File No. _____

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

EQUIFAX INC.

EQUIFAX CANADA CO.

APPLICANTS
(Petitioners)

- and -

DANIEL LI

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

(Article 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

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APPLICANTS' MEMORANDUM OF ARGUMENT

PART I – THE FACTS AND THE ISSUES OF PUBLIC IMPORTANCE

1. This appeal focuses on a key aspect of managing interjurisdictional disputes in the context of multijurisdictional class actions, namely, the staying of class action proceedings in one province in favour of another. The issue can be summarized in a single question: should duplicative class action proceedings be allowed to proceed simultaneously in different provinces simply because Canadian provinces have adopted conflicting approaches to motions to stay?

2. This Application for Leave to Appeal seeks to appeal a judgment of Roy J., of the Court of Appeal of Québec, rejecting an Application for Leave to Appeal[1] from a judgment rendered on May 7, 2018, by which Bisson J. of the Superior Court refused to stay the proceedings filed in Québec against Equifax inc. and Equifax Canada Co. (together the "**Applicants**") concerning a 2017 incident (the "**Incident**") involving unauthorized access to some of the personal information held by Equifax. Bisson J. refused to stay the within action despite the fact that five other similar class action proceedings were ongoing in three other Canadian provinces[2], four of which were national in scope.[3]

3. The advent of class actions has been a major development in civil litigation in Canada in recent decades. Multijurisdictional class actions, i.e. class actions that expand across provincial borders, represent the next frontier in the Canadian class action landscape. It is a novel area of law that is intrinsically national in scope since multijurisdictional class actions raise the issue of relations between equal but different superior courts in the Canadian federal system.

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1 Judgment of the Court of Appeal, **Application for Leave to Appeal (hereinafter "A.L.A."), vol. I, p. 33ff.**

2 A seventh class action proceeding was filed in British Columbia on August 27, 2018, i.e. after the Superior Court's judgment was rendered by Bisson J. and before the hearing of the Leave to Appeal at the Court of Appeal by Roy J.

3 Judgment of the Superior Court, **A.L.A., vol. I, p. 3ff.**

4. In Québec, requests for a temporary stay of a domestic class action in favour of an overlapping national class action instituted in another province are usually addressed through the lens of *lis pendens*, codified in art. 3137 of the *Civil Code of Québec* ("**CCQ**"), in conjunction with the newly enacted art. 577 of the *Code of Civil Procedure* ("**CCP**"), which concerns the protection of the rights and interests of Québec residents.

5. The crux of the matter lies in the interpretation of the requirement that an action be pending in another jurisdiction for the stay to be granted pursuant to art. 3137 CCQ also referred to as the anteriority requirement. A first line of cases has adopted a contextual approach to the analysis under art. 3137 CCQ, acknowledging the potential advantages of staying a Québec class action when there is a national class action in another province (the "**Contextual Approach**"). This line of cases is best exemplified by the judgment of Justice Stephen Hamilton, j.s.c. as he then was, in *Chasles c. Bell Canada inc.*[4], which interprets the anteriority requirement liberally, allowing a stay in a case where the Québec action was filed a few days before the national class action in Ontario. The Contextual Approach recognizes that it is obviously most efficient for all parties to aim for a single judgment or a single settlement of the matter, as such an approach avoids the risk of conflicting judgments and is likely to result in greater economies of scale, achieve greater judicial economy and encourage behaviour modification from defendants where necessary.

6. The lower court judgments in this appeal belong to a second line of cases, stemming from the decision of Justice Marie-Anne Paquette, j.s.c., in *Garage Poirier & Poirier inc. c. FCA Canada inc.*[5], under appeal[6], which predicated a strict application of the anteriority criterion (the "**Strict Approach**"). Applying this Strict Approach in the case at hand, Bisson J. declared that he was precluded from exercising his discretion regarding the stay request because one of the conditions of art. 3137 CCQ was not met: the Québec proceedings had

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4 2017 QCCS 5200 [*Chasles*].
5 2018 QCCS 107 [*Poirier*].
6 *Application for Leave to Appeal* deferred to a bench of three judges by Justice Manon Savard, j.c.a., 2018 QCCA 490.

been filed before the proceedings in Ontario.[7] Despite this conclusion at the first stage of the analysis, Bisson J. went on to consider the protection of the rights and interests of the Québec members under art. 577 CCP and decided against a stay.

7. Bisson J.'s reasoning and the Strict Approach entail that Québec actions can never be temporarily stayed in favour of a national class in another province when the Québec action was filed first[8], even when the refusal to stay would be contrary to the protection of the rights and interests of Québec residents, voiding the newly enacted art. 577(2) CCP of its substance. The Strict Approach means that a Québec action would always proceed in parallel to a national or multijurisdictional class action in such circumstances, creating a risk of conflicting judgments, possibly excluding Québec residents from a national settlement, needlessly monopolising judicial resources, multiplying costs and increasing uncertainty for all parties involved.

8. Such an outcome is manifestly at odds with the principles of proportionality and proper administration of justice enshrined in Québec law.[9] In *Saumur c. Avid Life Media Inc.*[10], a decision involving a request for a stay of proceedings in the context of a multijurisdictional class action, Turcotte J. interpreted the requirements of art. 18 CCP as follows:

> [14] It is in accordance with article 18 of the Québec Code of Civil Procedure to avoid that the judicial resources of the superior courts of both Ontario and Québec are utilised when it is not necessary. Article

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7 It is to be noted that an action in Saskatchewan was filed before the Québec action. However, the stay of the proceedings in Québec was asked to the benefit of the Ontario action. See Judgment of the Superior Court, **A.L.A., vol. I, p. 17, paras. 51-52**. The Saskatwhewan action was permanently stayed on November 13, 2018: *Robert Dwight Johnson v. Equifax Inc. and Equifax Canada Co.*, 2018 SKQB 305.

8 Or where the party requesting the stay cannot meet its burden to demonstrate that another action was filed first, notably in cases where multiple actions were filed simultaneously on the same day, such as in *Poirier*. See *Poirier*, *supra* note 5, paras. 44-47.

9 Art. 18 CCP, **A.L.A., vol. I, p. 63.**

10 2016 QCCS 6304.

> 18 C.c.p. obliges the parties and the judges to observe the principle of proportionality in order to assure the proper administration of justice.[11]

9. In fact, the Strict Approach indirectly condones a strategy whereby class counsels claim turf in Québec by filing a Québec domestic action before a national class can be constituted to bolster their claim in an eventual carriage motion or to ensure that they will reap the benefits of a successful claim or settlement in Québec.

10. The Strict Approach also results in an troubling discrepancy between the analysis of the Québec courts and the analysis in other jurisdictions. In a time where it is common for multiple class action proceedings to be filed simultaneously or over the course of a few days across Canada, Québec courts rely on the minor and arbitrary factor of the date of filing to solve interjurisdictional disputes. Common law provinces, for their part, have adopted a holistic approach[12], weighing factors that recognize the usefulness and purpose of class action proceedings.

11. Furthermore, the common law provinces' recourse to the doctrine of abuse of process and willingness to look "below the surface of the proceedings to understand what [was] really going on"[13] have started to address the practice of filing identical class actions in parallel

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11 *Ibid*., para. 14.

12 See for instance the statutory provisions adopted in Alberta, Saskatchewan and British Columbia, inspired by the Uniform Law Commission: *Class Proceedings Act*, SA 2003, c C-16.5, s. 5(6), (7), (8) , **A.L.A., vol. I, p. 101ff.**; *The Class Actions Act*, SS 2001, c C-12.0, s. 6(2), (3) , **A.L.A., vol. I, p. 111ff.**; *Class Proceedings Act*, RSBC 1996, c 50, s. 4(3), (4), **A.L.A., vol. I, p. 97ff.** See also the Ontario courts' broad jurisdiction in determining the conduct of a class proceeding : *Class Proceedings Act, 1992*, SO 1992, c 6, s. 12, **A.L.A., vol. I, p. 93ff.**

13 *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896, paras. 83, 86; *Hafichuk-Walkin et al v. BCE Inc et al*, 2016 MBCA 32, para. 56; *Bear v. Merck Frosst Canada & Co*, 2011 SKCA 152, para. 74.

across the country in order to claim territory that has become prevalent among certain class counsel. These efforts cannot be reciprocated in Québec if the Strict Approach prevails.

12. One such example is *Johnson v. Equifax Inc. and Equifax Canada Co.*[14], wherein the Saskatchewan Court of Queen's Bench has permanently stayed as an abuse of process a parallel multijurisdictional proceeding concerning the Incident (commenced by the same class counsel as the within action) because it was not commenced, and was not being continued, for the *bona fide* purpose of advancing the claims of putative class members.

13. In addition, the Strict Approach signals a break with the principles of interprovincial comity advocated by this Honorable Court in *Canada Post Corp. v. Lépine.*[15] By refusing to even consider whether Québec residents may be well served by a national action instituted in a different province, the Strict Approach undermines the notion of comity and signifies a lack of appreciation of the significant advantages offered by multijurisdictional or national class actions.

14. Finally, the Strict Approach seems to go as far as preventing parties from staying a class action by consent, jeopardising the existing efficient practice whereby plaintiff and defendant counsels in different provinces cooperate in choosing where the main action will proceed while other actions are temporarily stayed. In fact, this understanding of the reasons in *Poirier* has even recently been shared by a Superior Court judge dealing with similar requests to stay proceedings in Québec[16].

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14 2018 SKQB 305.

15 2009 SCC 16 [*Lépine*].

16 Notwithstanding Roy J.'s obiter comment that judges retain discretion to stay an action at the request of the parties, Justice André Prévost, j.c.s., postponed sine die the hearing of the joint application to stay the proceedings in *Mercedès Élizabeth Carrigan* c. *Glaxosmithkline et al.* (C.S. 500-06-000807-160) until the Court of Appeal decides *Poirier*. His letter reveals his understanding of Paquette J.'s decision, i.e. where there is no demonstration of the anteriority of the foreign action, art. 3137 CCQ and art. 577 CCP do not allow for the stay to

15. This Court has recognized in *MacDonald v. City of Montreal*[17] and *Roberge v. Bolduc*[18] that its discretionary power to grant leave extends to decisions on leave from provincial appellate courts raising issues of public importance. Such is the case here. Indeed, if the trend at the appellate level to deny leave to appeal in similar circumstances continues, no appellate court will have the opportunity to rule on the issues of interprovincial comity, allocation of judicial resources and proper administration of justice that arise in the context of multijurisdictional class actions, as in the present case.

16. This Court has not rendered a decision fully addressing multijurisdictional class actions[19] since its call for interprovincial comity in *Lépine*[20] in 2009. This Court's guidance is therefore acutely needed.

1. The Application for Leave to Appeal

a) Facts

17. Between September 8, 2017, and August 27, 2018, seven proposed class action proceedings were filed across Canada against the Applicants, all pursuing the same objectives, raising the same or substantially similar issues and stemming from the same Incident involving unauthorized access to certain personal information. As it is common in the class action context in Canada, four of those proceedings were filed almost simultaneously in the course

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be granted. Letter from Justice André Provost, J. dated November 6, 2018, **A.L.A, vol. II, pp. 176-177.**

17 [1986] 1 SCR 460.

18 [1991] 1 SCR 374.

19 In *Endean v. British Columbia*, 2016 SCC 42 [*Endean*], this Court also endorsed a broad interpretation of the statutory and inherent powers of judges in a manner consistent with the purpose of class actions to provide access to justice, and a fair, judicially economical and expeditious resolution of the plaintiffs' claims. See paras. 1, 4. See also *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, paras. 27-29, on the purpose of class action proceedings.

20 *Lépine*, *supra* note 15, paras. 56-57.

of five days in different jurisdictions. The seven class proceedings commenced in Canada in relation to the Incident are as follows:

a) On September 8, 2017, Robert Dwight Johnson (Merchant Law Group), filed a *Statement of Claim* in Saskatchewan on behalf of a national class (the "**Saskatchewan Action**").[21] This action has now been permanently stayed as an abuse of process;[22]

b) On September 11, 2017, Daniel Li (Merchant Law Group), filed an *Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff*, by which he proposed to represent a provincial class in Québec ("**Québec Action**");[23]

c) On September 12, 2017, Laura Ballantine (Merchant Law Group), filed a *Statement of Claim* in Ontario, on behalf of a national class, which was stayed on January 24, 2018, after the hearing on the carriage motion;[24]

d) On September 12, 2017, Bethany Agnew-Americano (Sotos LLP), filed a *Statement of Claim* in Ontario, by which she proposed to represent a national class ("**Ontario Action**");[25]

e) On September 18, 2017, Yaseen Azam and Khyati Sujai Patel (Merchant Law Group), filed a *Notice of Civil Claim* in British Columbia, by which they proposed to represent a national class ("**Azam/Patel (BC) Action**");[26]

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21 **A.L.A., vol. II, p. 20ff.**
22 *Robert Dwight Johnson v Equifax Inc. and Equifax Canada Co.*, 2018 SKQB 305.
23 **A.L.A., vol. II, p. 1ff.**
24 **A.L.A., vol. II, p. 101ff.**
25 **A.L.A., vol. II, p. 58ff.**
26 **A.L.A., vol. II, p. 132ff.**

f) On January 10, 2018, Joshua Elliott Temple (Branch MacMaster LLP and Camp Fiorante Matthews Mogerrnan LLP), filed a *Notice of Civil Claim* in British Columbia, by which he proposed to represent a provincial class;[27]

On August 27, 2018, Daniel Thalheimer (Rosenberg Kosakoski LLP), filed a *Notice of Civil Claim* in British Columbia, by which he proposed to represent a national class;[28]

b) Judgments below

18. As stated above, Bisson J. adopted a strict application of the anteriority criterion pursuant to art. 3137 CCQ and denied the stay because the Québec action was filed before the Ontario action.[29]

19. It is not contested, and it was recognized by Bisson J., that all the proposed national actions that had been filed as of the date of the hearing, i.e. the Saskatchewan Action, the Ontario Action, and the Azam/Patel (BC) Action, share common parties, facts and purpose with the Québec Action, thus creating a situation of *lis pendens* and the risk of conflicting judgments on decisive issues.[30] Bisson J. also acknowledged that the Saskatchewan Action and the Ontario Action could result in a decision which may be recognized in Québec.[31]

20. In the reasons for judgment on leave from the appellate court, Roy J. questioned the very existence of a right to appeal a decision dismissing a request to stay a class proceeding, but refrained from further comment due to the appeal in *Poirier*.[32]

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27 **A.L.A., vol. I, p. 119ff.**
28 **A.L.A., vol. II, p. 158ff.**
29 Judgment of the Superior Court, **A.L.A., vol. I, p. 12-14, para. 34.**
30 Judgment of the Superior Court, **A.L.A., vol. I, p. 16, para. 45.**
31 Judgment of the Superior Court, **A.L.A., vol. I, p. 19, para. 61.**
32 Judgment of the Court of Appeal, **A.L.A., vol. I, p. 35, paras. 7-8**; In *Poirier*, *supra* note 5, Justice Manon Savard, j.c.a., deferred the *Application for Leave to Appeal* to a bench of three judges, notably raising the question as to whether the first instance judgment dismissing the

21. Erroneously, Roy J. refused to determine the question of law brought before her concerning the anteriority criterion and the liberal interpretation of art. 3137 CCQ recommended in the context of interprovincial and multijurisdictional class actions - the very question determining if judges of the Superior Court may stay a class action where the action in Québec is filed first.

22. Further, Roy J. erroneously made a determination in respect of the discretionary analysis of art. 577 CCP, calling for deference from the Court of Appeal, without first having made a determination regarding the interpretation of art. 3137 CCQ.

PART II – CONCISE STATEMENT OF THE QUESTIONS IN ISSUE

23. The only issue on this leave application is whether the proposed appeal raises issues of national interest that ought to be addressed by this Court, namely:

> Should duplicative class action proceedings be allowed to proceed simultaneously in different provinces simply because Canadian provinces have adopted conflicting approaches to motions to stay?
>
> More specifically, should the Contextual Approach or the Strict Approach prevail in Québec in regards to motions to stay in the context of multijurisdictional actions?

PART III – CONCISE STATEMENT OF ARGUMENTS

24. The Applicants submit that the Contextual Approach should prevail in the context of multijurisdictional class actions.

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application to stay the proceedings can be appealed under the new CCP. See *FCA Canada inc. c. Garage Poirier & Poirier inc.*, 2018 QCCA 490, paras. 4-7.

25. If granted leave, the Applicants will argue that courts must adopt a modified analysis of art. 3137 CCQ in the context of multijurisdictional class actions, applying the anteriority requirement liberally. The Applicants contend that the rights and interests of the Québec members should be paramount to the first-to-file rule, in light of the objectives of the new class action framework promulgated by the Québec legislator in 2016, and more specifically art. 577 CCP.

26. The Applicants will demonstrate that the Contextual Approach to the anteriority requirement is consistent with the principles of interprovincial comity and is a continuation of the existing jurisprudential trend of adapting the requirements of art. 3137 CCQ to the reality of multijurisdictional actions.

27. The Applicants will show that motions to declare Québec *forum non conveniens* are not a suitable alternative to motions to stay in the context of multijurisdictional class actions. Finally, the Applicants will plead that stays can always be granted with the consent of all parties, provided the rights and interests of Québec members are adequately protected.

1. Modifying the conditions of art. 3137 CCQ in the context of multijurisdictional class actions

a) The relevant legislative provisions

28. Art. 3137 CCQ sets out five conditions that must be satisfied for a Québec action to be stayed in favour of a foreign action: 1) that both actions are between the same parties, 2) that both actions are based on the same facts, 3) that both actions have the same subject, 4) that the foreign action is pending; and 5) that the foreign action can result in a decision which may be recognized by the Québec court. When the conditions of *lis pendens* are met, the court may, but is not obligated to, stay its ruling.

29. Art. 3137 CCQ was promulgated in 1994. It is based on equivalent provisions in international law.[33] Prior to 1994, *lis pendens* was only recognized in Québec vis-a-vis Canadian provinces, but not vis-a-vis foreign states. The Minister's comments indicate that the article aims to prevent conflicting judgments.[34]

30. The legislative purpose behind art. 3137 CCQ is of particular importance here. Crucially, the fourth requirement of art. 3137 CCQ, i.e. the requirement of the anteriority of the foreign action, was adopted to prevent the occurrence of "forum shopping".[35] In the context of individual actions, "forum shopping" describes the situation whereby a defendant sued in Québec institutes an identical action before a different provincial or foreign court in order to avoid the jurisdiction of the Québec court. However, such concerns do not arise in the context of class actions, since defendants are not able to institute class action proceedings.

31. In 2016, the Québec legislature promulgated art. 577 CCP as part of a new legislative framework for class actions. Art. 577(2) CCP compelled the courts to consider the protection of the rights and interests of Québec residents when staying an application for authorization of a class action. The Minister's comments reveal that art. 577 CCP was intended to introduce an additional procedural criterion to the court's analysis under arts 3137 and 3135 CCQ.[36] As will be shown below, the application of art. 3137 CCQ in the context of multijurisdictional class actions must be informed by art. 577 CCP which promotes the paramountcy of the rights and interests of Québec members.

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33 Québec, Ministère de la Justice, *Commentaires du ministre de la Justice : Le Code civil du Québec*, t. 2, Québec, Publications du Québec, 1993 at art. 3137, **A.L.A., vol. II, p. 182**, citant : *Loi fédérale sur le droit international privé suisse de 1987*, art. 9, **A.L.A., vol. I, p. 117ff**; *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, arts. 5, 20, **A.L.A., vol. I, p. 105ff**.

34 Québec, Ministère de la Justice, *Commentaires du ministre de la Justice : Le Code civil du Québec*, t. 2, Québec, Publications du Québec, 1993 at art. 3137, **A.L.A., vol. II, p. 182.**

35 Gérald Goldstein, *Droit international privé*, vol. 2 (Cowansville, Que : Yvon Blais, 2013), EYB2013DCQ1277, para. 560, **A.L.A., vol. II, p. 178ff**; *Lac d'amiante du Québec ltée c. 2858-0702 Québec inc*., J.E. 97-1167, EYB 1997-00787 (C.S.).

36 Ministère de la Justice, *Nouveau Code de procédure civile et commentaires de la ministre de la Justice* (Montréal, Wilson & Lafleur, 2015) at art. 577, **A.L.A., vol. II, p. 181.**

b) The anteriority requirement of art. 3137 CCQ must be liberally interpreted

i) The Contextual Approach and the Strict Approach

32. The Contextual Approach is best exemplified by the judgment rendered by Hamilton J. in *Chasles* in the context of a multijurisdictional class action relating to the alleged misuse of customers' personal information. Hamilton J. refused to strictly apply the anteriority requirement under art. 3137 CCQ where the Québec domestic action was filed two days before the Ontario national action. His analysis honed in on the fact that art. 3137 CCQ is not adapted to class actions, much less to multijurisdictional class actions:

> [26] The difficulty is that the conditions of Article 3137 CCQ are designed for the typical litigation where one or more plaintiffs sue one or more defendants. They do not apply readily to class actions. The courts have recognized that the question of *lis pendens* "doit être analysée en fonction des règles particulières de l'action collective".[37]

33. Hamilton J. noted that Québec class counsels tend to institute class actions before counsels in other provinces because of the existence of the first-to-file rule for deciding between motions for authorization of class action within Québec.[38] He declared that while the first-to-file rule benefits intra-provincial class actions by avoiding carriage disputes, it makes little sense when dealing with overlapping multijurisdictional class proceedings, and that "[t]here are more important considerations than who filed first in these situations".[39]

34. After concluding that the conditions for *lis pendens* were met, Hamilton J. held that the rights and interests of the Québec members could be adequately protected by Ontario action pursuant to art. 577 CCP, relying on communications between judges and the safeguards

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37 *Chasles, supra* note 4, para. 26, citing *Conseil pour la protection des malades c. Biomet Canada inc.*, 2016 QCCS 4574, para. 19. See also *Boucher c. Boston Scientific Corporation*, 2014 QCCS 6395, para. 12.

38 *Chasles, supra* note 4, para. 44

39 *Chasles, supra* note 4, para. 46.

provided by the *Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice* [the "***Protocol***"].[40]

35. The Strict Approach stems from the decision in *Poirier* in the context of a class action related to alleged defects in vehicles. Paquette J. was seized of a motion to suspend a domestic action in Québec in favour of a national action in Ontario. Citing the Québec Court of Appeal's decision in *Fastwing Investments*[41], which interpreted the French term "déjà" in art. 3137 CCQ in the context of a commercial dispute rather than a class proceeding, Paquette J. refused to stay the Québec class action because, *inter alia*, the party seeking the stay could not establish the anteriority of the Ontario action[42], which was filed on the same day. Without referring to the *Chasles* decision or addressing the different context of *Fastwing Investments*, Paquette J. further held that the continuation of the Québec proceedings was the rule, and a stay of proceedings was to be treated as an exception and thus interpreted restrictively.[43]

36. In the first instance judgment of the case at hand, Bisson J. adopted Paquette J.'s reasons *mutatis mutandis*, characterising her approach as a two-step test where the court must 1) verify whether all the requirements of art. 3137 CCQ are met in the first step, and, if so, 2) consider the rights and interests of Québec members pursuant to art. 577 CCP.

ii) The Contextual Approach should prevail over the Strict Approach

37. Bisson J. erred in adopting the Strict Approach rather than the Contextual Approach to the anteriority requirement of art. 3137 CCQ because it is ill-suited to the reality of multijurisdictional or interprovincial class actions.

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40 *Chasles*, *supra* note 4, para. 85, citing the *Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice*, Resolution 18-03-A of the Canadian Bar Association, 2018 (first adopted in 2011) [*Protocol*], **A.L.A., vol. I, p. 65ff.**

41 *Fastwing Investment Holdings Ltd. c. Bombardier inc.*, 2011 QCCA 432, para. 30-32 (j. M.-F. Bich, j. unique), cited in *Poirier*, *supra* note 5, para. 37.

42 *Poirier*, *supra* note 5, para. 48.

43 *Poirier*, *supra* note 5, para. 47.

a) The Courts interpret art. 3137 CCQ, including the anteriority requirement, liberally in the context of class action proceedings

38. Québec courts have interpreted art. 3137 CCQ liberally in the context of class proceedings.[44] In particular, when interpreting the "same parties" requirement, Québec courts have acknowledged that two class proceedings will rarely have the same representative plaintiffs or the exact same class definition, and as a result, have not applied the Strict Approach.[45]

39. If the Strict Approach is correct, no stay based on *lis pendens* could ever be granted on consent where the Québec action was commenced first. However, Québec courts have not interpreted the anteriority requirement in this manner in previous cases. In *Boehmer* c. *Bard Canada inc.*[46], where a Québec action was filed 22 days before an Ontario action and 43 days before a British Columbia action, Justice Pierre-C. Gagnon, j.s.c., granted the stay of the Québec action. Similarly, in *9085-4886 Québec inc.* c. *Visa Canada Corporation*[47], the application for authorization to bring a class action in Québec was filed on December 10, 2010, months before similar actions were brought before the Ontario and British Columbia courts on March 28, 2011 and May 13, 2011, respectively. Justice Chantal Corriveau, j.s.c., nevertheless granted a stay of the proceedings in Québec.

40. In those two cases, the criteria of art. 3137 CCQ were examined by the judges[48] even though all the parties had agreed that the application to stay should be granted. In both cases, the

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44 The same way courts have adopted a liberal approach to the identity of parties criterion and the identity of subject criterion of *lis pendens* (see for instance *Lépine*, *supra* note 15, paras. 54-55; *Chasles*, *supra* note 4, para. 31; *Conseil pour la protection des malades c. Biomet Canada inc.*, 2016 QCCS 4574, para. 19).

45 Bisson J. found that the Saskatchewan Action and the Ontario Action met the same parties requirement. Judgment of the Superior Court, **A.L.A., vol. I, p. 16, para. 45.**

46 *Boehmer c. Bard Canada inc.*, 2016 QCCS 4702 [*Boehmer*].

47 *9085-4886 Québec inc. c. Visa Canada Corporation*, 2012 QCCS 2572 [*Visa*].

48 *Ibid.*, paras. 15-16.

first-to-file rule was not addressed in the reasons written by the judges, thus demonstrating that Justice Gagnon and Justice Corriveau applied the fourth criterion liberally.

b) The Contextual Approach prevents the duplication of class action proceedings and is consistent with the paramountcy of the rights and interests of the Québec members

41. The Strict Approach inevitably guarantees that class actions based on the same facts, having the same subject, often against the same defendant and covering the same potential class members will proceed in parallel in at least two provinces. It guarantees a risk of conflicting judgments on decisive issues, inefficient use of judicial resources, higher costs of litigation, and uncertainty for the parties. More importantly, it makes it more difficult to reach a single national settlement.

42. There are situations where the disadvantages listed above will be outweighed by the need for a Québec class action to be heard separately, certainly in cases where the criteria of art. 577 CCP will not be met. The Contextual Approach accounts for these situations, since interpreting art. 3137 CCQ liberally does not mean that the court abdicates its discretion in determining whether the conditions for *lis pendens* are met, and crucially, in determining whether the rights and interests of Québec residents are sufficiently taken into account in the national action. Rather, the Contextual Approach enables courts to comply with their obligation to consider the rights and interests of Québec residents under art. 577(2) CCP and to take into account all relevant factors in order to render a well-balanced decision on the stay issue.

43. On the opposite, when read together with art. 577 CCP, the practical effect of a Strict Approach to the anteriority requirement of art. 3137 CCQ is to obviate the legislator's intent to protect the rights and interests of Québec residents. Indeed, a factor as minor as a filing

date[49] would then preclude the court from complying with its obligation to consider the rights and interests of Québec residents.[50]

43.1 For example, this approach can result in the absurd situation where the Québec court would be required to consider the interests of Québec members if a stay is requested in favor of an extra-provincial action filed before the Québec action (e.g., as here, in Saskatchewan), but precluded from doing so if the stay is requested in favor of another extra-provincial action, filed after the Québec action (here, Ontario).

c) The Contextual Approach is consistent with the principles of interprovincial comity and promotes the proper administration of justice

44. Furthermore, the Strict Approach is a far cry from the principles of interprovincial comity that this Court has consistently advocated since its ruling in *Morguard Investments Ltd. c. De Savoye*[51], and stressed in the context of multijurisdictional class actions in *Lépine*. In the latter case, after delving into the complex issue of the recognition of judgments rendered by the Superior Court of another province, this Court imparted the following guidance concerning the proper management of multijurisdictional class actions, recognizing their usefulness:

> [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. […]
>
> [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

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49 Perhaps the timing of such filing, when both actions are filed on the same day.

50 Art. 577 CCP reads : "[…] the court is required […]".

51 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077, pp. 1095-1096, 1098-1101, 1107; *Hunt v. T&N plc*, [1993] 4 SCR 289, pp. 314-315, 325; *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, paras. 51-53; *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, paras. 25, 63, 74, 112. See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Montréal, LexisNexis, 2014) paras. 26.25-26.30, **A.L.A., vol. II, p. 184-185.**

> in a federal system in which civil procedure and the administration of justice are under provincial 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.[52]
>
> [We underline.]

45. The rigidity of the Strict Approach cannot be seen as conducive to improved "communications or contacts between the courts and the lawyers involved in class action proceedings"[53] or as being consistent with the principles set out in the *Protocol*.[54] To the contrary, such a categorical refusal to engage with other superior courts undermines the notion of interprovincial comity.

46. As we have seen, the Contextual Approach takes into account the difference between individual actions and class actions which by their very nature presuppose large numbers of potential class members and thus the potential for multiple counsels in different jurisdictions acting independently of each other before different courts across the country. It is indeed telling that Hamilton J. relies on the *Protocol* in reaching his decision as it was enacted as a tool towards achieving some level of interprovincial comity in the context of multijurisdictional class actions.

47. Paradoxically, despite the fact that art. 3137 CCQ is directed at preventing "forum shopping", the Strict Approach indirectly encourages the type of "forum shopping" that may occur in the context of multijurisdictional class actions, i.e. the attempt by class counsel to claim turf in Québec and benefit from the first-to-file rule in order advance their financial

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52 *Lépine*, *supra* note 15, paras. 56-57.
53 *Ibid.*, para. 57.
54 *Protocol*, *supra* note 40, **A.L.A., vol. I, p. 65ff**.

interests. Rather than discouraging the practice of rushing to file a class action suit in Québec for purposes other than those of the interests of class members, a strict reading of the fourth requirement of art. 3137 CCQ enables it by making the date of filing a deciding factor in determining stay motions.

48. It follows that the courts have recognized that the issue of *lis pendens* should be analyzed according to the particular rules of class actions and that the conditions of art. 3137 CCQ can and should be applied liberally. The time is ripe for a clear message from this Court to the effect that the mere fact that a foreign action is brought after the Québec proceeding is not a bar to staying an application for authorization to institute a class action in Québec.

c) The recognition requirement is fulfilled where parties attorn to the foreign jurisdiction

49. The fifth criterion of art. 3137 CCQ, viz. the requirement that a foreign action can result in a decision that may be recognized in Québec, has been read by some proponents of the Strict Approach as a "Catch-22", where *lis pendens* cannot be declared in favour of a foreign action instituted after the Québec action because the foreign action would not be recognized in Québec due to the mere fact that it was instituted after the Québec action pursuant to art. 3155(4) CCQ.

50. The answer to this circular reasoning may be found in Hamilton J's reasons in *Chasles*. Indeed, Hamilton J. clarified that, with respect to the enforcement of foreign judgments in Québec, the defendants' participation in and submission to the jurisdiction of the foreign court is sufficient to render any judgment awarded against that defendant enforceable in the province of Québec. On the other hand, however, a judgment in favour of the defendant will only be enforceable against Québec residents if they also attorned (e.g. by electing not to opt-out of a class proceeding) to the jurisdiction of the foreign court. While improper or inadequate notice in Québec may render a subsequent judgment unenforceable against Québec residents, the court cannot assume that notice to Québec residents would be

inadequate in a given case.[55] As a result, the Québec proceeding cannot resist being stayed on this basis alone.

51. In light of Hamilton J.'s analysis in *Chasles*, and as was recognized by Bisson J. in the case at hand[56], the Applicants are of the view that an Ontario judgment in their favour would be recognized in Québec.

d) The Doctrine of Forum Non Conveniens is not a suitable alternative to motions to stay

52. According to Bisson J., parties are not without recourse in situations where the Québec class action is filed first, since they can refer to the doctrine of *forum non conveniens*[57], codified at art. 3155 CCQ. This view is clearly problematic since an application to declare Québec *forum non conveniens* would result in a permanent stay of the Québec class action, whereas the result sought here and in similar situations is a temporary stay of the Québec class action, ensuring continued supervision of the Québec class action by the Québec courts, including the power to lift the stay to proceed to trial or approve a settlement.

2. In all cases, courts have the power to grant stays with the consent of all parties

53. Bisson J's reasons in the case at hand, as well as Paquette J.'s reasons in *Poirier*, seem to indicate that, unless all the conditions of art. 3137 CCQ, including anteriority of the foreign judgment are met, a Québec class action can never be stayed in favour of a class action in another province, no matter the circumstances, including consent by all parties.

54. As mentioned above, in cases where requests to stay class actions were made on consent, the courts have not hesitated to grant stays of class action proceedings in Québec, even where the foreign action was filed after the Québec proceeding.[58] In that regard, the Applicants

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55 *Chasles*, *supra* note 4, para. 80; *Poirier*, *supra* note 5, paras. 61-62.
56 Judgment of the Superior Court, **A.L.A., vol. I, p. 19, para. 61.**
57 Judgment of the Superior Court, **A.L.A., vol. I, p. 17, para. 50.**
58 *Boehmer*, *supra* note 46; *Visa*, *supra* note 47.

submit that the approach adopted by this honorable Court in *Endean*[59] should be put forward in any case management or request by mutual consent.

55. In the absence of a national class action regime, cooperation between counsels in different provinces is one of the few effective tools for achieving efficient and transparent management of multijurisdictional class actions. Given the current climate of confusion, a confirmation from this Court that such cooperation, including stays of certain class actions by consent, should be allowed and indeed encouraged would be most timely and necessary.

PART IV – SUBMISSIONS CONCERNING COSTS

56. The Applicants submit that the costs of this application should follow the event.

PART V – ORDER SOUGHT

57. The Applicants submit that leave to appeal should be granted against the judgment of Roy J., of the Court of Appeal of Québec, rejecting the Application for Leave to Appeal, and against the judgment of Bisson J., of the Superior Court, rendered on May 7, 2018, dismissing the Application to stay the proceedings filed in Québec, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montréal, November 19, 2018

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59 *Endean*, *supra* note 19.

PART VI – TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Jurisprudence

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine
