SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000435-087

DATE: November 1st, 2013

IN THE PRESENCE OF : THE HONOURABLE MARC DE WEVER, J.S.C.

SHEILA CALDER
Petitioner
v.
BANQUE ROYALE DU CANADA
and
RBC DOMINION SECURITIES LIMITED
and
RBC DOMINION SECURITIES INC.
and
RBC CAPITAL MARKETS CORPORATION
Respondents

RSM RICHTER INC.
and
RAYMOND MASSI, C.A. CIRP
Mis-en-cause

CORRECTED JUDGMENT ON MOTION FOR AUTHORIZATION
TO INSTITUTE CLASS ACTION PROCEEDINGS

JD 2232

[1] The petitioner, Sheila Calder (hereafter Calder), seeks authorization to institute class action proceedings on behalf of the following group of persons, of which she is also a member:

> « All Canadian retail investors who purchased one of the Olympus United Funds Corporation shares (formerly First Horizon Holdings Ltd.) from June 27, 1999 to June 29, 2005 and who had outstanding shares in said corporations as of June 29, 2005. »

THE CONTEXT

[2] The context of these proceedings is well described in petitioner's motion :

> « **The Norshield / Olympus Scheme**
>
> 5. Between June 1999 and June 2005, John Xanthoudakis (Xanthoudakis), through the *Norshield Financial Group* developed, marketed and operated the *Norshield investment structure*;
>
> 6. *Norshield Financial Group* was not an incorporated entity, but rather a brand name to which Xanthoudakis, managed to give a strong aura of performance and credibility in the years preceding its complete financial collapse;
>
> 7. The *Norshield investment structure* allowed the *Norshield Financial Group* to raise Canadian retail investors money, which flowed through the following entities:
>
> **Olympus United Funds Corporation (Canada)**
>
> **(formally(sic) First Horizon Group)**
>
>
>
> **Olympus United Bank and Trust SCC (Barbades)**
>
> **(formally(sic) First Horizon Bank)**
>
>
>
> **Olympus Univest Ltd (Bahamas)**
>
> **(formally(sic) Univest)**
>
>
>
> **Mosaic Composite Ltd. (Bahamas)**
>
> **(formally(sic) Norshield Composite Ltd)**
>
> 8. In May 2005, the *Norshield investment structure* failed to meet redemption requests;

9. From that incapacity to meet redemptions, the *Norshield Financial Group* collapsed, as appears from the following paragraphs;

The collapse of the *Norshield Financial Group*

10. The first *Norshield Financial Group* entity to be placed into insolvency proceedings was **Olympus Univest Ltd** (**Univest**) which, on May 19, 2005, decided on its voluntary liquidation, the whole as appears from paragraph 1.1 of Exhibit R-21;

11. Univest's voluntary liquidation was followed, on June 29, 2005, by the following entities to be placed into receivership, the whole as appears from paragraphs 1 and 2 of Exhibit R-12B:

Norshield Asset Management Ltd (NAM)

Norshield Investment Partners Holdings Ltd

Olympus United Funds Holdings Corporation

Olympus United Funds Corporations (Olympus Funds)

Olympus United Bank and Trust SCC (Olympus Bank)

Olympus United Group Inc.

12. On September 9, 2005 and October 14, 2005, the two following entities were also placed into receivership, as appears from paragraph 3 of Exhibit R-12B:

Norshield Capital Management Corporation

Honeybee Software Technologies Inc.

(formerly Norshield Investment Corporation)

13. Finally, on January 20, 2006, **Mosaic Composite Ltd (formally(sic) Norshield Composite Ltd)** was placed in receivership as appears from paragraph 8 of Exhibit R-49A;

14. All of the companies describes above are part of the *Norshield Financial Group;*

15. The Mis-en-cause, Massi and RSM Richter (Richter), are involved in each of these insolvency processes, either as Receivers, Joint Custodians or Joint Liquidators;

The Olympus scheme

16. Between June 1999 to June 2005, the *Norshield investment structure* allowed *Norshield Financial Group* to raise tens of millions of dollars of Canadian retail investors money;

17. The flow of funds within the *Norshield investment structure* was described by Richter in November 2005, by the chart which Plaintiff files in support of the present motion as Exhibit R-50;

18. When the *Norshield investment structure* collapsed, some 1 900 Canadian retail investors (the Class) were left with $159 million of unredeemable shares of Olympus United Funds Corporation, the whole as appears from the Mis-en-cause's *Thirteeth Report of Receivers* filed as Exhibit R-51, at paragraph 16;

19. The *Norshield investment structure's* foundation was a basket of hedge funds created in the Bahamas in June 1999, by *Norshield Financial Group* and RBC. »

FACTS ALLEGED

[3] The petitioner maintains that Banque Royale du Canada and RBC Capital Markets Corporation[1] (hereafter collectively RBC) knowingly or blindfully took part in the setting up of a fraudulent scheme or structure by the *Norshield Financial Group*, the whole with a view to making a profit, when they knew or should have known that their business partner was defrauding third parties, that is the Canadian retail investors.

[4] To demonstrate the existence of the fraudulent scheme, the petitioner relies on the following «Decisions or Reports» :

- June 2, 2005 decision of the Autorités des Marchés Financiers (exhibit R-15);
- June 21, 2005 preliminary report of Richter (exhibit R-12A);
- Affidavit of Richard Radu, Ontario Securities Commission Investigator (exhibit R-25);
- Initial order of the Ontario Superior Court of June 29, 2005 (exhibit I-1);
- First report of May 26, 2006 of the Joint liquidator (exhibit R-12C);
- First Mosaic Joint liquidators' report of February 13th, 2008 (exhibit R-49A).

[5] On the basis of these « Decisions or Reports », the petitioner, in her motion, invokes the following facts:

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[1] Although petitioner also includes as respondents RBC Dominion Securities Limited and RBC Dominion Securities Inc., it appears, on the basis of the proceedings, exhibits and discoveries that these two entities were not involved in the fraudulent scheme described by petitioner or in the actual process by her of purchasing Olympus United Funds Corporation shares. The motion should therefore be dismissed as against these two entities.

« 20. On June 8th, 1999, *Norshield Financial Group* signed with RBC Dominion Securities (acting for Royal Bank of Canada) a *Letter Agreement with respect to a structured call option transaction*, (Exhibit R-29);

...

22. By way of the R-29 transaction, RBC was in fact extending a USD $100 million margin loan to *Norshield Financial Group*;

23. This margin loan was granted with the specific goal of creating a basket of offshore hedge funds;

...

25. In order to gain access to the $100 million margin loan, *Norshield Financial Group* paid a premium of USD $15 million in cash (or 15% of the margin loan);

...

27. On June 29, 1999, an RBC Dominion Securities *Confidential client questionnaire* (R-31) was signed by which Norshield Composite Ltd. (later Mosaic Composite Ltd) was identified as the *Norshield Financial Group* entity to be RBC's counterparty;

28. The R-29 transaction was finalized on July 30, 1999 between RBC and Norshield Composite Ltd., as appears from the R-33 Norshield Composite board of directors resolution, the R-34 ISDA Master Agreement and the R-35 Confirmation of agreement;

29. The R-35 Confirmation of agreement provided that RBC had authority over:

- the modification of the index of the basket of hedge funds (par.9);
- the calculation of the value of the index (par. 13(2));
- any assignment of the option (par. 13(4));

...

31 Notably, R-29 provided that RBC itself would negotiate and sign the Investment Advisory Agreements with each of the managers of each of the new hedge funds (par. 3);

32. On August 7, 1999, RBC signed with one of those hedge funds managers an *Investment Management Agreement*, said agreement being filed as Exhibit R-52;

33. Another concrete example of RBC's power over the basket of hedge funds is an August 29, 2000 letter from RBC informing *Norshield Asset Management* of a change in composition of the Index, said letter being filed as Exhibit R-53;

...

36. On June 27th 1999, Canadian retail investors were offered the *Horizon Group of Investment Funds* (later the *Olympus United Funds*), the whole as appears from Exhibits R-9A to R-9G;

37. The R-9 Offering Memorandums indicated that the retail investor's monies would be managed by *Olympus United Bank* SCC (Olympus Bank), a wholly owned Barbados subsidiary;

38. (...) Most of *Olympus Bank's* equity was in turn invested in *Olympus Univest Limited* (Olympus Univest), as appears from the R-56A to R-56D Olympus Bank's financial statements;

...

40. *Olympus Univest* then invested most of its equity in *Mosaic Composite Limited* (*Mosaic*), the "owner" of the basket of hedge funds created with the R-35 margin loan;

41. *Mosaic's* basket of hedge funds was the main asset on which was calculated the value of the *Olympus United Funds* shares;

42. But the underlying debt attached to that basket of hedge funds was not taken into account in calculating the *Olympus United Funds* shares value;

43. Founding *Olympus United Funds* shares value on a heavily leveraged asset, without taking this asset's underlying debt into account, had the effect of grossly inflating the value at which Class members bought their shares of *Olympus United Funds*;

...

45. During 2003 and 2004 an exceptionally high proportion of redemptions of *Olympus United Funds* shares occurred;

46. During those two years, whereas Canadian retail investors injected $105 million to buy new shares at grossly inflated values, $90 million went out to pay redemptions;

...

49. For one, the R-35 $100 million margin loan was followed, on June 28, 2002, by a second agreement which extended an extra $33,33 million loan from RBC to Mosaic as appears from the R-39A Letter Agreement;

50. Then, during the thirteen months between September 2002 and October 2003, the R-39A margin loan was amended and augmented eight times by RBC to end up totalling $245,33 million;

51. On or before March 4, 2004, the R-35 and R-39A margin loans were merged, and on March 4, 2004, the merged loan was one more time augmented by RBC to end up totalling $353,1 million;

52. During that relatively short period, in consideration for those margin loan augmentations, RBC pocketed cash premiums of over $38 million;

53. Those $38 million added to the $15 million premium already pocketed by RBC from the original R-35 margin loan;

54. Thus, the total premiums generated by RBC from its lending activity to *Norshield Financial Group* amounted to $53 million USD;

55. These margin loan augmentations had the effect of augmenting the assets under management in the underlying basket of hedge funds, which in turn artificially inflated the value of the *Olympus United Funds* shares;

56. During that period, most of *Olympus United Funds* share subscriptions were used to pay redemptions (ponzi scheme) and to make some $217 million in unexplained payments to *Norshield Financial Group* related entities;

57. In the OSC decision concerning Xanthoudakis et al., filed as Exhibit R-54, the Ontario securities commission (OSC) found that :

(...)

292. "The fact remains that because of the dissipation of investor funds at various points throughout the Norshield Investment Structure, only a small portion of investor funds made their way to the hedge fund managers. Massi testified that "[in] later years, most of the money never went down to the bank. It stayed at the fund level" (Hearing Transcript, November 4, 2008, p. 144). Consequently, the use of leverage was required in order to provide the hedge fund managers with sufficient funds and to ensure that a diverse set of assets could be achieved".

...

60. On January 19th 2004, RBC presented to the Canadian public and investment professionals the *RBC Olympus United Univest Principal Protected Hedge Funds Linked Deposit Notes, Series 1*, as appears from RBC/*Norshield Financial Group* Press release, said press release being already filed as Exhibit R-41;

61. In the R-41 press release, RBC and *Norshield Financial Group* mention that they :

"are proud to bring you the : *Univest Principal Protected Hedge Funds Linked Deposit Notes, Series 1*"

...

64. The *RBC Olympus United Univest Principal Protected Hedge Funds Linked Deposit Notes, Series 1* was offered through an *Information Statement* filed as Exhibit R-55;

...

67. Pages iv to x of R-55 identify Norshield Asset Management (NAM) as "basket manager", said basket being a basket of hedge funds;

68. NAM was *a Norshield Financial Group* entity implicated at every level of the *Norshield investment structure*, as indicated by the Mis-en-causes in the R-50 chart;

69. Other concrete examples of NAM's implication in the *Norshield investment structure* are :

a) NAM was RBC's Advisor to the *Mosaic* basket of hedge funds (R-29 Letter Agreement);

b) NAM was Portfolio Manager of the *Olympus United Funds* from at least 2002 (R-9D Offering memorandums and R-10 Portfolio Management Agreement);

...

71. What's more, at that time, not only did RBC had *Know your clients obligations*, but they also had anti-laundering and anti-terrorist monitoring obligations.

72. During the years preceding the R-55 PPN:

- *Olympus United Funds* investor's money was not making its way down the *Olympus investment structure* but was being diverted by the hundreds of millions to *Norshield Financial Group* related entities;

- *Olympus United Funds* share redemptions became as high as subscriptions;

- *Norshield Financial Group's* indebtedness in the R-35/R-39A margin loan had grown exponentially;

- *Norshield Financial Group* was over-evaluating *Olympus United Funds* and *Univest* shares by as much as the amount due to RBC;

...

74. On November 10th 2004, Mosaic assigned it's benefit in the SOHO Option to MS-II as appears from the R-43A Assignment Agreement (the assignment was to be retroactive to October 29th 2004). At the time of the assignment, Mosaic's interest in the SOHO Option was it's main asset (R-49 at para.66); as of October 29th, 2004, the SOHO Option was then valued at USD $52 493 000 (R-37 Valuation Report);

75. MS-II was a Cayman Island corporation whose representative was Terri Engelman-Rhodes, who was also one of the Norshield Composite's representative for the first SOHO Option agreement in 1999 (R-29, R-32); Xanthoudakis was also the signee of future dealings between RBC and MS-II (R-39A, at page 58 and following);

76. The assignment transaction was made in consideration for Class A and B shares of MS-II being emitted to Mosaic (R-49A, para 68); the assignment transaction was made in a manner that Mosaic could maintain an economical interest in the SOHO Option basket of hedge funds, in order to continue to base the *Norshield investment structure's* value on the said basket of hedge funds (R-49A, para.67);

77. As per the SOHO Option agreements, RBC had to consent to the R-43A assignment, which it did as appears from the document;

78. Then, on November 19th 2004, MS-II and RBC agreed to a partial termination of the SOHO Option, by which 272 of the then 1 000 options were "cash settled" for an amount of USD $15 million (R-39B, at page 55 of 68); as appears from page 2 of the Partial Termination agreement, at the request of MS-II, the proceeds were to be wired to the JP Morgan Chase New York bank account of a European financial institution : Daiwa Securities Trust & Banking (Europe), London; »

[6] Petitioner's attorneys also quote some specific sections from the «Decisions or Reports» that pinpoint important facts.

[7] From the liquidators' first report :

« 22. Investments in Olympus United Funds Corporation flowed into its wholly-owned subsidiary, Olympus United Bank and Trust SCC in Barbados, wherein the said, investments were purportedly segregated into different "cells" (as constituted according to Barbados banking laws) which, more or less, matched the investment strategies of each class of shares of Olympus United Funds Corporation.

23. Olympus United Bank and Trust SCC then invested its funds into Olympus Univest in the Bahamas. Olympus United Bank and Trust SCC's investments were co-mingled in Olympus Univest with investments received from pension funds and financial institutions, mostly from Canada, as well as other persons whose investments were made either in cash or by way of "in kind" contributions. At the time of Culmer's

appointment as Voluntary Liquidator of Olympus Univest, on May 19, 2005, its equity amounted to approximately $483 millions.

24. Olympus Univest then invested, either directly or through other funds, in Mosaic. Mosaic, in turn, held investments in both hedged and non-hedged assets.

25. Mosaic's hedged assets consisted predominantly of two cash settled equity barrier call options with the Royal Bank of Canada which were consolidated into a single option on March 31, 2004 (the "RBC SOHO Option"). The RBC SOHO Option permitted Mosaic to invest in a basket of hedge funds managed by various fund managers. Furthermore, the RBC SOHO Option was highly leveraged such that the basket of hedge funds had a gross value of approximately six times the value of Mosaic's actual investment.

26. As at September 30, 2003, the date of the last audited financial statements of Mosaic, the RBC SOHO Option had a gross value of approximately $300 million while Mosaic's actual investment therein (equity) was approximately $50 million. » (exhibit R-49A)

[8] At paragraph 27, the liquidators add :

« 27. In addition to its significant value, the RBC SOHO Option was important to the Norshield Investment Structure because the gross value of the basket of hedge funds was the basis upon which the net asset value of the shares of Mosaic, Olympus Univest and Olympus United Funds Corporation, as reported to their investors, was substantially calculated. » (exhibit R-49A)

[9] From the Sixth report of the receiver :

« 150. Both John Xanthoudakis and Dale Smith stated during their examinations by the Receiver that the NAVs which were provided on a weekly basis by Mosaic for presentation to the preference shareholders of Olympus Univest and indirectly to the Retail Investors (flowing up from Olympus Univest, through Olympus Bank and then Olympus Funds) were calculated almost entirely on the value of the hedged assets of Mosaic.

...

153. In order for this method of calculating the NAVs of the entities within the Norshield investment structure to be supported, Mosaic's non-hedged assets would have to have had, at a minimum, a realizable value equal to or greater than the outstanding amount of the margin loans which were secured by Mosaic's hedged assets. As stated above, Mosaic's non-hedged assets consisted principally of its investments in the Channel Entities.

...

155. The Receiver has concluded that the asset values carried on the audited financial statements of the Channel Entities were overstated by at least US $200 million for fiscal 2002, increasing to at least US $300 million for fiscal 2003. As a result, the value of the Channel Entities' assets was overstated by approximately 88% on their fiscal 2003 financial statements.

...

170. The Receiver has identified numerous significant payments from 2002 to 2004 made by Mosaic to entities and/or funds which appear to have or have had i) close connections to John Xanthoudakis and/or to Norshield entities, and/or ii) connections to entities over which John Xanthoudakis had influence with respect to investment decisions. The Receiver has not identified evidence that any of these third party payments have benefited either John Xanthoudakis or Dale Smith personally.

171. These payments totalling $156.6 million ...

172. The Receiver has not found a satisfactory explanation for these payments.

173. The Receiver also identified significant payments made by Olympus Bank from January 2001 to June 2005 ...

174. These payments by Olympus Bank totalled $60.7 million ...

175 The Receiver has not found a satisfactory explanation for these payments. » (Exhibit R-12D)

[10] In summary, these «Decisions or Reports» present the following chronology :

- June 8, 1999, signing of the letter of agreement with respect to structure the call option transaction (the SOHO Option) (exhibit R-29) between RBC and an entity of Norshield Financial Group;

- June 27, 1999, First Horizon / Olympus United Funds shares offered to the Canadian retail investors (exhibit R-9A);

- June 29, 1999, Mosaic (formally Norshield Composite Ltd) designated as RBC's counter party to the SOHO Option (exhibit R-32);

- July 30, 1999, signing of the master Agreement between RBC and Mosaic (exhibit R-34);

- Numerous extensions of the SOHO Option between September 2002 and March 2004 for a total of $353 million (exhibits R-35, R-39A and R-39B);

- January 19, 2004, deployment of the RBC Olympus United Univest Principal Protected Hedge Funds Linked Deposit Notes (exhibit R-55);

- November 10th, 2004 assignment by Mosaic of its benefit in the SOHO Option to MS-II, a Cayman Island Corporation, with RBC's consent (exhibit R-43A);

- November 19th, 2004, partial termination of the SOHO Option by mutual agreement between MS-II and RBC (exhibit R-39B).

[11] Petitioner therefore maintains that these specific events involving RBC factually demonstrate that RBC was the nemesis of the *Norshield Investment Structure* fraud, helped the fraudulent structure to evolve and gain credibility, permitted the diversion of money out of the structure and thus caused damages equivalent to the value of the unredeemable shares of Olympus United Funds held by the petitioner and other class members as of July 2005.

THE LAW

[12] Articles 1002 and following *C.c.P.* detail the conditions that must be met in order to obtain an authorization to institute a class action.

[13] Article 1003 *C.c.P.* states:

> « **1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> *(a)* the recourses of the members raise identical, similar or related questions of law or fact;
>
> *(b)* the facts alleged seem to justify the conclusions sought;
>
> *(c)* the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
>
> *(d)* the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately. »

[14] In *Dow Corning*, our colleague, Mr Justice Denis, describes how the Court must approach these conditions:

« a) Généralité

« Avant d'aborder ces conditions, il n'est pas inutile de rappeler que le recours collectif a une portée sociale et vise à fournir l'accès à la justice à des citoyens qui ont des problèmes communs dont la valeur pécuniaire peut souvent être d'une modicité relative et qui n'oseraient ou ne pourraient pas de façon appropriée mettre en marche le processus judiciaire. »

« Reprenant l'enseignement de la Cour suprême dans Comité régional des usagers de transports en commun de Québec c. C.T.C.U.Q., [1981] 1 R.C.S., 424, la jurisprudence a généralement établi que les conditions de l'article 1003 doivent être interprétées de façon non restrictive et qu'elles laissent peu de discrétion au Tribunal lorsqu'elles sont remplies sans pour autant que le Tribunal ait à se prononcer sur le bien-fondé en droit des conclusions en regard des faits allégués. »

« Le premier juge a qualifié le recours collectif de «recours exceptionnel». Avec égards, je ne partage pas ce point de vue. Le recours collectif est un véhicule procédural comme il y en a plusieurs autres dans le Code et il est disponible lorsque les conditions d'exercice se rencontrent. »

« Disons tout d'abord qu'un courant jurisprudentiel semble maintenant s'établir à l'effet que, en cas de doute, le doute doit jouer en faveur du mérite de la requête en autorisation. En d'autres mots, les dispositions de l'article 1003 du Code de procédure civile n'ont pas à être interprétées de façon restrictive, mais de façon libérale. »

a) L'article 1003 a) C.p.C.

« L'article 1003a) exige que le recours de l'ensemble des membres présente des caractéristiques suffisamment communes pour que l'essentiel du litige puisse être tranché par un seul jugement. Ainsi dans Nagar c. Ville de Montréal, [1991] R.D.Q. 604 (C.A.), notre Cour a reconnu qu'une requête pour exercer un recours collectif n'était pas recevable lorsque les questions sont très diversifiées, notamment quant aux dommages subis, aux régimes concernés, à la réglementation applicable et au partage de responsabilité éventuel. La seule diversité des réclamations individuelles ou encore la variété des circonstances n'est toutefois pas un obstacle insurmontable à l'exercice de ce recours (Comité d'environnement de la Baie Inc. c. Société d'électrolyse et de chimie Alcan, déjà cité; Tremaine c. C.C.H. Robins Canada Inc., déjà cité). Il suffit qu'il existe un certain nombre de questions de droit ou de fait suffisamment semblables ou connexes pour justifier le recours (Guilbert c. Vacances sans frontières Ltée. [1991] R.D.J. 513 (C.A.); Association coopérative d'économie familiale (Acef) du Nord de Montréal c. Ste-Marie, déjà cité ».

« Avec égards pour l'opinion contraire, l'essentiel du débat, c'est la conception même du stérilet Dalkon Shield. S'il s'avère que cette conception n'était pas

erronée et que son utilisation ne pouvait causer de problèmes, c'en sera fait du recours en dommages-intérêts.

Si, par contre, les réclamantes franchissent collectivement cette étape de façon victorieuse, le reste – outre la question de prescription – constituera des modalités propres à chaque membre du groupe.

Certes, à partir de ce moment, la preuve variera d'une personne à l'autre mais le législateur de 1978 n'a pas voulu limiter le recours collectif à des cas stéréotypés. »

b) L'article 1003 b) C.p.C.

« Les mots «paraissent justifier» et «justifient» ne peuvent avoir la même portée à moins que dans la première expression l'on ne tienne pas compte de la présence du verbe paraître. Et c'est ici que le renvoi au passage cité de l'opinion du juge Brossard dans l'arrêt St-Léonard, précité, est utile sur le sens à donner au verbe paraître qui sied à mon avis tout aussi bien dans le contexte de l'art. 1003. Le législateur a voulu que le tribunal écarte d'emblée tout recours frivole ou manifestement mal fondé et n'autorise que ceux où les faits allégués dévoilent une apparence sérieuse de droit.

Je conclus donc que l'expression «paraissent justifier» signifie qu'il doit y avoir aux yeux du juge une apparence sérieuse de droit pour qu'il autorise le recours, sans pour autant qu'il ait à se prononcer sur le bien-fondé en droit des conclusions en regard des faits allégués[2]. »

[15] The Court agrees with this approach described by Mr Justice Denis.

THE PRESENT MOTION

A. Article 1003(a) *C.c.P.*

[16] As regards identical, similar or related questions of law or fact, petitioner puts forward in her motion the following questions :

« 94 a) Did RBC participate in the creation of a financial product that was used to defraud the class members?

b) Did RBC allow this fraudulent structure to evolve, strive, and survive until $159 million were lost by Class members?

c) Did RBC know or ought to have known that the class members were being defrauded or at serious risk of losing their investments within that structure?

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2 *Manon Doyer* c. *Dow Corning Corporation et al.*, 500-06-000013-934, pages 6 to 8 of 20.

d) Did RBC voluntarily blind itself because of the financial benefits it derived from the fraudulent structure?

e) Did RBC omit to refrain from continuing its collaboration with *Norshield Financial Group*?

f) Did RBC omit to inform authorities of obvious risks and irregularities they knew or should have known about within *Norshield Financial Group* and the *Olympus investment structure*?

g) Did RBC lend their credibility to *Norshield Financial Group* and the *Olympus investment structure*, first by providing hundreds of millions of dollars in financing, and then by offering a principal protected financial product to the Canadian public which was directly based on the fraudulent structure?

g.1) Did RBC authorize transfers of funds and/or assets from the *Norshield Financial structure* that caused such assets to be diverted from assets that would have benefited the Group?

h) Does a positive answer to one or more of the questions above equate to an extra-contractual fault on the part of RBC?

i) If so, did RBC's fault(s) cause the losses incurred by Class members? »

[17] Petitioner asserts that all these questions are common to the group and only the amount of losses will vary from one member to the other.

[18] In support of this submission, petitioner refers the Court to several decisions[3] and also the following comment by Mr Justice Fournier of the Appeal Court in *Brown* v. *B2B Trust* :

> « 59. Une question est commune aux membres du groupe lorsqu'il est nécessaire d'y répondre pour résoudre la demande de chaque membre, que sa détermination a un effet significatif sur le sort des réclamations de chacun d'eux...
>
> 60. Bref, dans la mesure où se pose une question commune aux membres du groupe, question qui est par ailleurs significative, le critère est satisfait. »[4]

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3 Comité d'environnement de La Baie Inc. c. Société d'électrolyse et de chimie Alcan Ltée, 1990 QCCA 3338, Nadon c. Anjou (Ville), 1994 QCCA 5900, Sigouin c. Merck & Co. inc., 2006 QCCS 5325, Collectif de défense des droits de la Montérégie (CDDM) c. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît, 2011 QCCA 826, Option consommateurs c. Infineon, 2011 QCCA 2116, Dell'Anielo c. Vivendi Canada Inc., 2012 QCCA 384.

4 2012 QCCA 900, p. 15 of 17.

[19] For its part, respondents refer, amongst others, to the case of *Harmegnies* v. *Toyota Canada Inc.*:

> « 54. Il est, en effet, essentiel de démontrer le caractère collectif du dommage subi et le recours collectif n'est pas approprié lorsqu'il donnerait naissance, lors de l'audition au fond, à une multitude de petits procès et qu'un aspect important de la contestation engagé ne se prête pas à une détermination collective en raison d'une multiplication de facteurs subjectifs[5]... »

[20] Respondents pretend that, in effect, causation (article 1457 QCC) will be a fundamental question at issue and consequently this will give rise to a multitude of trials.

[21] This argument is based on the premise that petitioner as well as other members of the group did rely on RBC's involvement before deciding to invest in Olympus.

[22] Petitioner replies that reliance is not at the core of this recourse.

[23] The Court agrees that, in her motion, petitioner doesn't invoke reliance on any « faits et gestes » of respondents before deciding to invest in Olympus.

[24] The crux of petitioner's argument is that respondents decided to partake in the fraudulent scheme or structure with a view to making a profit while knowing or presumed to have known that their co-contracting partner was defrauding third parties.

[25] Furthermore, in the more recent ruling of *CDDM*[6] cited by petitioner, the Appeal Court ruled that the possibility of mini trials should not be considered as an obstacle to a class action:

> «[23] Il est fort possible que la détermination des questions communes ne constitue pas une résolution complète du litige, mais qu'elle donne plutôt lieu à des petits procès à l'étape du règlement individuel des réclamations. Cela ne fait pas obstacle à un recours collectif...»[7]

[26] The Court concludes that the questions of fact and law enumerated by petitioner in her motion[8] do raise common questions of law or fact and that, therefore, the criterion of article 1003 a) *C.c.P.* is met.

B. <u>Article 1003(b) *C.c.P.*</u>

[27] Do the facts alleged by petitioner and previously summarized seem to justify the conclusions sought?

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5 2008 QCCA 380, p. 10 of 11.
6 2011 QCCA 826.
7 Id., p. 4 of 8.
8 Paragraph 94 of the motion.

[28] Let us recall that this criterion deals with the issue of whether or not petitioner's motion shows a « good colour of right » or not. At this stage, the Court doesn't rule on the merits of the case.

[29] With regards to this criterion, petitioner cites the decision of *Menard* v. *Matteo et al* where Mr Justice Buffoni writes:

> « [42] Le syllogisme du recours envisagé ici se présente sommairement comme suit:
>
> 42.1 Selon l'article 1457 du *Code civil du Québec* (CCQ), toute personne a le devoir de respecter les règles de conduite qui s'imposent à elle de manière à ne pas causer de préjudice à autrui. Lorsqu'elle manque à ce devoir, elle est responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice.
>
> 42.2 Or, allègue la requérante, chacun des intimés a manqué à une ou plusieurs règles de conduite qui s'imposaient à lui et a, en ce faisant, participé d'une façon ou d'une autre ou favorisé d'une façon ou d'une autre la perpétration collective de la fraude, cause directe des pertes financières subies par les membres du Groupe.
>
> 42.3 Donc, conclut-elle, chacun des intimés est tenu solidairement de réparer le préjudice causé par sa faute aux membres du Groupe.
>
> [43] En tenant pour avérées les allégations de la requête amendée, l'on doit se demander si le recours envisagé satisfait à la condition de l'apparence sérieuse de droit, tant à l'égard de chacun des intimés qu'à l'égard de chacun des trois éléments requis: faute, préjudice, lien de causalité[9]. »

[30] In *Brown* v. *B2B Trust*[10] previously cited, the Court of Appeal states:

> « [40] Au stade de l'autorisation, le fardeau de l'appelant n'en est pas un de preuve prépondérante. Il lui suffit de faire la démonstration d'un syllogisme juridique qui mènera, si prouvé, à une condamnation et le juge saisi de la requête ne peut considérer les moyens de défense qui pourraient être soulevés.
>
> ...
>
> [43] Comme je le mentionnais plus haut, le fardeau de l'appelant en est un de démonstration et c'est en tenant compte de ce fardeau que le juge exerce sa discrétion de l'examen des quatre critères. Le paragraphe b) de l'article précise bien que les faits allégués <u>paraissent justifier</u> les conclusions recherchées. Un peu comme en matière d'injonction interlocutoire, à ce stade précoce de la

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9 2011 QCCS 4287, at p. 7-8 of 20.
10 2012 QCCA 900, Page of ...

procédure, le fardeau du demandeur se limite à établir une apparence de droit et non à convaincre à la suite d'un débat contradictoire[11] »

[31] To the same effect are the comments of our colleague, Mr Justice Mongeon, in the matter of *Jean-François Paris*:

> « 49. Dès qu'il constate une allégation qui, si elle est prouvée à l'audition au fond, peut permettre à un tribunal de conclure à une faute génératrice d'un dommage et que cette situation suggère qu'une(sic) ou plusieurs questions communes à des membres d'un groupe, le tribunal d'instance se doit de s'abstenir de rejeter le recours au stade de l'autorisation et de permettre que le débat soit tranché après audition complète de toute la preuve. Le processus de filtration des recours collectifs au moyen de la requête en autorisation n'est ni le moment ni le forum approprié pour fermer la porte à l'exercice d'un recours judiciaire sauf lorsqu'il est évident que le recours n'a aucune chance de réussite comme recours collectif.
>
> ...
>
> 60. Les défendeurs administrateurs et dirigeants plaident essentiellement que les faits allégués par le demandeur doivent être remis en perspective, certains parce qu'ils sont eux-mêmes faux et inexacts, d'autres parce qu'ils sont contredits par la preuve documentaire produite par le demandeur lui-même. Bref, s'il fallait retenir leur thèse, cela équivaudrait à décider de l'issue de cette cause sur la seule foi des mémoires, sans entendre la preuve, sans voir les témoins et sans apprécier leur crédibilité. Cela ne veut pas dire que le demandeur a raison ou qu'il a tort. Cela ne veut pas dire que le demandeur a raison ou qu'il a tort. Cela veut dire que malgré l'intérêt des questions et des arguments de part et d'autre, le Tribunal se doit d'entendre un recours collectif à moins que la lecture des allégations ne fasse ni bon sens ni logique, somme toute, que ces allégations soient à ce point frivoles et manifestement mal fondées, que la poursuite du débat judiciaire ne résulte qu'en un abus du système et ne débouche que sur un constat prévu d'avance[12]. »

[32] Respondents maintain that petitioner has failed in her burden to demonstrate a good color of right for three reasons:

- no allegation of concrete facts that could qualify as a fault on the part of respondents;
- no allegation of reliance on respondents' contribution to the alleged fraud;
- no standing to sue for the loss of value of petitioner's or other members' investments in Olympus.

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[11] 2008 QCCA 380, p. 10 of 11.
[12] Jean-François Paris c. Renaud Lafrance et al., 500-06-000440-087, September 1, 2011.

[33] Because of the principle that the facts alleged by petitioner must be taken for granted, the Court is of the opinion that the facts alleged by petitioner in the motion or referenced in the exhibits do show a good color of right in favour of petitioner.

[34] More specifically, if those facts are taken for granted, they support the submission that respondents committed a fault in the course of their business operations, said fault causing the damages claimed by petitioner.

[35] Of course, at trial, the Court will rule on the basis of the proof presented by both parties and will then decide whether or not respondents, in the present instance, had an obligation to review and investigate the financial structure of Norshield and/or Mosaic the whole in the context of determining if they committed or not a fault.

[36] Coming back to the three arguments raised by respondents to argue that the alleged facts do not seem to justify the conclusions sought, the Court will underline the following points.

[37] The first argument is to the effect that petitioner makes no allegation of concrete facts that could qualify as a fault on the part of respondents.

[38] More specifically, respondents maintain that the SOHO Option is not a margin loan as pleaded by petitioner but rather an investment vehicle.

[39] Much of respondents' contestation is directed at convincing the Court of this distinction.

[40] Repeating again that, at the stage of the authorization, the facts alleged must be taken for granted, the Court cannot entertain this first argument by respondents.

[41] Only the proof at trial will permit to determine if respondents knew or should have known that they were voluntarily participating in a fraudulent scheme.

[42] The Court also notes that in the receiver's Sixth report, he refers to a « margin loan » not an « investment vehicle »:

> « 153. In order for this method of calculating the NAVs of the entities within the Norshield investment structure to be supported, Mosaic's non-hedged assets would have to have had, at a minimum, a realizable value equal to or greater than the outstanding amount of the margin loans which were secured by Mosaic's hedged assets. As stated above, Mosaic's non-hedged assets consisted principally of its investments in the Channel Entities[13]. »
>
> (Our underlining)

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[13] Exhibit R-12D.

[43] As a second argument, respondents maintain that petitioner makes no allegation of reliance on respondents' contribution to the fraudulent scheme.

[44] We have already seen that, in effect, petitioner does not invoke the argument of reliance and, therefore, the Court believes that this argument is mute.

[45] Respondents point out that the Memorandum (exhibits R-9 and R-9-F) doesn't refer to them and provides « risk tolerance warnings » for potential investors as well as many « Beware » in exhibit R-55.

[46] Again, the Court considers that these may be valid arguments but only to be raised at the hearing on the merits not at the stage of the authorization.

[47] Thirdly, respondents maintain that petitioner as well as other members of the group have no standing to sue for the loss of value of their investments in Olympus.

[48] In support of this argument, respondents refer the Court to cases involving claims by shareholders or to the fact that only the receiver is entitled to initiate proceedings against the respondents, a decision the receiver has not taken.

[49] The Court does not endorse this argument because, in the present instance, petitioner and other class members are basing their right to sue on the premise that they were fraudulently lured into investing in Olympus. They do not invoke the contracts, per se, between respondents and *Mosaic* or any other extra-contractual links between respondents and other entities involved in the fraudulent structure.

[50] The Court concludes that if petitioner is successful in her claim against respondents and obtains damages, this should not constitute a preferential treatment.

C. Article 1003(c) *C.c.P*.

[51] Our Appeal Court[14] recently cited the Supreme Court decision in *Western Canadian Shopping Centre* which discusses the question of the composition of the group:

> « 38 Bien qu'il existe des différences entre les critères, il se dégage quatre conditions nécessaires au recours collectif. Premièrement, le groupe doit pouvoir être clairement défini. La définition du groupe est essentielle parce qu'elle précise qui a droit aux avis, qui a droit à la réparation (si une réparation est accordée), et qui est lié par le jugement. Il est donc primordial que le groupe puisse être clairement défini au début du litige. La définition devrait énoncer des critères objectifs permettant d'identifier les membres du groupe. Les critères devraient avoir un rapport rationnel avec les revendications communes à tous les membres du groupe mais ne devraient pas dépendre de l'issue du litige. Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. Il

[14] CDDM v. CSSS du Suroît et al., 2011 QCCA 826 (CanLII), p. 9 of 14.

> est toutefois nécessaire que l'appartenance d'une personne au groupe puisse être déterminée sur des critères explicites et objectifs : voir Branch, *op. cit.*, par. 4.190-4.207; Friedenthal, Kane et Miller, *Civil Procedure* (2e éd. 1993), p. 726-727; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (C. Ont. (Div. gén.)), par. 10-11. »

[52] In view of these comments, the respondents do not seriously contest the premise that the composition of the group proposed by petitioner makes the application of articles 59 or 67 *C.c.P.* difficult or impracticable.

D. Article 1003(d) *C.c.P.*

[53] Respondents maintain that petitioner is not in a position to represent the group adequately because she does not have an interest to sue.

[54] This argument has already been set aside[15].

[55] They also claim that petitioner would know very little about the pertinent facts so that other members of the proposed class would not accept to be represented by her.

[56] The Court is of the opinion that, on the contrary, petitioner has shown that she has a good understanding of the facts relevant to this motion.

[57] The Court underlines all the various steps taken by petitioner over the past few years to bring forward this claim, despite numerous set backs and difficulties, as illustrated in the various proceedings before the Court as well as her capabilities to submit to discoveries and provide answers to pertinent questions.

[58] The Court concludes that petitioner is in a position to represent the group adequately.

[59] Still on the question of the group's composition, the Court agrees with petitioner's submission that the class definition should be national in scope.

[60] Respondents do not appear to contest such a national scope.

[61] Furthermore, it should be noted that there is a real and substantial connection with the jurisdiction of this Court (article 3148 *C.c.Q.*) since the alleged fraud was perpetrated in Montreal where *Norshield Financial Group* was founded and RBC as well as the mis-en-cause Richter and Massi have either a head office or a domicile.

[62] Lastly, respondents are right to argue that the definition of the proposed class must exclude any person who is or was in any way related to John Xanthoudakis or any other former director, administrator, representative or employee of the *Norshield Financial Group*.

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[15] See paragraphs 44 to 47.

FOR THESE REASONS, THE COURT :

[63] **GRANTS** the present motion against Banque Royale du Canada and RBC Capital Markets Corporation;

[64] AUTHORISES the exercise of the following class action: An action in damages for extra-contractual liability;

[65] **GRANTS** petitioner the status of representative member in order to institute class action proceedings on behalf of those persons belonging to the following class:

> « All Canadian retail investors who purchased one of the Olympus United Funds Corporation shares (formally First Horizon Holdings Ltd.) from June 27, 1999 to June 29, 2005, and who had outstanding shares in said corporations as of June 29, 2005, but to the exclusion of any person who is or was in any way related to John Xanthoudakis or any other former director, administrator, representative or employee of the *Norshield Financial Group*. »

[66] **IDENTIFIES** as follows the principal questions of fact and law to be dealt with on a collective basis:

a) Did RBC participate in the creation of a financial product that was used to defraud the class members?

b) Did RBC allow this fraudulent structure to evolve, strive, and survive until $159 million were lost by Class members?

c) Did RBC know or ought to have known that the class members were being defrauded or at serious risk of losing their investments within that structure?

d) Did RBC voluntarily blind itself because of the financial benefits it derived from the fraudulent structure?

e) Did RBC omit to refrain from continuing its collaboration with *Norshield Financial Group*?

f) Did RBC omit to inform authorities of obvious risks and irregularities they knew or should have known about within *Norshield Financial Group* and the *Olympus investment structure*?

g) Did RBC lend their credibility to *Norshield Financial Group* and the *Olympus investment structure*, first by providing hundreds of millions of dollars in financing, and then by offering a principal protected financial product to the Canadian public which was directly based on the fraudulent structure?

g.1) Did RBC authorize transfers of funds and/or assets from the *Norshield Financial* structure that caused such assets to be diverted from assets that would have benefited the Group?

h) Does a positive answer to one or more of the questions above equate to an extra-contractual fault on the part of RBC?

i) If so, did RBC's fault(s) cause the losses incurred by Class members?

[67] **IDENTIFIES** as follows the class action conclusions sought:

> **GRANT** the present class action;
>
> **CONDEMN** respondents to pay to the Class members the balance in Canadian dollars attributed to their unredeemed shares of *Olympus United Funds Corporation* or its predecessor First Horizon Holdings Ltd, as of June 29, 2005, less any amount received by class members pursuant to the judgment rendered by this Court on July 26th 2012, in court file 500-06-000434-080, and subject to the judgment of July 26th 2012 in the present instance, plus legal interest and the special indemnity provided by Article 1619 of the *Civil Code of Quebec* calculated from the first date of the service of the proceedings;
>
> **ORDER** the collective recovery of the damages;
>
> **CONDEMN** respondents to costs including experts' fees;

[68] **DECLARES** that all members of the class shall be bound by the judgment to intervene with respect to the class action proceedings except where they have opted to be excluded as provided by law;

[69] **ORDERS** that every member shall benefit from a period of ninety (90) days from the judgment to intervene in order to exercise any statutory right to be excluded from the class;

[70] **ORDERS** the mis-en-cause to provide the petitioner with a complete list of the known identifies and coordinates of Class members;

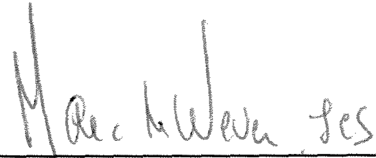
[71] **ORDERS** the publication of a notice to the members in accordance with a national diffusion plan to be ordered by this Court;

[72] **ORDERS** that the said notice to members be published within a period of thirty (30) days from the judgment to intervene on the present motion;

[73] **THE WHOLE** with costs;

[74] **DISMISSES** the motion against RBC Dominion Securities Limited and RBC Dominion Securities Inc.;

[75] **WITHOUT COSTS** as regards RBC Dominion Securities Limited and RBC Dominion Securities Inc.



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Dates of hearing : April 10th and 11th, 2013.