

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-09
C.S. No : 500-06-000580-114

LA CIE MATÉRIAUX DE CONSTRUCTION BP CANADA

APPELLANT – Respondent

v.

DIANE FITZSIMMONS

RESPONDENT – Representative Plaintiff

APPLICATION FOR LEAVE TO APPEAL *DE BENE ESSE*
(articles 30 al. 2, 31 and 357 C.C.P.)
Appellant, dated February 25, 2016

LA CIE MATÉRIAUX DE CONSTRUCTION BP CANADA (THE « APPELLANT »)
RESPECTFULLY SUBMITS THAT:

I. INTRODUCTION

1. The Appellant seeks to appeal a decision rendered by the Honorable Justice Danielle Turcotte (the “**First instance judge**”) on January 27, 2016 (the “**Judgment**”) granting in part Diane Fitzsimmons’ (the “**Respondent**”) Amended Motion for Directives, dated October 15, 2015 (the “**Motion for Directives**”), in respect of a class action settlement entered into by the parties on January 18, 2012 (the “**Settlement**”), and subsequently approved by the First instance judge on October 5, 2012 (the “**Judgment Approving the Settlement**”), copies of which are communicated herewith as **Annexes 1, 2, 3 and 4**, respectively;
2. The Settlement provides for a claims process through which class members can seek compensation, in kind or in money, to replace allegedly defective roof shingles manufactured by the Appellant. The value of the Settlement exceeds

\$2.4 million, which is the amount paid by Appellant for class members counsels legal fees, exclusive of any class members' claim;

3. The class defined by the Settlement comprises all present and past owners (including legal persons with fewer than 50 employees) of buildings whose roofs contain or contained BP produced organic shingles in Quebec. If damages appeared after the Settlement, class members benefit from 150 days from the moment damages are discovered to file a claim through the claims process;
4. In the Judgment Approving the Settlement, the First instance judge came to the conclusion that the claims process offered class members compensation similar to that which would have been available to them in Court under the applicable law. The only right foregone by class members upon executing the Settlement, thus, is the right to file a judicial claim for monies which could be recovered in their entirety via the Settlement's claim process, which Respondent acknowledged provides a faster and cheaper alternative to the judicial system;
5. As consideration for the foregoing, the Appellant obtained finality and certainty in respect of the number of class members opting out of the Settlement, without which it would not have entered into the Settlement, as is plain and obvious from paragraph 13.1 of the Settlement;
6. Class members had until September 19, 2012 to opt out. A list of the opt-outs then had to be provided by Respondent within 7 days, such that Appellant could be in a position to exercise its correlative right to terminate the Settlement in the subsequent 30 days, should the number of settlement class members opting out have reached a level that threatened to frustrate the essential purpose of the Settlement. The Appellant could then be confident that it had a full picture of the extent of the opt-outs, subject to the exceptional cases provided by article 1005 O.C.C.P. whereby a class member could opt out beyond the opt-out deadline if he could prove that it was impossible for him to act sooner;

7. The Motion for Directives sought to radically vary the terms of the Settlement by way of a declaratory judgment that would state that it was impossible for all class members whose alleged prejudice had not appeared by the opt-out deadline to opt out within the prescribed delay, such that these class members could automatically benefit from an extended opt-out deadline;
8. The First instance judge granted the relief sought and declared that such class members would benefit from an opt-out deadline set 150 days from the first appearance of damages, which would correspond to their deadline to file a claim (the “**Impugned conclusion**”);
9. The Impugned conclusion undermines the balance achieved through the Settlement by stripping it of its finality, by opening the floodgates of undetermined future opt-outs for years to come, and by voiding the only consideration received by Appellant for settling. The Impugned conclusion, *inter alia*, completely empties Appellant’s right to terminate the Settlement upon receiving the list of opt-outs of its substance. Conversely, the Judgment provides no tangible benefit to class members;
10. Additionally, the Impugned conclusion is not supported by any evidence specific to the situation of any class member, such that it is impossible to determine who the decision ultimately benefits and why it was allegedly impossible for such class member to opt out in time;
11. The Appellant respectfully submits that the Judgment is a declaratory and final judgment, appealable *de plano*. In this respect, the Appellant emphasizes that the First instance judge exceeded her jurisdiction on matters of execution such that the Judgment amounts to an appeal in disguise of the Judgment Approving the Settlement;
12. Alternatively, the Appellant submits that the appeal raises novel and important questions of principles pertaining to the First instance judge’s jurisdiction to substantially modify an executed and approved settlement in the context of a

class action, and to the notion of “impossibility to act” contained in article 1005 O.C.C.P. (576 C.C.P.), which has never been interpreted by our Courts. The Appellant adds that the Judgment amounts to a manifest injustice causing it irreparable damage;

13. The Appellant has also been informed by Siskinds LLP, counsel to the Appellant before the Superior Court, that class counsels had mentioned during a call held on February 10, 2016 that they viewed the Judgment as a case management measure which it contended is not subject to appeal. The Appellant strongly disagrees with that qualification and adds that even if the Respondent was right, the Appellant could still seek leave to appeal pursuant to article 32 of the C.C.P.;
14. The First instance judge committed clear and overriding errors of law in that she (a) exceeded her jurisdiction by modifying the Settlement, which she denatured by voiding the consideration received by Appellant (b) misidentified the facts relevant to the analysis of the impossibility of class members to opt out, and (c) confused impossibility to act in fact and in law in respect of the settlement notice and erroneously ruled, absent any specific evidence, that none of the class members could act as a matter of legal principle;

II. PROCEDURAL CONTEXT

15. On September 30, 2011, the Respondent filed a Motion to Authorize the Bringing of a Class Action and to Be Ascribed the Status of Representative (the “**Motion for Authorization**”), communicated herewith as **Annex 5**. In the Motion for Authorization, the Respondent alleged that the Appellant was liable for an alleged defect which caused the premature deterioration of the organic shingles, and asked for the cost of repairing or replacing the damaged shingles;
16. On January 18, 2012, Appellant and Respondent executed the Settlement. The Settlement’s release is limited to damages to Appellant’s organic shingles; class members reserved their rights in respect of personal injury and/or damage to building caused by the organic shingles (para. 15.1 of the Settlement);

17. On March 21, 2012, in the context of the Settlement, Respondent filed, with Appellant's consent, a Motion for Permission to Amend the Motion to Authorize the Bringing of a Class Action and to Be Ascribed the Status of Representative (the "**Motion to Amend**"), communicated herewith as **Annex 6**, and a Motion to Authorize the Bringing of a Class Action and to Be Ascribed the Status of Representative for the Purpose of Approving the Notice to the Members for the Purpose of Approving a Settlement Agreement (the "**Motion for Authorization for the Purpose of Approving the Settlement**"), communicated herewith as **Annex 7**, in which the Respondent recognized at paragraph 10 that the Settlement is more advantageous to class members than the warranties already offered by the Appellant;
18. On March 27, 2012, the First instance judge granted the Motion to Amend, communicated herewith as **Annex 8**, and the Motion for Authorization for the Purpose of Approving the Settlement (the "**Judgment on Authorization**"), communicated herewith as **Annex 9**, in which it approved, at paragraphs 11 and 13, the form and content of the notice of the Settlement to class members, communicated herewith as **Annex 10**;
19. On September 19, 2012, Respondent filed a Motion to Approve the Settlement, communicated herewith as **Annex 11**, in which she recognized (i) that the Settlement offered compensation similar to that provided for by the Civil Code of Quebec and the Consumer Protection Act (paragraph 31) and (ii) that the Settlement provides an important additional benefit over the pursuit of individual actions in granting free legal assistance to class members (paragraph 33);
20. In the Judgment Approving the Settlement, the First instance judge approved the settlement and dismissed the objections raised by contesting class members. Addressing, contesting class members' grievance that the Settlement is "difficult to understand", the First instance judge recognized that the Settlement is clear, and noted the benefit to class members of having class counsels assist them for free (paragraphs 18 and 19 of the Judgment Approving the Settlement);

21. Subsequently addressing class contesting members' grievance that the Settlement is "limited only to compensation for defective shingles", the First instance judge found that the Settlement was fair and appropriate in that it effectively compensates class members for the entirety of the claims they could have brought forward in the context of an action (paragraphs 21 and 28 of the Judgment Approving the Settlement);

III. GROUND OF APPEAL

A. THE FIRST INSTANCE JUDGE EXCEEDED HER JURISDICTION BY MODIFYING THE TERMS OF THE SETTLEMENT

22. The Impugned conclusion fundamentally alters the rights of the parties under the Settlement by creating a right of right of opt-out for all class members whose prejudice first appeared after the opting out deadline. In so doing, it completely sets aside the mechanisms provided by paragraph 10 of the Settlement;
23. The Impugned conclusion thus far exceeds the courts supervisory power provided at paragraph 43 of the Judgment Approving the Settlement;
24. It is trite law that class action settlements are *res judicata* and cannot be appealed, such that the First instance judge was *functus officio* from revisiting the terms of the Settlement;
- *Page c. Procureur Général du Canada*, AZ-00021082 (C.S., 1999).
25. In a recent decision, the Superior court reiterated that the Court may not modify the terms of a Settlement in the class action context under the cover of the Court's residual power to supervise the settlement's execution, the Court of Appeal adding that there would be no legal basis for such a modification;
- *Coopérative d'habitation Village Cloverdale c. Société Canadienne d'hypothèques et de logement*, 2011 QCCS 2783 & 2012 QCCA 56, para. 28.
26. The Appellant respectfully submits that it is well-founded in asking the Court of Appeal to reverse the Impugned conclusion on this basis alone;

B. THE FIRST INSTANCE JUDGE MISIDENTIFIED THE FACTS RELEVANT TO THE ANALYSIS OF THE IMPOSSIBILITY OF CLASS MEMBERS TO OPT OUT

27. While the First instance judge is correct that the right to claim damages under the Settlement is premised on their manifestation, pursuant to s. 4.1 (e) of the Settlement, she commits a reviewable error of law in finding that class members must first be in a position to file a claim under the Settlement in order to opt out (paras. 33, 34 and 35 of the Judgment);
28. The exercise of these two rights is premised on the class members' knowledge of entirely distinct and unrelated facts. The manifestation of damages is irrelevant to the capacity to exercise the right to opt out under the Settlement. The only facts relevant to the latter under article 1005 O.C.C.P. are the existence and definition of a class affected by the Settlement, and of a deadline to opt out;
29. The First instance judge implicitly recognizes as much in stating that the notice of settlement is clear to the effect that class membership and right to claim are distinct (paragraph 33 of the Judgment);
30. It is uncontested that the information relevant to opting out was communicated in its entirety in the notice of the Settlement that was sent to class members, specifically in (i) the introduction and section 1 to 5, which establish that the Settlement has occurred; (ii) section 6, which contains the class definition; (iii) section 10, which reiterates that the Settlement settles all present and future, as well as known and unknown claims; and (iv) section 19, which provides the deadline for opting out;
31. The Appellant submits that it was not particularly difficult for a class member to understand that the Settlement concerned (i) allegedly defective BP organic roof shingles (ii) that it was binding on owners of buildings in Quebec whose roofs contained such shingles and (iii) that if such shingles were defective or one day became defective, he would have to file a claim through the claims process and not through the Courts, unless he had opted-out by September 19, 2012;

C. THE FIRST INSTANCE JUDGE CONFUSED IMPOSSIBILITY TO ACT IN FACT AND IN LAW IN RESPECT OF THE SETTLEMENT NOTICE

32. The First instance judge also erroneously decided that class members reading the notice of settlement could reasonably believe that their shingles were exempt of defects, so that they had no reason to seek an exclusion from the class (paragraphs 36 and 37 of the Judgment);
33. First, the average class member would certainly understand that a denial of liability, which is customary in class action settlements, does not mean that the products for which the Settlement offers a claims process are (and will remain) exempt from any defect. The very existence of a claims process necessarily suggests the opposite. Any interpretation of the notice to the contrary is manifestly unreasonable and constitutes a dominant and overriding error of fact;
34. Furthermore, alleged ignorance by class members of the legal consequences of the facts communicated in the notice of settlement does not constitute “impossibility to act in fact”, but rather – and at best for class members – “impossibility to act in law”;
35. It is trite law that only “impossibility to act in fact” can excuse plaintiff who exceeded a delay to act;
 - *9103-4421 Québec inc. c. Hôpital du Sacré-Cœur de Montréal*, 2016 QCCA 15 (“**9103**”), paras. 29-30.
36. In the case at hand, the Appellant never communicated erroneous information, and the First instance judge made no finding to that effect. In any event, the Respondent, let alone the first instance judge, could hardly have characterized as faulty a notice of settlement agreed to by the Respondent and approved by the Court in the Judgment on Authorization;
37. In *9103*, at paragraph 35, the Court of Appeal stressed the public policy rationale underlying the rule limiting the application of “impossibility to act” to matters of fact, emphasizing that to recognize “impossibility to act in law” would lead to the

absurd result whereby those individuals who were vigilant and consulted legal counsels would be at a disadvantage compared to those who did not;

38. Considering that the Settlement was framed to allow class members to get free advice and assistance from class counsels, at the Appellant's expense (in the amount of \$2.4 million), so as to facilitate the exercise of their rights, it is particularly unfair in this case to prejudice the Appellant on the basis of the alleged confusion of class members;
39. The First instance judge's blanket statement at paragraph 37 of the Judgment was also made on the basis of a single and vague allegation contained in paragraph 19 of the Motion for Directives concerning unnamed class members. The only evidence on record in support of that allegation is an affidavit signed by a lawyer who formerly practiced in the firm of Respondent's counsel and which, for all intent and purposes, amounts to hearsay;
40. The last line of paragraph 37 of the Judgment suggests that the First instance judge palliated the evidentiary gap by deciding on the issue of "impossibility to act" as a matter of general principle. "Impossibility to act", both as a matter of prescription and procedure, however, is an eminently factual finding which requires evidence personal to the party invoking it.
 - J.-L. Baudouin and P. Deslauriers, La responsabilité civile, Vol. 1, 8th edition, Éditions Yvons Blais, Cowansville, 2014, p. 1169
41. The Appellant submits that, in the circumstances, the allegation and evidence did not support a finding of "impossibility to act" for a single class member. To find, by inference, that an entire undefined group could not act, in the circumstances, amounts to an overriding and dominant error.
42. Lastly, at paragraphs 42 to 44 of the Judgment, the First instance judge found the Appellant foreclosed from contesting the application of "impossibility to act" because it consented to the Motion to Approve the Settlement. It is manifest that

consent to the application of a rule does not imply consent to its application to a specific set of yet undefined fact; to hold otherwise is a clear denial of justice.

IV. CONCLUSION

43. Appellant respectfully submits that the Judgment is vitiated by numerous errors of law and facts that need to be corrected by this Court.

44. The Appellant will ask the Court of Appeal to:

- a. **GRANT** its appeal;
- b. **SET ASIDE** the following conclusions contained in the Judgment:

[72] DÉCLARE que le délai pour s'exclure du recours collectif est de 150 jours à compter de la première manifestation d'un préjudice;

[73] ORDONNE à l'intimée de corriger les informations disponibles aux membres en conséquence;

- c. **THE WHOLE WITH COSTS**, including the costs in appeal.

FOR THESE REASONS, APPELLANT ASKS THE COURT OF APPEAL TO:

GRANT its Application for leave to appeal;

AUTHORIZE the Appellant to appeal from the judgment rendered on January 27, 2016, by the Honorable Danielle Turcotte of the Superior Court, district of Montréal, in file number 500-06-000580-114;

THE WHOLE WITH COSTS, pending the result of the appeal.

MONTREAL, February 25, 2016

(s) McCarthy Tétrault S.E.N.C.R.L., s.r.l.

MCCARTHY TÉTRAULT LLP

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SWORN STATEMENT

I, the undersigned, **NICOLAS DESLANDRES**, lawyer, practising at 1000 De La Gauchetière Street West, Montreal, Quebec, affirm under my oath of office, as follows:

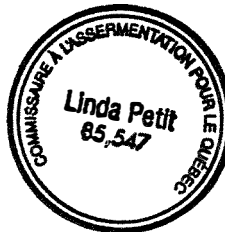
1. I am one of the lawyers acting in the present case;
2. I have read the attached application and all the facts mentioned therein are true;

AND I HAVE SIGNED:


NICOLAS DESLANDRES

**SOLEMNLY AFFIRMED BEFORE ME
IN MONTREAL**, this 25th day of
February, 2016


Commissioner for oaths for Quebec



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McCarthy Tétrault S.E.N.C.R.L., s.r.l., LLP

NOTICE OF PRESENTATION

TO: Mtre André Lespérance

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Lawyers for Respondent

TO: Mtre Michel Bélanger

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Lawyers for Respondent

TAKE NOTICE that the present application for leave to appeal *de bene esse* will be presented before one of the Honourable Judges of the Court of Appeal, Division of Montreal, in Room RC-18, of the Court of Appeal, located at 100 Notre-Dame Street East, Montréal, QC, on March 15, 2016, at 9:30 a.m., or as soon as counsel may be heard.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, February 25, 2016

(s) McCarthy Tétrault S.E.N.C.R.L., s.r.l.

McCARTHY TÉTRAULT LLP

Lawyers for APPELLANT / Respondent

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McCarthy Tétrault S.E.N.C.R.L., s.r.l., LLP

COURT OF APPEAL

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DISTRICT OF MONTRÉAL

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LA CIE MATÉRIAUX DE CONSTRUCTION BP CANADA,
APPELLANT – Respondent

v.

DIANE FITZSIMMONS, r
RESPONDENT – Representative Plaintiff

LIST OF ANNEXES (in support of our Application for Leave to Appeal *De Bene Esse*)

ANNEX 1	Judgment rendered by the Honorable Justice Danielle Turcotte on January 27, 2016;
ANNEX 2	Amended Motion for Directives, dated October 15, 2015;
ANNEX 3	Agreement of Compromise and Settlement entered into by the parties on January 18, 2012;
ANNEX 4	Judgment rendered by the Honorable Justice Danielle Turcotte on October 5, 2012;
ANNEX 5	Motion to Authorize the Bringing of a Class Action and to Be Ascribed the Status of Representative, dated September 30, 2011;
ANNEX 6	Motion for Permission to Amend the Motion to Authorize the Bringing of a Class Action and to Be Ascribed the Status of Representative, dated March 21, 2012;

ANNEX 7	Motion to Authorize the Bringing of a Class Action and to Be Ascribed the Status of Representative for the Purpose of Approving the Notice to the Members for the Purpose of Approving a Settlement Agreement, dated March 21, 2012;
ANNEX 8	Judgment rendered by the Honorable Justice Danielle Turcotte dated March 27, 2012 granting the Motion to Amend;
ANNEX 9	Judgment rendered by the Honorable Justice Danielle Turcotte dated March 27, 2012 granting the Motion for Authorization for the Purpose of Approving the Settlement;
ANNEX 10	Notice of the Settlement to class members, dated March 27, 2012;
ANNEX 11	Motion to Approve the Settlement, dated September 19, 2012;

MONTREAL, February 25, 2016

(s) McCarthy Tétrault S.E.N.C.R.L., s.r.l.

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RESPONDENT – Representative Plaintiff

**APPLICATION FOR LEAVE TO APPEAL
DE BENE ESSE
(articles 30 al. 2, 31 and 357 C.C.P.)
Appellant, dated February 25, 2016**

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