Court File No.: T-1673-17

FEDERAL COURT

CLASS PROCEEDING

BETWEEN:

CHERYL TILLER, MARY-ELLEN COPLAND AND DAYNA ROACH

Plaintiffs/Applicants

ANDl

HER MAJESTY THE QUEEN

Defendants/Respondents

Brought pursuant to the *Federal Courts Rules*, SOR/98-106

BOOK OF AUTHORITIES OF THE REPRESENTATIVE PLAINTIFFS

Counsel for the Applicant, Cheryl Tiller and Mary-Ellen Copland

Klein Lawyers LLP
Barristers and Solicitors
400-1385 West 8th Avenue
Vancouver, BC V6H 3V9
Tel: 604-874-7171/Fax: 604-874-7180
Attn: Nicola Hartigan

Counsel for the Applicant, Dayna Roach

Higgerty Law
Main Floor, Millennium Tower
101-440 2nd Avenue, SW
Calgary, AB T2P 5E9
Tel: 403-503-8888/ Fax: 587-316-2260
Attn: Jill Taylor

TO: Counsel for the Respondent, Her Majesty the Queen

Department of Justice Canada
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Tel: 604-666-0096
Fax: 604-666-2710

Attn : Donnaree Nygard, Jennifer Chow, QC, Mara Tessier

AUTHORITIES

Tab

Canada Post Corporation *Appellant*

v.

Michel Lépine *Respondent*

and

Attorney General of Canada and Cybersurf Corp. *Interveners*

Indexed as: Canada Post Corp. *v.* Lépine

Neutral citation: 2009 SCC 16.

File No.: 32299.

2008: November 17; 2009: April 2.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Private international law — Foreign or external judgments — Recognition procedure — Parallel class proceedings commenced in different provinces — Whether Quebec court hearing application for recognition of judgment can take account of doctrine of forum non conveniens in determining whether foreign authority had jurisdiction — Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3155(1), 3164.

Private international law — Foreign or external judgments — Recognition procedure — Parallel class proceedings commenced in different provinces — Notice procedure for Ontario judgment certifying class proceeding and approving settlement agreement — Quebec residents bound by settlement agreement — Whether notice procedure for Ontario judgment entailed contravention of fundamental principles of procedure that precluded recognition of Ontario judgment in Quebec — Civil Code of Québec, S.Q. 1991, c. 64, art. 3155(3).

Private international law — Foreign or external judgments — Recognition procedure — Lis pendens — Parallel class proceedings commenced in different provinces — Whether Quebec and Ontario proceedings gave rise to situation of lis pendens — Civil Code of Québec, S.Q. 1991, c. 64, art. 3155(4).

Société canadienne des postes *Appelante*

c.

Michel Lépine *Intimé*

et

Procureur général du Canada et Cybersurf Corp. *Intervenants*

Répertorié : Société canadienne des postes *c.* Lépine

Référence neutre : 2009 CSC 16.

N[o] du greffe : 32299.

2008 : 17 novembre; 2009 : 2 avril.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit international privé — Jugements étrangers ou externes — Procédure de reconnaissance — Recours collectifs parallèles intentés dans des provinces différentes — Le tribunal québécois saisi d'une demande de reconnaissance de jugement peut-il prendre en compte la doctrine du forum non conveniens pour établir la compétence de l'autorité étrangère? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3135, 3155(1), 3164.

Droit international privé — Jugements étrangers ou externes — Procédure de reconnaissance — Recours collectifs parallèles intentés dans des provinces différentes — Procédure de notification du jugement ontarien certifiant un recours collectif et entérinant une transaction — Résidants du Québec liés par la transaction — La procédure de notification du jugement ontarien constituait-il une violation des principes essentiels de la procédure qui empêchait la reconnaissance judiciaire du jugement ontarien au Québec? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3155(3).

Droit international privé — Jugements étrangers ou externes — Procédure de reconnaissance — Litispendance — Recours collectifs parallèles intentés dans des provinces différentes — Existait-il une situation de litispendance entre les recours québécois et ontarien? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3155(4).

In September 2000, the Canada Post Corporation began marketing a lifetime Internet service in Canada, but it terminated its commitment in September 2001. This led to complaints and various proceedings. In Quebec, a customer who had purchased this service filed a motion for authorization to institute a class action on behalf of every natural person residing in Quebec who had purchased it. Subsequently, in Ontario, the Superior Court of Justice certified a class proceeding and approved a settlement agreement pursuant to which Canadian consumers could obtain a refund of the purchase price of the CD-ROM and receive three months of free Internet access. According to the Ontario judgment, the settlement agreement was binding on every resident of Canada who had purchased the service except those in British Columbia. On the next day, the Quebec Superior Court authorized the Quebec class action on behalf of a group limited to residents of Quebec. The Corporation then sought to have the Ontario judgment recognized under art. 3155 *C.C.Q.* The Quebec Superior Court dismissed the Corporation's application on the basis that the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the class action under way in Quebec, which constituted a contravention of the fundamental principles of procedure (art. 3155(3) *C.C.Q.*). The Quebec Court of Appeal affirmed that judgment on this issue and added that although the Ontario court had jurisdiction over the proceeding, it should have declined jurisdiction over Quebec residents by applying the doctrine of *forum non conveniens* (arts. 3155(1), 3164 and 3135 *C.C.Q.*). Finally, the two class proceedings gave rise to a situation of *lis pendens*, since the Quebec proceeding had been commenced first (art. 3155(4) *C.C.Q.*).

Held: The appeal should be dismissed.

In applying the doctrine of *forum non conveniens*, the Court of Appeal added an irrelevant factor to its analysis of the foreign court's jurisdiction. Although the application of this doctrine finds support, at first glance, in the very broad wording of the reference in art. 3164 *C.C.Q.* to Title Three on the international jurisdiction of Quebec authorities, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign judgments set out in the *Civil Code of Québec*. In reviewing an application for recognition of a foreign judgment, the Quebec court does not have to consider how the court of another province or of a foreign country should have exercised its jurisdiction or, in particular, how it might have exercised a discretion to decline jurisdiction over the case or suspend its intervention. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised,

En septembre 2000, la Société canadienne des postes commercialise un service d'Internet à vie sur le marché canadien, mais met fin à son engagement en septembre 2001. Cela provoque des plaintes et des recours divers. Au Québec, un client de ce service dépose une requête en autorisation d'exercer un recours collectif au nom de toute personne physique résidant au Québec qui avait acheté le service. Plus tard, en Ontario, la Cour supérieure de justice certifie un recours collectif puis entérine une transaction aux termes de laquelle les consommateurs canadiens pourront se faire rembourser le prix d'achat du cédérom et recevoir trois mois de service Internet gratuit. Selon le jugement ontarien, la transaction lie tous les résidants du Canada qui ont acheté le service, sauf ceux de la Colombie-Britannique. Le lendemain, la Cour supérieure du Québec autorise le recours collectif au Québec pour un groupe incluant seulement les résidants du Québec. La Société tente alors d'obtenir la reconnaissance du jugement ontarien en vertu de l'art. 3155 *C.c.Q.* La Cour supérieure du Québec rejette sa demande au motif que l'avis de la certification du recours ontarien était inadéquat au Québec et créait de la confusion avec le recours collectif entamé au Québec, ce qui violait les principes essentiels de la procédure (par. 3155(3) *C.c.Q.*). La Cour d'appel du Québec confirme le jugement sur cette question et ajoute que bien que la cour ontarienne avait compétence à l'égard du recours, elle aurait dû décliner compétence sur les résidants québécois en application de la doctrine du *forum non conveniens* (par. 3155(1) et art. 3164 et 3135 *C.c.Q.*). Enfin, il y avait litispendance entre les deux recours collectifs, la procédure québécoise ayant été engagée la première (par. 3155(4) *C.c.Q.*).

Arrêt : Le pourvoi est rejeté.

En appliquant la doctrine du *forum non conveniens*, la Cour d'appel ajoute un élément non pertinent dans son analyse de la compétence du tribunal étranger. Bien que le libellé très large du renvoi au titre troisième relatif à la compétence internationale des autorités québécoises figurant à l'art. 3164 *C.c.Q.* invite à première vue à cette application, une telle interprétation néglige le principe premier de l'aménagement juridique de la reconnaissance et de l'exécution des jugements étrangers dans le *Code civil du Québec*. Dans le cas d'une demande de reconnaissance d'un jugement étranger, le tribunal québécois n'a pas à se demander comment la cour d'une autre province ou d'un pays étranger aurait dû exercer sa compétence ni, en particulier, comment elle aurait pu utiliser un pouvoir discrétionnaire de ne pas se saisir de l'affaire ou de suspendre son intervention. L'*exequatur* du tribunal québécois dépend de l'existence de la compétence du tribunal étranger,

apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context would therefore be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. The application of the specific rules set out in arts. 3165 to 3168 *C.C.Q.* will generally suffice to determine whether the foreign court had jurisdiction. It may be necessary in considering a complex legal situation to apply the general principle in art. 3164 *C.C.Q.* and to establish a substantial connection between the dispute and the originating court. But even when it is applying that general rule, the court hearing the application for recognition cannot rely on a doctrine that is incompatible with the recognition procedure. In the instant case, there is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. [34-38]

In the context in which they were published, the notices provided for in the judgment of the Ontario Superior Court of Justice contravened the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.* In a class action, it is important that the notice procedure be designed so as to make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. Compliance with these requirements constitutes an expression of the necessary comity between courts and a condition for preserving it within the Canadian legal space. In the instant case, the clarity of the notice was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The Ontario notice was likely to confuse its intended recipients, as it did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them. [42-46]

The Quebec courts were also precluded from recognizing the Ontario judgment on the basis of *lis pendens* pursuant to art. 3155(4) *C.C.Q.* The interpretation to the effect that a class action exists only as of its filing date, after it has been authorized, is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. The application for authorization to institute a class action is a form of judicial proceeding between parties for the

et non des modalités de l'exercice de celle-ci, hormis les exceptions prévues par le *Code civil du Québec*. Le recours au *forum non conveniens* dans ce contexte fait donc fi de la distinction de base entre la détermination de la compétence proprement dite et son exercice. En général, le recours aux règles spécifiques prévues aux art. 3165 à 3168 *C.c.Q.* permet de statuer sur la compétence des tribunaux étrangers. Il se peut qu'une situation juridique complexe exige d'appliquer le principe général de l'art. 3164 *C.c.Q.* et d'établir la présence d'un lien important entre le litige et le tribunal d'origine. Même s'il a recours à cette règle générale, le tribunal de l'*exequatur* ne peut s'appuyer sur une doctrine incompatible avec la procédure de reconnaissance. Dans la présente affaire, l'existence même de la compétence de la Cour supérieure de justice de l'Ontario ne fait pas de doute selon l'art. 3168 *C.c.Q.*, puisque la Société, défenderesse à l'action, a établi son siège social en Ontario. Ce facteur de rattachement justifiait à lui seul la reconnaissance de la compétence du for ontarien. [34-38]

Dans le contexte où ils ont été publiés, les avis prévus par le jugement de la Cour supérieure de justice de l'Ontario ne respectaient pas les principes essentiels de la procédure au sens de le par. 3155(3) *C.c.Q.* En matière de recours collectif, il importe que la procédure de notification soit conçue de telle manière qu'elle rende probable la communication de l'information à ses destinataires. La rédaction des avis doit prendre en considération le contexte dans lequel ils seront diffusés et, en particulier, la situation du destinataire de l'information. Le respect de ces exigences constitue une manifestation de la courtoisie nécessaire entre les différents tribunaux et une condition de sa préservation dans l'espace juridique canadien. Dans la présente affaire, la clarté de l'avis importait particulièrement dans un contexte où, à la connaissance de tous les intéressés, des procédures collectives parallèles avaient été engagées au Québec et en Ontario. L'avis ontarien était de nature à créer de la confusion chez ses destinataires, car il n'explicitait pas adéquatement la portée du jugement de certification pour les membres québécois du groupe national établi par la Cour supérieure de justice de l'Ontario. Il pouvait amener le lecteur québécois à conclure qu'il n'était tout simplement pas concerné. [42-46]

La litispendance empêchait aussi la reconnaissance du jugement ontarien vu le par. 3155(4) *C.c.Q.* L'interprétation voulant que l'action en recours collectif n'existe qu'à compter du moment de son dépôt, après autorisation, ne respecte pas le texte du par. 3155(4) ni les modalités de son application dans le contexte d'un recours collectif. La demande d'autorisation du recours collectif constitue une forme de débat judiciaire engagé entre les parties pour déterminer précisément

purpose of determining whether a class action will in fact take place. In the instant case, the three identities were present at the stage of this application. The basic facts in support of both proceedings were the same for Quebec residents, the object was the same and the legal identity of the parties was established. [51-55]

Cases Cited

Referred to: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Hocking v. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321; *Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Thompson v. Masson*, [1993] R.J.Q. 69; *Hotte v. Servier Canada Inc.*, [1999] R.J.Q. 2598; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374.

Statutes and Regulations Cited

Civil Code of Québec, S.Q. 1991, c. 64, arts. 3134 to 3168, 3135, 3137, 3155, 3158, 3164, 3168.
Code of Civil Procedure, R.S.Q., c. C-25.
Fair Trading Act, R.S.A. 2000, c. F-2.

Authors Cited

Black's Law Dictionary, 8th ed. St. Paul, Minn.: Thomson/West, 2004, "dispute".

Glenn, H. Patrick. "Droit international privé", dans *La réforme du Code civil*, t. 3, *Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoire*s. Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec. Sainte-Foy, Qué.: Presses de l'Université Laval, 1993, 669.

Goldstein, Gérald, et Ethel Groffier. *Droit international privé*, t. I, *Théorie générale*. Cowansville, Qué.: Yvon Blais, 1998.

Grand Robert de la langue française, 2e éd. augm., t. 4. Paris: Dictionnaires Le Robert, 2001, "*litige*".

Reid, Hubert. *Dictionnaire de droit québécois et canadien avec table des abréviations et lexique anglais-français*, 3e éd. Montréal: Wilson & Lafleur, 2004, "*litige*".

Royer, Jean-Claude. *La preuve civile*, 4e éd. Cowansville, Qué.: Yvon Blais, 2008.

Saumier, Geneviève. "The Recognition of Foreign Judgments in Quebec — The Mirror Crack'd?" (2002), 81 *Can. Bar Rev.* 677.

Talpis, Jeffrey A., with the collaboration of Shelley L. Kath. *"If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate*

si le recours collectif verra le jour. À l'étape de cette demande, les trois identités se rencontraient dans la présente affaire. Les faits essentiels au soutien des deux procédures étaient les mêmes quant aux résidants du Québec, l'objet était le même et l'identité juridique des parties était établie. [51-55]

Jurisprudence

Arrêts mentionnés : *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, [2002] 4 R.C.S. 205; *Hocking c. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189; *Currie c. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321; *Birdsall Inc. c. In Any Event Inc.*, [1999] R.J.Q. 1344; *Rocois Construction Inc. c. Québec Ready Mix Inc.*, [1990] 2 R.C.S. 440; *Thompson c. Masson*, [1993] R.J.Q. 69; *Hotte c. Servier Canada inc.*, [1999] R.J.Q. 2598; *Roberge c. Bolduc*, [1991] 1 R.C.S. 374.

Lois et règlements cités

Code civil du Québec, L.Q. 1991, ch. 64, art. 3134 à 3168, 3135, 3137, 3155, 3158, 3164, 3168.
Code de procédure civile, L.R.Q., ch. C-25.
Fair Trading Act, R.S.A. 2000, ch. F-2.

Doctrine citée

Black's Law Dictionary, 8th ed. St. Paul, Minn. : Thomson/West, 2004, « *dispute* ».

Glenn, H. Patrick. « Droit international privé », dans *La réforme du Code civil*, t. 3, *Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires.* Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec. Sainte-Foy, Qué. : Presses de l'Université Laval, 1993, 669.

Goldstein, Gérald, et Ethel Groffier. *Droit international privé*, t. I, *Théorie générale*. Cowansville, Qué. : Yvon Blais, 1998.

Grand Robert de la langue française, 2e éd. augm., t. 4. Paris : Dictionnaires Le Robert, 2001, « litige ».

Reid, Hubert. *Dictionnaire de droit québécois et canadien avec table des abréviations et lexique anglais-français*, 3e éd. Montréal : Wilson & Lafleur, 2004, « litige ».

Royer, Jean-Claude. *La preuve civile*, 4e éd. Cowansville, Qué. : Yvon Blais, 2008.

Saumier, Geneviève. « The Recognition of Foreign Judgments in Quebec — The Mirror Crack'd? » (2002), 81 *R. du B. can.* 677.

Talpis, Jeffrey A., with the collaboration of Shelley L. Kath. *« If I am from Grand-Mère, Why Am I Being Sued in Texas? » Responding to Inappropriate*

Foreign Jurisdiction in Quebec–United States Cross-border Litigation. Montréal: Thémis, 2001.

APPEAL from a judgment of the Quebec Court of Appeal (Delisle, Pelletier and Rayle JJ.A.), 2007 QCCA 1092, [2007] R.J.Q. 1920, [2007] SOQUIJ AZ-50446058, [2007] J.Q. nº 8498 (QL), 2007 CarswellQue 13496, affirming a decision of Baker J., J.E. 2005-1631, [2005] SOQUIJ AZ-50325631, [2005] Q.J. No. 9806 (QL), 2005 CarswellQue 5457, 2005 CanLII 26419. Appeal dismissed.

Serge Gaudet, *Gary D. D. Morrison* and *Frédéric Massé*, for the appellant.

François Lebeau and *Jacques Larochelle*, for the respondent.

Alain Préfontaine, for the intervener the Attorney General of Canada.

No one appeared for the intervener Cybersurf Corp.

English version of the judgment of the Court delivered by

LeBel J. —

I. Introduction

A. *Nature of the Appeal*

[1] In September 2000, the appellant, the Canada Post Corporation ("Corporation"), began marketing a lifetime Internet service in Canada. Many consumers purchased the service. However, the Corporation terminated its lifetime commitment in September 2001 and discontinued the service, which led to complaints and various proceedings. There was a settlement in Ontario after the Ontario Superior Court of Justice had certified a class proceeding and approved a settlement agreement with the Corporation. A class action had also been instituted in Quebec. The Corporation sought to have the Ontario judgment recognized under art. 3155 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), and to have the Quebec proceedings dismissed, but

Foreign Jurisdiction in Quebec–United States Cross-border Litigation. Montréal : Thémis, 2001.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Delisle, Pelletier et Rayle), 2007 QCCA 1092, [2007] R.J.Q. 1920, [2007] SOQUIJ AZ-50446058, [2007] J.Q. nº 8498 (QL), 2007 CarswellQue 7329, qui a confirmé une décision du juge Baker, J.E. 2005-1631, [2005] SOQUIJ AZ-50325631, [2005] Q.J. No. 9806 (QL), 2005 CarswellQue 5457, 2005 CanLII 26419. Pourvoi rejeté.

Serge Gaudet, *Gary D. D. Morrison* et *Frédéric Massé*, pour l'appelante.

François Lebeau et *Jacques Larochelle*, pour l'intimé.

Alain Préfontaine, pour l'intervenant le procureur général du Canada.

Personne n'a comparu pour l'intervenante Cybersurf Corp.

Le jugement de la Cour a été rendu par

Le juge LeBel —

I. Introduction

A. *Nature du pourvoi*

[1] En septembre 2000, la Société canadienne des postes (« Société »), l'appelante, commercialisa un service d'Internet à vie sur le marché canadien. De nombreux consommateurs achetèrent ce service. Toutefois, la Société mit fin à son engagement à vie et interrompit le service en septembre 2001. Cette interruption provoqua des plaintes et des recours divers. Un règlement intervint en Ontario après que la Cour supérieure de justice de l'Ontario eut certifié un recours collectif et entériné une transaction avec la Société. Un recours collectif avait aussi été entamé au Québec. La Société tenta d'obtenir la reconnaissance du jugement ontarien en vertu de l'art. 3155 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »), et de faire arrêter les procédures

the Quebec Superior Court dismissed its application. The Quebec Court of Appeal affirmed that judgment. For reasons that differ in part from those given by the Court of Appeal, I would dismiss this appeal, which concerns the conditions under the *Civil Code of Québec* for recognizing a judgment rendered outside Quebec. The appeal also raises issues concerning the management of parallel class actions instituted in different provinces.

B. *Origin of the Case*

[2] The events on which this case is based began in September 2000, when the Corporation offered its customers a lifetime Internet access package using software designed by the intervener Cybersurf Corp., an Internet service provider. The software came on a CD-ROM that was sold for $9.95. In exchange for free service, purchasers agreed to have advertising transmitted to their computers. According to the Corporation, it sold 146,736 CD-ROMs across Canada. For reasons not specified by the parties, the Corporation discontinued the lifetime Internet service on September 15, 2001. Some consumers were upset, and their reactions led, *inter alia*, to the proceedings now before this Court.

[3] In 2001, the Alberta government complained to the Corporation under the *Fair Trading Act*, R.S.A. 2000, c. F-2. Then, on February 6, 2002, Michel Lépine, the respondent in this appeal, filed a motion in the Quebec Superior Court for authorization to institute a class action under Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25. He sought to institute the action against the Corporation on behalf of every natural person residing in Quebec who had purchased the Corporation's Internet package. On March 28, 2002, Paul McArthur also commenced a class proceeding against the Corporation in the Ontario Superior Court of Justice. He sought leave to represent everyone who had purchased the Corporation's CD-ROM and Internet service, except Quebec residents. Finally, on May 7, 2002, John Chen commenced a class proceeding in the British Columbia Supreme Court on behalf of residents of that province who had purchased the

québécoises, mais la Cour supérieure du Québec rejeta sa demande. La Cour d'appel du Québec confirma ce jugement. Pour des motifs en partie différents de ceux de l'arrêt d'appel, je rejetterais le pourvoi, qui examine les conditions de reconnaissance d'un jugement rendu hors du Québec en vertu du *Code civil du Québec*. Le présent pourvoi soulève aussi certains problèmes de gestion de recours collectifs parallèles intentés dans des provinces différentes.

B. *Origine du litige*

[2] L'origine de la présente affaire se situe en septembre 2000. La Société offre alors à ses clients un forfait d'accès à vie à l'Internet par l'intermédiaire d'un logiciel conçu par un fournisseur d'accès Internet, l'intervenante Cybersurf Corp. Le logiciel est offert sur cédérom au coût de 9,95 $. En échange du service gratuit, les acquéreurs acceptaient que de la publicité soit transmise à leurs ordinateurs. La Société affirme avoir vendu 146 736 cédéroms dans l'ensemble du Canada. Pour des raisons que ne précisent pas les parties, la Société met fin au service d'Internet à vie à compter du 15 septembre 2001. Des consommateurs s'estiment lésés. Leurs réactions donnent lieu, entre autres, au débat dont notre Cour est aujourd'hui saisie.

[3] En 2001, le gouvernement de l'Alberta se plaint à la Société en vertu de la *Fair Trading Act*, R.S.A. 2000, ch. F-2. Puis, le 6 février 2002, M. Michel Lépine, l'intimé dans le présent appel, dépose en Cour supérieure du Québec une requête en autorisation d'exercer un recours collectif conformément au *Code de procédure civile* du Québec, L.R.Q., ch. C-25. Il souhaite exercer le recours contre la Société au nom de toute personne physique résidant au Québec qui lui avait acheté son forfait Internet. Le 28 mars 2002, M. Paul McArthur entame aussi un recours collectif contre la Société devant la Cour supérieure de justice de l'Ontario. Il demande à être autorisé à représenter toute personne, sauf les résidants du Québec, qui a acheté le cédérom et le service Internet de la Société. Enfin, le 7 mai 2002, M. John Chen entreprend un recours collectif devant la Cour suprême de la Colombie-Britannique pour le compte des résidants de cette

CD-ROM distributed by the Corporation. A settlement was reached in Alberta in December 2002, and the Corporation undertook to refund the purchase price of the CD-ROM to Canadian consumers who returned the CD-ROM to it.

[4] Negotiations were conducted to settle the class proceedings under way in Quebec, Ontario and British Columbia. The Corporation offered the same settlement as in Alberta, which it later enhanced by offering three months of free Internet access. According to information provided by the parties, the applicants for certification of the class proceedings in British Columbia and Ontario accepted the Corporation's offers. The applicant for authorization in the Quebec action, Mr. Lépine, rejected them.

[5] The application for authorization of the Quebec class action, which the Corporation contested vigorously, was still pending at the time of these negotiations. On June 18, 2003, the Quebec Superior Court decided to hear the application on November 5, 6 and 7 of that year.

[6] In the meantime, in Ontario in early July 2003, the parties to the Ontario and British Columbia proceedings entered into a settlement agreement with the appellant based on the offer they had accepted. The agreement created two classes of claimants. The first was limited to British Columbia residents. For the purposes of the Ontario proceeding, the second class included residents of every province of Canada except British Columbia, as it no longer excluded Quebec residents despite the fact that the respondent, Michel Lépine, was proceeding with his application for authorization to institute a class action in Quebec and had rejected the proposed settlement. To give effect to the settlement, the Ontario application for certification was amended on November 19, 2003 to include Quebec residents in the class.

[7] Beginning at the time of negotiation of the settlement, various proceedings that had contradictory purposes and effects were commenced in the Ontario Superior Court of Justice and the

province qui ont acheté le cédérom distribué par la Société. Un règlement intervient en Alberta en décembre 2002. La Société s'engage alors à rembourser le prix d'achat du cédérom aux consommateurs canadiens qui le lui renverront.

[4] Des négociations ont lieu pour régler le sort des procédures collectives entamées au Québec, en Ontario et en Colombie-Britannique. La Société offre le même règlement qu'en Alberta, qu'elle bonifie par la suite en proposant trois mois de service Internet gratuit. Suivant les informations données par les parties, les demandeurs de la certification des recours collectifs en Colombie-Britannique et en Ontario acceptent les offres de la Société. L'auteur de la demande d'autorisation du recours québécois, M. Lépine, les rejette.

[5] Vigoureusement contestée par la Société, la demande d'autorisation du recours collectif québécois est toujours pendante au cours de ces négociations. Le 18 juin 2003, la Cour supérieure du Québec décide de l'entendre les 5, 6 et 7 novembre suivants.

[6] Pendant ce temps, en Ontario, au début de juillet 2003, les parties à l'origine des procédures engagées dans cette province et en Colombie-Britannique transigent avec l'appelante vu l'acceptation de l'offre de règlement. La transaction crée deux groupes de réclamants. Le premier comprend uniquement les résidants de la Colombie-Britannique. Pour les besoins du recours ontarien, le second groupe inclut tous les résidants du Canada, sauf ceux de la Colombie-Britannique, mais n'exclut plus ceux du Québec, malgré le maintien par l'intimé Michel Lépine de sa demande d'autorisation d'exercer un recours collectif au Québec et son refus du règlement proposé. Pour donner effet à cette transaction, la demande de certification ontarienne est modifiée le 19 novembre 2003 pour inclure les résidants du Québec dans le groupe visé.

[7] À compter du moment où la transaction est négociée, des procédures diverses, mais contradictoires dans leurs buts et leurs effets, sont engagées devant la Cour supérieure de justice de l'Ontario et

Quebec Superior Court. When informed of the settlement with the Corporation, Mr. Lépine sought unsuccessfully to obtain safeguard orders from the Quebec Superior Court as well as a declaration that the Ontario agreement could not be set up against Quebec residents. His motion was heard on July 22, 2003, but the judge merely ordered the Corporation to give Quebec counsel details related to the applications for approval in Ontario and British Columbia.

[8] Nevertheless, the Quebec Superior Court heard Mr. Lépine's application for authorization on the scheduled dates, November 5 to 7, 2003, despite attempts by the Corporation to obtain a stay of the hearing and the judgment. The judge reserved his decision on November 7.

[9] The Ontario proceeding also continued. The Superior Court of Justice heard the application for certification of the class proceeding, to which the application for approval of the settlement agreement had now been added. Mr. Lépine's Quebec counsel did not appear in the Ontario proceeding. However, he sent the judge hearing the application for certification and approval a letter asking him to decline jurisdiction over Quebec residents for reasons he set out in detail. On December 22, 2003, the Superior Court of Justice certified the class proceeding and approved the settlement. It excluded British Columbia residents but not Quebec residents from the class. It did not comment on Mr. Lépine's request, but referred to that request in the following terms in its recitals: ". . . and upon being advised of the situation in the Province of Quebec and the correspondence forwarded to this Court by Quebec counsel, François LeBeau . . . ." Thus, the Ontario Superior Court of Justice approved the settlement reached with the Corporation without reservation and ordered that notices of the judgment be published accordingly. The following are the most important heads of relief in its order:

1. THIS COURT ORDERS AND ADJUDGES that for purposes of the settlement, as set out in the Settlement Agreement attached as Schedule "A" ("the

la Cour supérieure du Québec. Informé de la transaction avec la Société, M. Lépine tente en vain d'obtenir de la Cour supérieure du Québec des ordonnances de sauvegarde et de faire déclarer l'entente ontarienne inopposable au Québec. Sa requête est entendue le 22 juillet 2003, mais le juge ne fait qu'ordonner à la Société d'aviser les avocats québécois des détails concernant la demande d'homologation en Ontario et en Colombie-Britannique.

[8] Cependant, la Cour supérieure du Québec entend la demande d'autorisation de M. Lépine aux dates prévues, soit du 5 au 7 novembre 2003, malgré les tentatives de la Société pour faire surseoir à l'audition et au jugement. Le juge prend la demande en délibéré le 7 novembre.

[9] En Ontario, la procédure se continue aussi. La Cour supérieure de justice est saisie de la demande de certification du recours collectif à laquelle s'ajoute désormais la demande d'homologation de la transaction intervenue. L'avocat québécois de M. Lépine ne comparaît pas en Ontario. Cependant, il adresse au juge saisi de la demande de certification et d'homologation une lettre lui demandant de décliner compétence à l'égard des résidants québécois pour des raisons qu'il expose en détail. Le 22 décembre 2003, la Cour supérieure de justice certifie le recours collectif et entérine la transaction. Elle exclut du groupe visé les résidants de la Colombie-Britannique, mais non ceux du Québec. À ce propos, elle ne commente pas la demande de M. Lépine, mais ses considérants en font état dans les termes suivants : [TRADUCTION] « . . . et informée de la situation au Québec et des éléments communiqués à la Cour par l'avocat québécois, François Lebeau . . . » Ainsi, la Cour supérieure de justice de l'Ontario homologue sans réserve la transaction intervenue avec la Société et ordonne de publier des avis du jugement en conséquence. Je reproduis ci-après les conclusions les plus importantes de son ordonnance :

[TRADUCTION]

1. LA COUR ORDONNE, aux fins énoncées dans le règlement dont le texte est joint à l'annexe A (le « règlement »), la certification de l'action à titre de

Settlement Agreement"), the within action is certified as a Class Proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

. . .

3. THIS COURT ORDERS AND ADJUDGES that, as set out in the Settlement Agreement, the group of persons who are members of the Ontario Class be:

> "Any person in Canada, not a resident of the Province of British Columbia, who purchased a CD-Rom through any Canada Post outlet at a retail price of $9.95, exclusive of applicable taxes, the packaging of which displayed the words 'free internet for life', on or after September 27, 2000."

4. THIS COURT ORDERS AND ADJUDGES that the claims asserted on behalf of the Class are for breach of contract and misrepresentation and the relief sought is damages, including punitive, aggravated and exemplary damages, interest and costs as set out in the Amended Statement of Claim.

. . .

10. THIS COURT ORDERS AND ADJUDGES that any Class Member who does not opt-out within the time provided and in the manner described in the Settlement Agreement is bound by the Settlement Agreement and this Order and is hereby enjoined from pursuing any claims covered by the Settlement Agreement against the Defendants.

On the next day, December 23, 2003, the Quebec Superior Court rendered a judgment authorizing the institution of a class action against the Corporation on behalf of a group limited to residents of Quebec.

[10] Finally, on April 7, 2004, the British Columbia Supreme Court approved the settlement for the class of British Columbia residents. The settlement with the Corporation had accordingly been completed.

[11] In the meantime, the judgments rendered by the Ontario Superior Court of Justice and the Quebec Superior Court had created an unavoidable

recours collectif en vertu de la *Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6.

. . .

3. ELLE ORDONNE que, conformément au règlement, la constitution du groupe ontarien est la suivante :

> « Toute personne au Canada, à l'exclusion d'un résidant de la Colombie-Britannique, ayant acheté un cédérom à une succursale de la Société canadienne des postes au prix de 9,95 $ majoré des taxes applicables, sous emballage portant la mention "Internet à vie entièrement gratuit", le 27 septembre 2000 ou après. »

4. ELLE ORDONNE que les allégations formulées pour le compte du groupe sont la rupture de contrat et la déclaration trompeuse et que la réparation demandée correspond aux dommages-intérêts, notamment punitifs et majorés, plus l'intérêt et les dépens, comme le précise la déclaration modifiée.

. . .

10. ELLE ORDONNE que tout membre qui ne s'exclut pas du groupe dans le délai imparti et de la manière prévue dans le règlement est lié par celui-ci et par la présente ordonnance et ne peut poursuivre les défenderesses relativement à quelque élément visé par le règlement.

Par ailleurs, le lendemain, soit le 23 décembre 2003, la Cour supérieure du Québec rend un jugement autorisant un recours collectif contre la Société pour un groupe incluant seulement les résidants du Québec.

[10] Enfin, le 7 avril 2004, la Cour suprême de la Colombie-Britannique homologue la transaction pour le groupe des résidants de la Colombie-Britannique. Le règlement avec la Société se trouve dès lors complété.

[11] Entre-temps, les jugements rendus par les cours supérieures de l'Ontario et du Québec ont créé un conflit juridique incontournable. D'une part, se

legal conflict. On the one hand, a class action against the Corporation was continuing in the Quebec Superior Court. On the other hand, the Corporation had obtained a judgment from the Ontario Superior Court of Justice declaring that the claims against it had been settled, including the claims of Quebec residents. To break the impasse, the Corporation applied to the Quebec Superior Court in June 2004 to have the judgment of the Ontario Superior Court of Justice recognized and declared enforceable. To this date, more than four years later, the Ontario judgment has not yet been recognized in Quebec, and the class action authorized by the Quebec Superior Court has not yet been heard.

II. Judicial History

A. *Quebec Superior Court*, [2005] Q.J. No. 9806 (QL)

[12] On July 20, 2005, Baker J. of the Quebec Superior Court dismissed the Corporation's application for recognition of the judgment of the Ontario Superior Court of Justice on the basis that the application did not meet the requirements of art. 3155 *C.C.Q.* Baker J. based his decision to refuse recognition on the ground of contravention of the fundamental principles of procedure, which is provided for in art. 3155(3) *C.C.Q.* In his view, the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the class action under way in Quebec and the notices given in that action.

B. *Quebec Court of Appeal (Delisle, Pelletier and Rayle JJ.A.)*, 2007 QCCA 1092, [2007] R.J.Q. 1920

[13] In a unanimous decision written by Rayle J.A., the Quebec Court of Appeal dismissed the Corporation's appeal from the Superior Court's judgment. Rayle J.A. found that there were three reasons to refuse recognition. She conceded that the Ontario Superior Court of Justice had jurisdiction over Mr. McArthur's application. But in her view, that court should have declined jurisdiction over Quebec residents by applying the doctrine of

continue devant la Cour supérieure du Québec un recours collectif contre la Société. D'autre part, celle-ci a obtenu un jugement de la Cour supérieure de justice de l'Ontario qui déclare réglées les réclamations présentées contre elle, y compris celles des résidants du Québec. Afin de dénouer l'impasse, en juin 2004, la Société s'adresse à la Cour supérieure du Québec pour faire reconnaître et déclarer exécutoire au Québec le jugement de la Cour supérieure de l'Ontario. À ce jour, et plus de quatre ans plus tard, ce jugement ontarien n'est toujours pas reconnu au Québec et le recours collectif autorisé par la Cour supérieure du Québec n'a pas encore été entendu.

II. Historique judiciaire

A. *Cour supérieure du Québec*, [2005] Q.J. No. 9806 (QL)

[12] Le 20 juillet 2005, le juge Baker de la Cour supérieure du Québec rejette la demande présentée par la Société pour faire reconnaître le jugement de la Cour supérieure de justice de l'Ontario. À son avis, cette demande ne satisfait pas aux exigences de l'art. 3155 *C.c.Q.* Le juge Baker retient le motif de la violation des principes essentiels de la procédure prévu au par. 3155(3) *C.c.Q.* pour refuser la reconnaissance. Selon lui, l'avis de la certification du recours ontarien était inadéquat au Québec et créait de la confusion avec le recours collectif entamé au Québec et les avis donnés dans le cadre de celui-ci.

B. *Cour d'appel du Québec (les juges Delisle, Pelletier et Rayle)*, 2007 QCCA 1092, [2007] R.J.Q. 1920

[13] Dans un arrêt unanime rédigé par la juge Rayle, la Cour d'appel du Québec rejette le pourvoi de la Société contre le jugement de la Cour supérieure. La juge Rayle retient trois motifs pour refuser la reconnaissance. Elle reconnaît que la Cour supérieure de justice de l'Ontario avait compétence à l'égard du recours de M. McArthur. Cependant, la Cour supérieure de justice aurait dû, selon elle, décliner compétence sur les résidants québécois

forum non conveniens. Next, she agreed with the trial judge that the confusion created by the notices concerning the class proceeding certified in Ontario had resulted in a contravention of the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.* Finally, the Court of Appeal found that the two class proceedings gave rise to a situation of *lis pendens*. Because the Quebec proceeding had been commenced first, art. 3155(4) *C.C.Q.* precluded the Quebec courts from recognizing the Ontario judgment. The Court of Appeal did not rule on the issue of violation of international public order under art. 3155(5) *C.C.Q.* However, Rayle J.A. stated that she was puzzled by the decision of the Ontario Superior Court of Justice judge to exclude British Columbia residents but not Quebec claimants from the class. She wondered why the Ontario court had not adhered to the principles of interprovincial comity in relation to the Quebec court, which had been the first one seised of the dispute. The Corporation appealed that judgment to this Court, asking that it be reversed.

III. Analysis

A. *Issues*

(1) Nature of the Issues

[14] This appeal concerns the interpretation and application of art. 3155 *C.C.Q.* with regard to the recognition of a judgment rendered in a class proceeding in Ontario. I prefer to characterize that judgment as an external rather than a foreign one, despite the language used in the *Civil Code of Québec*. In essence, the dispute between the parties raises three issues. First, can a Quebec court hearing an application for recognition of an external judgment take account of the doctrine of *forum non conveniens*? Next, did the Ontario Superior Court of Justice adhere to the fundamental principles of procedure? If there were defects, did they entail a contravention of the fundamental principles of civil procedure within the meaning of art. 3155(3) *C.C.Q.*? Finally, did the application for authorization in Quebec and the application for certification in Ontario give rise to a situation of *lis pendens*?

en application de la doctrine du *forum non conveniens*. Ensuite, comme le juge de première instance, elle retient la violation des principes essentiels de la procédure au sens du par. 3155(3) *C.c.Q.* en raison de la confusion créée par les avis relatifs au recours collectif certifié en Ontario. Enfin, la Cour d'appel estime qu'il y a litispendance entre les deux recours collectifs. Comme la procédure québécoise a été engagée la première, les tribunaux du Québec ne peuvent accorder la reconnaissance au jugement ontarien, selon le par. 3155(4) *C.c.Q.* La Cour d'appel ne se prononce pas sur le moyen de la violation de l'ordre public international au sens du par. 3155(5) *C.c.Q.* La juge Rayle se déclare toutefois perplexe à l'égard de la décision du juge de la Cour supérieure de justice de l'Ontario d'exclure le groupe des résidants de la Colombie-Britannique, mais non celui des réclamants québécois. Elle se demande pourquoi le tribunal ontarien ne s'est pas laissé guider par les principes de la courtoisie interprovinciale à l'égard de la cour québécoise, qui avait été la première saisie du litige. La Société se pourvoit alors devant notre Cour contre ce jugement dont elle demande la réformation.

III. Analyse

A. *Les questions en litige*

(1) Nature des questions en litige

[14] Le présent appel porte sur l'interprétation et l'application de l'art. 3155 *C.c.Q.* pour la reconnaissance d'un jugement rendu en Ontario en matière de recours collectif. Je préfère qualifier ce jugement d'externe plutôt que d'étranger, en dépit du vocabulaire du *Code civil du Québec*. Le débat entre les parties soulève essentiellement trois questions. D'abord, le tribunal québécois saisi d'une demande de reconnaissance judiciaire d'un jugement externe peut-il prendre en compte la doctrine du *forum non conveniens*? Ensuite, les principes essentiels de la procédure ont-ils été respectés par la Cour supérieure de justice de l'Ontario? Les vices constatés, le cas échéant, emportaient-ils la violation des principes essentiels de la procédure au sens du par. 3155(3) *C.c.Q.*? Enfin, existait-il une situation de litispendance entre la demande d'autorisation au Québec et celle de certification en Ontario?

[15] The discussion of these issues will also require some comment on the issue of interprovincial judicial comity in the conduct of interprovincial class actions. Although the outcome of this appeal does not depend on the resolution of this last issue, it is one that now seems likely to affect the conduct of class actions involving two or more Canadian provinces, as well as relations between the superior courts of different provinces. It therefore merits some thought, as can be seen from the problems or reactions it appears to have provoked in this case.

(2) The Parties' Positions

[16] The appellant submits that none of the provisions of art. 3155 *C.C.Q.* stood in the way of its application for recognition in Quebec and that the Quebec Superior Court should therefore have recognized the judgment of the Ontario Superior Court of Justice. According to the Corporation, the Quebec court could not raise the application of the doctrine of *forum non conveniens* by the Ontario court as an issue. The Corporation adds that the notices given in Quebec were consistent with the fundamental principles of procedure. Finally, it denies that the conditions for *lis pendens* were met.

[17] The respondent relies primarily on the judgment of the Quebec Court of Appeal on the three issues being discussed. He also alleges that the Ontario proceedings were conducted in a manner inconsistent with international public order, which the appellant disputes. This argument need not be considered in the circumstances of this case. Finally, the Attorney General of Canada has intervened on the issue of the application of the doctrine of *forum non conveniens* in the procedure for the recognition of judgments rendered in the provinces of Canada. Before considering these questions, I believe it will be helpful to summarize the rules governing the recognition of external judgments by Quebec courts under the *Civil Code of Québec*.

[15] La discussion de ces questions exigera aussi quelques commentaires sur le problème de la courtoisie judiciaire interprovinciale dans la conduite de recours collectifs interprovinciaux. Le sort du présent pourvoi ne dépend pas du règlement de ce problème. Cependant, celui-ci semble maintenant de nature à influencer le déroulement de recours collectifs lorsque plusieurs provinces canadiennes sont en cause, ainsi que les rapports entre les tribunaux supérieurs des différentes provinces. Il mérite donc réflexion, comme en témoignent les difficultés ou les réactions qu'il paraît avoir suscitées dans le présent dossier.

(2) La position des parties

[16] L'appelante plaide qu'aucune des dispositions de l'art. 3155 *C.c.Q.* ne faisait obstacle à sa demande de reconnaissance judiciaire au Québec. En conséquence, la Cour supérieure du Québec aurait dû accorder la reconnaissance judiciaire au jugement de la Cour supérieure de justice de l'Ontario. Selon les prétentions de la Société, le tribunal québécois ne pouvait soulever le problème de l'application de la doctrine du *forum non conveniens* par la Cour supérieure de justice de l'Ontario. La Société soutient également que les avis donnés au Québec respectaient les principes essentiels de la procédure. Elle nie enfin que les conditions d'existence de la litispendance aient été réunies.

[17] L'intimé s'appuie principalement sur l'arrêt de la Cour d'appel du Québec à l'égard des trois questions discutées. Il invoque aussi la violation de l'ordre public international dans la conduite des procédures en Ontario, ce que conteste l'appelante. Il n'est pas nécessaire de s'attarder à cet argument dans les circonstances du présent dossier. Enfin, le procureur général du Canada intervient au sujet de l'application de la doctrine du *forum non conveniens* dans la procédure de reconnaissance des jugements prononcés dans les provinces canadiennes. Avant de passer à l'étude de ces questions, je crois utile de rappeler les grandes lignes des règles régissant la reconnaissance des jugements externes par les tribunaux du Québec en vertu du *Code civil du Québec*.

B. *Legal Framework for the Judicial Recognition of External Judgments*

[18] The rules on the international jurisdiction of Quebec authorities and the recognition of foreign or external judgments are found, respectively, in Title Three (arts. 3134 to 3154) and Title Four (arts. 3155 to 3168) of Book Ten of the *Civil Code of Québec* on private international law. The two titles are closely related. I will come back to this in the course of my analysis.

[19] In substance, Title Three sets out general rules and specific rules for identifying the connecting factors that will give Quebec authorities jurisdiction in an international context. Where there are no specific rules, whether a Quebec authority has jurisdiction will depend on whether the defendant is domiciled in Quebec (art. 3134). As a whole, these rules ensure compliance with the basic requirement that there be a real and substantial connection between the Quebec court and the dispute, as this Court noted in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at paras. 55-56.

[20] Other provisions of Title Three supplement these rules by giving the Quebec court a discretion to either intervene or decline to do so in a dispute. Article 3135 is particularly important, as it confirms the incorporation of the doctrine of *forum non conveniens* into private international law in Quebec. Under this provision, a Quebec court may decline to hear a case over which it has jurisdiction if it considers that the authorities of another country are in a better position to decide.

[21] Title Four concerns foreign judgments or judgments rendered outside Quebec that are brought before the courts of that province. It establishes the conditions for the recognition and enforcement of such judgments.

[22] In accordance with the evolution of private international law, which seeks to facilitate the free flow of international trade, the basic principle laid down in art. 3155 *C.C.Q.* for all the rules in

B. *Le cadre juridique de la reconnaissance judiciaire des jugements externes*

[18] Les règles relatives à la compétence internationale des autorités du Québec et à la reconnaissance des jugements étrangers ou externes forment respectivement les titres troisième (art. 3134 à 3154) et quatrième (art. 3155 à 3168) du Livre dixième du *Code civil du Québec*, qui traite du droit international privé. Des liens étroits existent entre les deux titres. J'y reviendrai au cours de mon analyse.

[19] En substance, le titre troisième édicte des règles générales et des règles spécifiques pour déterminer les facteurs de rattachement qui fonderont la compétence des autorités québécoises dans un contexte international. En l'absence de règles spécifiques, la compétence reposera sur l'existence du domicile du défendeur au Québec (art. 3134). L'ensemble de ces règles assure le respect de l'exigence fondamentale de l'existence d'un lien réel et substantiel entre le tribunal québécois et le litige, comme l'a rappelé notre Cour dans l'arrêt *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, [2002] 4 R.C.S. 205, par. 55-56.

[20] D'autres dispositions de ce troisième titre complètent ces règles en conférant au tribunal québécois un pouvoir discrétionnaire d'intervention ou d'abstention à l'égard d'un litige. L'article 3135 est particulièrement important, car il confirme l'incorporation de la doctrine du *forum non conveniens* dans le droit international privé du Québec. Il permet à un tribunal québécois de se dessaisir d'une affaire à l'égard de laquelle il est compétent lorsqu'il estime que les autorités d'un autre État se trouvent mieux à même de trancher le litige.

[21] Le titre quatrième porte sur la réception des jugements étrangers ou rendus à l'extérieur du Québec par les tribunaux de la province. Il détermine les conditions de la reconnaissance et de la mise à exécution de ces jugements.

[22] En accord avec l'évolution du droit international privé qui veut favoriser la fluidité des échanges internationaux, l'art. 3155 *C.c.Q.* établit, comme principe fondamental de l'ensemble des règles de ce

Title Four is that any decision rendered by a foreign authority must be recognized unless an exception applies. The exceptions are limited: the decision maker had no jurisdiction, the decision is not final or enforceable, there has been a contravention of the fundamental principles of procedure, *lis pendens* applies, the outcome is inconsistent with international public order, and the judgment relates to taxation. This legislative intent is clear from the wording of art. 3155:

3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

(1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;

(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

(3) the decision was rendered in contravention of the fundamental principles of procedure;

(4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

(6) the decision enforces obligations arising from the taxation laws of a foreign country.

[23] Article 3158 limits the scope of a Quebec court's power to review a foreign decision. The court must confine itself to considering whether the requirements for recognizing the decision have been met. It cannot review the merits of the case or retry the case. Article 3158 expressly prohibits this:

3158. A Québec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

titre quatrième, que toute décision rendue par une autorité étrangère doit être reconnue, sauf exception. Ces exceptions demeurent limitées : absence de compétence du décideur, caractère non définitif ou non exécutoire de la décision, violation des principes essentiels de la procédure, litispendance, atteinte à l'ordre public international et nature fiscale du jugement. Cette conception législative ressort du texte même de l'art. 3155 :

3155. Toute décision rendue hors du Québec est reconnue et, le cas échéant, déclarée exécutoire par l'autorité du Québec, sauf dans les cas suivants :

1° L'autorité de l'État dans lequel la décision a été rendue n'était pas compétente suivant les dispositions du présent titre;

2° La décision, au lieu où elle a été rendue, est susceptible d'un recours ordinaire, ou n'est pas définitive ou exécutoire;

3° La décision a été rendue en violation des principes essentiels de la procédure;

4° Un litige entre les mêmes parties, fondé sur les mêmes faits et ayant le même objet, a donné lieu au Québec à une décision passée ou non en force de chose jugée, ou est pendant devant une autorité québécoise, première saisie, ou a été jugé dans un État tiers et la décision remplit les conditions nécessaires pour sa reconnaissance au Québec;

5° Le résultat de la décision étrangère est manifestement incompatible avec l'ordre public tel qu'il est entendu dans les relations internationales;

6° La décision sanctionne des obligations découlant des lois fiscales d'un État étranger.

[23] Par ailleurs, l'art. 3158 limite l'étendue du pouvoir d'examen de la décision étrangère par le tribunal québécois. Celui-ci doit se contenter d'examiner si les conditions de réception de la décision sont respectées. Il ne saurait examiner à nouveau le fond de l'affaire et rejuger celle-ci. L'article 3158 le lui interdit expressément :

3158. L'autorité québécoise se limite à vérifier si la décision dont la reconnaissance ou l'exécution est demandée remplit les conditions prévues au présent titre, sans procéder à l'examen au fond de cette décision.

[24] However favourable these principles may be to the recognition of foreign decisions, it must still be found that none of the exceptions provided for in art. 3155 *C.C.Q.* apply. In particular, as art. 3155(1) provides, the Quebec court must find that the court of the country where the judgment was rendered had jurisdiction over the matter. In this regard, Title Four also contains arts. 3164 to 3168, which set out rules the Quebec court is to apply to determine whether the foreign authority had jurisdiction. The main analytical tool for art. 3164 relates to the technique of referring to the rules in Title Three on establishing the jurisdiction of Quebec authorities.

[25] This provision creates a mirror effect. The foreign authority is deemed to have jurisdiction if the Quebec court would, by applying its own rules, have accepted jurisdiction in the same situation (G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 416). To this principle, art. 3164 *C.C.Q.* adds the requirement of a substantial connection between the dispute and the foreign authority seised of the case:

3164. The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

[26] Articles 3165 to 3168 then set out more specific rules applicable to a variety of legal situations. Only art. 3168 is important for the purposes of this case. It identifies the cases in which a Quebec court will recognize a foreign authority's jurisdiction in personal actions of a patrimonial nature. This provision applies to the matters in dispute here. It provides for six situations in which a foreign authority's jurisdiction will be recognized in such actions:

3168. In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases:

(1) the defendant was domiciled in the country where the decision was rendered;

[24] Si favorables que soient ces principes à la reconnaissance des décisions étrangères, encore faut-il qu'aucune des exceptions prévues à l'art. 3155 *C.c.Q.* ne trouve application. En particulier, comme le précise le par. 3155(1), le tribunal québécois doit constater que le tribunal de l'État dont provient le jugement avait compétence sur la matière. Le titre quatrième édicte alors aux art. 3164 à 3168 des règles destinées à permettre au tribunal québécois de déterminer si l'autorité étrangère avait compétence. L'article 3164 choisit comme instrument principal d'analyse la technique du renvoi aux règles du titre troisième sur l'établissement de la compétence des autorités québécoises.

[25] Cette disposition crée un effet miroir. L'autorité étrangère est réputée compétente dans la mesure où l'application par le tribunal québécois de ses propres règles lui aurait donné compétence dans la même situation (G. Goldstein et E. Groffier, *Droit international privé*, t. I, *Théorie générale* (1998), p. 416). L'article 3164 *C.c.Q.* ajoute à ce principe l'exigence d'un lien important entre le litige et l'autorité étrangère saisie :

3164. La compétence des autorités étrangères est établie suivant les règles de compétence applicables aux autorités québécoises en vertu du titre troisième du présent livre dans la mesure où le litige se rattache d'une façon importante à l'État dont l'autorité a été saisie.

[26] Les articles 3165 à 3168 édictent ensuite des règles plus ponctuelles applicables à des situations juridiques diverses. Seul l'article 3168 importe aux fins du présent dossier. Cet article détermine dans quels cas le tribunal québécois reconnaîtra la compétence des autorités étrangères à l'égard des actions personnelles à caractère patrimonial. Il s'applique aux matières visées par le présent litige. Cette disposition prévoit six cas dans lesquels la compétence d'une autorité étrangère est reconnue à l'égard de ces actions :

3168. Dans les actions personnelles à caractère patrimonial, la compétence des autorités étrangères n'est reconnue que dans les cas suivants :

1° Le défendeur était domicilié dans l'État où la décision a été rendue;

(2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;

(3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;

(4) the obligations arising from a contract were to be performed in that country;

(5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;

(6) the defendant has recognized the jurisdiction of the foreign authority.

[27] Because of the way these rules of recognition are set out in the legislation, a problem rises that is of particular significance for the analysis of the instant case. Do the jurisdictional rules in arts. 3164 to 3168 incorporate, by reference to Title Three, the doctrine of *forum non conveniens*? Do they thus give a Quebec court the power, even if the foreign authority's jurisdiction has been established, to determine whether the court that rendered the decision should have applied the doctrine of *forum non conveniens*? Can a Quebec court refuse to recognize a judgment rendered outside Quebec because, in its opinion, the foreign court should, pursuant to that doctrine, have declined jurisdiction over the case?

C. *Mirror Effect and Application of the Doctrine of Forum Non Conveniens*

[28] The question of the mirror effect and its scope has been a problem in Quebec private international law since the *Civil Code of Québec* came into force. In art. 3164 *C.C.Q.*, the legislature has not been as clear as might be hoped about the scope of its reference to the provisions of Title Three of Book Ten (see, for example, Goldstein and Groffier, at p. 416). This drafting problem has led some Quebec authors and judges to support what is known as the "little mirror" theory. This theory seems to be based on a literal interpretation of the reference in art. 3164

2° Le défendeur avait un établissement dans l'État où la décision a été rendue et la contestation est relative à son activité dans cet État;

3° Un préjudice a été subi dans l'État où la décision a été rendue et il résulte d'une faute qui y a été commise ou d'un fait dommageable qui s'y est produit;

4° Les obligations découlant d'un contrat devaient y être exécutées;

5° Les parties leur ont soumis les litiges nés ou à naître entre elles à l'occasion d'un rapport de droit déterminé; cependant, la renonciation du consommateur ou du travailleur à la compétence de l'autorité de son domicile ne peut lui être opposée;

6° Le défendeur a reconnu leur compétence.

[27] L'aménagement législatif de ces règles de reconnaissance pose un problème fort important pour l'analyse du présent litige. Les règles de compétence contenues aux art. 3164 à 3168 incorporent-elles par renvoi au titre troisième la doctrine du *forum non conveniens*? Permettent-elles ainsi au tribunal québécois, même dans les cas où la compétence de l'autorité étrangère a été établie, de se demander si le tribunal d'où provient la décision aurait dû appliquer la doctrine du *forum non conveniens*? Le tribunal québécois pourrait-il refuser de reconnaître un jugement rendu à l'extérieur du Québec parce que, selon lui, le tribunal étranger aurait dû se dessaisir du litige par application de cette doctrine?

C. *L'effet miroir et le recours à la doctrine du forum non conveniens*

[28] La question de l'effet miroir et de sa portée pose problème en droit international privé québécois depuis l'entrée en vigueur du *Code civil du Québec*. En effet, à l'art. 3164 *C.c.Q.*, le législateur ne s'exprime pas avec toute la clarté souhaitable sur l'étendue de son renvoi aux dispositions du titre troisième du livre dixième (voir, par exemple, Goldstein et Groffier, p. 416). Ce problème de rédaction a donné naissance à la théorie du « petit miroir » formulée dans une partie de la doctrine et de la jurisprudence québécoises. Cette théorie

to the general provisions of Title Three on determining whether a Quebec authority has jurisdiction and on the exercise of such jurisdiction. Under that interpretation, because the reference does not exclude any of Title Three's provisions, it necessarily encompasses the doctrine of *forum non conveniens*, which is accepted in Quebec private international law under art. 3135 *C.C.Q.*

[29] Thus, according to the theory, the possibility of applying the doctrine of *forum non conveniens*, when considering a motion for judicial recognition of a foreign or external judgment, supplements the provisions on establishment of the foreign court's jurisdiction by enabling the Quebec authority to more effectively ensure compliance with the basic requirement under art. 3164 *C.C.Q.* of a substantial connection between the dispute and the country whose authority is seised of the case. Moreover, this interpretation means that, when considering whether a foreign court has jurisdiction over an action of a patrimonial nature, the Quebec authority will not limit itself to determining whether the application for recognition corresponds to one of the situations provided for in art. 3168 *C.C.Q.* The Quebec court can also consider how the foreign authority should have applied the doctrine of *forum non conveniens* to decide whether or not to decline jurisdiction.

[30] Goldstein and Groffier, who support the little mirror theory, stress the importance they attach to the wording of art. 3164 *C.C.Q.*, which does not limit the scope of the reference to the general provisions of Title Three (at p. 417):

[TRANSLATION] It must first be noted that the jurisdiction of Quebec authorities that is extended to foreign authorities is logically determined not only through specific connecting principles, *but also through the general provisions* such as those on *forum non conveniens*, *forum conveniens* and exclusive jurisdiction. In referring to the Quebec rules on jurisdiction, art. 3164 C.C.Q. does not limit them to the specific rules (arts. 3141 to 3154 C.C.Q.) and therefore refers implicitly to arts. 3134 to 3140 C.C.Q. as well. The latter provisions considerably alter the specific rules on jurisdiction

paraît reposer sur une interprétation littérale du renvoi de l'art. 3164 aux dispositions générales du titre troisième sur la détermination de la compétence des autorités québécoises et sur son exercice. Suivant cette interprétation, parce que ce renvoi n'exclut aucune des dispositions du titre troisième, il englobe nécessairement la doctrine du *forum non conveniens* admise en droit international privé du Québec à l'art. 3135 *C.c.Q.*

[29] Ainsi, la possibilité de recourir à la doctrine du *forum non conveniens* à l'occasion de l'examen d'une requête en reconnaissance judiciaire d'un jugement étranger ou externe, compléterait les dispositions relatives à l'établissement de la compétence du tribunal étranger, en permettant à l'autorité québécoise de s'assurer plus efficacement du respect de l'exigence fondamentale d'un lien important entre le litige et le ressort saisi prévue à l'art. 3164 *C.c.Q.* Par ailleurs, cette interprétation signifierait que, lors de l'étude de la compétence d'un tribunal étranger sur une action à caractère patrimonial, l'autorité québécoise ne se bornerait pas à vérifier si la demande de reconnaissance correspond à l'un des cas prévus à l'art. 3168 *C.c.Q.* Le tribunal québécois pourrait aussi s'interroger sur l'application que l'autorité étrangère aurait dû faire de la doctrine du *forum non conveniens* pour décliner ou non compétence.

[30] Goldstein et Groffier, favorables à l'application de la théorie du petit miroir, soulignent à ce propos toute l'importance qu'ils attachent au texte de l'art. 3164 *C.c.Q.* En effet, celui-ci n'apporte aucune limite à la portée du renvoi aux dispositions générales du titre troisième (p. 417) :

En effet, il faut d'abord souligner que la compétence des autorités québécoises qui est étendue aux autorités étrangères s'établit logiquement non seulement en vertu de principes de rattachement précis, *mais aussi en vertu des dispositions générales* telles que le *forum non conveniens*, le *forum conveniens* ou la compétence exclusive. En effet, l'article 3164 C.c.Q., renvoyant aux règles de compétence québécoises, ne limite aucunement celles-ci aux règles spécifiques (art. 3141 à 3154 C.c.Q.), mais renvoie donc implicitement aussi aux articles 3134 à 3140 C.c.Q. Or, ces dispositions modifient

in Quebec by giving the courts a broad discretion. It should therefore be accepted that foreign authorities can have the same freedom to exclude heads of jurisdiction that the Quebec courts would have excluded. As Professor Glenn points out:

> The foreign authority's jurisdiction is assessed not broadly, in light of the connections accepted under the various heads of jurisdiction, but in light of the specific circumstances of each case. The question is whether the Quebec authority would have agreed to exercise its jurisdiction in such circumstances. The mirror principle becomes the principle of a "little mirror" that reflects the specific circumstances of the case in light of the general provisions.

(Emphasis in original.)

These authors add that the Quebec court may therefore apply the doctrine of *forum non conveniens* to determine how, in its view, the foreign court should have applied that very doctrine (p. 417; along the same lines, see also: H. P. Glenn, "Droit international privé", in *La réforme du Code civil* (1993), vol. 3, 669, Nos. 117-19, at pp. 770-72).

[31] The Quebec Court of Appeal adopted this approach in the instant case. It recognized that the Ontario Superior Court of Justice had jurisdiction over the subject matter in the usual sense of the term (para. 64). However, because it found that it had to consider the jurisdiction of the Ontario court through the prism of the reciprocity required by the little mirror theory, it concluded that the Superior Court of Justice should have applied the doctrine of *forum non conveniens* and should, on that basis, have excluded Quebec residents from the class in the class proceeding it was certifying (paras. 64-69). The Superior Court of Justice should have recognized that it was not the most appropriate forum with respect to this class of claimants, and thus deferred to the jurisdiction of the Quebec Superior Court.

[32] However, some Quebec authors reject the application of *forum non conveniens* in the recognition of foreign or external judgments. They would limit the effect of the reference to Title Three in art. 3164 by excluding *forum non conveniens* from

considérablement les règles de compétence québécoises spécifiques, en attribuant un large pouvoir discrétionnaire aux tribunaux. Il devrait donc être admis que les autorités étrangères puissent exercer cette même liberté pour écarter des chefs de compétence que les tribunaux québécois auraient écartés. Comme le fait remarquer le professeur Glenn :

> La compétence de l'autorité étrangère s'apprécie non pas de façon large, selon les rattachements admis par les divers chefs de compétence, mais selon les circonstances précises de chaque affaire. Il s'agit de savoir si l'autorité québécoise aurait accepté ou non d'exercer sa compétence dans de telles circonstances. Le principe du miroir devient celui d'un « petit miroir » qui reflète les circonstances particulières de la cause à la lumière des dispositions générales.

(En italique dans l'original.)

Ces auteurs ajoutent que le tribunal québécois peut alors recourir à la doctrine du *forum non conveniens* pour déterminer comment la cour étrangère aurait dû, à son avis, appliquer cette même doctrine (p. 417; voir aussi, en ce sens : H. P. Glenn, « Droit international privé », dans *La réforme du Code civil* (1993), t. 3, 669, n^{os} 117-119, p. 770-772).

[31] La Cour d'appel du Québec a adopté cette approche en l'espèce. Elle a reconnu que la Cour supérieure de justice de l'Ontario avait compétence sur la matière au sens usuel du terme (par. 64). Toutefois, parce qu'elle estimait devoir examiner la compétence du tribunal ontarien à travers le prisme de la réciprocité voulue par la théorie du petit miroir, elle a conclu que la Cour supérieure de justice aurait dû appliquer la doctrine du *forum non conveniens*. Cette application aurait dû l'amener à exclure les résidants du Québec du groupe visé par le recours collectif qu'elle certifiait (par. 64-69). La Cour supérieure de justice aurait dû reconnaître qu'elle n'était pas le tribunal le plus approprié à l'égard de cette catégorie de réclamants, et déférer ainsi à la compétence de la Cour supérieure du Québec.

[32] Toutefois, une partie de la doctrine québécoise rejette l'application de l'exception du *forum non conveniens* en matière de reconnaissance des jugements étrangers ou externes. Ce courant doctrinal limite l'effet du renvoi, à l'art. 3164,

it. For example, in a study on the rules for recognizing and enforcing foreign or external judgments in Quebec, Professor Geneviève Saumier is highly critical of the application of this doctrine ("The Recognition of Foreign Judgments in Quebec — The Mirror Crack'd?" (2002), 81 *Can. Bar Rev.* 677). According to her, this interpretation of art. 3164 *C.C.Q.* is not justified despite the very general language used in drafting that provision. In her opinion, to apply the doctrine of *forum non conveniens* when considering an application for recognition confuses the establishment of the foreign court's jurisdiction as such with the exercise of that jurisdiction (pp. 691-92). Thus the literal interpretation of art. 3164 *C.C.Q.* cannot be reconciled with the general principle in art. 3155 *C.C.Q.* that a foreign or external judgment should be recognized once the originating court has been shown to have jurisdiction in the strict sense, and it is inconsistent with the fact that this principle remains the cornerstone of the system of recognition of foreign judgments established by the *Civil Code of Québec*. The addition of a mechanism based on the discretion of the court to which the application has been made, one that depends in all cases on the existence of a specific factual context, is inconsistent with this principle (pp. 693-94).

[33] Professor Jeffrey Talpis refers to a few cases in which Quebec courts have favoured the application of the doctrine of *forum non conveniens* in the recognition and enforcement of foreign decisions. However, he expresses serious reservations about the soundness of this approach, which he considers incompatible with the legal framework for the recognition of foreign or external judgments set out in the *Civil Code of Québec*:

> Despite the fact that some support obviously exists in jurisprudence and doctrine for the "little mirror" approach, it is somewhat distressing to note that a reviewing court can decide that the originating court should have declined jurisdiction on *forum non conveniens* grounds and that the first court's failure to do so may be justification for denial of recognition of the resulting judgment is rather distressing. To deny

aux dispositions du titre troisième et en exclut le *forum non conveniens*. Par exemple, la professeure Geneviève Saumier s'est montrée fort critique à l'égard de l'application de cette doctrine dans une étude sur les règles de reconnaissance et d'exécution des jugements étrangers ou externes au Québec (« The Recognition of Foreign Judgments in Quebec — The Mirror Crack'd? » (2002), 81 *R. du B. can.* 677). Selon elle, cette interprétation de l'art. 3164 *C.c.Q.* ne se justifie pas, malgré les termes très généraux employés dans le texte de cette disposition. À son avis, l'application de la doctrine du *forum non conveniens*, au moment de l'examen d'une demande d'*exequatur*, confond la détermination de la compétence proprement dite du tribunal étranger et l'exercice de celle-ci (p. 691-692). L'interprétation littérale de l'art. 3164 *C.c.Q.* ne se concilie pas avec le principe général favorable à la reconnaissance du jugement étranger ou externe qu'établit l'art. 3155 *C.c.Q.*, une fois démontrée la compétence *stricto sensu* du tribunal d'origine. L'interprétation littérale oublie que ce principe demeure la pierre angulaire du système de reconnaissance des jugements étrangers ou externes établi par le *Code civil du Québec*. Ce principe s'harmonise mal avec l'ajout d'un mécanisme axé sur le pouvoir discrétionnaire du tribunal d'accueil dont l'exercice dépend à chaque fois d'un contexte factuel particulier (p. 693-694).

[33] De son côté, le professeur Jeffrey Talpis note quelques jugements de tribunaux québécois favorables à l'application de la doctrine du *forum non conveniens* en matière de reconnaissance et d'exécution de décisions étrangères. Toutefois, il exprime des réserves importantes sur le bien-fondé de cette approche, qu'il estime incompatible avec l'aménagement juridique de la reconnaissance des jugements étrangers ou externes dans le *Code civil du Québec* :

> [TRADUCTION] Bien que la théorie du « petit miroir » obtienne manifestement un certain appui dans la jurisprudence et dans la doctrine, il est plutôt navrant de constater que la cour de révision peut décider que le tribunal d'origine aurait dû décliner compétence pour cause de *forum non conveniens* et que l'omission de le faire peut justifier la non-reconnaissance du jugement. Refuser de reconnaître un jugement à cause de l'omission du premier

recognition for failure to do something that is only discretionary in the first court would seem to contradict the very foundations of the exceptional character of the *forum non conveniens* doctrine in Quebec. This "second guess" approach is even more disturbing in an inter-provincial context. Be that as it may, one cannot deny that application of the two grounds does provide a good antidote to inappropriate foreign forum shopping.

(*"If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec–United States Crossborder Litigation* (2001), at p. 109; see also the critical comments of Bich J.A. of the Quebec Court of Appeal in *Hocking v. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189, at paras. 174 *et seq.*)

[34] In my view, these reservations about extending the application of the doctrine of *forum non conveniens* to the recognition of foreign or external judgments in Quebec are justified. I do not deny that the application of this doctrine finds support, at first glance, in the very broad wording of the reference to Title Three in art. 3164 *C.C.Q.* However, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign or external judgments set out in the *Civil Code of Québec*. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context would be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. In this respect, I believe that it will be helpful to repeat the quotation of the first paragraph of art. 3155 of the *Civil Code of Québec*, which sets out the following exception to the obligation to recognize a foreign decision:

. . . the authority of the country where the decision was rendered had no jurisdiction . . . .

The words chosen by the legislature specify the nature of the analysis the court hearing the application for recognition must conduct. The court must ask whether the foreign authority had jurisdiction, but is not to enquire into how that jurisdiction was supposed to be exercised.

tribunal d'accomplir un acte relevant de son seul pouvoir discrétionnaire paraît contredire les fondements mêmes du caractère exceptionnel de l'application du *forum non conveniens* au Québec. Cette « réévaluation » est encore plus consternante dans le contexte interprovincial. Quoi qu'il en soit, on ne saurait nier que l'application des deux motifs est de nature à décourager la recherche indue d'un tribunal favorable.

(*« If I am from Grand-Mère, Why Am I Being Sued in Texas? » Responding to Inappropriate Foreign Jurisdiction in Quebec–United States Crossborder Litigation* (2001), p. 109; voir aussi les commentaires critiques de la juge Bich de la Cour d'appel du Québec dans l'arrêt *Hocking c. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189, par. 174 et suiv.)

[34] J'estime justifiées ces réserves au sujet de l'extension de l'application de la doctrine du *forum non conveniens* à la reconnaissance des jugements étrangers ou externes au Québec. Je ne nie pas que le libellé très large du renvoi au titre troisième figurant à l'art. 3164 *C.c.Q.* invite à première vue à cette application. Cependant, une telle interprétation néglige le principe premier de l'aménagement juridique de la reconnaissance et de l'exécution des jugements étrangers ou externes dans le *Code civil du Québec*. L'*exequatur* du tribunal québécois dépend de l'existence de la compétence du tribunal étranger, et non des modalités de l'exercice de celle-ci, hormis les exceptions prévues par le *Code civil du Québec*. Le recours au *forum non conveniens* dans ce contexte fait fi de la distinction de base entre la détermination de la compétence proprement dite et son exercice. À ce propos, je crois utile de citer de nouveau le premier paragraphe de l'art. 3155 du *Code civil du Québec*, qui crée l'exception suivante à l'obligation de reconnaître la décision étrangère :

L'autorité de l'État dans lequel la décision a été rendue n'était pas compétente . . .

Le libellé choisi par le législateur précise la nature de l'analyse que doit effectuer le tribunal de l'*exequatur*, qui doit se demander si l'autorité étrangère avait compétence, et non si elle devait l'exercer d'une manière ou d'une autre.

[35] Furthermore, this distinction between jurisdiction and the exercise thereof is recognized in the wording of the provisions of the *Civil Code of Québec* on the jurisdiction of Quebec authorities. Article 3135 *C.C.Q.* provides that a Quebec court may refuse to exercise jurisdiction it has under the relevant connecting rules. However, in reviewing an application for recognition of a foreign or external judgment, the Quebec court does not have to consider how the court of another province or of a foreign country should have exercised its jurisdiction or, in particular, how it might have exercised a discretion to decline jurisdiction over the case or suspend its intervention.

[36] Article 3164 *C.C.Q.* provides that a substantial connection between the dispute and the originating court is a fundamental condition for the recognition of a judgment in Quebec. Articles 3165 to 3168 then set out, in more specific terms, connecting factors to be used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority. The application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction. However, it may be necessary in considering a complex legal situation involving two or more parties located in different parts of the world to apply the general principle in art. 3164 in order to establish jurisdiction and have recourse to, for example, the forum of necessity. The Court of Appeal added an irrelevant factor to the analysis of the foreign court's jurisdiction: the doctrine of *forum non conveniens*. This approach introduces a degree of instability and unpredictability that is inconsistent with the standpoint generally favourable to the recognition of foreign or external judgments that is evident in the provisions of the *Civil Code*. It is hardly consistent with the principles of international comity and the objectives of facilitating international and interprovincial relations that underlie the *Civil Code*'s provisions on the recognition of foreign judgments. In sum, even when it is applying the general rule in art. 3164, the court hearing the application for recognition cannot rely on a

[35] Le texte des dispositions du *Code civil du Québec* sur la compétence des autorités québécoises consacre d'ailleurs cette distinction entre la compétence et son exercice. En effet, l'art. 3135 *C.c.Q.* dispose que le tribunal québécois peut refuser d'exercer une compétence qu'il possède par ailleurs en vertu des règles de rattachement pertinentes. Par contre, dans le cas des demandes de reconnaissance de jugements étrangers ou externes, le tribunal québécois n'a pas à se demander comment la cour d'une autre province ou d'un pays étranger aurait dû exercer sa compétence ni, en particulier, comment elle aurait pu utiliser un pouvoir discrétionnaire de ne pas se saisir de l'affaire ou de suspendre son intervention.

[36] L'article 3164 *C.c.Q* établit comme condition fondamentale de la reconnaissance d'un jugement au Québec l'existence d'un lien important entre le litige et le tribunal d'origine. Les articles 3165 à 3168 énoncent ensuite de manière plus spécifique des facteurs de rattachement permettant de conclure à la présence d'un lien suffisant entre le litige et l'autorité étrangère dans certaines situations. En général, le recours à des règles spécifiques, comme celles de l'art. 3168 applicables aux actions personnelles à caractère patrimonial, permettra de statuer sur la compétence du tribunal étranger. Cependant, il se peut qu'une situation juridique complexe où plusieurs parties se trouvent dans des fors différents impose le recours au principe général de l'art. 3164 pour déterminer la compétence et recourir par exemple au for de nécessité. L'arrêt de la Cour d'appel ajoute un élément non pertinent à l'analyse de la compétence du tribunal étranger : la doctrine du *forum non conveniens*. Cette approche introduit ainsi un élément d'instabilité et d'imprévisibilité qui s'accorde mal avec l'attitude en principe favorable à la reconnaissance des jugements étrangers ou externes qu'expriment les dispositions du *Code civil*. Elle ne respecte guère les principes de courtoisie internationale et les objectifs de facilitation des échanges internationaux et interprovinciaux qui sous-tendent les dispositions du *Code civil* sur la reconnaissance des jugements étrangers. En somme, même dans le cas où il a recours à la règle générale prévue à l'art. 3164, le tribunal de l'*exequatur* ne peut s'appuyer

doctrine that is incompatible with the recognition procedure.

[37] It would accordingly have been sufficient had the Quebec authorities asked whether the Ontario Superior Court of Justice had jurisdiction, in the strict sense, over the dispute. If it did, their next step would have been to determine whether the respondent, Mr. Lépine, had established that there were other obstacles to the recognition of the Ontario judgment, as indeed the Quebec Court of Appeal found that he had.

D. *Jurisdiction of the Ontario Superior Court of Justice*

[38] There is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. The question whether there were obstacles to the recognition of the judgment is more problematic, especially given the allegations that it had been rendered in contravention of the fundamental principles of procedure and that the motion for authorization made in Quebec and the parallel application for certification made in Ontario had given rise to a situation of *lis pendens*.

E. *Issue of Notices to the Quebec Members of the National Class*

[39] One of the main arguments made by the respondent in contesting the application for recognition relates to the issue of contravention of the fundamental principles of civil procedure. Under art. 3155(3) *C.C.Q.*, such a contravention precludes enforcement. The Court of Appeal accepted this argument, among others, to justify dismissing the application for recognition.

[40] The issue of the application of art. 3155(3) arises in relation to the notices given pursuant to the Ontario Superior Court of Justice's judgment certifying the class proceeding. The respondent submits that the very content of the notices contravened the

sur une doctrine incompatible avec la procédure de reconnaissance.

[37] Il aurait donc suffi que les autorités québécoises se demandent si la Cour supérieure de justice de l'Ontario avait compétence au sens strict sur le litige. Si tel était le cas, les tribunaux du Québec devaient ensuite examiner si l'intimé, M. Lépine, avait établi l'existence d'autres obstacles à la reconnaissance du jugement ontarien, comme l'a d'ailleurs conclu la Cour d'appel du Québec.

D. *La compétence de la Cour supérieure de justice de l'Ontario*

[38] L'existence même de la compétence de la Cour supérieure de justice de l'Ontario ne fait pas de doute selon l'art. 3168 *C.c.Q.*, puisque la Société, défenderesse à l'action, a établi son siège social en Ontario. Ce facteur de rattachement justifiait à lui seul la reconnaissance de la compétence du for ontarien. La question de la présence d'obstacles à la reconnaissance du jugement pose davantage de problèmes, notamment quant aux allégations de violation des principes essentiels de la procédure et de litispendance entre la requête en autorisation présentée au Québec et celle en certification présentée parallèlement en Ontario.

E. *Le problème des avis aux membres québécois du groupe national*

[39] L'un des principaux moyens soulevés par l'intimé pour contester la demande de reconnaissance judiciaire correspond à la violation des principes essentiels de la procédure civile. Le paragraphe 3155(3) *C.c.Q.* considère une telle violation comme un obstacle à l'*exequatur*. La Cour d'appel a retenu ce motif, parmi d'autres, pour rejeter la demande de reconnaissance judiciaire.

[40] Le problème de l'application du par. 3155(3) se pose à l'égard des avis donnés en vertu du jugement de certification du recours collectif prononcé par la Cour supérieure de justice de l'Ontario. L'intimé plaide que la violation des principes

fundamental principles of procedure. In his opinion, the notices published in Quebec newspapers were insufficient and confusing. Their wording did not enable class members residing in Quebec to understand the impact of the Ontario judgment on their rights and on the authorization of the class action by the Quebec Superior Court on December 23, 2003.

[41] This argument does not amount to a request to review the Ontario Superior Court of Justice's decision. The judge hearing the application for recognition does not examine the merits of the judgment (art. 3158 *C.C.Q.*). However, at the stage of recognition and, therefore, of enforcement of the judgment, he or she must consider whether the procedure leading up to the decision and the procedure for giving effect to it are consistent with the fundamental principles of procedure. The judge hearing the application is concerned not only with the procedure prior to the judgment but also with the procedural consequences of the judgment. This approach is particularly important in the case of class actions.

[42] A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — in particular the possibility of opting out of the class action — they have under the judgment, and sometimes, as here, about a settlement in the case. In the instant case, the question raised by the respondent relates not to the Ontario statute but to the way it was applied by the Ontario Superior Court of Justice in a case in which that court knew that a parallel proceeding was under

essentiels de la procédure se retrouve dans la teneur même de ces avis. Selon ses prétentions, les avis publiés dans des journaux du Québec étaient insuffisants et confus. Leur libellé n'aurait pas permis aux membres du groupe résidant au Québec de saisir la portée du jugement ontarien sur leurs droits et de connaître ses effets sur l'autorisation du recours collectif par la Cour supérieure du Québec le 23 décembre 2003.

[41] Ce moyen n'équivaut pas à demander la révision de la décision de la Cour supérieure de justice de l'Ontario. En effet, le juge de l'*exequatur* n'intervient pas sur le fond du jugement (art. 3158 *C.c.Q.*). Cependant, ce même juge doit se demander, au stade de la reconnaissance et, donc, de la mise en application de ce jugement, si la procédure qui a conduit à cette décision et les modalités prévues pour son exécution respectent les principes essentiels de la procédure. Le juge de l'*exequatur* ne se soucie pas seulement de la procédure qui a précédé le jugement, mais aussi des conséquences procédurales de celui-ci. Le respect de cette démarche se révèle particulièrement important dans le cas des recours collectifs.

[42] En effet, le recours collectif dépasse le cadre du duel traditionnel entre un demandeur et un défendeur. Dans une procédure collective, le représentant agit fréquemment pour le compte de très grands groupes. Les décisions prises touchent non seulement le représentant et les parties défenderesses, mais aussi, potentiellement, tous les réclamants compris dans les groupes visés par le recours. Une information adéquate devient alors une condition nécessaire de la préservation des droits individuels, qu'impose l'exercice de la procédure collective. La procédure de notification joue un rôle indispensable pour permettre aux membres de connaître les effets sur eux du jugement d'autorisation ou de certification, des droits qu'il leur confère — en particulier la possibilité de s'exclure d'un recours collectif — et parfois, comme en l'espèce, d'un règlement intervenu dans le dossier. Dans la présente affaire, la question soulevée par l'intimé ne porte pas sur la loi ontarienne, mais sur l'usage qu'en a fait la Cour supérieure de justice de l'Ontario dans un dossier où elle savait qu'une

way in Quebec. Were the notices provided for in the Ontario court's judgment therefore consistent, in the context in which they were published, with the fundamental principles of procedure applicable to class actions?

[43] The Ontario Court of Appeal stressed the importance of notice to members in a case involving an application for recognition of a judgment rendered in Illinois, in the United States. It emphasized the vital importance of clear notices and an adequate mode of publication (*Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, at paras. 38-40). In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context. In light of the requirement of comity between courts of the various provinces of Canada, they are no less compelling in a case concerning recognition of a judgment from within Canada. Compliance with these requirements constitutes an expression of such comity and a condition for preserving it within the Canadian legal space.

[44] In the context of the instant case, I agree with the opinion expressed by the Quebec Court of Appeal and with the findings of the trial judge on the notice issue. The procedure adopted in the Ontario judgment certifying the class proceeding for the purpose of notifying Quebec members of the national class established in the judgment contravened the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.*, and enforcement was therefore precluded.

procédure parallèle était engagée au Québec. Les avis prévus par le jugement de la Cour supérieure de l'Ontario dans le contexte où ils ont été publiés, respectaient-ils alors les principes essentiels de la procédure collective?

[43] La Cour d'appel de l'Ontario a souligné toute l'importance des avis aux membres dans le cas de la demande de reconnaissance d'un jugement prononcé en Illinois, aux États-Unis. Elle a insisté sur le caractère critique de la clarté des avis et de la suffisance de leur mode de publication (*Currie c. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, par. 38-40). En matière de recours collectif, il importe que l'information nécessaire puisse être communiquée aux membres. On n'exige pas la démonstration que chaque membre a réellement été informé. Cependant, il faut que la procédure de notification soit conçue de telle manière qu'elle rende probable la communication de l'information à ses destinataires. La rédaction des avis doit prendre en considération le contexte dans lequel ils seront diffusés et, en particulier, la situation des destinataires. Des situations particulières peuvent imposer une rédaction plus précise et plus complète afin de permettre aux membres du groupe de bien comprendre les conséquences du recours collectif sur leurs droits. Ces exigences représentent un principe essentiel de la procédure relative aux recours collectifs. La courtoisie nécessaire entre les tribunaux des différentes provinces du Canada ne rend pas ces exigences moins contraignantes dans le cas de la reconnaissance d'un jugement rendu au Canada. Leur respect constitue une manifestation de cette courtoisie et une condition de sa préservation dans l'espace juridique canadien.

[44] Dans le présent contexte, je suis d'accord avec l'opinion de la Cour d'appel du Québec et les conclusions du juge de première instance sur la question de l'avis. La procédure de notification arrêtée dans le jugement de certification ontarien à l'égard des membres québécois du groupe national qu'il établit ne respectait pas les principes essentiels de la procédure au sens du par. 3155(3) *C.c.Q.* et faisait ainsi obstacle à l'*exequatur.*

[45] The clarity of the notice to members was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The notice published in Quebec pursuant to the Ontario judgment did not take this particular circumstance into account. Those who prepared it did not concern themselves with the situation resulting from the existence of a parallel class proceeding in Quebec and the publication of a notice pursuant to the Quebec Superior Court's judgment authorizing the class action. The notice made it look like the Ontario proceeding was the only one. Nor, even though Quebec residents were also a group under the Quebec class action, did the notice clearly state that the settlement applied to them. In this regard, the Quebec Superior Court carefully described the problems that had resulted from the procedure adopted to give effect to the Ontario court's judgment certifying the class proceeding in the context in which that procedure was conducted. Thus, on February 21, 2004, the designated representative in the Quebec class action published a notice of the authorization to institute a class action on behalf of a group that was limited to Quebec residents. The notice indicated that the members could request exclusion on or before April 21, 2004. In the Ontario class proceeding, the notice published on April 7, 2004, that is, shortly before the expiry of the time limit for requesting exclusion from the Quebec action, stated that a settlement had been reached in class proceedings commenced in Ontario and British Columbia but did not mention that the settlement also applied to Quebec residents. The way the notice was written was likely to confuse its intended recipients, as Rayle J.A. of the Quebec Court of Appeal correctly noted in her opinion (see para. 73).

[46] In sum, the Ontario notice did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them. The argument made by the respondent in this respect was in itself sufficient to justify dismissing the application for recognition. However, another

[45] La clarté de l'avis aux membres importait particulièrement dans un contexte où, à la connaissance de tous les intéressés, des procédures collectives parallèles avaient été engagées au Québec et en Ontario. L'avis publié au Québec en vertu du jugement ontarien ne tenait nullement compte de ce contexte particulier. Il ne se souciait pas de la situation créée par l'existence d'une procédure collective parallèle au Québec et par la publication d'avis en vertu du jugement d'autorisation prononcé par la Cour supérieure du Québec. Il donnait à penser que les seules procédures en cours étaient celles engagées en Ontario. Il ne précisait d'ailleurs pas clairement que la transaction intervenue visait le groupe constitué des résidants du Québec, pourtant compris également dans le recours québécois. À cet égard, le jugement de la Cour supérieure du Québec relève avec attention les difficultés causées par la mise à exécution du jugement de certification ontarien dans le contexte où elle s'est déroulée. Ainsi, le 21 février 2004, le représentant désigné dans le cadre du recours collectif québécois faisait publier un avis de l'autorisation d'exercer un recours collectif uniquement pour un groupe limité aux résidants du Québec. L'avis indiquait que les membres visés pouvaient présenter une demande d'exclusion au plus tard le 21 avril 2004. Par ailleurs, dans le cadre du recours collectif ontarien, l'avis publié le 7 avril 2004, soit peu avant l'expiration du délai pour s'exclure du recours québécois, faisait état d'un règlement intervenu en Ontario et en Colombie-Britannique sans préciser que ce règlement visait également les résidants du Québec. Ce mode de rédaction était de nature à créer de la confusion chez les destinataires de l'avis, comme le souligne avec justesse la juge Rayle, de la Cour d'appel du Québec (voir par. 73).

[46] En somme, l'avis ontarien n'explicitait pas adéquatement la portée du jugement de certification pour les membres québécois du groupe national établi par la Cour supérieure de justice de l'Ontario. Il pouvait amener le lecteur québécois à conclure qu'il n'était tout simplement pas concerné. À lui seul, le moyen invoqué par l'intimé à cet égard justifiait le rejet de la demande de reconnaissance judiciaire. Toutefois, il convient d'examiner aussi

argument raised by the respondent and accepted by the Quebec Court of Appeal — *lis pendens* — should also be examined.

F. *Lis Pendens*

[47] The respondent has argued since the beginning of the recognition proceedings that enforcement was precluded by a situation of *lis pendens*, as provided for in art. 3155(4) *C.C.Q.* The Quebec Superior Court expressed no opinion on this point, but the Court of Appeal accepted this argument.

[48] There are two different legal situations in which *lis pendens* is dealt with in Quebec private international law. The first reference to *lis pendens* in the *Civil Code of Québec* appears in art. 3137, which is found among the general rules that establish the bases for the jurisdiction of Quebec authorities and the fundamental conditions for exercising that jurisdiction in relation to a dispute involving a foreign element. Under art. 3137, a Quebec court may stay its ruling on a dispute over which it otherwise has jurisdiction if there is a situation of *lis pendens* with respect to an action under way before a foreign authority. *Lis pendens* depends on the existence of three identities, that of the parties, that of the facts on which the actions are based and that of the object of the actions:

3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[49] The second situation of *lis pendens*, the one with which we are concerned in this appeal, arises in respect of an application for recognition of a judgment rendered by a foreign authority. Under art. 3155, this situation is one of the cases in which a decision rendered outside Quebec cannot be declared enforceable in that province.

[50] The first situation concerns the discretion of a Quebec court to decide whether it will exercise

un autre argument soulevé par l'intimé et accepté par la Cour d'appel du Québec, celui de la litispendance.

F. *La litispendance*

[47] L'intimé plaide depuis le début de la procédure de reconnaissance judiciaire qu'une situation de litispendance faisait obstacle à l'*exequatur*, comme le prévoit le par. 3155(4) *C.c.Q.* La Cour supérieure du Québec n'a pas exprimé d'avis sur ce point, mais la Cour d'appel a admis ce moyen.

[48] Le droit international privé québécois se préoccupe de la litispendance dans deux situations juridiques différentes. Le *Code civil du Québec* traite d'abord de la litispendance à l'art. 3137. Celui-ci appartient aux règles générales qui établissent les bases de la compétence des autorités québécoises et les conditions fondamentales de son exercice à l'égard d'un litige comportant un élément d'extranéité. L'article 3137 permet au tribunal québécois de surseoir à statuer sur un litige, à l'égard duquel il est par ailleurs compétent, lorsqu'apparaît une situation de litispendance avec une action en instance devant une autorité étrangère. La litispendance naît de trois identités, celle des parties, celle des faits à la base des recours et celle de l'objet de ceux-ci :

3137. L'autorité québécoise, à la demande d'une partie, peut, quand une action est introduite devant elle, surseoir à statuer si une autre action entre les mêmes parties, fondée sur les mêmes faits et ayant le même objet, est déjà pendante devant une autorité étrangère, pourvu qu'elle puisse donner lieu à une décision pouvant être reconnue au Québec, ou si une telle décision a déjà été rendue par une autorité étrangère.

[49] Le second cas de litispendance, celui qui nous intéresse dans le présent appel, se présente à l'occasion de l'examen de la demande de reconnaissance du jugement d'une autorité étrangère. Suivant l'article 3155, il s'agit de l'un des cas où la décision rendue hors du Québec ne saurait être déclarée exécutoire dans cette province.

[50] La première situation met en jeu le pouvoir discrétionnaire du tribunal québécois de décider s'il

its jurisdiction despite a finding of *lis pendens* (*Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.), at p. 1351). In the second situation, the one that arises in respect of an application for recognition of a foreign or external judgment, the court hearing the application has been given no discretion under art. 3155(4) *C.C.Q.* The legislature has precluded the application of the general principle of recognition of foreign or external judgments in a situation of *lis pendens* (see: Glenn, No. 105, at pp. 763-64). Thus, when the conditions for *lis pendens* are met, the *Civil Code of Québec* guarantees that the Quebec court has priority, provided that it was seised of the case first.

[51] What must now be determined is whether, as a result of *lis pendens*, the Quebec courts were precluded in the case at bar from recognizing the judgment of the Ontario Superior Court of Justice. The conditions for *lis pendens* are well established in the domestic context in Quebec civil law. Like *res judicata*, *lis pendens* depends on identity of the parties, identity of the cause of action and identity of the object (J.-C. Royer, *La preuve civile* (4th ed. 2008), Nos. 788-89, at p. 635; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440). However, in private international law matters, the nature of the required identities is altered somewhat in the *Civil Code of Québec* in the case of *lis pendens*. In particular, in art. 3137, as in art. 3155(4), the Code retains identity of the parties and identity of the object but substitutes identity of the facts on which the actions are based for identity of the cause of action.

[52] This change takes account of the problems involved in reconciling the specific features of legal systems that come into contact with each other, as well as the diversity in their substantive law concepts and procedural rules. The Quebec judge therefore considers the facts on which the actions are based and does not go beyond the differences in the legal systems in question to try to find an identity of the cause of action. The analysis thus focuses more on the respective objects of the two actions (*Birdsall*, at pp. 1351-52; Goldstein and Groffier, at pp. 325-26).

exercera ou non sa compétence malgré la litispendance qu'il constate (*Birdsall Inc. c. In Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.), p. 1351). Dans la seconde situation, celle de la demande de la reconnaissance du jugement étranger ou externe, le par. 3155(4) *C.c.Q.* n'accorde pas de pouvoir discrétionnaire au tribunal de l'*exequatur.* Le législateur écarte le principe général de la reconnaissance des jugements étrangers ou externes lorsque naît une situation de litispendance (voir : Glenn, n^{o} 105, p. 763-764). Ainsi, lorsque les conditions de la litispendance sont réunies, le *Code civil du Québec* assure la primauté du for québécois, à condition qu'il ait été le premier saisi.

[51] Il faut donc examiner maintenant si la litispendance empêchait en l'espèce la reconnaissance du jugement de la Cour supérieure de justice de l'Ontario. Les conditions d'existence de la litispendance sont bien établies dans l'ordre interne en droit civil québécois. Comme la chose jugée, la litispendance repose sur l'identité des parties, de la cause d'action et de l'objet (J.-C. Royer, *La preuve civile* (4^{e} éd. 2008), n^{os} 788-789, p. 635; *Rocois Construction Inc. c. Québec Ready Mix Inc.*, [1990] 2 R.C.S. 440). Toutefois, dans les situations qui relèvent du droit international privé, le *Code civil du Québec* modifie en partie la nature des identités nécessaires pour qu'il y ait litispendance. En particulier, à l'art. 3137 comme au par. 3155(4), le Code conserve l'identité des parties et de l'objet, mais substitue l'identité des faits à la base des recours à celle de la cause d'action.

[52] Cette modification prend en compte la difficulté de concilier les traits particuliers des systèmes juridiques en rapport, ainsi que la diversité des concepts de droit substantiel et des règles de procédure qu'ils emploient. Le juge québécois se penche alors sur les faits à la base des recours et ne cherche pas à retrouver l'identité des causes d'action au-delà des différences entre les systèmes juridiques considérés. L'analyse se concentre alors davantage sur les objets respectifs des deux demandes en justice (*Birdsall*, p. 1351-1352; Goldstein et Groffier, p. 325-326).

[53] However, the appellant argues that, in any event, the Quebec courts did not even have to consider the question of *lis pendens*. According to art. 3155(4), *lis pendens* is relevant only if the Quebec proceeding predates the foreign action. The Corporation submits that the Quebec proceeding commenced no earlier than the date the Quebec Superior Court authorized the class action, that is, December 23, 2003. In support of this argument, the appellant relies, *inter alia*, on *Thompson v. Masson*, [1993] R.J.Q. 69, in which the Quebec Court of Appeal stressed that a class action does not commence until it is filed, that is, after the judgment authorizing the class action. Before that time, there is only an authorization proceeding whose purpose is to screen applications. In the instant case, according to the appellant, the Ontario proceeding predated the Quebec action because it was certified one day before the class action was authorized in Quebec.

[54] This interpretation is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. While it is true that Mr. Lépine's action did not exist yet in Quebec at the time the judgment certifying the class proceeding was rendered in Ontario, an application for authorization was nevertheless before the Quebec Superior Court prior to December 23, 2003. The term "dispute" has a broad meaning that encompasses all types of legal proceedings (see *Black's Law Dictionary* (8th ed. 2004), at p. 505; see also, regarding the term "*litige*" used in the French version of art. 3155(4), H. Reid, *Dictionnaire de droit québécois et canadien* (3rd ed. 2004), at p. 355; *Le Grand Robert de la langue française* (2nd ed. enl. 2001), vol. 4, at p. 864; Goldstein and Groffier, at p. 384). The application for authorization is a form of judicial proceeding between parties for the specific purpose of determining whether a class action will take place. The Quebec proceeding predated the one in Ontario, and the Quebec court was therefore seised before the Ontario court, which means that art. 3155(4) *C.C.Q.* was applicable.

[55] At that stage, the three identities were present. The basic facts in support of both proceedings were

[53] Cependant, l'appelante plaide que de toute manière, les tribunaux du Québec n'avaient même pas à examiner la question de la litispendance. En effet, selon le par. 3155(4), celle-ci n'est pertinente que lorsque la procédure québécoise est antérieure à l'action en justice étrangère. Selon la Société, le début de la procédure québécoise se situerait au plus tôt au moment de l'autorisation du recours collectif par la Cour supérieure du Québec, c'est-à-dire le 23 décembre 2003. Pour plaider en ce sens, l'appelante s'appuie notamment sur l'arrêt *Thompson c. Masson*, [1993] R.J.Q. 69, où la Cour d'appel du Québec souligne que l'action entreprise par la voie collective ne commence que lors de son dépôt, après l'autorisation. Avant, il n'existe qu'une procédure d'autorisation visant à filtrer les demandes. En l'espèce, selon l'appelante, la procédure ontarienne était antérieure au recours québécois puisque la certification en Ontario précédait d'une journée l'autorisation du recours collectif au Québec.

[54] Cette interprétation ne respecte pas le texte du par. 3155(4), ni les modalités de son application dans le contexte d'un recours collectif. Si l'action en justice engagée par M. Lépine n'existait pas encore au Québec lors du prononcé du jugement de certification ontarien, avant le 23 décembre 2003, une demande d'autorisation se trouvait néanmoins toujours en instance devant la Cour supérieure du Québec. Le terme « litige » a un sens large qui englobe les différentes formes de débat judiciaire (voir H. Reid, *Dictionnaire de droit québécois et canadien* (3e éd. 2004), p. 355; *Le Grand Robert de la langue française* (2e éd. augm. 2001), t. 4, p. 864; Goldstein et Groffier, p. 384; voir également, pour ce qui est du terme « *dispute* » utilisé dans le texte anglais du par. 3155(4), le *Black's Law Dictionary* (8e éd. 2004), p. 505). La demande d'autorisation constitue une forme de débat judiciaire engagé entre des parties pour déterminer précisément si un recours collectif verra le jour. Cette instance précédait le recours ontarien, et le for québécois s'est trouvé saisi avant le tribunal ontarien, ce qui rendait applicable le par. 3155(4) *C.c.Q.*

[55] À cette étape, les trois identités se rencontraient. Les faits essentiels au soutien des deux

the same for Quebec residents, namely the purchase and discontinuation of an Internet access service. The object was also the same: compensation for breach of the undertaking. Identity of the parties was established: a legal representative, the applicant at the authorization stage, was acting for the entire group of residents. The identity of the representative in a class action may vary in the course of the proceeding, but there is always one representative for all the members. What the courts have required is not physical identity of the parties, but legal identity (*Hotte v. Servier Canada Inc.*, [1999] R.J.Q. 2598 (C.A.), at p. 2601; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 410-11). The *lis pendens* argument was well founded, and the Court of Appeal rightly accepted it. Like the contravention of the fundamental principles of procedure, the *lis pendens* situation precluded judicial recognition of the decision of the Ontario Superior Court of Justice.

G. *National Classes and Parallel Class Actions*

[56] In addition to its conclusions of law, the Quebec Court of Appeal seems to have had reservations or concerns about the creation of classes of claimants from two or more provinces. We need not consider this question in detail. However, the need to form such national classes does seem to arise occasionally. The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.

[57] As can be seen in this appeal, the creation of national classes also raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial

procédures étaient les mêmes quant aux résidants du Québec : l'achat d'un service Internet et l'interruption de celui-ci. L'objet était aussi le même : l'indemnisation pour la violation de l'engagement. L'identité des parties était établie. Un représentant juridique, le requérant au stade de l'autorisation, agit pour l'ensemble du groupe des résidants. L'identité du représentant dans le cadre du recours collectif peut varier au cours de la procédure collective, mais il y en a toujours un pour l'ensemble des membres. La jurisprudence n'exige pas l'identité physique des parties, mais leur identité juridique (*Hotte c. Servier Canada inc.*, [1999] R.J.Q. 2598 (C.A.), p. 2601; *Roberge c. Bolduc*, [1991] 1 R.C.S. 374, p. 410-411). Le moyen de la litispendance était fondé, et la Cour d'appel l'a retenu à bon droit. Comme la violation des principes essentiels de la procédure, il faisait obstacle à la reconnaissance judiciaire de la décision de la Cour supérieure de justice de l'Ontario.

G. *Les groupes nationaux et les recours collectifs parallèles*

[56] Au-delà de ses conclusions de droit, la Cour d'appel du Québec me semble avoir exprimé des réticences ou des inquiétudes à l'égard de la constitution de groupes de réclamants provenant de plusieurs provinces. Nous n'avons pas à examiner en profondeur ce problème. Cependant, je noterais que la formation de tels groupes nationaux semble à l'occasion nécessaire. Leur établissement peut poser le problème délicat de la constitution de sous-groupes en leur sein et de la détermination du régime juridique qui leur serait applicable. Le contexte de ces instances impose aussi au tribunal saisi de la demande le devoir de s'assurer que la conduite de la procédure, le choix des réparations et l'exécution des jugements prennent effectivement en compte les intérêts particuliers de chaque groupe et il leur commande de veiller à la communication d'une information claire.

[57] Comme on le constate dans le présent appel, la création des groupes nationaux pose aussi le problème des rapports entre tribunaux supérieurs égaux, mais différents, dans un système fédéral où la procédure civile et l'administration de la justice

jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.

IV. Conclusion

[58] For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Heenan Blaikie, Montréal.

Solicitors for the respondent: Unterberg, Labelle, Lebeau, Montréal.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

relèvent des provinces. Le présent dossier montre que les décisions rendues peuvent parfois provoquer des frictions entre les tribunaux de différentes provinces. Il s'agit sans doute souvent de problèmes de communication ou de contact entre les tribunaux et entre les avocats engagés dans ces procédures. Cependant, les législatures provinciales devraient porter plus d'attention au cadre des recours collectifs nationaux et aux problèmes posés par ceux-ci. Des méthodes plus efficaces de gestion des conflits de compétence devraient être établies dans l'esprit de courtoisie mutuelle qui s'impose entre les tribunaux des différentes provinces dans l'espace juridique canadien. Il ne nous appartient pas de définir les solutions nécessaires. Il importe cependant de relever les difficultés qui semblent parfois se poser dans la conduite de ces recours.

IV. Conclusion

[58] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Heenan Blaikie, Montréal.

Procureurs de l'intimé : Unterberg, Labelle, Lebeau, Montréal.

Procureur de l'intervenant le procureur général du Canada : Sous-procureur général du Canada, Ottawa.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Harrington v. Dow Corning Corporation et al.,*** 2007 BCSC 244

Date: 20070223
Docket: C954330
Registry: Vancouver

Between:

Helen Harrington, as a Representative Plaintiff

Plaintiffs

And

Dow Corning Corporation, Dow Corning Canada, Inc. The Dow Chemical Company, Dow Corning-Wright Corporation,

McGhan Medical Corporation, McGhan Nusil Corporation, Minnesota Mining & Manufacturing Company (3M), Inamed Corporation, Union Carbide Chemicals and Plastics Company Inc., Union Carbide Corporation

Baxter International Inc., Baxter Healthcare Corporation, Mentor Corporation,

Bristol-Myers Squibb Company, Medical Engineering Corporation, and The Cooper Companies, Inc.

Defendants

Before: The Honourable Mr. Justice E. R. A. Edwards

Reasons for Judgment

Counsel for the appellants, Alexandra (Barbara) Law and Yvette Goguen:	M. J. Peerless (of the Ontario Bar)
Class Counsel:	M. R. Steven
Written submission filed:	November 29, 2006 Vancouver, B.C.

[1] These reasons pertain to a motion by Alexandra (Barbara) Law and Yvette Goguen for an order allowing the filing of their late claims under the Dow Corning/British Columbia and Other Provinces Breast Implant Litigation Settlement (the "2005 Settlement") approved by the court on August 5, 2005. The Claims Administrator rejected both claims on the basis that the applicants' Opt-In forms were filed after the December 2, 2005 deadline imposed by the 2005 Settlement.

[2] Ms. Law's Opt-In form was signed on January 16, 2006. Ms. Goguen's Opt-In form was signed on January 5, 2006. Both claimants filed their claim forms and supporting documentation prior to the February 1, 2006 deadline for those documents. Counsel for the applicants submit that neither claimant has any other option than to pursue her claim under the Settlement, and denying their claims would make it impossible for them to receive compensation for the injuries they have suffered.

[3] According to a representative of Siskinds LLP, solicitors for the applicants, the claimants were living outside of the area to which the deadlines were advertised, and the firm was not notified of the deadlines despite having a number of clients who were eligible to participate in the 2005 Settlement. The firm found out about the 2005 Settlement and related deadlines by coincidence while researching another matter, on or about November 2, 2005, which left them only a short time to double-check their filing system for clients who were eligible to participate in the 2005 Settlement.

[4] In support of their appeal, the applicants brought to my attention orders from two Ontario cases: in ***Linda Jones and Sylvia Furneaux and American Heyer-Schulte Corporation, Baxter Healthcare Corporation and Baxter International Inc.***, Winkler J. allowed four claimants' appeals after their Product Identification Documentation had been rejected as out of time. In ***Smith et al v. Corporation of the Municipality of Brockton et al***, Winkler J. allowed the appeals of several claimants, some of whom filed claims as late as 2 years after the claims deadline.

[5] In ***Harrington v. Dow Corning Corp.***, 2001 BCSC 221, 15 women had missed the opt-in deadline and sought an extension. At para. 22 I wrote:

> If the deadline is not relaxed or removed there will be a number of claims which will necessarily go without any remedy under the B.C. Settlement or elsewhere. Balancing that against the potential prejudice to those who filed on time, I have concluded that the interests of justice dictate that the deadline should be relaxed or removed so that no one who may have a valid claim is rejected only because they missed the deadline.

At para. 25 I concluded:

> I am not persuaded any of the lack of explanation for not filing on time or other possible shortcomings in forms tendered by the applicants need be considered on this application. The only issue is whether forms should be summarily rejected only because they were not filed by the deadline. I have concluded they should not be rejected on that basis alone, since that is too great a potential hardship for persons who may have a valid claim.

[6] I note that leave to appeal this decision was granted (2001 BCCA 534), but it does not appear that the appeal was ever pursued.

[7] Considering that only the Opt-In forms were late in this case and the claims and supporting documentation were received on time, and considering the fact that the applicants will be left with no other avenue to pursue compensation for their injuries if this application is denied, I conclude that the filing of their late claims should be allowed and I so order.

"E.R.A. Edwards, J."
The Honourable Mr. Justice E.R.A. Edwards

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Killough v. The Canadian Red Cross Society,* 2014 BCSC 1789

Date: 20140912
Docket: C976108
Registry: Vancouver

Between:

Edward Killough, Patricia Nicholson, Irene Fead, Daphne Martin, Deborah Lutz, and Melanie Crehan

Plaintiffs

And

The Canadian Red Cross Society, Her Majesty The Queen In Right Of The Province Of British Columbia, and The Attorney General Of Canada

Defendants

Before: The Honourable Chief Justice Hinkson

Oral Reasons for Judgment

Counsel for Plaintiffs, E. Killough, P. Nicholson, I. Fead, D. Martin:	D. Klein, G. Smith
Counsel for Defendant, Canada (Attorney General):	P. Bickery, M. Tessier
Place and Date of Trial/Hearing:	Vancouver, B.C. September 12, 2014
Place and Date of Judgment:	Vancouver, B.C. September 12, 2014

[1] This action arose as a result of the contamination of the national blood supply with the Hepatitis C virus. It was one of four such actions; the other three being in Alberta, Ontario and Quebec. After years of court proceedings and difficult and complex negotiations, Class Counsel reached a settlement with the defendants in 2007. The Settlement Agreement provides that compensation would be paid to those individuals who contracted Hepatitis C from the blood system before January 1, 1986 and after July 1, 1990.

[2] The Settlement Agreement was approved in this class action by an order made by Mr. Justice Pitfield on June 8, 2007. The appeal period from that order was 30 days from its date.

[3] Pursuant to the Settlement Agreement, both this Court and Class Counsel have ongoing roles in the administration of the Settlement.

[4] According to paragraph 25 of the Settlement Approval Order, this Court retains jurisdiction over the action to implement and enforce the provisions of the Settlement and supervise the ongoing performance of the Settlement.

[5] As a part of its ongoing role, Klein Lyons, one of the firms appointed as Class Counsel for this action seeks two orders from this Court:

a) an order for a protocol to deal with claims by the estates of class members; and

b) an order pursuant to s. 5.07(2) of the Settlement Agreement with respect to the sufficiency of the Compensation Fund.

Background

[6] In the Settlement Agreement, the defendant, The Attorney General of Canada (hereinafter “Canada”) agreed to pay $962 million to create a Compensation Fund to provide lump sum benefits to class members. Pursuant to Article 1.03 of the Settlement Agreement, Canada’s obligation to fund the settlement is limited to the amount already paid.

[7] Article 3.01(1) of the Settlement Agreement stipulates that the filing deadline for deceased HCV Infected Class Members is the later of 3 years after the death of the HCV Infected Class Member, or 2 years after the Implementation Date. The Implementation Date is defined as 30 days after the last of Court Approval Orders became final. Subsequent to the Courts' approval of the settlement, the parties agreed that the Implementation Date was August 10, 2007.

[8] Seventy estate claims filed prior to the June 30, 2010 initial claim deadline have been rejected because they were filed more than three years after the death of the HCV Infected Class Member and more than two years after the Implementation Date.

[9] The Compensation Fund is divided into two subsidiary funds: the Main Compensation Fund and the Past Economic Loss and Dependents Fund. The latter fund provides payment for loss of income and loss of services benefits, as well as all benefits payable to dependents. All other benefits are paid from the Main Compensation fund. Should the Past Economic Loss and Dependents Fund have insufficient assets to pay all benefits for approved claims, there is a provision to allow the courts to authorize a transfer of assets from the Main Compensation Fund to the Past Economic Loss and Dependents Fund, so long as the Main Compensation Fund would remain sufficient following such a transfer.

[10] Under article 4.02 of the Settlement Agreement, the families of class members may be eligible for certain benefits. Class Counsel described the Main Compensation Fund as including a notional accounting for these family benefits, called the "Dynamic Non-segregated Family Benefits Fund", but concedes that there is no true separation of assets (as with the Past Economic Loss and Dependents Fund) or limit on total benefits payable.

[11] Article 4.02(4) of the Settlement Agreement provides that any positive balance in the notional family fund is to be paid out *pro rata* to the infected class members upon termination of the fund. I have been advised by Class Counsel that currently, there is a $27 million positive balance in this fund.

[12] The Settlement Agreement also provides certain limits on the benefits that may be transferred from the Main Compensation Fund to the Past Economic Loss and Dependents Fund, at a later date, if the former fund has sufficient assets.

[13] There is a “Claims Experience Premium” provided for in Article 5.07 of the Settlement Agreement. The premium recognizes that many of the lump sum amounts payable under the Settlement Agreement have been reduced by 10% to create a provision for adverse deviation, subject, to later payment on the termination of the fund provided the fund is sufficient to make such payment.

[14] Article 5.07(2) of the Settlement Agreement permits the supervising courts to order payment of the Claim Experience Premium if the fund is financially capable of bearing it. This article provides:

> On notice to Canada, Class Counsel shall apply to the Courts, 120 days or more after each of June 30. 2010, June 30, 2013 and June 30, 2016 to assess the financial sufficiency of the Compensation Fund and may seek directions as to she amounts and timing of the payment of the claims experience premium set out in Section 5.07(1).

[15] One of the responsibilities of Class Counsel set out in Section 5.07(2) of the Settlement Agreement is to apply to the court 120 days or more after each of June 30, 2010, June 30, 2013 and June 30, 2016 to assess the financial sufficiency of the Compensation Fund and seek directions as to the amounts and timing of the payments of the Claims Experience Premium set out in Section 5.07(1). To do so, Class Counsel are to retain actuaries to determine the financial sufficiency of the Trust Fund pursuant to Section 8.05(1)(f) of the Settlement Agreement.

[16] This application is the first of these four sufficiency hearings and no application is presently before any of the other three supervising courts.

[17] A current issue regarding fund sufficiency is that the Past Economic Loss and Dependants’ Fund is now insufficient to provide compensation to all Approved HCV Class members, Approved Personal Representatives and Dependants. As a result, payments to class members who qualify for compensation from this Fund have stopped.

[18] If there are sufficient monies in the Compensation Fund, the Courts can authorize claims experience premium payments to certain categories of Class Members pursuant to Article 5.07(1) of the Settlement Agreement.

Discussion

a) The Requested Protocol

[19] The Settlement Agreement sets an initial claim deadline of June 30, 2010. That date is featured prominently on the Administrator's website and on the Claim Application Package, but the parties agree that the Notice of Settlement, the Administrator's website and the Claim Package all failed to state the Implementation Date. None of the Approval Orders were on the website. Thus, there was no publicly available information as what the Implementation Date was, nor was it reasonably possible for class members to calculate the Implementation Date.

[20] In *Canada Post Corp. v. Lepine*, 2009 SCC 16, the Supreme Court of Canada discussed the requirement that individual rights be safeguarded in a class proceeding, and at para. 42 Mr. Justice LeBel described the notice procedure in class action proceedings as indispensable in that it informs class members about how the judgment authorizing the class action or certifying the class proceeding affects them. At para. 43 LeBel J. explained that:

> … In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context.

[21] Class Action Counsel contends that the Notice in this settlement was inadequate with respect to the Implementation Date deadline applicable to estate claims, because the deadline date was not specified in any of the material available

to class members and it was not reasonably possible for class members to determine that date. Canada does not disagree.

[22] The protocol requested by Class Counsel is:

> 1. The Administrator shall consider applications made pursuant to Article Three of the Settlement Agreement if the claimant first advised the Administrator of a potential claim on or before June 30, 2010.
>
> 2. If an application has not already been received by the Administrator, the Administrator shall notify the claimant in writing that the deadline to deliver the application will be ninety (90) days from the date of the .Administrator's written notification. After the expiration of ninety (90) days from the date of the Administrator's written notification to the claimant, the Administrator shall process the claim as denied.
>
> 3. If the application was received by the Administrator on or before June 30. 2010. but was rejected as a result of being received after the applicable deadline, the Administrator shall re-
>
> open and process the claim to determine eligibility for compensation in accordance with the terms of the Settlement Agreement and the Court Approved Protocols in place at the time of processing.
>
> 4. If, as a result of the processing of a claim made under this Protocol, the Administrator rejects the claim, the Administrator shall:
>
> A. notify the claimant in writing that the claims is rejected, and the basis for rejecting the claim: and
>
> B. advise the claimant of the right to appeal as provided in the Settlement Agreement.

[23] I am satisfied that the requested Protocol is necessary and appropriate to ensure that class members are not prejudiced by the failure to clearly state the Implementation Date, and I will approve the protocol as requested.

b) The Sufficiency of the Compensation Fund

[24] The second application is brought pursuant to Sections 2.07(3), s. 5.07(2), 8.05(1)(f) of the Settlement.

[25] Canada contends that the financial sufficiency assessment order should be made on the following terms:

> a) that as of November 30, 2012, the Main Compensation Fund is sufficient; and

b) that as of November 30, 2012, the Past Economic Loss and Dependents Fund is insolvent.

[26] There are essentially two issues in this application:

i. Is the fund sufficient?

ii. What payments can be made out of the Main Compensation Fund and in what priority?

i) The Sufficiency of the Fund

[27] In 2009, Class Counsel retained actuaries to assess the financial sufficiency of the Compensation Fund as required by the Settlement Agreement. This application has been delayed until this time as there were several issues related to outstanding claims that needed to be resolved before the actuarial report could be completed.

[28] The actuary's report by Ernst & Young was provided to Class Counsel on February 20, 2013 and was delivered to Canada the next day. Canada points out that this actuarial report assesses the funds' sufficiency as of November 30, 2012. To maintain parity, Canada's actuarial report by Morneau Shepell also assesses the fund as of November 30, 2012, and notes that the "results as of 30 June 2010 would he similar to those presented herein and my findings and actuarial certification would be the same as presented herein."

[29] Class Counsel and Canada agree that the Main Compensation Fund is sufficient, with certain qualifications. Morneau Shepell's best estimate for the surplus in the Main Compensation Fund is $54,369,000 (prior to any payment of the Claims Experience Premium). If the full Claim Experience Premium were to be paid out, there would be a shortfall in the Main Compensation Fund totalling $47,052,000.

[30] Class Counsel and Canada agree that the Past Economic Loss and Dependants Fund is insufficient and has "effectively run out of money". Morneau Shepell's best estimate for the Past Economic Loss and Dependants Fund's shortfall

is $55,303,000 (before the removal, of the limits on benefits under Article 2.05) or $84,953,000 (after the removal of the limits on benefits).

[31] Canada asserts that the Ernst & Young report also fails to address all the liabilities facing the Compensation Fund, but based on the report of its own actuarial expert, Canada agrees with Class Counsel that the Main Compensation Fund is solvent and that the Past Economic Loss and Dependants fund is insolvent and is unable to pay further benefits.

[32] Canada's position is that the report commissioned by Class Counsel and executed by Ernst & Young is inadequate because it fails to address all the liabilities facing the Compensation Fund, including:

- There is a $27 million balance in the "Dynamic Non-segregated Family Benefits Fund". In all likelihood, this full amount will not be required to pay family benefits, and there will thus be a surplus in this notional fund. This surplus must be paid out *pro rata* to the infected class members upon termination of the fund.
- The Ernst & Young Report fails to account for future fees and expenses for administering the plan. This is a troubling omission since Morneau Shepell estimates that expected future fees and expenses will most likely exceed the $20 million limit set by Article 8.03 of the Settlement Agreement.
- As will be discussed below the Ernst & Young Report offers the opinion that there are insufficient assets to pay out the Claims Experience Premium or remove the limits on benefits under PELD. However, the Ernst & Young Report fails to quantify how much these payments would cost.
- Page 9 of the Ernst & Young Report may appear to suggest that as a whole, the settlement fund is solvent. This is inaccurate because the PELD is insolvent and should not be aggregated with the Main Compensation Fund.

[33] Notwithstanding these issues, the actuaries agree that there is a surplus in the Main Compensation Fund. Morneau Shepell's estimate of $54,369,000 for the surplus in the Main Compensation Fund is based on actuarial assumptions that represent the most likely outcome (i.e., "the best estimate"). For a more conservative approach, Morneau Shepell says that standard practice is to factor in a provision for

adverse deviations. Under this provision for adverse deviations, Morneau Shepell estimates a surplus in the Main Compensation Fund of $45,849,000.

[34] Ernst & Young, on the other hand, provide estimates for a “base case" (where the surplus in the Main Compensation Fund is $67,200.000) or an “adverse scenario” (where the surplus is $17,700.000).

[35] I find that that the Main Compensation Fund was solvent as of November 30, 2012, but that the Past Economic Loss and Dependents Fund was insolvent as of that date.

ii) Payments from the Main Compensation Fund

[36] Class Counsel’s actuarial report of February 20, 2013 provided an analysis pursuant to Section 2.07(3) of the Settlement Agreement on whether the Trustee can transfer an amount from the Compensation Fund to the Past Economic Loss and Dependants Fund. In his opinion, there may be insufficient funds in the Compensation Fund for Class Counsel to recommend to the court that a transfer of money to the Past Economic Loss and Dependants Fund be authorized.

[37] As noted above, the actuaries for both Canada and Class Counsel agree that there is some amount of surplus in the Main Compensation Fund, but this agreement raises the question of whether the Main Compensation Fund should assume any further liabilities, and if so, in what priority.

[38] Canada’s position is that first priority must be given to (a) the pro *rata* distribution of any positive balance in the Non-segregated Dynamic Family Fund to infected class members under Article 4.02(4)(a), and (b) to pay for all future fees and expenses under Article 8.03. Both these liabilities are already factored into Morneau Shepell’s best estimate of a surplus in the Main Compensation Fund of $54,369,000 (prior to any payment of the Claims Experience Premium). These liabilities are not mentioned in the Ernst & Young Report.

[39] The next priority identified by Canada is the Claims Experience Premium. The Ernst *&* Young Report concludes that there "may" be insufficient funds to pay the Claims Experience Premium, but does not provide a figure for the cost of paying the Premium. Morneau Shepell's best estimate is that paying the full Claims Experience Premium would cost $101,421,000. As discussed above, this would push the best, estimate for the $54,369,000 surplus in the Main Compensation Fund into a shortfall of $47,052,000.

[40] The next priority identified by Canada would be the Past Economic Loss and Dependents Fund. Transferring money from the Main Compensation Fund, to the Past Economic Loss and Dependents Fund, and/or lifting the restrictions in Article 2.05(1) and Article 2.05(2)(b)(i) are both possibilities.

[41] Class Counsel did not make submissions with respect to the priority to be given to any *pro rata* distribution of any positive balance in the Non-segregated Dynamic Family Fund to infected class members under Article 4.02(4)(a) or to the payment of any future fees and expenses under Article 8.03, and I make no findings with respect thereto.

[42] I do find, however, that although the Main Compensation Fund was solvent as of November 30, 2012, it cannot be assumed that it is in a position to transfer funds to the Past Economic Loss and Dependents F**u**nd. Based on the actuarial reports, the Main Compensation Fund might be able to make a partial payment on the termination of the Settlement Agreement. Therefore, the Main Compensation Fund would also not have sufficient assets to support making any payment into the Past Economic Loss and Dependents Fund, a secondary priority to the Claims Experience Payment under the Settlement Agreement.

[43] Canada agrees with Class Counsel that there should be no payment of the Claims Experience Premium at this time.

[44] A partial payment of the Claims Experience Premium may, however, be possible following the termination of the Settlement Agreement.

[45] Given that both actuaries estimate that the Main Compensation Fund cannot pay the entire Claims Experience Premium, it is my opinion that it would be inappropriate to allocate any funds from the Main Compensation Fund to the Past Economic Loss and Dependents Fund at this time.

"The Honourable Chief Justice Hinkson"

Parsons et al. v. The Canadian Red Cross Society et al.

Kreppner et al. v. The Canadian Red Cross Society et al.

[Indexed as: Parsons v. Canadian Red Cross Society]

51 O.R. (3d) 261
[2000] O.J. No. 4457
Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice
Winkler J.
November 24, 2000

Civil procedure -- Class proceedings -- Settlement -- Directions -- Entitlement to compensation -- Interpretation of settlement agreement in class proceedings arising out of contamination of blood supply -- Cryoprecipitate within definition of blood plasma -- Class Proceedings Act, 1992, S.O. 1992, c. 6.

Civil procedure -- Class proceedings -- Settlement -- Expert evidence -- Determination of entitlement to compensation in class proceedings arising out of contamination of blood supply -- Statistical evidence about extent of blood contamination -- Administrator of settlement in class proceedings proposing to use statistical evidence for purposes of determining entitlement to compensation -- Statistical evidence having prejudicial influence -- Use of statistical evidence not permitted -- Class Proceedings Act, S.O. 1992, c. 6, s. 23.

Evidence -- Expert evidence -- Statistical evidence -- Probability analysis -- Determination of entitlement to compensation in class proceedings arising out of contamination of blood supply -- Statistical evidence about extent of blood contamination -- Administrator of settlement in class

proceedings proposing to use statistical evidence for purposes of determining entitlement to compensation -- Statistical evidence having prejudicial influence -- Use of statistical evidence not permitted.

In two class proceedings brought as a result of the contamination of the Canadian blood supply with the Hepatitis C virus (HCV), settlements were reached. Under the settlement of the class proceeding known as the "Transfused Action", the court had an ongoing supervisory function, and in that proceeding, Class Action Counsel brought a motion for directions about two issues. The first issue was whether persons infected with HCV from a transfusion of a blood product known as "cryoprecipitate" were eligible for compensation. This issue arose because, in contrast to the definition of "blood" that had been used in the settlement of the class proceeding, known as the "Hemophiliac Action", which definition included cryoprecipitate, the definition of blood in the Transfused HCV Plan did not mention cryoprecipitate.

The second issue was whether approval should be granted for a "Traceback Protocol" to be used by the Administrator of the settlement to determine the eligibility of claimants. Under the agreement, a claimant who has or had an HCV infection and who had received blood by transfusion within the class period established a prima facie entitlement; however, compensation could be denied if the Administrator could establish on the balance of probabilities that the claimant was not infected with HCV for the first time within the class period. The Traceback Protocol was an investigative procedure to determine whether the blood received by a claimant was contaminated. The particular issue was whether an expert's statistical probability calculations could be used as a tool for determining the eligibility of claimants who had multiple transfusions of blood over an extended period.

Held, persons infected from cryoprecipitate transfusions were eligible; the Traceback Protocol was not approved.

Cryoprecipitate was included within the definition of "plasma" and hence was within the definition of "blood". The

issue of whether cryoprecipitate was included within the definition of blood was a matter of interpreting the settlement agreement. The effect of including cryoprecipitate on the sufficiency of the settlement could not inform the matter of interpretation and, moreover, the submission that permitting cryoprecipitate claims would threaten the sufficiency of the fund was contrary to the evidence. The argument that these claims should be excluded based on the interpretative doctrine of "implicit exclusion" or inclusio unis est exclusio alterius failed because the predicate requirement for this doctrine is that the provisions to be interpreted must be found in the same agreement. In the immediate case, separate compensation plans were negotiated and they were negotiated by different counsel. Further, the evidence established that cryoprecipitate was plasma.

The probability calculations should not be used to determine entitlement. Under the settlement, there was a presumption in favour of entitlement. Pure statistical evidence was insufficient to overcome this presumption. Using the calculations as part of the determination was prejudicial; there was a manifest danger of misuse. Given the overwhelming effect of expert evidence of this nature, especially where the evidence to the contrary was sparse or non-existent, the calculations would likely become the sole determining factor used by the Administrator. Because of the unfair prejudicial effect that the consideration of such evidence would have, no use could be made of it for the purposes of disqualification. Accordingly, the motion for approval of the Traceback procedure in its present form should be denied.

Cases referred to

Ace Holdings Corp. v. Montreal Catholic School Board (1971), [1972] S.C.R. 268, 23 D.L.R. (3d) 498; Eli Lilly and Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1, 227 N.R. 201, 80 C.P.R. (3d) 321, 152 F.T.R. 160n; Hamilton v. Firby, [1976] O.J. No. 217 (Div. Ct.); Lawson v. Laferriere, [1991] 1 S.C.R. 541, 78 D.L.R. (4th) 609, 123 N.R. 325, 6 C.C.L.T. (2d) 119, 38 Q.A.C. 161; R. v. D. (D.), 2000 SCC 43

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 23, 25, 26

Authorities referred to

Ontario, Report of the Attorney General's Committee on Class Action Reform (February 1990), p. 53

MOTION for directions in proceedings under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

Harvey Strosberg, Q.C., Heather Rumble Peterson, Bonnie Tough, Pierre R. Lavigne, J.J. Camp, Q.C. (by written submission), Carolyn Horkins and John Callaghan.

WINKLER J.:

Nature of the Motions

[1] These motions are brought by the Class Action Counsel in the Transfused Action (Parsons v. The Canadian Red Cross Society) pursuant to s. 10.01 of the January, 1, 1986 - July 1, 1990 Hepatitis C Settlement Agreement. Through the operation of that provision, in conjunction with the powers granted to the court under ss. 25 and 26 of the Class Proceedings Act, 1992, S.O. 1992, c. 6, the court has an ongoing supervisory function in these class proceedings. The motions are for: (a) directions concerning the definition of Blood in the Transfused HCV Plan; and (b) approval of a revised Traceback Protocol for the determination of eligibility of claimants to compensation under the Settlement Agreement.

[2] Oral or written submissions on these motions were made by all members of the Joint Committee appointed to oversee the administration of the settlement, including those members of the Committee appointed by the courts in Quebec and British

Columbia. Oral and written submissions were also made by the Fund Counsel appointed by this court in the Transfused Action and the Hemophiliac Action (Kreppner v. The Canadian Red Cross Society).

Background

[3] These class proceedings were initiated as a result of the contamination of the Canadian blood supply with the Hepatitis C virus. The classes were confined to those persons infected between January 1, 1986 and July 1, 1990 based on the plaintiffs' theory of liability. The Transfused and Hemophiliac Actions were settled as against the federal, provincial and territorial governments in 1999. Similar proceedings in Quebec and British Columbia were settled, as against the same defendants, concurrently with the Ontario actions, resulting in a single Pan-Canadian Settlement Agreement which received approval from the courts overseeing the class actions in all three provinces (the "Courts").

[4] The Settlement Agreement, and the Transfused and Hemophiliac HCV Plans incorporated by reference therein, provide a mechanism for class members to make claims for compensation for their injuries. Generally, the Administrator appointed by order of the Courts is charged with the responsibility for determining eligibility according to the criteria which are set out in the Plans. Should a claim be rejected by the Administrator, the Agreement provides for an appeal process that may be utilized by the claimant. However, as claims are now being received and processed by the Administrator, it has become apparent that some of these claims raise issues of eligibility that are not readily determinable by the Administrator under the provisions of the Settlement Agreement or the Plans. These motions have been brought by the Class Action Counsel in the Transfused Action in order to provide directions to the Administrator and to avoid unnecessary burdens to claimants.

(a) Definition of "blood" in the transfused HCV plan

[5] The ostensible issue on this motion is whether those

persons infected with HCV in the class period as a result of a transfusion with a blood product known as "cryoprecipitate" are eligible for compensation under the Settlement Agreement.

[6] In order to put this issue in context, it is necessary to set out, in part, the eligibility criteria and related definitions for compensation under the Transfused HCV Plan. Article 4.01 of the Plan states that "Each Approved HCV Infected Person will be paid . . . compensation for damages." This compensation is to be paid from the fund established in accordance with the terms of the Settlement Agreement (the "Settlement Fund"). In Article 1.01, an "HCV Infected Person" is defined, in part, as a "Primarily Infected Person", who, in turn, is defined, in part, as meaning "a person who received a Blood transfusion in Canada during the Class Period . . .".

[7] Blood is also a defined term in Article 1.01 of the Plan:

> "Blood" means whole blood and the following blood products: packed red cells, platelets, plasma (fresh frozen and banked) and white blood cells. Blood does not include Albumin 5%, Albumin 25%, Factor VIII, Porcine Factor VIII, Factor IX, Factor VII, Cytomegalovirus Immune Globulin. Hepatitis B Immune Globulin, Rh Immune Globulin, Varicella Zoster Immune Globulin, Immune Serum Globulin, (FEIBA) FEVIII Inhibitor Bypassing Activity, Autoplex (Activate Prothrombin Complex) Tetanus Immune Globulin, Intravenous Immune Globulin (IVIG) and Antithrombin III (ATIII).

[8] It is apparent, in this context, that the real issue to be determined on this motion is whether cryoprecipitate is included in the definition of Blood for the purposes of the Transfused HCV Plan.

[9] The submissions of all counsel can be distilled into two discrete, contrary positions:

(a) cryoprecipitate-infected claimants are eligible for compensation because cryoprecipitate is a plasma product and hence captured under the definition of blood; or

(b) cryoprecipitate was specifically excluded from the definition of Blood, is not captured by the definition of plasma and therefore claimants infected by cryoprecipitate transfusions are not eligible for compensation.

[10] In my view, and in consideration of the affidavit evidence filed on the motion, the former is the correct interpretation of the Transfused HCV Plan. Cryoprecipitate is properly included in the definition of plasma and, hence, in the definition of Blood. Accordingly, claimants infected within the class period by a transfusion of cryoprecipitate are eligible to be considered for compensation in accordance with the provisions of the Settlement Agreement and the Transfused HCV Plan.

[11] The position in favour of exclusion was supported by three main arguments. First, it was submitted that the inclusion of cryoprecipitate in the definition of Blood in the Hemophiliac HCV Plan and the absence of a specific reference to it in the definition of Blood in the Transfused HCV Plan should be treated as evidence of an intention to specifically exclude cryoprecipitate from the Transfused HCV Plan. Second, it was argued that there are countless numbers of blood products, including cryoprecipitate, which are derived from plasma, but which cannot be properly defined as plasma. Third, it was submitted that an interpretation that included cryoprecipitate in the definition of Blood in the Transfused HCV Plan would put the sufficiency of the Settlement Fund in question.

[12] The latter submission raises an issue that, in my view, should be addressed in priority in these reasons, not so much because it is contradicted by the evidence, but because it is erroneous in principle. The sufficiency of the Settlement Fund to provide the compensation as set out in the Settlement Agreement and the Plans was addressed by this court, and the courts in Quebec and British Columbia, in approving the settlement. The Settlement Fund was found to be sufficient by the Courts to provide the stated benefits to legitimate claimants. Accordingly, a consideration of Settlement Fund sufficiency does not, and cannot, inform any part of the

decision on either of these motions. The issues raised on these motions go to entitlement. Either a claimant is eligible for compensation or he or she is not. Every legitimate claimant is entitled to receive the compensation as provided through the settlement. There is no evidence to suggest that the Settlement Fund is insufficient. However, even if the expert evidence proffered to the Courts on the settlement approval motions was in error as to the sufficiency of the Settlement Fund, denying compensation to legitimate claimants would serve to compound the error, rather than correct it. It would clearly be unacceptable to adopt such an approach.

[13] Moreover, in this case, the submission that permitting cryoprecipitate claims under the Transfused HCV Plan will threaten the sufficiency of the Settlement Fund is also contrary to the evidence. Sharon Matthews, one of the class counsel group in the British Columbia class action for transfused victims, filed an affidavit on this motion. In para. 4 of her affidavit, she deposes that the original calculations of class size made by Dr. Robert Remis included data relating to transfusions of cryoprecipitate. The calculations of class size by Dr. Remis were used by the actuaries as a benchmark check in providing a report on the sufficiency of the Fund to the Courts on the settlement approval motions. It is apparent therefore that, even if it were a proper consideration, the sufficiency of the Settlement Fund is not a concern because cryoprecipitate-based claims have already been included in the calculations relating to class size.

[14] Similarly, I cannot accept the submission that the express inclusion of cryoprecipitate in the definition of Blood in the Hemophiliac HCV Plan and the absence of express reference to it in the definition in the Transfused HCV Plan should be construed as evidence of an intention to exclude cryoprecipitate from the Transfused HCV Plan. This submission relies heavily on the doctrine inclusio unius est exclusio alterius, or "implicit exclusion". This doctrine is generally used in statutory interpretation where there are specific and general provisions relating to a particular matter. Where a term, or definition, is specifically included in one provision, it is deemed to be implicitly excluded from a general provision

relating to the same matter. (See Ace Holdings Corp. v. Montreal Catholic School Board (1971), [1972] S.C.R. 268, 23 D.L.R. (3d) 498; Hamilton v. Firby, [1976] O.J. No. 217 (Div. Ct.).)

[15] The doctrine is sometimes applied to contractual interpretation. However, in order to apply the doctrine, it would seem that a predicate requirement is that the provisions must be found in the same agreement. Clearly, that is not the case here. There were two class actions, relating to transfused and hemophiliac victims respectively, in each of the three provinces. In each province, the transfused class and the hemophiliac class were represented by different counsel. In fact, affidavit evidence filed on earlier motions in these proceedings indicated that there was a strongly held belief among some counsel that the transfused classes and the hemophiliac classes had conflicting interests. Accordingly, separate compensation plans were negotiated for the transfused and hemophiliac victims. Furthermore, not only were there separate plans, but the plans were, as stated, negotiated by different counsel. Although each plan was incorporated by reference into one Settlement Agreement, this provides no basis to a pply the "implicit exclusion" doctrine to two separate and distinct documents. In circumstances where an interpretation is required of one of two documents that have identifiably different authors, with identifiably different concerns and constituencies to protect, the "implicit exclusion" doctrine is of no assistance where the proposed application requires the court to use one document to interpret the other.

[16] Counsel also submitted evidence relating the intention of those drafting the Transfused HCV Plan. In para. 2 of her affidavit, Ms. Matthews deposed as to the probable reasons for the absence of any specific reference to cryoprecipitate. In my view, however, this constitutes direct evidence of subjective intent and in these circumstances is inadmissible. (See Eli Lilly and Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1.)

[17] In respect of the issue as to whether or not cryoprecipitate is "plasma", I accept the evidence of Dr.

Gershon Growe, the Medical Director of the Blood Bank at Vancouver General Hospital. Dr. Growe is an expert in this area, with 30 years' experience in the position of Director [and] substantial clinical experience, and is the author or co-author of numerous publications in the field of blood studies. In para. 2 of his affidavit, Dr. Growe deposed that:

> 2. Cryoprecipitate ("cryo") is a derivative of plasma which in turn comes from whole blood donations. After whole blood is collected from a donor, it is immediately broken down or "fractionated" into its components which include packed red cells, platelets, white cells and plasma. Cryo is a derivative of plasma and is made by freezing and subsequently thawing and re freezing a small portion of the original plasma donation.

(Emphasis added)

Dr. Growe's evidence was neither challenged nor contradicted by any other evidence on this motion.

[18] I find that cryoprecipitate is properly included in the definition of Blood in the Transfused HCV Plan. Accordingly, any person who is or was infected with HCV as a result of a transfusion with cryoprecipitate within the class period, and [is] not ineligible for any other reason under the terms of the Settlement Agreement or the Transfused HCV Plan, is a proper claimant and eligible to be considered for compensation. I note as well that there were some submissions to the effect that permitting cryoprecipitate-based claims would be effectively amending the Settlement Agreement contrary to the restriction on such amendments set out in s. 12.02. I disagree. This motion calls for an interpretation rather than an amendment. The motion is granted.

(b) The revised Traceback Protocol

[19] This is a motion for final approval of a "Traceback Protocol" to be used by the Administrator to assist in determining the eligibility of claimants under the Transfused HCV Plan. "Traceback" refers to an investigative procedure

conducted under the direction of the Administrator. A claimant's eligibility for compensation is dependent on the proof of an infection with HCV through receipt of blood or a blood product (collectively "Blood") by transfusion within the class period. The Traceback procedure is intended to provide the Administrator with information to determine whether the Blood received by the claimant in the class period was contaminated by HCV. Alternatively, under the terms of the Plan, if a claimant received contaminated Blood outside of the class period, he or she may be ineligible for compensation. Therefore, the Administrator attempts, through investigation, to trace each claimant's Blood transfusion history.

[20] The Traceback procedure for claimants with claims based on one-time incidents of Blood transfusion is straightforward. The Administrator is confronted with a far more difficult problem when a claimant has had multiple transfusions of Blood over an extended period. In an attempt to alleviate this problem, the Joint Committee obtained an expert report from Dr. Remis relating to the statistical probability of infection during the class period.

[21] The issue on this motion for directions is whether the statistical probability calculations provided by Dr. Remis can be used as a tool by the Administrator to exclude potential claimants. The issue arises because there are a significant number of claimants who have received Blood within the class period, but who also have multiple incidents of Blood receipt outside of the class period. This is significant because a claimant infected for the first time prior to the class period is ineligible for compensation under the Plan.

[22] Counsel put three differing positions to the court with respect to the use that could or should be made of the statistical calculations prepared by Dr. Remis as a basis for the rejection of a claim for compensation. These may be summarized as follows:

(a) claims should be rejected where the claimant has had a sufficient number of transfusions outside of the class period so that there is a 60 per cent probability of

infection according to the Remis calculations; or

(b) claims should be rejected in any situation where the number of transfusions outside the class period results in a greater probability of infection outside the class period rather than within the class period according to the Remis calculations (in other words (a) absent the 60 per cent threshold for use); or

(c) in the absence of other evidence, the Remis calculations should not be used as the sole criterion by which eligibility is determined.

[23] The need for directions on the appropriate use to be made of the Remis calculations arises because of two factors. The first is the definition of "Primarily-Infected Person" in Article 1.01:

"Primarily-Infected Person" means a person who received a Blood transfusion in Canada during the Class Period and who is or was infected with HCV unless:

(a) it is established on the balance of probabilities by the Administrator that such person was not infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period;

This definition is used in the provisions of the Transfused HCV Plan dealing with the nature of the evidence required to establish that a claimant meets the conditions for entitlement. The claimant must meet an evidentiary burden to establish that both of the conditions for entitlement, i.e. receipt of blood or blood products within the class period and infection or past infection with HCV, are met. The evidentiary burden on the claimant is not onerous and for the most part may be satisfied by the proffering of blood transfusion records and test results showing the presence of HCV or its antibodies in the claimant's blood. However, once the claimant has provided this evidence to the Administrator, the claim can only be denied if the Administrator can establish, on a balance of probabilities,

that the claimant was not infected with HCV for the first time within the class period. The effect of the definition of "Primarily Infected Person", therefore, is to create an onus on the Administrator in re spect of the denial of claims from those claimants who meet the two conditions.

[24] The second factor is that it has proved impossible to trace all blood donations made prior to and in the class period. According to data tabulated from the experience of Canadian Blood Services, it is more probable than not that where a claimant has had more than a minimal number of transfusions, a Traceback procedure will result in an incomplete history for the claimant. This occurs for a variety of reasons including incomplete or erroneous records, missing or dead donors or the outright refusal of identified past donors to provide an additional blood sample for testing.

[25] Where the Traceback investigation can only be partially completed, there are situations where there are negative results for both the pre-class and the class period. Conversely, there are also situations where the Traceback investigation produces a positive result, that is, a record of a Blood receipt from an HCV-infected unit of Blood within the class period, but there are also a number of transfusions prior to the class period that cannot be traced. Both situations require the Administrator to make a decision as to the claimant's eligibility for compensation under the Plan.

[26] Certain counsel contended that the Remis calculations could be used in both of the above situations to assist the Administrator in making the necessary decision.

[27] This submission relies heavily on the "probability of infection" aspect of the Remis calculations. The starting point for these calculations is the assumption that, in a given period of time, the Canadian blood supply had a calculable number of units of infected Blood. For the purposes of a statistical analysis, the number of units of infected Blood was divided by the total number of units of Blood to derive an infection factor per unit of Blood generally. The first use made of this information was to assist in the calculation of

the class size. The collateral use propounded on this motion is that the per-unit probability of infection ought to be applied to individual cases where a Traceback investigation cannot be completed. Thus, it was submitted, where the probability of infection from the number of units of Blood that a claimant received in the pre-class period exceeds 60 per cent, the Administrator should have regard to the calculations and determine that the claimant should be denied compensation under the Plan because the Administrator has "established on a balance of probabilities" that the claimant was not infected for the first time within the class period. Further, it was submitted that even where there was a positive Traceback result within the class period, the Administrator should reject the claim if the number of transfusions prior to the class period indicated a 60 per cent or greater probability of infection. I cannot accede to either of these submissions. My reasons follow.

[28] The purpose of the Plan is to compensate class members. A claimant has established a prima facie case to entitlement to compensation where two criteria are satisfied: (a) the claimant has or had an HCV infection; and (b) the claimant received Blood by transfusion within the class period. Where the claimant establishes a prima facie case for entitlement, his or her claim can only be denied where the Administrator has evidence which establishes, on a balance of probabilities, that the HCV infection did not occur for the first time within the class period. Counsel advocating the use of statistical evidence to decide this point submitted that, in cases where the claimant has had multiple transfusions, the Administrator can meet this onus simply by recourse to the probability calculations in the absence of any other evidence. I disagree.

[29] I have no difficulty in rejecting this proposition given the evidence of Dr. Remis. He states in his report dated June 30, 2000 that:

> The results of the present analyses must be interpreted in the context in which they were carried out. Many of the questions addressed in this and the May 2000 analysis were analyzed in relative isolation from each other. Actual cases

> may occasionally have features which include several challenging issues simultaneously. It is difficult to develop a pre-established algorithm that can resolve these issues in all such cases. The decision about whether to compensate an applicant under the Class Action Settlement may be complex and, at times, will require consideration of issues beyond the simple application of the results of any single one of these analyses.

(Emphasis added)

Dr. Remis' caveat is compelling. He states clearly that his probability calculations cannot be used in isolation to establish that a claim should be rejected. This is dispositive of the contention that, in cases where the claimant has had multiple transfusions, probability calculations alone may be sufficient, in a legal sense, to establish on a balance of probabilities that the claimant became infected for the first time prior to the class period.

[30] A more difficult question is whether the probability calculations have any evidentiary value in an entitlement determination. The court has accepted the use of a probability analysis created by Dr. Remis as an administrative tool in the implementation of this settlement. However, that probability analysis, known as the Remis "Yes/No Tables", is restricted in its application. The calculations are not used to reject any claimant. Rather, they are used for the sole purpose of determining whether the Administrator may dispense with the requirement of a complete transfusion history in situations where the claimant only received Blood within the class period. According to the studies and calculations made by Dr. Remis, in some of these cases, there is a virtual certainty that the claimant was infected with HCV from the Blood and not from other causes. The use of the probability calculations in those cases serves to lower the administrative costs by relieving the Administrator of the financial burden of conducting tracebacks. In those situations, the use of the probability calculations also serves to accommodate the claimants by reducing waiting periods for processing claims through eliminating the delay that a traceback entails.

[31] However, there is a fundamental difference in using a probability analysis as an aid to facilitate the expeditious determination of entitlement, as opposed to using the analysis for purposes of disqualification. The distinction was recognized by the Supreme Court of Canada in Lawson v. Laferriere, [1991] 1 S.C.R. 541, 78 D.L.R. (4th) 609. Gonthier J., writing for the court in respect of the use of probability calculations as part of a causation analysis, stated [at p. 606 S.C.R.]:

> As far as possible, the court must consider the question or responsibility with the particular facts of the case in mind, as they relate concretely to the fault, causation and actual damage alleged in the case. While probabilities are unquestionably a part of the assessment of these elements in the finding of responsibility, I am very reluctant to remove the analysis from the concrete to the probabilistic plane.

(Emphasis added)

[32] Certain counsel contend that the Administrator should be permitted to consider the probability calculations in the context of other evidence when determining a claim. They state that a prohibition on the use of the probability calculations would unduly fetter the Administrator in the performance of its duties. On closer analysis, this submission cannot prevail. In my view, to paraphrase the words of Gonthier J. in Lawson, while probabilities may be part of a determination of causation, the determination of entitlement should not be moved from the concrete to the probabilistic plane. In these circumstances, given the overwhelming effect of expert evidence of this nature, especially where the evidence to the contrary is sparse or non-existent, the use of the probability calculations will likely become the sole determining factor used by the Administrator. Moreover, this inherent danger in the use of expert evidence has been recognized by the Supreme Court of Canada in R. v. D.(D.), 2000 SCC 43. There, Major J., writing for the majority, expressed a concern that the use of expert evidence often leads to the decision-maker simply "attorning" to the expert's opinion. In this case, the danger of the misuse of

the probability calculations is manifest.

[33] I note also that the use of statistical evidence in class proceedings is addressed specifically in s. 23 of the Class Proceedings Act, 1992. It provides, in part, that:

> 23(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

[34] However, there are conditions that must be met by the party seeking to make use of the evidence. One such condition is set out in s-s. 23(6), which provides:

> 23(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

[35] In the present circumstances, it would be impossible for the Administrator to comply with this requirement in exercising its administrative functions in processing a claim. Admittedly, the provisions in [the] Act are stated to apply to "parties" and there is an arguable distinction between class members and parties. Nonetheless, the underlying purpose of the CPA is to facilitate the litigation of meritorious claims, and consequent recovery, by individuals through a single proceeding. It would be contrary to that purpose, and inherently counterintuitive, to apply less stringent conditions for the use of statistical evidence to the administration of claims, where that use will affect the entitlement of individual class members, than would be applied where the evidence was sought to be used to the benefit of, or against, the class as a whole or the defendants in the action.

[36] As stated above, the use of the probability calculations would in many cases be ultimately determinative of the claim.

The Report of the Attorney General's Committee on Class Action Reform (February 1990) adverted to this potential problem at p. 53:

> The Committee notes that [section 23] should not be interpreted as requiring the court to consider such evidence or as making such evidence determinative of the issues. This provision is designed to facilitate evidence gathering among a potentially huge class of individuals. The court would continue to be in the position of attaching whatever weight it felt appropriate to the evidence tendered.

(Emphasis added)

[37] The probability calculations were arrived at through the use and analysis of group data. In my view, it is fundamentally unfair to exclude an individual on the basis of a group statistic without regard to the individual's attributes or circumstances. It was suggested that the use of statistical evidence in these circumstances would always be in conjunction with other evidence personal to the individual, in that the calculations would only be used where there was evidence of one or more transfusions prior to the class period. While attractive in the abstract, this argument ignores the weight that may in fact be given to the probability calculation in the application to each particular case.

[38] It is one thing to state that the Administrator should consider the number of prior incidents of Blood receipt as a factor when determining entitlement. However, it becomes quite a different consideration if a numerical value is assigned to each incident and a cumulative threshold of rejection is conclusively established. First, it could be characterized as having the effect of amending the Agreement. Currently, there is a presumption in favour of entitlement where an HCV-infected claimant has had a transfusion within the class period, regardless of whether or not transfusions occurred prior. However, by permitting the Administrator to make use of probability calculations as an exclusionary tool, the effect would be to deny the benefit of the presumption to those individuals who have had a certain number of pre-class period

transfusions. In practical terms, this would represent an amendment to the Agreement. Second, it is difficult to conceive, once a threshold figure is established for rejection, how a claimant could rebut the probability calculation in his or her specific case. Claimants will have to attempt to make their cases without ready access to essential records, testing results or comparable expert evidence.

[39] Nor am I persuaded, as alternatively submitted, that the insertion of an arbitrary threshold of 60 per cent probability for the use of this evidence cures the inherent defects in using the probability calculations. In my opinion it does not. Similarly, raising the threshold to another arbitrary percentage would merely diminish the deficiency rather than correct it. I note as well that this aspect was not part of the expert's formula. It originates with counsel without any support forthcoming from the expert and there is no evidentiary basis to support the mathematical validity of such an arbitrary adjustment.

[40] In summary, there is a presumption in favour of entitlement enshrined in the Plan. Pure statistical evidence, in the form of a probability of infection analysis, is insufficient to overcome this presumption. Further, because of the unfair prejudicial effect that the consideration of such evidence would have, no use can be made of it for the purpose of disqualification. The motion for the approval of the Traceback procedure in its present form is denied.

Order accordingly.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Richard v. British Columbia,* 2015 BCSC 265

Date: 20150223
Docket: S024338
Registry: Vancouver

Between:

William Joseph Richard and W.H.M.

Plaintiffs

And

Her Majesty the Queen in the Right of the Province of British Columbia

Defendant

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

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiffs:	D.A. Klein C. Lloyd
Counsel for the Defendant:	W.K. Branch D.C. Prowse, Q.C. D. Baumgard
Counsel for the Public Guardian and Trustee:	A.L. Murray, Q.C.
Place and Date of Hearing:	Vancouver, B.C. November 28, 2014
Place and Date of Judgment:	Vancouver, B.C. February 23, 2015

INTRODUCTION

[1] This application raises the issue of whether the Court should extend the claims deadline in a settled class action.

BACKGROUND

[2] The class action concerns allegations of abuse and neglect at the Woodlands School in New Westminster, BC ("Woodlands"). Woodlands was a residential institution run by the Province for children and adults with mental and physical disabilities. The school closed in 1996. The Ministry of Children and Family Development subsequently commissioned a report to investigate residents' allegations of physical, sexual and psychological abuse. That report, entitled "The Need to Know: Administrative Review of Woodlands School", was authored by Dulcie McCallum and released in August 2001. The report concluded that abuse had occurred at Woodlands and that the abuse was systemic in nature, including (at page 18):

> … hitting, kicking, smacking, slapping, striking, restraining, isolating, grabbing by the hair or limbs, dragging, pushing onto table, kicking and shoving, very cold showers and very hot baths resulting in burns to the skin, verbal abuse including swearing, bullying and belittling, inappropriate conduct such as extended isolation, wearing shackles and a belt-leash with documented evidence of the injuries including bruising, scratches, broken limbs, black eyes, and swollen face.

[3] A subsequent report released by the Public Guardian and Trustee, entitled "The Woodlands Project, July 2002 – June 2004: A Report of the Public Guardian and Trustee of British Columbia, August 2004" (the "PGT Report"), also found abuse had occurred at Woodlands (at pages 18-21).

[4] This class action was commenced in August 2002. In the spring of 2009, mediation proceedings began and led to a settlement agreement in October 2009 (the "Settlement Agreement"), which was approved by the Court in 2010: *Richard v. British Columbia*, 2010 BCSC 773. The Settlement Agreement creates a process for individual class members to prove entitlement to settlement funds. That process largely consists of written submissions to adjudicators. The Settlement Agreement

defines the criteria for eligibility for compensation and defines the range of awards that can be made within each compensation category. The possible awards range from $3,000 to $150,000. There is no ceiling on the total compensation to be paid by the government to members of the class.

[5] The Settlement Agreement provides that class members have 12 months from publication of court approval of the settlement to submit a written claim for compensation. The original claims deadline was September 19, 2011 (the "First Claims Deadline").

[6] The claims process proved to be much more complicated and time consuming than any of the parties expected. By the First Claims Deadline only ten claims had been filed. That was due in part to the vulnerability of many of the class members. The PGT Report referred to 127 interviews conducted with former residents and noted that many of the individuals interviewed could not read or write and many were non-verbal: *Richard v. British Columbia,* 2011 BCSC 1490 at para. 13 [*Richard 2011*]. In addition, close to half of the claimants do not have family members to assist them in the claims process; the Public Guardian and Trustee acts as litigation guardian for 366 class members.

[7] Prior to the expiry of the First Claims Deadline, class counsel, Klein Lyons, representing about 800 class members of the potential class of 1,168, applied for an extension of the claims deadline. Chief Justice Bauman granted a one-year extension of the claims deadline to September 19, 2012 (the "Second Claims Deadline"): *Richard 2011* at para. 18.

[8] As the Second Claims Deadline approached only a handful of additional claims had been submitted. A number of precedent cases had been concluded however, and the parties had worked out a simplified process for filing claims. There was some reason for optimism that the rate of filing of claims would increase in future. Bauman C.J. granted a further one-year extension to September 19, 2013, but asked class counsel to consider involving other firms in the process: *Richard v. British Columbia*, 2012 BCSC 1464 at paras. 20, 23 [*Richard 2012*]. Bauman C.J.

observed that the current rate of filing in 2012 of four to five claims per month "puts the viability of the Settlement Agreement at risk": *Richard 2012* at para. 23.

[9] The present application first came before me in December 2013. At that point class members had recovered a total of $2.3 million through contested adjudications and individually negotiated settlements under the simplified process. Individual awards ranged from a high of $132,000 to a low of $7,500. Class counsel sought a further two-year extension of the claims deadline to September 18, 2015. However, it was apparent that at the established rate of processing claims it would be impossible for Klein Lyons to process the remaining 670 claims within the additional two years sought.

[10] The Province had not strenuously opposed the first two extensions before Bauman C.J., but on this third application the Province took the position that a further two-year extension with no realistic prospect of compliance should not be granted.

[11] Klein Lyons has three full-time lawyers and three full-time paralegals dedicated to reviewing and filing claims for class members. Counsel stated that the firm was not in a position to commit further resources to that task. With the consent of the parties I granted an interim extension to March 28, 2014, to enable the parties to work together to identify other firms that would be willing to represent some of the claimants on either a pro bono or reduced fee basis. Earlier efforts to find additional counsel to assist on a contingency fee basis had failed because the awards were relatively low. Class counsel advises that, given the amount of time required to assess whether a class member has a claim, and then to prepare the case, the 15% contingency fee generally results in counsel being significantly undercompensated compared to an hourly rate.

[12] When the hearing before me resumed in March 2014, some progress had been made. A few firms had agreed to help potential claimants without charge, and eight law student volunteers had committed four hours a week to help review files and move the claims along. In addition, three of the 11 outstanding formal claims

had been taken on by other firms. However, the parties were not at that point able to assess the impact of this additional assistance on the rate of claims filing. I therefore granted a further interim extension of the claims deadline to November 28, 2014, to enable counsel to assess whether the rate of filing would significantly increase.

[13] By November 28, 2014, there was a slight increase in the number of claims filed each month but the numbers were not encouraging. Five years after the settlement was reached, class counsel had dealt with 269 of the 802 class members who wished to be considered for the filing of a claim, leaving 533 claims to be assessed and either submitted or closed.

[14] Class counsel states that the more difficult, highly disputed claims remain to be processed. Furthermore, it appears that the claims with the greatest potential have been advanced first: in 2013 the average amount paid per settlement was $22,585. In 2014 the average amount had fallen to $6,550 per claim. This suggests that a higher percentage of remaining claims will not be resolved through the informal settlement process and will instead have to go to formal hearings. Class counsel estimates that even with the additional resources it will take another six to ten years to process the remaining claims. It now seeks a ten-year extension of the claims deadline to November 2024. The Public Guardian and Trustee supports the extension of the claims deadline.

[15] The Province takes the position that at most a further six months should be granted given that the class members have already had an interim one-year extension through the adjournments of this hearing.

ISSUE

[16] The question before me is whether the Court should exercise its discretion to grant a further ten-year extension of the claims deadline, effectively extending the original 12-month deadline by 13 years.

ANALYSIS

[17] It is common ground that an extension of this magnitude is unprecedented. Counsel were not aware of any case in which an extension exceeding two years has been granted.

[18] The Province acknowledges that the Settlement Agreement gives the Court the discretion to extend the claims deadline. Paragraph 16 of the July 7, 2010, order of Bauman C.J. approving the Settlement Agreement provides:

> The Public Guardian and Trustee or any Class Member will be at liberty to apply to the Court to extend the claims deadline for any particular Class Member, so long as such application is made within six months following the end of the claims period under the Settlement Agreement.

[19] I note that paragraph 16 could be read narrowly to apply to individual class members, rather than the class as a whole, but the Province has not taken that position. The Province acknowledges that paragraph 16 provides authority for broad extensions. It submits, however, that the authority to extend the claims deadline must be exercised cautiously and in a manner that respects the original bargain struck by the parties.

[20] The Province argues that the process could be expedited if claimants submitted a summary claim, but I accept that a summary claim form is not realistic and would do little to expedite claims processing. Because class members cannot relate the facts upon which a claim could be based, potential claims can only be identified by reviewing former residents' files. A typical file ranges from 300 to 2,000 pages and is not in chronological order. In addition, counsel must review Woodlands' internal administrative records which consist of 85,000 pages. In short, it is the review that is the primary reason for the bottleneck in processing claims, not the form itself. In addition, the object of the filing of a claim is to obtain compensation for the former resident. There is no prospect of achieving that goal without adequate preparation of the claim. A claim form package typically consists of 300 to 2,500 pages.

[21] In deciding whether to grant the extension sought by class counsel I must balance the interests of both sides while being mindful of the agreement struck by the parties. As Bauman C.J. stated in *Richard 2011* at para. 17:

> [T]he application requires the Court to strike a balance between the parties which recognizes that in the give and take in the settlement negotiation process, each side made compromises to achieve their respective goals. It would be unfair, after the fact, to effectively take from one party a critical part of what it gained in the process through negotiation and compromise.

[22] The claimants argue that the Settlement Agreement is working to resolve claims but is just taking longer than anyone anticipated. They submit that the purpose of the agreement is to fairly compensate class members with meritorious claims. The claimants submit that an extension is fair and necessary because without it class members who have been "waiting at the gate" but unable to submit a claim will be denied the benefit of the settlement they concluded with the Province. The claimants argue that there is no real prejudice to the Province because many of the claims would not otherwise be subject to limitation periods.

[23] From the Province's perspective, one of the key benefits achieved in the settlement was closure – all claims were to be brought within a fixed period of time. Unlike many settlements, there is no cap on the amount payable under the Settlement Agreement. While there were other benefits to the Province such as privacy for the employees accused of wrongdoing, avoidance of a six-month common issues trial, general savings in trial costs, and avoidance of special and punitive damages, some of those benefits also accrued to the claimants. Under the adjudication process set up through the Settlement Agreement, claimants cannot be compelled to testify or subjected to cross-examination and can avoid the trial process entirely. They have the right to speak if they wish to, but are not required to do so. Further, the range of recovery for injuries of the kind suffered by the claimants is equivalent to recovery for comparable tort claims following trial.

[24] The claimants' proposal for a further six to ten-year extension on top of the three-year extension already granted, with the right to apply for further extensions on

a case by case basis thereafter, would substantially deprive the Province of one of the primary benefits of the agreement: the certainty of an end to the claims process and the Province's potential liability.

[25] We are now 12 years from the commencement of these proceedings and five years post-settlement. The extension sought by class counsel is based on their submission that they should be able to continue to process claims at a comfortable rate for their firm using resources the firm is willing to dedicate to its more than 800 clients who are class members. I recognize that Klein Lyons accepted this number of class members as clients in part because other firms were not interested in taking on this work, and that class counsel did so with the support of the Public Guardian and Trustee. Nonetheless, Klein Lyons bears some responsibility for agreeing to act for more claimants than the firm can properly serve.

[26] The Court's discretion in this case involves a balancing of the interests of both parties. The prejudice to each side of an extension granted or denied must be taken into account.

[27] The prejudice to the Province in this case is the loss of the certainty of an end to the process and the Province's potential liability for claims. The loss of that certainty is of particular significance when a settlement is not capped. What was to be a one-year deadline has already become effectively a four-year claims cut-off. To grant the claimants the ten-year extension they now seek would be to rewrite the bargain between the parties in a manner that accommodates and considers only one side of the equation. Effectively the claimants are asking the Court to permit class counsel to proceed at a comfortable pace, by extending the claims deadline to the point at which all claims can be processed at the current rate.

[28] By definition, a claims deadline means that some class members may fall on the exclusionary side of the line. The claimants in this case are extremely vulnerable; those who have suffered a wrong are most deserving of recompense. But that is generally so in a class action involving personal injury. Those infected with Hepatitis or HIV through blood transfusions, or those whose health has been

significantly compromised by defective devices are also worthy of recompense. Yet in those cases, as here, all class members are bound by the claims deadline agreed to in a settlement of their class action and some are thereby excluded.

[29] I also note that while these are vulnerable claimants, each is represented by a litigation guardian with the capacity to assess and consent to the terms of the Settlement Agreement. That agreement was concluded after extensive negotiation by experienced counsel and ultimately was approved by the Court.

[30] Of particular significance on this balancing of interests is the age of the class members. The claims arise out of events that occurred between 1974 and 1996. Many of the class members are in their 60s and beyond. I have already ruled on an earlier application that the estates of three deceased class members are not eligible to pursue compensation under the Settlement Agreement. The passage of another six to ten years will inevitably bring with it the passing of more of the claimants. Even for those whose claims are processed, the potential for the claimants to enjoy the benefits and comforts which would flow from an award diminishes with each passing year.

[31] The cases relied on by the claimants do not support their submission that an extension of six to ten years is appropriate in this case. In *Harrington v. Dow Corning Corp.*, 2001 BCSC 221, the deadline for class members to register for a settlement was 60 days after settlement approval, which made the deadline April 12, 1999. Fifteen class members who wished to file late registrations applied for an extension. Edwards J. extended the deadline for all class members by close to two years to March 31, 2001, on the basis that denying the application was "too great a potential hardship for persons who may have a valid claim": *Harrington* at paras. 24, 27.

[32] In *Harrington v. Dow Corning Corporation,* 2007 BCSC 244, Edwards J. extended the opt-in deadline for two class members in a subsequent settlement by other defendants. Both class members sought less than two-month extensions.

[33] In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839, Brown J. was called upon to review the conduct of an Alberta law firm representing several thousand claimants in the Indian Residential Schools class action settlement. More than a thousand of the claims being dealt with by that law firm had not been filed. Brown J. directed an orderly transfer of the files to other qualified law firms and ordered that the unfiled claims be accepted as filed to ensure that the pending deadline would not be missed: at paras. 189-191, 194. That protective order was issued even before the deadline for filing claims had expired and therefore was not technically an extension.

[34] Class counsel also relies on an unreported decision of the United States Court of Appeals for the Third Circuit, *Re Diet Drugs Products Liability Litigation* (23 February 2004), 02-4581. That decision affirmed the district judge's approval of an extension for class members to obtain echocardiograms that were a prerequisite for compensation under the settlement. The settlement administrator was unable to administer all of the echocardiograms prior to the deadline stipulated in the settlement agreement. However, that motion to amend the settlement agreement was brought jointly with the defendants.

[35] In none of the cases relied on by the claimants has a court extended a claims deadline by even the three years already granted in the present case. However, that is not conclusive of the issue before me. The discretion to extend the claims deadline is expressly provided for in the Settlement Agreement and must be exercised based on the circumstances of this case.

[36] The Woodlands class action is unique because of the extreme vulnerability of the claimants. This case is also unique because of the difficulty in identifying claimants without the usual benefit of a class member being able to self-identify as having been wronged. Instead, all former residents' files must be painstakingly reviewed to determine whether the individual has a potential claim. Both the Province and class counsel agree that, at the time the Settlement Agreement was entered into, neither anticipated the complexity of advancing these claims. The

Province, to its credit, has not opposed the extensions sought to date, effectively acceding to a four-year claims deadline when it had bargained for a limit of one year. It now takes the position that a line must be drawn and submits that six more months is appropriate.

[37] I agree that the time has come to draw a firm line. Litigation guardians have been lulled into complacency to some extent by the previous deadline extensions and the expectation that Klein Lyons would eventually get to their claims. The drawing of a firm cut-off will force all litigation guardians, including the Public Guardian and Trustee, to more aggressively seek out other counsel or other solutions in the face of the potential loss of a right to pursue a remedy for class members. Leaving claimants waiting for another six to ten years to have their claims addressed is not a viable option. However, the six-month extension proposed by the Province is not adequate. Litigation guardians need a reasonable period of time to find other counsel or other solutions.

[38] I conclude that a further extension of the claims deadline for all class members should be granted to September 19, 2016, five years beyond the original deadline.

The Honourable Madam Justice L.A. Fenlon

COURT FILE NO.:00-CV-192173CP
DATE:20040227

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAIME SMITH, ALANA DALTON, JAMIE MCDONALD and IRENE SALES INC., OPERATING AS THE HARTLEY HOUSE Plaintiffs	*F. Paul Morrison*, *Darryl Ferguson* and *Caroline Zayid* for Her Majesty the Queen in Right of Ontario
-AND-	*Heather Rumble Peterson*, Class Counsel Representative
THE CORPORATION OF THE MUNICIPALITY OF BROCKTON, THE BRUCE-GREY-OWEN SOUND HEALTH UNIT, STAN KOEBEL, THE WALKERTON PUBLIC UTILITIES COMMISSION and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendants	*Bruce Lee*, Plan Counsel *William Dermody*, Independent Advice Counsel *Stanley Tick, Q.C.*, *Michael Peerless*, *James Virtue*, *Robert Garcia*, *Dave Williams*, *Michelle Beckow*, Claimants' Counsel
-AND-	
IAN D. WILSON ASSOCIATES LIMITED, DAVIDSON WELL DRILLING LIMITED, EARTH TECH (CANADA) INC., CONESTOGA-ROVERS & ASSOCIATES LIMITED, B.M. ROSS AND ASSOCIATES LIMITED, GAP ENVIROMICROBIAL SERVICES INC., A&L CANADA LABORATORIES EAST, INC., DAVID BIESENTHAL AND CAROLYN BIESENTHAL Third Parties	Case Conference February 18, 2004
Proceeding under the *Class Proceedings Act, 1992*	

REASONS AND DIRECTIONS

WINKLER J.:

[1] The Walkerton Compensation Plan, as the court-approved settlement in this action is known, has now been in operation for almost three years. Since its approval by the court, the Plan has been administered by Crawford Adjusters Canada. The court has a broad supervisory jurisdiction over the Plan but is not involved in its day-to-day operation. The responsibility for claims intake, assessment and the making of compensatory payments rests with Crawford, as Administrator, and Plan counsel.

[2] During the course of the proceedings leading to the settlement, an estimate of the number of anticipated claims was provided to the court by plaintiffs' counsel. Using the Walkerton population as a base, approximately 5,000 people at the material time, it was estimated there would be 7,500 claims, including residents and visitors. As it turns out, the Administrator has received over 10,150 applications. The increased class size has created, understandably, some logistical difficulties for the Administrator in implementing the settlement.

[3] Since the settlement was approved, the court has been issuing orders and directions from time to time and holding periodic case conferences, where necessary, to monitor the operation of the Plan. Throughout, the court has directed that unnecessary delays in providing compensation to eligible claimants must be avoided. In this respect, I note that it has also been the court's experience that certain delays are not attributable to the administrative process but rather relate to delays by claimants in filing claims or responding to offers by the Administrator.

[4] Regardless of the underlying cause, the fact remains that the Plan has been in operation for almost 3 years and there are still some obvious delays in processing claims. In keeping with its supervisory role, the court convened a case conference on February 18, 2004. At the case conference, counsel for the Province of Ontario expressed concerns similar to those of the court and indicated that they had received instructions from the Province to bring a motion for directions to address certain perceived difficulties with the settlement implementation.

[5] In addition to counsel for the Province of Ontario, class counsel, the independent advice counsel appointed by the court, plan counsel, representatives from the Administrator and counsel for individual claimants were also present at the case conference. They were invited to make submissions in response to the court's concern that the delays in claim completion indicated that court intervention by way of formal directions was required. In their various submissions, all participants in the case conference supported such an intervention by the court at this time.

[6] In the past, the court has taken steps on numerous occasions when problems have arisen to correct those problems or to cause procedures to be created to address delay. During the first year of the Plan, a case conference resulted in the implementation of a standardized offer system for injuries lasting less than 30 days and water disruption, the intention of which was to expedite claim resolution by streamlining the process. As matters developed, special mediator/arbitrators were appointed by the court to deal with difficult claims. Independent advice counsel was appointed to assist unrepresented claimants free of charge. As a result of a motion, directions regarding arbitrations for business loss claims were issued.

[7] However, as is always the case, court intervention must first and foremost be based on accurate information. In that regard, an important point of reference is a determination of the exact number of outstanding claims. As stated above, information provided to the court regarding the ongoing administration of the Plan indicates that, since its inception, there have been over 10,150 applications. Of those 9,156 were accepted by the Administrator for assessment. From this group, there were 6,745 Stage 2 applications made and of those 5,859 have received at least a partial Stage 2 payment. In addition, the Administrator has made offers in respect of some Stage 2 claims for which no response has been received from the respective claimants.

[8] The claims resolved in whole or in part have resulted in payments of approximately $45,000,000 to the end of January 2004. Although the tracking system used by the Administrator indicates that there are approximately 5,400 outstanding claims, it became apparent at the case conference that this number is highly inflated. It includes, for example, claims that were not accepted for assessment at the outset, secondary or derivative claims that have already been settled as a result of the payment made on primary claims, outstanding offers for which no response has been received from the claimant and property value claims that do not relate to personal injuries and which are intended to be dealt with under a separate procedure.

[9] Consequently, the court has directed that this list of claims be reviewed to determine the precise number of claims that are, in reality, outstanding. This review will be undertaken on an expedited basis so that the court may address this issue.

[10] There are a number of other issues that can be dealt with at this time however, without waiting for the results of the review. It is obvious that the objectives of the Plan cannot be achieved unless unnecessary delays in the resolution of outstanding claims are avoided. In that respect, the court's review of Plan performance, in conjunction with the submissions of counsel made at the case conference, indicate that there are a number of obstacles to achieving the objectives of the Plan for all claimants. However, those obstacles share a common theme, namely, lack of communication. This, in turn, leads to the dissemination of inaccurate information, which begets confusion for the claimants in attempting to advance or assess their claims.

[11] As an example, there is a lack of information available to counsel with respect to settlements made or arbitration awards granted in relation to resolved claims. Such information would assist in enabling counsel and claimants to evaluate the fairness of offers made regarding outstanding claims, and thus, satisfy themselves that an offer under consideration is within an acceptable range. However, while the provision of information relating to the quantum of compensation paid will doubtless expedite the process, confidentiality concerns remain a paramount consideration. Accordingly, the information shall be made available in a manner that does not compromise the privacy interests of the individual claimants.

[12] A second problem area for claims processing relates to the large number of claims

recorded as outstanding that are based on the provisions of the *Family Law Act*. FLA claims are derivative claims that deal with compensation for a loss of care, guidance and companionship from the primary claimant to family members. However, in many cases, the person on whose behalf the derivative FLA claim has been advanced has also had a claim put forward as a primary claimant. In those cases, the claimant may have already received compensation in respect of his or her primary claim that was intended to subsume the derivative FLA claim as well. Thus, where there has not been a significant FLA type loss or where the claimant has received direct compensation as a primary claimant, the Administrator has, consistent with the circumstances, made what it calls "zero offers" in respect of such outstanding FLA claims. Understandably, because the primary claim has been resolved, no responses have been received with respect to many of these so-called "zero offers". The consequence is that these "offers" remain outstanding on the records of both the Administrator and the responsible counsel. As stated above, the significance of this is that a claim is recorded as outstanding for which the claimant has in fact received compensation under another offer or payment which in turn leads to an undue inflation in the number outstanding claims. A further direction to correct this problem will be issued once the review that has been directed is completed.

[13] A similar situation exists with respect to property value diminution claims. Currently, there appears to be in excess of 1,000 claims for diminished property values. Again, there seems to be a problem with information dissemination. The Administrator has compiled information regarding property sales in Walkerton as well as appraisal reports but this information has not been distributed to counsel for the claimants. To require counsel to duplicate the efforts in collecting this information would involve delay and added costs. Accordingly, the Administrator is directed to make this information available to counsel for claimants and the independent advice counsel to be used in assessing, or assisting claimants in assessing, offers made in respect of property value diminution.

[14] Finally, there are a significant number of compensation offers currently outstanding for which the Administrator has not received a response. This is one part of a two-fold problem that is beyond the Administrator's control in processing claims. The second aspect concerns those applicants with approved stage one claims who have not yet submitted stage two claims. Until these claims are submitted, the Administrator is not in a position to assess them or make offers. Problems associated with these circumstances cannot be attributed to the Administrator but nonetheless they are detrimental to the expeditious resolution of the remaining claims. This situation must be addressed.

[15] The foregoing difficulties stand as roadblocks to the efficient processing of claims. Their existence may, in part, be attributed to two elements of the plan that appear to be the most misunderstood, specifically those provisions dealing with compensation amounts and legal fees.

[16] Under the Plan, claimant's suffering an injury or loss are entitled to receive compensation equivalent to that which would be awarded in damages, in accordance with Ontario law, after a successful trial in respect of a claim. It must be kept in mind that the Plan does not depart from general legal principles and establish a unique compensation scale. Therefore, in making offers,

the Administrator must have reference to a developed body of law relating to damage awards for personal injuries and other types of compensable losses covered by the Plan. Further, the Administrator should take into account, in the interests of fairness and consistency, amounts paid in relation to similar claims under the Plan. Nonetheless, the Administrator must also recognize that the standard of compensation enshrined in the Plan was meant to ensure that claimants received, in the words of the Plan's preamble, "full and complete" compensation. In other words, the Administrator's offer must be fair and reasonable at the outset, as supported by similar or analogous compensatory damages awards in Ontario cases or under the Plan.

[17] The offer system envisioned by the Plan is not meant to be a bargaining process. Therefore, the Administrator's must not make "lowball" offers, designed to begin a negotiation. However, since offers must be made on a principled basis, it would be a misnomer to refer to them as "take it or leave it".

[18] The Administrator is under an obligation to make an offer that is consistent with Ontario law for any properly supported claim for compensation. In this regard, it is anticipated that the amount of supporting information required will be reflective of the claim being advanced. Given the objectives of expedient and fair claim resolution, it should not be the situation that claimants are required to provide the same level of information in respect of a transient injury or smaller loss as would be the case if a claim were advanced for significant ongoing debilitation or loss. This does not mean that the Administrator must make offers in the air. There is still an obligation on a claimant to provide sufficient information to substantiate a claim. Where disputes arise in this process, either at the claims stage or because a claimant considers an offer unacceptable, the claimant does not have to accept the Administrator's decision. The claimant may refer the claim to mediation/arbitration for determination.

[19] This brings me to the second misunderstood element, the payment of legal fees for counsel representing claimants. The Plan provides for the payment of "reasonable" legal fees for claimants. It is clear that the intent of the Plan was that claimants would not have to pay their own legal costs. Moreover, it was represented to claimants at a "town hall" meeting, organized by counsel prior to the approval of the settlement, that the import of this provision was that claimants would be provided with legal services at no cost to them.

[20] Still, there is confusion among claimants about legal fees, especially in relation to potential arbitrations. It has been brought to the court's attention that some claimants have been incorrectly told that the provision respecting fees means that they may be at risk of paying their own costs if they insist on arbitration in respect of their claims. This is not the case.

[21] Where a claimant is represented by counsel under this Plan, the terms of the Plan are incorporated by reference into the retainer agreement. Therefore, once counsel has commenced representing a claimant, counsel cannot resile from further representation of that client without approval of the court, nor is it the case that claimants will be billed directly for the legal services provided. Counsel will be paid "reasonable" fees, as determined under the applicable process instituted by the court, from the funding of the Plan.

[22] This method of providing legal services to claimants appears to have been well utilized so far, in that as of January 2004, the Plan has paid out over 3.75 million dollars in legal fees and expenses in respect of claims advanced. This does not include the fees and expenses paid in relation to the class proceeding and settlement process.

[23] In summary, the court directs as follows:

1. In order to facilitate the resolution of outstanding claims, the Administrator shall compile a summary of settled claims and arbitration awards as of February 20, 2004. The summary shall be updated on a weekly basis until such time as the court orders otherwise. To protect the interests of the claimants, and in particular to ensure claimant confidentiality, no personal identifying information relating to any claimant shall be included in a case summary. However, the age range into which a particular claimant would fall, within a five year interval, shall be included in the summary.

2. The case summaries are to be held at the Administrator's office and may be distributed to counsel for a claimant or claimants, providing that a written undertaking of confidentiality is obtained. The undertaking shall be in a form that extends the protection of confidentiality to any updated materials that may be received. No copies of the materials distributed are to be made. All distribution copies are to be returned to the Administrator by each recipient as soon as practicable after the settlement of all outstanding claims for which the recipient acts as counsel. Mr. Dermody shall return all material received when advised by the Administrator that the claims of all unrepresented claimants have been resolved.

3. Class counsel and the monitor appointed by the court shall attend at the Administration office for the purpose of reviewing all outstanding offers, including "zero" offers, and outstanding claims for property value loss. Once the review has been completed, a report shall be made to the court and further directions will be issued.

4. Through the course of the case conference, participating claimants' counsel agreed that offers made by the Administrator may be communicated directly to the claimant concurrent with the communication to counsel. It is hoped that this will expedite the offer process. However, in the event that an offer is made and no response has been received by the Administrator within 30 days, or the offer is rejected before that time, the claim will be automatically scheduled for a mediation/arbitration which must be held and determined within 45 days after the deemed, or actual, rejection date. A panel of mediator/arbitrators will be appointed by the court.

5. The Administrator shall ensure that these reasons and directions are communicated to claimants. In addition, information regarding the ongoing Plan implementation, in a form acceptable to the court having regard to the confidentiality interests of the claimants, shall be distributed on a regular basis by such means as the court directs.

6. The court will revisit matters in 90 days to determine whether further directions are required.

WINKLER J.

Released: February 27, 2004

COURT FILE NO.: 00-CV-192173CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAIME SMITH *et al.*

Plaintiffs

-and-

THE CORPORATION OF THE MUNICIPALITY OF BROCKTON *et al.*

Defendants

-and-

IAN D. WILSON ASSOCIATES LIMITED *et al.*

Third Parties

REASONS FOR DECISION

WINKLER J.

Released: February 27, 2004

COURT FILE NO.:00-CV-192173CP
DATE:20040330

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAIME SMITH, ALANA DALTON, JAMIE MCDONALD and IRENE SALES INC., OPERATING AS THE HARTLEY HOUSE Plaintiffs	*F. Paul Morrison*, *Darryl Ferguson* and *Caroline Zayid* for Her Majesty the Queen in Right of Ontario
-AND-	*Heather Rumble Peterson*, Class Counsel Representative
THE CORPORATION OF THE MUNICIPALITY OF BROCKTON, THE BRUCE-GREY-OWEN SOUND HEALTH UNIT, STAN KOEBEL, THE WALKERTON PUBLIC UTILITIES COMMISSION and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendants	*Bruce Lee*, Plan Counsel *William Dermody*, Independent Advice Counsel *Stanley Tick, Q.C.*, *Michael Peerless*, *James Virtue*, *Robert Garcia*, *Dave Williams*, *Michelle Beckow*, Claimants' Counsel
-AND-	
IAN D. WILSON ASSOCIATES LIMITED, DAVIDSON WELL DRILLING LIMITED, EARTH TECH (CANADA) INC., CONESTOGA-ROVERS & ASSOCIATES LIMITED, B.M. ROSS AND ASSOCIATES LIMITED, GAP ENVIROMICROBIAL SERVICES INC., A&L CANADA LABORATORIES EAST, INC., DAVID BIESENTHAL AND CAROLYN BIESENTHAL Third Parties	Case Conference February 18, 2004 Supplementary Directions March 30, 2004, *ex parte*
Proceeding under the *Class Proceedings Act, 1992*	

SUPPLEMENTARY DIRECTIONS

WINKLER R.S.J.:

[1] On February 27, 2004, I released my Reasons and Directions, which followed from a case conference that I held on February 18, 2004 for the purpose of reviewing the administration of the settlement in this matter. In paragraphs 9 and 23 of those Reasons, I directed that a review be undertaken by class counsel and the court appointed monitor with respect to outstanding claims.

[2] The review process, although not yet complete, has revealed that there are currently 852 outstanding illness claims, much less than previously reported, but a significant number nonetheless, considering that the Plan has been in operation for almost 3 years. However, the mere number of outstanding claims does not tell the whole story because the review also indicates that offers have been made in respect of 478, or 55 per cent, of those claims for which the Administrator has not received a response from the claimants. In most cases, the offers have been outstanding for at least 90 days and in some cases for as long as 240 days.

[3] It appears that there are two primary reasons for the current number of outstanding claims. First, the files indicate that processing delays within the offices of counsel representing claimants are significant. In that regard, there are some cases where an offer presented to counsel representing a claimant do not appear to have been presented to the claimant by counsel until at least 4 months following receipt by counsel. Delays of this nature on the part of counsel in communicating offers to their clients are unacceptable. This problem will, however, be alleviated in the future because the Administrator will, pursuant to my earlier order, henceforth be required to send a copy of any offer sent to the claimants counsel, directly to the claimant as well.

[4] However, the court remains concerned that there may have been offers presented by the Administrator to counsel that still have not been communicated to claimants by counsel. Consequently, counsel are directed to review their files to determine whether all offers received by them have been communicated to each respective client. In the event that counsel is in receipt of any offer that has not been communicated to the client, the situation shall be rectified forthwith. I further direct that counsel in receipt of any offer on an outstanding file report to the Administrator within 14 days as to the status of the offer, including the date on which it was sent to or discussed with the client.

[5] Beyond delays attributable to counsel, there appears to be a second aspect that is contributing to the number of outstanding offers, namely, a continuing concern by claimants as to the provision of the Plan that permits future or subsequent claims. This concern appears to centre on the future operation of the Plan itself and, in particular, on the absence of a defined process for accessing compensation through the Plan after the all claims presented at this stage have been concluded.

[6] Simply stated, claimants need certainty as to how the claims review process can be initiated if the current administrative structure put in place to deal with large numbers of claims is significantly reduced or, more to the point, eliminated at the conclusion of all current outstanding claims.

[7] The appropriate way to address this concern is to ensure that claimants have a certain “access

point" for future claims. The claims process must of course remain separate from the government, as funder, to accord with the spirit of the Plan. Therefore, to ensure that the various objectives of the Plan are met in the event that the claims processing centre presently located in Walkerton is closed, the Administrator is directed to establish and maintain a toll free contact phone number, address and e-mail address which may be utilized by claimants wishing to present a claim for subsequent compensation in accordance with the terms of the Plan. The Administrator will be required to deal with claimant inquiries in a timely fashion. All contact information shall be publicized in Walkerton and the surrounding area and, additionally, distributed directly to all claimants under the Plan.

[8] This does not mean that all future claims will be automatically approved. The claimant must still meet the requirements under the Plan. However, in the event that a subsequent claim for compensation cannot be resolved, the Administrator shall arrange for a mediation/arbitration to take place as soon as is practicable. Claimants will remain entitled to have their reasonable legal fees paid for subsequent claims and all other provisions of the Plan will continue to apply. The Administrator will ensure that the claimant receives any compensation payable in respect of a subsequent claim as well as dealing with legal fees and disbursements of counsel for the claimant. The Government of Ontario will remain responsible for funding both the compensation payable and the costs associated with the continuation of the Plan, once those costs have been approved by the court.

[9] I turn now to some other issues that have arisen since the issuance of my Reasons and Directions dated February 27, 2004. The focus of my directions in that instance was delays experienced by some claimants in the claims process. Specific directives were given in order to expedite claims processing and resolve those claims that had not yet been dealt with completely. However, it is of paramount concern to the court that all claimants be treated fairly. It has become clear from the concerns expressed by some claimants, and through the review process initiated by the court, that a procedure must be established to ensure that claimants are not prejudiced by any steps taken with a view to expediting the process.

[10] Through file reviews done on behalf of the court, there is some evidence of a gap in communication between claimants and their counsel. In such situations, it may be unfair to the claimant to proceed to arbitration where the claim file is not complete or up to date. Accordingly, arbitrations will proceed through a modified case management process whereby a status hearing will be conducted by a court appointed referee on each file scheduled for arbitration. Claimants, their counsel and representatives of the Administrator will be expected to attend the status hearing before the referee. Claimants will be given an opportunity to review their claim files so that each may advise the referee whether it is complete and up-to-date. The referee will determine whether the file is sufficiently prepared so that a proper, fair arbitration may be conducted. Once a determination regarding the status of a file is made, the referee will issue such further direction as he or she deems to be appropriate to ensure that the process continues to move along on an expedited basis consistent with fairness. However, since all parties will be at the status hearing, mediators will be available immediately following the hearing in the event that a claimant wishes to avail him or herself of the opportunity to resolve a claim through mediation.

[11] Similarly, it has been brought to the attention of the court that there are a significant number of unrepresented claimants with outstanding claims. Although the court has in the past appointed Independent Advice Counsel to deal with general questions from claimants who do not otherwise have counsel, given the expedited process now being directed, unrepresented claimants may need more specific assistance. Accordingly, the court appoints Patrick Kelly, a solicitor in the area, for the purpose of providing direct legal assistance to unrepresented claimants with outstanding claims. Mr. Kelly will contact unrepresented claimants for the purpose of determining whether his assistance is required. There will be no charge to claimants and, to state the obvious, no requirement for claimants to utilize the services of Mr. Kelly should they not wish to do so. If a claimant choses not to have the benefit of Mr. Kelly's assistance, the status hearing and arbitration will be scheduled and conducted in the normal course with the claimant appearing unrepresented.

[12] Further directions will be issued if and when necessary.

WINKLER R.S.J.

Released: March 30, 2004

COURT FILE NO.: 00-CV-192173CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAIME SMITH *et al.*

Plaintiffs

-and-

THE CORPORATION OF THE MUNICIPALITY OF BROCKTON *et al.*

Defendants

-and-

IAN D. WILSON ASSOCIATES LIMITED *et al.*

Third Parties

REASONS FOR DECISION

WINKLER R.S.J.

Released: March 30, 2004

Federal Court Cour fédérale

Date: 20190528

Docket: T-1673-17

Citation: 2019 FC 749

Ottawa, Ontario, May 28, 2019

PRESENT: Mr. Justice Phelan

PROPOSED CLASS PROCEEDING

BETWEEN:

CHERYL TILLER, MARY ELLEN COPLAND AND DAYNA ROACH

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

INTERIM ORDER AND REASONS

I. Introduction

[1] This is a motion on consent for certification of a class proceeding for settlement purposes, approval of the Notice of Certification and Settlement Approval Hearing, and approval of the Notice Plan, pursuant to Part 5.1 of the *Federal Courts Rules*, SOR/98-106 [*Rules*],

governing class actions. In addition, the Plaintiffs ask for an order requiring Canada to release information about potential Class Members to those companies administering the Notice, the Assessor, and the Class Administrator.

[2] The Court is not prepared to issue its order with respect to certification until the parties have had an opportunity to consider and to make further submissions as indicated herein.

II. Background

[3] In *Merlo v Canada*, 2017 FC 51, 276 ACWS (3d) 281 [*Merlo*], the Federal Court certified a class action for the purpose of settlement in respect of female members of the Royal Canadian Mounted Police [RCMP] who experienced harassment during their term of service with the RCMP. The settlement was subsequently approved in *Merlo v Canada,* 2017 FC 533, 281 ACWS (3d) 702.

[4] This proposed class action seeks to settle with females who were not members of the RCMP but who experienced the same types of harassment in similar circumstances as the class members in *Merlo*. The challenge has been that this group of non-RCMP people is diverse, ranging from those working in a detachment to those who volunteered for activities which included some form of RCMP involvement.

[5] The common issue cited is similar to *Merlo* - “Is the Defendant liable to the Class?” - and inherent in the question is the issue of liability to such a broad group with varying degrees of relationships with the RCMP.

[6] The Class definition proposed is:

> **Primary Class Members:** All current and former living municipal employees, regional district employees, employees of non-profit organizations, volunteers, Commissionaires, Supernumerary Special Constables, consultants, contractors, public service employees, students, members of integrated policing units and persons from outside agencies and police forces, and similarly situated individuals, who are female or publicly identify as female and who worked with the RCMP during the Class Period, excluding individuals who are primary class members in *Merlo and Davidson v Her Majesty the Queen*, Federal Court Action Number T-1685-16 and class members in *Ross, Roy, and Satalic v Her Majesty the Queen*, Federal Court Action Number T-370-17 or *Association des membres de la police montée du Québec inc., Gaétan Delisle, Dupuis, Paul, Lachance, Marc v HMTQ*, Quebec Superior Court Number 500-06-000820-163. The Class Period is September 16, 1974 to the date the Settlement receives Court approval.
>
> **Secondary Class Members:** All persons who have a derivative claim, in accordance with applicable family law legislation, arising from a family relationship with a Primary Class Member.

[7] The motion also includes a request, firstly, for an order requiring Canada to produce a list of potential Primary Class Members who have had a HRMIS ID with the RCMP. The purpose of such information is to assist with the provision of notice to Class Members.

[8] Secondly, a further order is requested for Canada to produce a list of Primary Class Members who have been paid through some other process for similar harassment pleaded in the claim. This information is to assist with determining a claimant's entitlement to compensation.

III. Pending Matters

[9] In terms of the Class definition, the parties have struggled to arrive at a meaningful description of the group. The groups described are extremely diverse, and had dealings with the RCMP under varying circumstances. There appears to be no commonality of relationship within the groups and the RCMP.

[10] The Class definition would appear to be insufficiently defined and thus the common issue is overbroad.

[11] In establishing an identifiable class, this Court in *Paradis Honey Ltd v Canada*, 2017 FC 199 at paras 23-24, [2018] 1 FCR 275, citing the Supreme Court of Canada in *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at paras 17-20, [2001] 3 SCR 158, identified the existence of three elements to be met: (1) the class must be defined by objective criteria; (2) the class must be defined without reference to the merits of the action; and (3) there must be a rational connection between the common issues and the proposed class definition. It must be shown that the class is defined sufficiently narrowly so as to meet these elements.

[12] The Court recognizes that this is a case of certification for settlement and that, consistent with such authorities as *Merlo, Gariepy v Shell Oil Co*, 2002 OJ No 4022 at para 27, 117 ACWS (3d) 690 (Sup Ct J), and arguably *Bona Foods Ltd v Ajinomoto USA Inc*, [2004] OJ No 908, 129 ACWS (3d) 456 (Sup Ct J), the courts generally engage in a less rigorous analysis of the certification criteria.

[13] However, the certification criteria must be met. It is essential to ensure that there is adequate notice to the class, that potential claimants know whether they may be eligible, and that the settlement process is manageable and fairly limits the appropriate class.

[14] In the proposed Class definition the phrase used is “worked with the RCMP” - a term of almost indeterminate breadth. Other materials before the Court use phrases similar to “worked for” or “worked in”, which also have unclear meanings.

[15] The proposed definition also refers to “similarly situated individuals” without describing what that “similar situation” is. There is no apparent requirement that the class member was supervised or managed by a member of the RCMP or worked in an environment controlled by the RCMP.

[16] It appears to the Court that what the parties seek to encompass is the unacceptable conduct which occurred to those working in an RCMP controlled workplace environment. That notion gives some better definition to the phrase “similarly situated”.

[17] Therefore, the parties are to consider a definition that better defines the circumstances including the place of the misconduct.

[18] The Court is reluctant to impose, at this time, a definition in the context of a settlement, where the parties have an agreed view of who should be in the class.

[19] With respect to the lists to be produced, the second list is not necessary, as admitted by counsel, for the approval of certification and the steps to a settlement approval. Under those circumstances the Court would not impose a step which is more properly part of the claim process should the settlement be approved.

[20] Lastly, the Settlement Agreement specifies that if that agreement is not approved or the number of "opt outs" reaches the threshold number, this action is de-certified.

[21] While that may be what the parties wish and may be an inevitable consequence, as discussed below, Rule 334.19 of the *Rules* gives the Court the discretion to de-certify an action on motion where the conditions for certification are no longer satisfied. Rules 334.2 and 334.3 give the Court the exclusive power to allow the action to continue or discontinue the action.

[22] It would be prudent for the parties to better address whether they will seek a motion for decertification potentially on consent in their Settlement Agreement, should the Settlement Agreement not be approved.

IV. Conclusion

[23] Before making a final order on this motion, the Court wishes to afford the parties an opportunity to further consider the issues raised here.

INTERIM ORDER in T-1673-17

THIS COURT ORDERS that the parties may, within 30 days, submit such further representations, materials and amendments (including to the proposed Order) which arise from the motion hearing. There are no costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1673-17
STYLE OF CAUSE:	CHERYL TILLER, MARY ELLEN COPLAND AND DAYNA ROACH v HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 21, 2019
INTERIM ORDER AND REASONS:	PHELAN J.
DATED:	MAY 28, 2019

APPEARANCES:

Angela Bespflug Janelle O'Connor Patrick Higgerty, Q.C.	FOR THE PLAINTIFFS
Donnaree Nygard Jennifer Chow Mara Tessier	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Klein Lawyers LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS, CHERYL TILLER AND MARY ELLEN COPLAND
Higgerty Law Barristers and Solicitors Calgary, Alberta	FOR THE PLAINTIFF, DAYNA ROACH
Attorney General of Canada Vancouver, British Columbia	FOR THE DEFENDANT

Federal Court  Cour fédérale

Date: 20200310

Docket: T-1673-17

Citation: 2020 FC 321

CLASS PROCEEDING

BETWEEN:

CHERYL TILLER, MARY-ELLEN COPLAND AND DAYNA ROACH

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER (Settlement Approval)

PHELAN J.

I. Introduction

[1] The Settlement Agreement at issue here follows upon the settlement approval in *Merlo v Canada*, 2017 FC 533 [*Merlo-Davidson*], which dealt with gender and sexual orientation based harassment and discrimination of women who worked in the Royal Canadian Mounted Police [RCMP] as "Regular Members, Civilian Members and Public Service Employees" since September 16, 1974 – the first date on which women were eligible to join the RCMP.

[2] While the issue of counsel fees is part of the Settlement Agreement, it is separate from this approval and is the subject of a separate and distinct decision.

[3] This Settlement Agreement is designed to address similar conduct in a RCMP controlled workplace experienced by women who worked with or volunteered with the RCMP but for whom the RCMP was not their employer and therefore those persons were not part of the "Merlo Class".

[4] On June 21, 2019, the Representative Plaintiffs and the Defendant entered into a settlement for this group as set out in the "Settlement" (including its recitals, schedules and appendices). On October 1, 2019, the parties entered into a supplemental agreement which contains the terms of Appointment of the Administrator and the Assessor [Supplemental Agreement].

[5] For purposes of these Reasons and the Approval Order, the two agreements, the Settlement and the Supplemental Agreements, together form the "Settlement Agreement", unless otherwise indicated.

[6] The Settlement Agreement establishes a confidential claims process for compensation ranging from $10,000 to $220,000. It is to be a non adversarial process and contains the feature of a non-retaliation directive so that Class Members still working with the RCMP may claim without fear of retaliation.

[7] The parties have asked for Court approval of the Settlement Agreement, the proposed form, content and manner of distribution of the notice of settlement approval [Notice], the appointment of Deloitte LLP to administer the Settlement Agreement and the appointment of the Honourable Louise Otis, the Honourable Pamela Kirkpatrick and the Honourable Kathryn Neilson as Assessors of the claims process established under the Settlement Agreement.

[8] For the Reasons set forth, the Court approves the Settlement Agreement and the related documents and appointments and consequently the action will be dismissed.

II. Background

A. *Overview*

[9] This action was commenced November 2, 2017. The Plaintiffs allege that the RCMP was negligent and in breach of s 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, in failing to take reasonable measures to ensure that "Primary Class Members" could work in an environment free of gender and sexual orientation based harassment and discrimination. The Plaintiffs further allege that the Defendant Crown is liable for the action of individuals who worked for the RCMP and were at all material times Crown servants pursuant to the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. The Plaintiffs claim that this conduct caused them psychological and physical injuries.

[10] Following service of materials in March 2018 for a contested certification application, the parties rapidly engaged in settlement discussions over a period of approximately one year starting in June 2018. These discussions resulted in the Settlement.

[11] As a result, the claim was amended for settlement purposes and an Amended Statement of Claim filed in April 2019.

[12] Following further discussions with and submissions to the Court, the action was certified for settlement purposes on July 5, 2019. As discussed later, the proper description of the Class was a complicated matter. It is also important to note that the Class was defined and settled for settlement purposes only – a point repeated by the Defendant.

[13] *Merlo-Davidson* is an essential backdrop and driving factor in this proceeding. As part of the Certification Order, Klein Lawyers LLP and Higgerty Law were appointed Class Counsel. Both firms have experience in class action litigation and Klein Lawyers were one of the class counsel in *Merlo-Davidson*. Their experience and recommendation is one factor which the Court must consider in approving this Settlement Agreement.

[14] While this case moved into the settlement negotiation phase very quickly and given *Merlo-Davidson*, hotly contested litigation was not on the horizon, the Plaintiffs, necessarily, began the work for a contested certification process. In that regard, two experts also assisted in crafting the Settlement.

B. *The Settlement Agreement – Key Terms and Provisions*

(1) Class

[15] One of the most critical aspects of the Settlement Agreement and of the Certification Order was the Class, particularly the definition of "Primary Class Members". Apart from the exclusions such as the class in *Merlo-Davidson* being RCMP members, the intent was to capture a large group of people not captured in the exclusion. The genesis of this litigation was the realization that female non-RCMP personnel and others engaged with the RCMP and who experienced the same type of abuse and discrimination as the serving RCMP members, were not covered by the *Merlo-Davidson* case.

[16] In terms of exclusion (either specific or by implication) despite the RCMP being the provincial police force in eight provinces, provincial employees under the supervision, management or control of the RCMP are not included in this action because those employees had their own remedies under provincial law as discussed later.

[17] It was essential that there be a significant and meaningful connection with the RCMP. With input from the Court, the parties described that connection not only in terms of supervision and management but also in terms of circumstances where the RCMP was exercising control over the relevant personnel – paid employees or volunteers.

[18] The broad definition of the Primary Class is meant to describe the large group of women who have worked or volunteered with or under the RCMP in varying capacities but who were not included in the *Merlo-Davidson* settlement.

(2) Class Period

[19] The Class Period in the Settlement Agreement runs from September 16, 1974 until July 5, 2019 – a period of 45 plus years.

(3) Levels of Compensation

[20] The six levels of compensation provided for was to recognize the different forms of gender and sexual orientation based harassment and discrimination and that each could have a unique impact on the particular victim.

[21] The levels of compensation range from $10,000 to $220,000 as follows:

- Level 1 – Minimal Injury - $10,000
- Level 2 – Mild Injury - $35,000
- Level 3 – Low Moderate Injury - $70,000
- Level 4 – Upper Moderate Injury - $100,000
- Level 5 – Significant Injury - $150,000
- Level 6 – Severe Injury - $220,000

Compensation is also available to spouses and children of claimants whose claims have been assessed at Level 5 or Level 6.

C. *Claims Process*

[22] The claims process is intended to be confidential and non-adversarial. The process is based on document review and claimant interviews and the assessment performed in a psychological and emotional “safe” environment for Primary Class Members to facilitate the exchange of stories of sexual harassment, abuse and discrimination.

[23] The deadline for filing a claim is a relatively short 180 days from the later of the last day for an appeal (or leave to appeal) of the Approval Order or the date of a final determination of any such appeal by a Class Member.

[24] The claims process is clearly and succinctly set out in the Settlement Agreement and requires the provision of details of the offending conduct and the injuries caused by it.

[25] To avoid any potential for double recovery, the Defendant is required to provide the Administrator and the Assessor(s) with a list of Primary Class Members who have been paid by Canada under another civil claim, grievance or harassment complaint in respect of gender or sexual orientation based harassment or discrimination in the circumstances described in the Primary Class Member definition during the Claim Period [the Previous Compensation List].

[26] The Defendant through the RCMP has a further obligation to provide the Administrator with a list of potential Primary Class Members who have ever had a Human Resources Management System identification [HRMIS]. This is intended to assist the Administrator and

Assessor(s) in verifying the class membership. In the event that a claimant's name does not appear on this Class Member List, the Administrator will request additional proof of class membership from the claimant.

[27] Completed claim packages will be sent from the Administrator to the Assessor(s) where they will be placed in one of two categories – Levels 1/2 or Level 3 and above. Levels 1 and 2 attract only a paper review by the Assessor(s). For Levels 3 and above, the Assessor(s) will review the documents but also conduct an in-person interview of the claimant. For either category the Assessor(s) will determine whether the claim meets the compensation criteria and the appropriate level of compensation to be awarded.

D. *Confidentiality*

[28] Because of the nature of the offending acts and the concern for privacy, the Settlement Agreement contains numerous provisions to safeguard the confidential claims process. This is particularly important to Class Members still working for the RCMP who fear retaliation or other adverse consequences of making a claim.

[29] The RCMP itself has a necessarily limited role in the claims process generally restricted to certain administrative functions including making payments to the Administrator.

The offices of the Administrator and the Assessor(s) are and remain independent from the parties, the RCMP and each other.

[30] A particular feature of this Settlement Agreement to ensure confidentiality of the claims process is the creation of the “Designated Contact”. This is a confidential contact within the RCMP who responds to requests for information and records from the Administrator and the Assessor(s). Even within RCMP premises, the Designated Contact, who is responsible for ensuring the confidentiality of all requests/responses between the RCMP, is to be housed in a secure unmarked office accessible only to the Designated Contact.

E. *Settlement Parameter*

[31] As a claims made settlement there is no cap on the total settlement to be paid out. Each qualifying claim will be paid regardless of the total amount paid to the Class as a whole. This process avoids the risk of payment delays and reduced individual compensation if the number of claims exceeds the estimated “take up” rate (the estimate of the number of claimants and the amount of those claims).

[32] However, Class Counsel has estimated that about 5% of the Primary Claims Members will make claims, that the average claim value is approximately $50,000 and therefore the total settlement payment will be approximately $100 million.

F. *Notices*

[33] A critical element of any class action settlement is the opt-out provision allowing a potential claimant to opt out of the Settlement Agreement and proceed on their own. It is the ultimate protection for an individual who is dissatisfied with a class settlement.

As of the hearing before the Court, only two opt-outs were filed.

[34] Notices of Certification and of Settlement Approval Hearing have been distributed as required.

[35] Notice of Settlement will be dealt with according to the approved Notice Plan and will involve press releases, publication in print media, digital and social media, direct mailing, Class Counsel website display, posting in RCMP premises and requested distribution assistance in municipalities with municipal RCMP detachments and at CUPE branch offices.

G. *Opt-Out Rights*

[36] A key provision in every class action settlement is the Opt-Out Rights.

[37] The Opt-Out period is set at 70 days following the date of the Certification Order – September 13, 2019. To date, two opt-out notices have been received.

[38] The Opt-Out threshold was set at 50. As this threshold has not been met, the provision is academic.

H. *Administrator*

[39] The parties requested that Deloitte LLP be appointed Administrator. The duties of Administrator are well defined in Article 6 and Schedule B of the Settlement Agreement.

[40] The Court has evidence and knowledge of Deloitte LLP's experience in class action administration. The Defendant is responsible for paying the cost of administration.

I. *Assessor*

[41] The parties requested that the Honourable Louise Otis, formerly of the Court of Appeal of Quebec, be appointed as the Assessor. Subsequently they have asked for two further Assessors – the Honourable Pamela Kirkpatrick, formerly of the British Columbia Court of Appeal, and the Honourable Kathryn Neilson, formerly of the Supreme Court of British Columbia.

[42] The duties of the Assessor(s) are likewise well defined and are principally the evaluation of claims, where required, settling the amount of compensation claimed and preparing a report to the RCMP on their observations generally regarding claims and making recommendations to the RCMP to assist in minimizing workplace sexual harassment and discrimination. The Defendant is also liable for the costs of the Assessor(s).

J. *Counsel Fees*

[43] The matter of approval of Class Counsel fees is the subject of a separate decision. In general terms, however, the Defendant will contribute $6 million and Class Counsel seeks fees based upon 15% of the amount received by each claimant. As between Class Counsel, they have agreed to 70% for Klein Lawyers LLP and 30% for Higgerty Law.

K. *Support/Objection*

[44] In the Hearing Approval Order, provision was made for expressions of support or opposition to the Settlement Approval.

[45] No expressions of opposition were received. While no expressions of support were received by the Court, the Santos Affidavit indicates that approximately 575 persons have expressed a desire to be included in the compensation process.

III. Issue

[46] The issue for determination is whether the Settlement Agreement (except for Class Counsel fees to be determined separately) is fair and reasonable and in the best interests of the Class. Consequent on that determination is the approval of various notices and appointments.

IV. Analysis

A. *Legal Framework*

[47] The test for approving a class action settlement is well established and described in such decisions as *Merlo-Davidson* at paras 16-19, *Toth v Canada*, 2019 FC 125 at paras 37-39 and *Condon v Canada*, 2018 FC 522 [*Condon*].

[48] The test is whether, in all the circumstances, the Settlement is “fair, reasonable and in the best interests of the class as a whole”.

[49] In the application of the test, the Court is to consider numerous factors.

[50] As set forth in *Condon* at para 19, the non exhaustive list of factors is:

a. The likelihood of recovery or likelihood of success;

b. The amount and nature of discovery, evidence or investigation;

c. Terms and conditions of the proposed settlement;

d. The future expense and likely duration of litigation;

e. The recommendation of neutral parties, if any;

f. The number of objectors and nature of objections;

g. The presence of arm's length bargaining and the absence of collusion;

h. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;

i. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

j. The recommendation and experience of counsel.

[51] Recent case law in this Court and other superior courts (see *Manuge v Canada*, 2013 FC 341 [*Manuge*]) have emphasized that a class action settlement must be looked at as a whole and specially that it is not up to the Court to rewrite the substantive terms of a settlement. It is very much a "take it or leave it" proposition (except with respect to fees).

[52] In this case, the decision is relatively simple and straightforward given the settlement in *Merlo-Davidson*. The Defendant, through the RCMP having settled liability to serving members

of the RCMP for harassment and discrimination, could hardly avoid making a settlement in respect of civilian workers and similarly situated persons experiencing the same offending conduct from members of the RCMP.

[53] Further, I accept that there is a strong presumption of fairness where a settlement has been negotiated at arm's length by experienced counsel, as is the case here (see *Riddle v Canada*, 2018 FC 641).

[54] On the opposite side of the theoretical ledger of settlement approval is the impact of the Court rejecting a proposed settlement agreement. As held in *Manuge* at para 6 - "The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost."

[55] Given the parallel situation with respect to female members of the RCMP whose settlement was approved in *Merlo-Davidson*, it would be a travesty of justice to deny the non-members covered in the present Class a reasonable settlement of their claim.

[56] As with so many settlements, the "proof of the pudding is in the eating". To ensure that the goals and mechanisms of the Settlement Agreement are fulfilled, the parties accept this Court's continuing supervisory role. That role is vital as discussed in the Supreme Court's decision in *J.W. v Canada (Attorney General)*, 2019 SCC 20.

[57] In considering whether the Settlement is "fair, reasonable and in the best interests of the Class", the Court will touch upon the factors laid out in *Condon*.

B. *Factors*

(1) Likelihood of Recovery/Success

[58] While the Plaintiffs' counsel has suggested that this is complex litigation with a myriad of possible defences available to the Defendant – which might be the case if it were to be litigated – the chances of litigation unfolding were distant. The RCMP had settled the same type of claims for its members, and the Commissioner had issued statements acknowledging misconduct and pointing to the need for changes in the working culture within the RCMP.

[59] Having said this, while there were complexities in this case and its Settlement with respect to issues of union membership, Class Counsel has satisfied me that the Settlement Agreement does not interfere with grievance processes.

[60] In supplementary submissions, the parties addressed whether the Court had jurisdiction in this matter as it arguably related, at least in part, to remedies under labour relations regimes. I am satisfied that the decision in *Rivers v Waterloo Regional Police Services Board*, 2018 ONSC 4307 (upheld by the Ontario Court of Appeal), did not apply in these circumstances. The Primary Class does not have an employer-employee relationship with the Defendant similar to that discussed in the Ontario decision.

[61] A major issue was properly defining the Class. That process required some work and a failure to reach agreement on this definition would have led, at the very least, to an involved, uncertain certification process followed by the inevitable appeals and the potential of Class proceedings and individual proceedings clashing on many issues.

[62] I accept that the expansive Class definition and the 45 plus year Class Period represents a significant advantage in the Settlement Agreement, not necessarily achievable in contested litigation.

[63] Some sort of settlement was a strong probability; however, the nature and extent of this Settlement Agreement is a significant benefit to the Class and to the Defendant not so easily foreseen.

(2) Discovery/Evidence

[64] While there never was discovery or other significant pre-trial proceeding, Class Counsel did obtain reports from the RCMP and other sources about the gender based harassment culture within the RCMP. Class Counsel retained two experts to further develop an understanding of the nature of the offending conduct toward non-RCMP members in a workplace setting.

[65] Because of the less homogenous nature of the Primary Class – covering differing circumstances of engagement with the RCMP as compared to the *Merlo-Davidson* situation – Class Counsel engaged in detailed and extensive conversations with potential Class Members to

secure a better understanding of the types of discrimination and the impacts of that conduct on this diverse Primary Class.

(3) Settlement Terms and Conditions

[66] There are several features of the terms and conditions which support approval:

- a claims made approach avoids the risks of delay and the over-subscription risk present with lump sum settlements.
- the extensive Class Period commencing in 1974 avoids the complexities of limitation periods.
- the non-adversarial claims process reduces the risk of re-traumatization and facilitates the essential feature of confidentiality. Fear of retaliation or further harassment was a significant concern which confidentiality helps ameliorate.
- the compensation levels are consistent with damages awards and takes account of litigation risk and ease of claims process. They are also the same as *Merlo-Davidson* despite the different relationship with the RCMP and the different class definitions.

(4) Counsel Experience/Recommendation

[67] As expected, Class Counsel recommend this Settlement Agreement. More germane is that both firms are experienced class action counsel involved in a variety of such claims. Klein Lawyers have direct, highly relevant experience from *Merlo-Davidson* and are well versed in issues, complexities of the case and needs of the Class.

(5) Future Expense and Duration of Litigation

[68] Absent a settlement, the Plaintiffs would litigate a claim covering 45 years and conduct affecting thousands of Class Members. The potential for appeals at many of the key stages of a class action is real; the possibility of either the creation of sub-classes or individualized claims is also real.

(6) Number of Objectors/Objections/Opt Out

[69] There have been no objections filed. Also significant is that only two potential Class Members have opted out. With a class of approximately 41,000 members, this factor speaks to the support of the Class for this Settlement Agreement.

(7) Good Faith/Absence of Collusion

[70] There is no evidence of collusion. The year long negotiations appear from every perspective to having been conducted in good faith with the intention of finding resolution.

[71] The Court is not directly aware of the negotiations; however, it case managed this matter and there is nothing in the manner in which the case before the Court was conducted to even suggest that this was not an arm’s length negotiation in which compromises had to be made.

(8) Communication with Class Members

[72] Based on the affidavit evidence before the Court, Class Counsel have been in regular contact with Class Members. Hundreds of women have contacted Class Counsel. The Representative Plaintiff has likewise personally communicated with Class Members.

(9) Dynamics of Negotiation

[73] The steps leading to the Settlement Agreement were described in the affidavit of Mr. Tanjuatco.

[74] The Notice of Settlement is consistent with the Court's requirements and the Notice Plan is robust and practical. Notice providers, experienced in the field, have been appointed. The RCMP and CUPE are prepared to assist in the dissemination of information.

[75] The Settlement Agreement has been posted on the website of Class Counsel and of the Settlement itself (rcmpsettlement.ca).

(10) Other Matters

[76] The proposed Administrator, Deloitte LLP, has extensive experience in class action settlements including in *McLean v Canada*, 2019 FC 1075. The Court is prepared to approve its appointment.

[77] The proposed Assessors are judges of considerable relevant experience, well qualified to assess claims under the Settlement Agreement.

[78] To assist in determining claimants' entitlement to compensation – Class Members are barred from making a claim if they have previously received compensation in respect of events and injuries covered in this action – the Defendant is to prepare a Previous Compensation List. This is intended to prevent double recovery, to the extent it can.

[79] The Previous Compensation List is to be provided to the Assessor(s) and the Administrator.

V. Conclusion

[80] For these reasons, the Settlement Agreement is found to be fair and reasonable and in the best interests of the Class as a whole.

[81] The Court will issue the necessary Order with these Reasons,

[82] The Court retains jurisdiction over this matter and the Order and Settlement Agreement specifically. The Order is subject to amendment as may be necessary.

"Michael L. Phelan"
Judge

Ottawa, Ontario
March 10, 2020

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1673-17
STYLE OF CAUSE:	CHERYL TILLER, MARY-ELLEN COPLAND AND DAYNA ROACH v HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 17, 2019
REASONS FOR ORDER:	PHELAN J.
DATED:	MARCH 10, 2020

APPEARANCES:

Angela Bespflug David Klein Janelle O'Connor	FOR THE PLAINTIFFS CHERYL TILLER AND MARY-ELLEN COPLAND
Patrick Higgerty, Q.C.	FOR THE PLAINTIFF, DAYNA ROACH
Donnaree Nygard Mara Tessier	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Klein Lawyers LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS CHERYL TILLER AND MARY-ELLEN COPLAND
Higgerty Law Barristers and Solicitors Calgary, Alberta.	FOR THE PLAINTIFF, DAYNA ROACH
Attorney General of Canada Vancouver, British Columbia	FOR THE DEFENDANT

Federal Court File No.: T-1673-17

CHERYL TILLER, MARY-ELLEN COPLAND AND DAYNA ROACH **Plaintiffs**	**and**	**HER MAJESTY THE QUEEN** **Defendant**

FEDERAL COURT
PROPOSED CLASS PROCEEDING

Brought pursuant to the *Federal Courts Rules*, SOR/98-106

BOOK OF AUTHORITIES OF THE REPRESENTATIVE PLAINTIFFS

KLEIN LAWYERS LLP
Nicola Hartigan
400 – 1385 West 8th Avenue
Vancouver, BC V6H 3V9
Phone: (604) 874-7171
Fax: (604) 874-7180

HIGGERTY LAW
Jill Taylor
Main Floor, Millennium Tower
101 - 440 2nd Avenue SW
Calgary, AB T2P 5E9
Phone: (403) 503-8888
Fax: (587) 316-2260

Lawyers for the Plaintiffs, Cheryl Tiller, Mary-Ellen Copland and Dayna Roach