Cir. 1985).

¹²⁵ Some states have similar rules for state actions. The rule applies to both complaints and defences and has the merit of also causing attorneys to have second thoughts about filing meritless defences as a delay tactic.

¹²⁶ *Business Guides, Inc. v. Chromatic Communications Enterprises*, 111 A.S. Ct. 922 (1991).

¹²⁷ Federal Rule 9(b), which is roughly parallel to but somewhat narrower than Ontario Rule 25.06(8). The Ontario rule requires particularity in pleading of allegations of fraud, misrepresentation, breach of trust, malice or intent. In the United States in the securities context pleading rules have been changed by the *Private Securities Litigation Reform Act* to impose a particularity requirement which echoes Rule 9(b).

instituting and conducting spurious litigation".¹²⁸ Violation of the rule can give rise to cost consequences or, in theory, even to a disciplinary or perjury charge. A litigant or attorney who signs a pleading without proper basis for verification may be ordered to pay a fine to the court, to pay the other side's attorneys' fees or may be sanctioned in some other fashion.¹²⁹ Sanctions against attorneys have been made, for instance, where fraud or other speculative claims have been made without foundation and in cases where attorneys have simply not done their homework prior to commencing action.¹³⁰ Rule 11 is much broader than the statement of truth required under the new English rules. It is an obligation which is imposed on the attorney signing the pleading and not just the litigant. Rather than simply sanctioning the issuance of pleadings which are not honestly believed to be true, it imposes a requirement of an objective basis for pleading. There is little doubt that the Federal Court verification rule is designed to be, and is, significantly more chilling than the statement of truth procedure under the English rules.¹³¹

What, if anything, should we take from the English and American rules? A preliminary comment is made. Any civil procedure system is a function of the society which it serves. It is difficult to import any one foreign provision into our rules without having some sense as to how the foreign system as a whole resembles or diverges from ours. A rule may be appropriate in one jurisdiction but unsuited in another based simply on what lawyers do with it.

The similarity in our civil procedure to that of England is a historic and in many ways still a deep one. Our civil procedure system contains rules which are virtually identical to those of England with respect to both the content of pleadings and the cost consequences of unsuccessful actions. That these rules have apparently not been enough to deter frivolous pleadings in England may give us pause to reflect. The incentive created by our rules, as compared to the English, to add parties as defendants for the purpose of expanding the scope of oral discovery suggests the possibility of the problem being even larger here

¹²⁸ Jacob & Goldrein, *supra* note 39 at 341.

¹²⁹ Violation does not require bad faith. Only failure to meet an objective standard of reasonable inquiry need be shown, *Chambers v. NASCO Inc.*, 111B S.Ct. 2123 (1991), although many cases exhibit a strong tendency not to second guess on the issue of reasonableness.

¹³⁰ *Johnson v. A.W. Chesterton*, 18 F.3d 1362 (1994).

¹³¹ Rule 11 has attracted significant commentary and disagreement among commentators as to its wisdom. It has been alternately criticised as in "Note: Plausible Pleadings: Developing Standards For Rule 11 Sanctions" (1986-7) 100 Harv. L.Rev. 630, or hailed as injecting some measure of much needed responsibility back into the system: N.H. Klausner, "Note: The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility" (1986) 61 N.Y.U.L.Rev. 300. In 1993 the rule was amended again with the effect that cost awards against attorneys were rendered less likely by allowing an attorney, when faced with a Rule 11 motion, to withdraw the complaint: Specific provisions exist under 1995 legislation in connection with U.S. securities litigation given the perceived heightened possibility of abuse in such actions: see *Epstein v. First Marathon*, *supra* note 8 at 41-44.

than in England. The extent to which our own judges have expressed concern on this very issue may compel some action. In the author's view the statement of truth by litigants requirement under the new English rules is a very modest step in the direction of combatting pleadings and joinder abuse. Although access to the courts is a fundamental right, a sanction over and above costs on litigants if they do not honestly believe¹³² what they are saying in their pleadings does not appear to be an unreasonable condition of such access. Lack of honesty in using the court system should be punished. The necessity of counsel advising litigants of the possibility of punishment by way of contempt proceedings may provide a worthwhile deterrent.¹³³ A requirement of sworn verification of court pleadings is also similar to the present procedure in filing proofs of claims in bankruptcy.¹³⁴ A note of caution must be inserted. Any rule designed to limit abuse itself has the potential to be abused. In order to avoid contempt applications being brought for tactical purposes, a safeguard that leave is required before such proceedings can be brought and, perhaps, that proceedings for leave cannot be brought until the final determination of the litigation, might well be advisable.

It is not as clear to the author whether the U.S. model of requiring litigants to have, under pain of sanction, an objectively reasonable basis for their pleadings would add much of value to our civil procedure system. The purpose of the U.S. rule is deterrence. The U.S. rule, if breached, typically leads to an award of costs against the litigant. However, that is already a fundamental aspect of our loser pays costs litigation system. Punishing litigants by means of solicitor and client costs where claims are demonstrably without merit is also available in Canada. Deterrence by way of contempt appears a crude and inappropriate tool to impose on a litigant who genuinely, although it may turn out unreasonably, believed a set of facts to exist. The usual cost rules should suffice. Further, our civil litigation environment is still significantly different from that of the United States. Distinctions such as our more specific pleading requirements, relative lack of jury trials, limits on punitive damage awards and the unavailability of treble damages all reduce what to Canadian eyes appear to be the lottery aspects of American litigation. They therefore reduce the practical pressure to settle frivolous suits, regardless of merits, and hence the incentive of plaintiffs to bring such actions. Although our litigation system is far from perfect, it does not seem to have yet reached the excesses which caused the American rule makers to create special sanctions for lawsuits brought without a reasonable basis.

¹³² Although the English text is not clear, presumably indifference as to whether an allegation was true or not would negate a claim that a belief was honestly held.

¹³³ Although it hardly needs to be said, counsel who issue a pleading knowing that the litigant's verification was false would no doubt also be exposed to contempt or other criminal sanctions.

¹³⁴ *BIA* General Rules Form 74. Filing a claim containing a wilfully false statement or misrepresentation can result in disallowance *B.I.A.* (s. 125) or prosecution if an intent to defraud exists (s. 201(1)).

Even greater concerns exist with respect to the advisability of importing into Canada a Rule 11 obligation on counsel to verify under pain of sanction that they have a reasonable basis for factual allegations in pleadings. There is no doubt that if our civil litigation system is to work it must depend upon the integrity and responsibility of counsel. That does not mean, however, that a rule amendment along the lines of Rule 11 imposing sanctions on counsel is either necessary or advisable. Such an amendment might well create a new sport among counsel. Some counsel would delight in claiming that opposite counsel had violated the rule and threaten motions to determine whether that was the case and for cost sanctions against counsel if it were found out to be true.¹³⁵ Even if unsuccessful, the motion would have the potential of driving a wedge between client and counsel and would involve the possibility of client confidences being disclosed. One need only look at what has happened in practice as a result of the well intentioned decision of the Supreme Court of Canada in *MacDonald Estate v. Martin*¹³⁶ to realise that ethical rules of sweeping application in the context of civil litigation can lead to motions alleging rule violations which are often entirely tactical in purpose and hugely expensive.¹³⁷

This is not to say that there may not be something to be said for imposing (or perhaps clarifying) an ethical requirement on counsel akin to that of Rule 11 in a specified group of cases. Our rules already implicitly recognise that there are certain types of claims which are alleged much more often than they are ever proved and where, because of their seriousness, the mere bringing of the allegations can be harmful.¹³⁸ It is presumably because of this that the English ethical rules in relation to the pleading of fraud were created. Some clarification or amendment of our ethical rules with respect to pleading fraud and perhaps other specified allegations of similar seriousness would be welcome so that all counsel know the rules by which they must play. Indeed it is in exactly these sorts of cases that the court is at present most likely to award costs as against counsel¹³⁹ and clarification of the ethical rule might serve as a salutary warning. Again, interlocutory motions dealing with the role of counsel should not be permitted. The present practice which effectively only allows such issues to be dealt with at the end of the proceedings in the context of costs has much to commend it.¹⁴⁰

¹³⁵ "Note: Plausible Pleadings: Developing Standards for Rule 11 Sanctions", *supra* note 131 at 131: "...almost every major lawsuit includes at least the threat of a rule 11 motion..."

¹³⁶ [1990] 3 S.C.R. 1235.

¹³⁷ See also the English Court of Appeal's comments on this issue in *Ridehalgh v. Horsefield*, [1994] Ch. 205 (C.A.).

¹³⁸ These are the allegations requiring particularity (in Ontario r. 25.06(8)), to which one might add as judicial additions conspiracy and possibly any allegation of behaviour contrary to the *Criminal Code*.

¹³⁹ *E.g.*, *Re Bisysk (No. 2)* (1980), 32 O.R. (2d) 281, *aff'd* (1981), 32 O.R. (2d) 281n (C.A.); *Royal Bank v. Bernauer* (1993), [1994] 3 W.W.R. 438 (Sask. Q.B.).

¹⁴⁰ Theoretically, breach of an ethical rule with respect to pleadings could result in disciplinary sanction by a Law Society. Practically, there is little or no possibility of this ever occurring.

VI. *Conclusion*

Good lawyers have always sought to provide their clients with every and any tactical advantage that the civil litigation system leaves open to them. The upswing in cases dealing with joinder of corporate directors, officers and employees as defendants is a recent manifestation of this phenomenon and, perhaps, is also reflective of a more aggressive approach to litigation which is taking hold in many areas of Canada. Although it may well be that in the majority of cases such joinder is necessary, the case law reflects a growing judicial consensus that in a large subset of cases joinder has little practical purpose beyond the multiplying of the costs and miseries of the civil litigation process. The courts have not done a good job with this latter category of cases. The volume of reported cases suggests that the extent of misuse of the liberal joinder rules is such that there should be some considered reflection, either by the judiciary or the rules committees, as to whether some constraints should be imposed by the courts to curb such tactics.