COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-028180-198
(500-06-000923-181)

DATE: September 2, 2020

CORAM: THE HONOURABLE MANON SAVARD, C.J.Q.
STEPHEN W. HAMILTON, J.A.
BENOÎT MOORE, J.A.

MICRON TECHNOLOGY INC.
MICRON SEMICONDUCTOR PRODUCT INC.
SAMSUNG ELECTRONICS CO. LTD.
SAMSUNG ELECTRONICS CANADA INC.
SK HYNIX INC. (formely known as Hynix Semiconductor Inc.)
SK HYNIX AMERICA INC. (formely as Hynix Semiconductor Inc.)
APPELANTS – Defendants

v.

GAY HAZAN
RESPONDENT – Plaintiff

JUDGMENT

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[1] The Appellants appeal from a judgment rendered on February 11, 2019, by the honourable Donald Bisson of the Superior Court, district of Montreal, which dismissed their Joint Application for a Stay of the Class Action.

[2] For the reasons of Hamilton, J.A., with which Savard, C.J.Q. and Moore, J.A. concur, **THE COURT**:

[3] **DISMISSES** the appeal, with judicial costs.

MANON SAVARD, C.J.Q.

STEPHEN W. HAMILTON, J.A.

BENOÎT MOORE, J.A.

Mtre Sidney Elbaz
McMILLAN
For Micron Technology inc., Micron Semiconductor Product Inc.

Mtre Jean St-Onge
Mtre Karine Chênevert
Mtre Alexandra Hébert
BORDEN LADNER GERVAIS
For Samsung Electronics Co. Ltd., Samsung Semiconductor Inc., Samsung Electronics Canada Inc.

Mtre Nicholas Rodrigo
Mtre Faiz Munir Lalani
DAVIES WARD PHILLIPS & VINEBERG
For Sk Hynix Inc. (formely know as Hynix Semiconductor Inc.), Sk Hynix America Inc. (formely know as Hynix Semiconductor Inc.)

Mtre David Assor
LEX GROUP INC.
For Gay Hazan

Date of hearing: November 1, 2019

REASONS OF HAMILTON, J.A.

[4] The Appellants appeal from a judgment which dismissed their Joint Application for a Stay of the Class Action.[1]

[5] The judge refused to stay the Application for Authorization to Institute a Class Action pending before him in favour of a similar motion for certification made in Federal Court, because the Superior Court application had been filed first.

[6] Subsequent to the judgment in Superior Court, the Court issued its judgment in *FCA Canada inc. c. Garage Poirier & Poirier inc.* [*FCA*],[2] in which it held that the Superior Court has jurisdiction under Article 49 *C.C.P.* to suspend an application for authorization to institute a class action in Superior Court in favour of another instituted outside Quebec, even where the conditions under Article 3137 *C.C.Q.* are not met.

[7] In these reasons, I will consider whether the "first to file" rule applies in these circumstances such that the application to stay the proceedings should be dismissed for that reason and, if not, how the application should be decided.

CONTEXT

[8] On April 30, 2018, the Respondent filed an Application for Authorization to Institute a Class Action against the Appellants in Quebec Superior Court ("Quebec Proceedings"), in which the Respondent asked for authorization to institute a class action advancing claims under the *Competition Act*[3] that he and the class members had paid artificially inflated prices for dynamic random-access memory ("DRAM") and products containing DRAM because of a price-fixing conspiracy among the Appellants, and seeking damages. He also sought authorization to advance claims under provincial consumer protection legislation, including a claim for punitive damages. Authorization was sought to institute a class action on behalf of the following group:

> All persons or entities in Canada (subsidiarily in Quebec) who, between at least June 1, 2016 and February 1, 2018, acquired dynamic random-access memory ("DRAM") directly from one of the Defendants (the "Direct Purchasers") or who acquired DRAM and/or products containing DRAM either from a Direct Purchaser

1 *Hazan c. Micron Technology Inc,* 2019 QCCS 387 [motion judgment].
2 *FCA Canada inc. c. Garage Poirier & Poirier inc*., 2019 QCCA 2213.
3 R.S.C., 1985, c. C-34.

> or from another indirect purchaser at a different level in the distribution chain (the "Indirect Purchasers"), or any other Group(s) or Sub-Group(s) to be determined by the Court;[4]

[9] On May 2, 2018, two days after the Quebec Proceedings were filed, Chelsea Jensen filed a Statement of Claim in Federal Court claiming damages for price fixing against the same seven defendants ("Federal Court Proceedings").[5] The Federal Court Proceedings included a motion that the action be certified as a class action on behalf of the following group:

> All persons or entities in Canada who, from June 1, 2016 to February 1, 2018 (the "Class Period"), purchased DRAM or products containing DRAM. Excluded from the Class are the defendants and their parent companies, subsidiaries, and affiliates.[6]

[10] A second application for authorization was filed in Quebec Superior Court on May 3, 2018. It was suspended on June 14, 2018 under the "first to file" rule.[7] A second proposed class action was filed in Federal Court but was discontinued after the Jensen statement of claim was amended to include the second plaintiff and his lawyers.[8] Similar proceedings were also filed in the British Columbia and Ontario courts, but no further steps have been taken in either jurisdiction. The plaintiff in the Ontario proceedings (now a co-plaintiff in the Federal Court Proceedings) informed the Federal Court that he intends to hold his proceedings "in abeyance" while advancing the Federal Court Proceedings.

[11] On November 15, 2018, the Appellants filed a Joint Application for a Stay of the Class Action before the Quebec Superior Court, alleging that there is a situation of *lis pendens* between the Quebec Proceedings and the Federal Court Proceedings and that there is a risk of conflicting authorization judgments and of contradictory judgments on the merits of the claims in the two files. They submitted that it would be prejudicial to them to be forced to defend the same causes of action in two different jurisdictions at the same time in lawsuits brought on behalf of exactly the same group of people and that in the light of the guiding principles of civil procedure, proportionality and the inherent jurisdiction of the Superior Court, the Quebec Proceedings should be stayed.

[12] On February 11, 2019, the judge dismissed the Appellants' Joint Application for a Stay of the Class Action.

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4 Application for authorization to institute a class action.
5 See *Jensen v. Samsung Electronics Co., Ltd.*, F.C., n°T-809-18.
6 Exhibit R-2, Amended Statement of Claim dated August 7, 2018.
7 *Hazan c. Micro Technology Inc.*, 2018 QCCS 5891.
8 *Abesdris v. Samsung Electronics Co. Ltd.*, F.C., n°T-1217-18, 14 November 2018 (Exhibit R-4).

SUPERIOR COURT JUDGMENT

[13] The judge found that the Superior Court and the Federal Court have concurrent jurisdiction in respect of class actions based on breaches of the *Competition Act*.[9] He also found that the proceedings are between the same parties based on the same facts and seeking the same object, but he characterized the situation as *quasi-lis pendens*, as opposed to complete *lis pendens*, because the Quebec Proceedings invoke the *Civil Code of Quebec* and the *Consumer Protection Act* and other provincial consumer protection legislation, while the Federal Court Proceedings involve only tort claims.

[14] Moreover, the judge held that the Federal Court is not a "foreign authority", and that class action proceedings filed before that Court cannot be considered as "under way outside Québec". He therefore concluded that Articles 3137 *C.C.Q*. and 577 *C.C.P*. were not applicable.

[15] Then, the judge concluded that the policy reasons that led the Court to adopt the "first to file" rule in *Hotte c. Servier Canada inc.*[10] and *Schmidt c. Johnson & Johnson inc.,*[11] which concern concurrent applications for authorization of class actions in Superior Court, apply with equal force to concurrent applications in Superior Court and in Federal Court. He therefore concluded that the "first to file" rule applies. Since in this case the Quebec Proceedings were filed first, the judge dismissed the application to stay them.

[16] The judge went on to say that, even if the "first to file" rule did not apply, he would nevertheless have dismissed the application to stay the Quebec Proceedings.

[17] He was concerned by the Appellants' request to stay the Quebec Proceedings at the same time as they intended to ask for a temporary suspension of the Federal Court Proceedings pending the Supreme Court of Canada's judgment in *Pioneer Corp v. Godfrey*.[12] The judge was of the view that the members' interests would not be served if both files were suspended. He was particularly concerned by the Appellants' failure to disclose their intention to ask for a suspension of the Federal Court Proceedings until one of their lawyers was cross-examined during the hearing before him. He found that this reason was sufficient to dismiss the Appellants' application for a stay.

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9 *Supra*, note 3, s. 36.

10 [1999] R.J.Q. 2598, 1999 CanLII 13363 (C.A.) [*Hotte c. Servier*].

11 2012 QCCA 2132.

12 On March 26, 2019, the Defendants' motion to temporarily suspend the Federal Court Proceedings was dismissed: *Jensen v. Samsung Electronics Co., Ltd*., 2019 FC 373. Ultimately, the judgment in *Pioneer Corp v. Godfrey* was rendered on September 20, 2019: *Pioneer Corp v. Godfrey*, 2019 SCC 42.

[18] Finally, he reviewed the 12 arguments advanced by the Appellants to justify the stay of the Quebec Proceedings. He agreed that there was a risk of contradictory decisions, but found that the other arguments were not proven or did not justify a stay. He concluded that the Appellants did not demonstrate how the best interests of the class members would be served by staying the Quebec Proceedings.

[19] He therefore dismissed the Joint Application for a Stay of the Class Action.

ISSUES

[20] The Appellants present three issues:

- Did the motion judge err in applying the “first to file” rule in the context of an application to stay a class action in the Superior Court in favour of a parallel action in the Federal Court?

- If the “first to file” rule does not apply, what is the appropriate framework for the exercise of a judge’s discretion to stay proceedings in a case such as this?

- Did the motion judge reach an unreasonable conclusion by taking into consideration the brief temporary pause sought before the Federal Court?

ANALYSIS

1. The “first to file” rule

[21] If the judge was right that the “first to file” rule applies in this matter, then it is clear that the appeal must be dismissed as the Quebec Proceedings were instituted first.

[22] To determine whether the rule applies, it is essential to review how the rule developed in cases involving concurrent applications for authorization of class actions in Superior Court (intra-Quebec cases) and why the Court did not extend it to cases involving interprovincial or international proceedings in *FCA*.

- **Intra-Quebec cases**

[23] The Court adopted the "first to file" rule for concurrent motions[13] for authorization to institute class actions filed in Quebec Superior Court in the leading case of *Hotte c. Servier Canada inc.*[14]

[24] In *Hotte c. Servier*, the Superior Court was seized with three concurrent motions for authorization to institute similar class actions. The issue was framed by the parties as a matter of *lis pendens.*

[25] Under the general rules, there is *lis pendens* between two pending actions when the conditions for *res judicata* are met: "the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same" (Art. 2848 *C.C.Q.*).[15] When there is *lis pendens*, the court will proceed with the first action filed and dismiss the second and any subsequent actions, under Article 168 *C.C.P*.

[26] The general rules on *lis pendens* do not apply neatly to motions for authorization to institute class actions. The Court found instead "une apparence de litispendance". It concluded that there was an identity of parties, even though there were three different petitioners, because the petitioners proposed representing the same group and the group was the real party. The Court held that the first motion filed should proceed, hence the "first to file" rule. It did not, however, dismiss the other motions as provided for in Article 165(1) *f.C.C.P.* (now Article 168(1) *C.C.P.*) but rather used its inherent jurisdiction to suspend them until the first motion for authorization was decided, at which time it leaves open the possibility to seek the dismissal of the suspended motions under the principle of *res judicata*.

[27] There was criticism of the "first to file" rule and the Court revisited the issue in *Schmidt c. Johnson & Johnson inc.*[16] Justice Dalphond characterized the decision in *Hotte c. Servier* as a matter of judicial policy flowing from the courts' inherent jurisdiction, which was inspired by the principles of *lis pendens*:

> [30] Cette décision, comme on peut le voir à sa lecture, constitue une véritable décision de politique judiciaire découlant de la compétence inhérente de la Cour supérieure de contrôler ses dossiers. S'inspirant du principe connu de la litispendance, la Cour constate en l'espèce « une apparence de litispendance » entre les recours concurrents, puis, référant aux pouvoirs inhérents, ordonne une

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13 *Hotte c. Servier* was decided under the former *C.C.P.* which used the term "motion". This term has been replaced in the present *C.C.P.* by "application".

14 *Supra*, note 10.

15 *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at 448.

16 *Supra*, note 11.

> suspension des requêtes subséquentes plutôt que leur rejet, conséquence habituelle en matière de litispendance tel que l'indique le paragr. 165(1) *C.p.c.*

[28] The Court held in *Schmidt* that the "first to file" rule should be maintained but applied with flexibility. It found that the rule was easy to apply and was preferable to an expensive debate to determine which petitioner was better qualified. However, the Court also recognized that the strict application of the "first to file" rule is not always in the best interests of the members of the class and provided that the rule can be set aside in certain exceptional circumstances:

> [52] Ainsi, est admissible la démonstration que la première requête déposée au greffe souffre de graves lacunes, que les avocats qui en sont les responsables ne s'empressent pas de la faire progresser, qu'ils ont déposé des procédures similaires ailleurs au Canada, et ce, pour les mêmes membres putatifs, etc., c'est-à-dire des indices que les avocats derrière la première procédure tentent uniquement d'occuper le terrain et ne sont pas mus par le meilleur intérêt des membres putatifs québécois.

- **Interprovincial and international cases**

[29] The principle of *lis pendens* is codified in international matters by Article 3137 *C.C.Q.*:

3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.	**3137.** L'autorité québécoise, à la demande d'une partie, peut, quand une action est introduite devant elle, surseoir à statuer si une autre action entre les mêmes parties, fondée sur les mêmes faits et ayant le même objet, est déjà pendante devant une autorité étrangère, pourvu qu'elle puisse donner lieu à une décision pouvant être reconnue au Québec, ou si une telle décision a déjà été rendue par une autorité étrangère.

[Emphasis added]

[30] The notion of "pending before a foreign authority" has been interpreted as meaning that the Quebec action can be stayed only if the foreign action was filed first.[17] This is confirmed by Article 3155(4) *C.C.Q.* which provides that a foreign judgment will not be recognized if there is *lis pendens* with a Quebec action and the Quebec court is "first seized of the dispute". Further, Article 3137 *C.C.Q.* provides that the Quebec action may be stayed, not that it will be dismissed as under Article 168 *C.C.P.*

[31] Applied to class action proceedings, Article 3137 *C.C.Q.* allows the Superior Court to stay an application to authorize a class action or a class action when a motion to certify a class action or a class action is already under way outside Quebec.

[32] Further, before the court stays the application to authorize a class action, Article 577 *C.C.P.* requires it to have regard for the protection of the rights and interests of the Quebec members:

577. The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.	**577.** Le tribunal ne peut refuser d'autoriser l'exercice d'une action collective en se fondant sur le seul fait que les membres du groupe décrit font partie d'une action collective multiterritoriale déjà introduite à l'extérieur du Québec.
If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.	Il est tenu, s'il lui est demandé de décliner compétence ou de suspendre une demande d'autorisation d'une action collective ou une telle action, de prendre en considération dans sa décision la protection des droits et des intérêts des résidents du Québec.
If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for	Il peut aussi, si une action collective multiterritoriale est intentée à l'extérieur du Québec, refuser, pour assurer la protection des droits et des intérêts des membres du Québec, le désistement d'une demande d'autorisation ou

[17] *R.S. v. P.R.*, 2019 SCC 49, at paras 37-40; *FCA*, *supra*, note 2, at para 45; *Fastwing Investment Holdings Ltd. c. Bombardier inc.*, 2011 QCCA 432 (judge in chambers).

authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.	encore autoriser l'exercice par un autre demandeur ou représentant d'une action collective ayant le même objet et visant le même groupe s'il est convaincu qu'elle assure mieux l'intérêt des membres.

[33] There was some debate in the Superior Court as to how these rules should be applied. Most judgments concluded that Article 3137 *C.C.Q.* applies to class actions under *Hotte c. Servier*, and that it was stricter than the "first to file" rule in that the Superior Court had no jurisdiction to stay the Quebec proceedings if they were instituted first and a discretion to do so (based on Article 3137 *C.C.Q.* and Article 577 *C.C.P.*) if they were not first.[18]

[34] In *FCA*, there were concurrent applications to authorize class actions in Quebec, Ontario and British Columbia. The Superior Court held that the Quebec application could not be stayed under international *lis pendens* and Article 3137 *C.C.Q.* because it had been filed before the others.[19]

[35] The Court agreed with the Superior Court's interpretation of Article 3137 *C.C.Q.* However, the Court went on to say that, even if the conditions of Article 3137 *C.C.Q.* are not met, the Superior Court has the inherent jurisdiction under Article 49 *C.C.P.* to suspend the Quebec class action proceedings, provided that the interests of the Quebec members and the proper administration of justice militate in favour of a suspension.[20] As a result, the Superior Court can suspend Quebec class action proceedings in favour of proceedings filed outside Quebec, even if the Quebec proceedings were filed first.

- **Federal Court v. Superior Court**

[36] In the present matter, the application to authorize a class action was introduced in Quebec Superior Court and the motion to certify a class action was instituted in the

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[18] *Lebrasseur c. Hoffmann-La Roche ltée*, 2011 QCCS 5457, at paras 13-14, 24, 28, 43; *Garage Poirier & Poirier inc. c. FCA Canada inc.*, 2018 QCCS 107, at paras 37-39; *Li c. Equifax inc.,* 2018 QCCS 1892, at paras 48-49; *Paquette c. Samsung Electronics Canada inc.,* 2018 QCCS 767, at para 26. *Contra*: *Chasles c. Bell Canada Inc*., 2017 QCCS 5200, at paras 41-46.

[19] The Quebec proceedings were filed before the B.C. proceedings but on the same day as the Ontario proceedings. Article 3137 *C.C.Q.* required that the Ontario proceedings be filed before the Quebec proceedings, and that had not been established: *Garage Poirier & Poirier inc. c. FCA Canada inc.*, *supra*, note 18, at paras 42-43, 48-49.

[20] *FCA*, *supra*, note 2, at paras 73, 78.

Federal Court two days later. The application to stay the Quebec Proceedings alleges *lis pendens* and "the efficient management of multijurisdictional class actions".

[37] There is no precedent as to whether the "first to file" rule applies in these particular circumstances. According to *Hotte c. Servier*, the rule applies when both proceedings are in Superior Court because there was *lis pendens* or an appearance of *lis pendens* and for policy reasons, and according to *FCA*, it does not apply when one proceeding is in Superior Court and the other is outside Quebec because the Superior Court has the inherent jurisdiction to suspend proceedings even where the conditions of Article 3137 *C.C.Q.* on interprovincial and international *lis pendens* are not met.

[38] Because of the peculiar status of the Federal Court, this case falls somewhere in between *Hotte c. Servier* and *FCA*: the Federal Court is recognized in Article 8 *C.C.P.* as a court "hav[ing] jurisdiction in some civil matters in Quebec" but it is separate from the Superior Court and is not subject to its general power of judicial review under Article 34 *C.C.P.* Like *Hotte c. Servier*, both the application and the motion are therefore pending before courts having jurisdiction in Quebec but they are not both pending in Superior Court; like *FCA*, one of the proceedings is in Superior Court and the other is not, but it is not "outside Quebec". Moreover, Article 3137 *C.C.Q.* does not apply to proceedings in Federal Court.

[39] In my view, the reasons underlying *FCA* apply with equal force when the other proceedings are in Federal Court, such that the Superior Court has the inherent jurisdiction to suspend the Quebec Proceedings in favour of the Federal Court Proceedings notwithstanding the "first to file" rule.

[40] As set out above, the "first to file" rule flows from the rules on *lis pendens*. It was adopted in intra-Quebec class action matters as a matter of judicial policy. Its purpose was to provide a simple rule and to avoid having an expensive carriage motion between competing law firms that could become a beauty contest. It was also an important consideration in support of that rule, as set out in *Schmidt*, that the Superior Court held the other proceedings in abeyance and retained the capacity to have the subsequently filed case take the place of the first case if circumstances so required.

[41] Those considerations did not justify extending the "first to file" rule to interprovincial cases in *FCA* and do not justify extending it in the present circumstances.

[42] When the issue is whether the class action should proceed in Superior Court as opposed to the courts of another province or the Federal Court, other considerations will be relevant. The court can consider those without turning it into a beauty contest. The simplicity of the "first to file" rule is not necessary or appropriate.

[43] Moreover, it is also relevant that in an intra-Quebec case, all of the proceedings are pending before the Superior Court such that the Superior Court has the ability to

choose which proceeding will go forward as it can suspend all of the others. This led the Court to adopt the "first to file" rule in *Hotte c. Servier*, with the possibility, as indicated in *Schmidt*, that the Superior Court can later change its mind and proceed with one of the other cases if circumstances so warrant.

[44] That is not the case if the other proceeding is in the Federal Court or in the courts of another province. In those circumstances, the Superior Court can only decide whether to suspend its proceedings: if it concludes that its proceedings should go forward, it cannot suspend the proceedings in Federal Court or the court of the other province. We live in a federation where there is comity amongst the courts, and they should all apply similar tests and reach similar outcomes on issues like this. If the Superior Court decides that the Quebec action should proceed after taking into account all of the relevant factors, and not simply the order of filing, it increases the likelihood that the other court will come to the same conclusion and will suspend its proceedings.

[45] I am therefore of the view that the judge correctly refused to stay the Quebec Proceedings under the principle of *lis pendens* because they were filed before the Federal Court Proceedings. However, in light of *FCA* (which, in fairness to the judge, was only decided after he rendered his judgment), he should also have considered the possibility of suspending the Quebec Proceedings under the court's inherent jurisdiction. The "first to file" rule does not apply in that analysis.

2. The appropriate test for a suspension

[46] The "first to file" rule has the undeniable benefit of being simple and easy to apply. Once it is excluded, the request for a suspension must be decided on some other basis.

[47] In *FCA*, the Court held that the Superior Court had the inherent jurisdiction to suspend the class proceedings pending in Superior Court "[s]i l'intérêt des membres putatifs et l'administration de la justice militent pour la suspension de l'instance".[21]

[48] This test flows from the nature of the inherent jurisdiction of the Superior Court under Article 49 *C.C.P.* There is also the mandatory language of Article 577 *C.C.P.*, the second paragraph of which provides:

> If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have
>
> Il est tenu, s'il lui est demandé de décliner compétence ou de suspendre une demande d'autorisation d'une action collective ou une telle action, de prendre en considération

[21] *Id.*, at para 78.

regard for the protection of the rights and interests of Québec residents.	dans sa décision la protection des droits et des intérêts des résidents du Québec.

[Emphasis added]

[49] I note that Article 577 *C.C.P.* may not apply in the present case. The first paragraph of Article 577 *C.C.P.* is limited to instances where there is "a multi-jurisdictional class action already under way outside Québec", which would not include the present case because the proceedings in the Federal Court cannot be said to be "under way outside Québec". The Court suggested in *FCA* that the limitation in the first paragraph does not apply to the second paragraph. In any event, whether or not the second paragraph of Article 577 *C.C.P.* applies in the present case, the Superior Court would nevertheless have the duty to ensure that the rights and interests of the members are adequately protected.[22]

[50] The test applied in *FCA*, the interest of the members and the administration of justice, also applies in the present circumstances.

[51] As a starting point and in principle, it will generally not be in the interests of justice or of the parties to have two class actions proceed **on the merits** in parallel in front of different courts. Besides the risk of conflicting judgments, there is also the cost to the parties and the waste of scarce judicial resources.

[52] Once the court considering a suspension determines that the proposed class actions raise similar issues, it should also assess whether either proposed class action includes issues, remedies or class members not included in the other, whether as a result of a strategic decision by a party or as a result of limits on the territorial or subject-matter jurisdiction of one of the courts. A difference in the scope of the proposed class actions may be relevant because it suggests that additional proceedings may be necessary in the other forum to cover all of the issues, remedies and class members.

[53] The court must also ensure that the rights and interests of Quebec residents are adequately protected and that the proposed representative is in a position to properly represent them. This would include, for example, that the Quebec residents be treated in the same way as residents of other jurisdictions, that they receive the benefits of any applicable Quebec legislation, and that any notices and other communications be disseminated in Quebec and in French.

[54] One final note. The debate on the suspension typically takes place, as in this matter, before either class action is authorized or certified. That is hardly surprising. The parties are trying to save money by not going through the authorization process twice.

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[22] *Id.*, at paras 64-69.

However, it means that the court considering the suspension application does not know whether the other proposed class action will be authorized or certified and does not have the benefit of a judgment which defines the class, the issues and the remedies.

[55] In a case where both applications for authorization are brought before the Superior Court, this is not a problem. The Superior Court will apply the "first to file" rule and, provided only that the first application is of acceptable quality and the lawyers who filed it demonstrate their intention to move it forward, there is no need to compare the recourses beyond their filing dates.

[56] Moreover, if the Superior Court is called upon to suspend an application to authorize a class action in Superior Court in favour of a motion to certify or authorize a somewhat different class action in Federal Court, another provincial court or a foreign court, and all of the parties consent and present a litigation plan to the Superior Court showing how they will conduct the litigation and protect the rights and interests of the Quebec members, that again may be sufficient for the judge to grant the suspension before either proceeding is authorized or certified.

[57] However, the lack of authorization or certification may be problematic in cases where the application for a suspension is contested and the parties make representations as to what the Superior Court and the other court may or may not do with respect to authorization or certification. While the Superior Court retains the inherent jurisdiction to suspend the Quebec proceedings pending before it at any stage, the judge might consider, depending on the circumstances, dismissing as premature such a request made before the other concurrent class action has been authorized or certified.

3. Application to the facts of this case

[58] Although the judge dismissed the application for a stay based on the "first to file" rule, he went on to consider other arguments.

[59] He first ruled that the fact that the Appellants had asked the Federal Court to suspend proceedings pending the judgment of the Supreme Court in *Pioneer Corp v. Godfrey*, and that they failed to advise him of this fact was sufficient, on its own, to dismiss the application for a stay.[23]

[60] The judge was justifiably upset by this behaviour. The Appellants cannot ask the Superior Court judge to suspend or stay the proceedings in his court so that they can proceed in Federal Court without disclosing to the judge that they also intend to ask for the suspension of the Federal Court Proceedings.

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[23] Motion judgment, *supra*, note 1, at paras 62-63.

[61] However, improper conduct by the Appellants is not a sufficient ground for dismissing the application to suspend. As the judge properly concluded, "[e]n soi, le comportement des défenderesses en cour ne doit pas avoir une incidence sur l'intérêt des membres."[24]

[62] The possible suspension of the Federal Court Proceedings was relevant in assessing the interests of the class members. However, it was not sufficient to say that it goes counter to their interest to suspend the Quebec Proceedings in favour of the Federal Court Proceedings because those proceedings might be suspended. It would have been appropriate to take a more global view and review all of the relevant factors. It also would have been important to understand the reasons for suspending the Federal Court Proceedings pending the Supreme Court decision, and why there was no intention to seek the suspension of the Quebec Proceedings. Further, it would have been important to assess the likelihood of the Federal Court granting the suspension and the potential duration of the suspension. As it turns out, the Appellants' motion to temporarily suspend the Federal Court Proceedings was dismissed on March 26, 2019.[25] In any event, the Supreme Court issued its judgment in *Pioneer Corp v. Godfrey* on September 20, 2019.[26]

[63] This factor, on its own, was not a sufficient basis to dismiss the application to suspend.

[64] The judge went on to consider the 12 factors raised by the Appellants:

> 1) Les deux dossiers portent principalement sur la *Loi sur la concurrence*, une loi fédérale d'application pancanadienne. Les allégations du présent dossier visant le droit québécois n'ont pas de conséquence sur les dommages réclamés;
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> 2) Les faits allégués dans les deux dossiers sont identiques et les dommages réclamés sont sensiblement les mêmes;
>
> 3) Il existe un risque de décisions contradictoires tant sur l'autorisation d'exercer une action collective que sur le mérite du dossier, avec des conséquences négatives sur un groupe national pancanadien qui a le droit d'être régi par une seule décision qui devrait avoir une portée nationale;
>
> 4) Obliger les défenderesses à se défendre de façon simultanée et parallèle devant deux tribunaux pour une question identique impliquant le même groupe proposé causera préjudice aux défenderesses et les obligera à encourir les coûts d'un tel dédoublement;

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[24] *Id.*, at para 63.
[25] *Jensen v. Samsung Electronics Co., Ltd.*, *supra*, note 12.
[26] *Pioneer Corp v. Godfrey*, *supra*, note 12.

5) La poursuite des deux dossiers de façon parallèle constitue une perte de ressources judiciaires;

6) La proportionnalité et le pouvoir de gérer l'instance commandent la suspension du présent dossier;

7) Il existe la possibilité que l'action collective québécoise, si autorisée, ne vise pas un groupe national mais uniquement un groupe purement québécois;

8) La Cour fédérale a compétence pour rendre des ordonnances qui sont exécutoires dans toutes les provinces et pour protéger de façon adéquate les intérêts des membres situés au Québec. La Cour fédérale est mieux placée que la Cour supérieure pour protéger les membres hors Québec;

9) Toute conclusion de fait ou de droit de la Cour fédérale aura éventuellement un impact et une application dans le présent dossier en Cour supérieure;

10) L'intérêt des membres milite en faveur de la suspension du présent dossier au profit du dossier Jensen en Cour fédérale;

11) La Cour fédérale a une expertise plus pointue en droit de la concurrence que la Cour supérieure;

12) Dans le dossier ontarien *Abesdris v. Samsung Electronics Co. ltd. et al.*, dans lequel le groupe proposé est national, les parties ont indiqué que leur dossier n'avancera pas en attendant le sort du dossier Jensen en Cour fédérale, démontrant un effort de coordination de tous les intervenants impliqués au Canada, à l'exception du demandeur ici.

[65] The judge summarily dismissed each of these arguments, save for the third one:

1) Argument : Les deux dossiers portent principalement sur la *Loi sur la concurrence*, une loi fédérale d'application pancanadienne. Les allégations du présent dossier visant le droit québécois n'ont pas de conséquence sur les dommages réclamés. Réponse du Tribunal : Cet argument ne peut être retenu car il ne correspond pas à la réalité du présent dossier, dans lequel le *C.c.Q.* et la *Loi sur la protection du consommateur* sont présents et pourront avoir une incidence sur la nature de la faute et les dommages, même si secondaires par rapport à la *Loi sur la concurrence*. De plus, le demandeur réclame des dommages-intérêts punitifs en vertu de l'article 272 de la *Loi sur la protection du consommateur*, cet élément n'étant pas présent dans le dossier Jensen en Cour fédérale. Le fait que potentiellement seuls les membres québécois puissent bénéficier de ces éléments et non pas les membres hors Québec est un élément spéculatif au présent stade du dossier et dépend de trop d'inconnus, tels entre

autres la portée du groupe autorisé s'il y a autorisation, le droit applicable et la preuve du droit des autres provinces;

2) Argument : Les faits allégués dans les deux dossiers sont identiques et les dommages réclamés sont sensiblement les mêmes. Réponse du Tribunal : Cet argument est rejeté car les dommages réclamés ne sont pas les mêmes et n'ont pas tous la même base, comme expliqué à l'argument 1. Il est vrai que les faits sont identiques, mais cela en soi ne change rien;

3) Argument : Il existe un risque de décisions contradictoires tant sur l'autorisation d'exercer une action collective que sur le mérite du dossier, avec des conséquences négatives sur un groupe national pancanadien qui a le droit d'être régi par une seule décision qui devrait avoir une portée nationale. Réponse du Tribunal : Cet argument est fondé car il existe un tel risque. C'est cependant le seul argument qui milite en faveur de la suspension et, de l'avis du Tribunal, il ne l'emporte pas face à toutes les autres considérations;

4) Argument : Obliger les défenderesses à se défendre de façon simultanée et parallèle devant deux tribunaux pour une question identique impliquant le même groupe proposé causera préjudice aux défenderesses et les obligera à encourir les coûts d'un tel dédoublement. Réponse du Tribunal : Cet argument ne peut être retenu car il constitue une généralité hypothétique sans aucune démonstration;

5) Argument : La poursuite des deux dossiers de façon parallèle constitue une perte de ressources judiciaires. Réponse du Tribunal : Cet argument ne peut être retenu. L'économie de ressources judiciaires et de celles des parties « en général » ne convainc pas le Tribunal. En effet, au Québec, le débat sur la demande d'autorisation d'exercer une action collective durera au maximum une journée et se fera sur un dossier très sommaire. Le débat sera somme toute assez simple et ne constituera pas, de l'avis du Tribunal, une tâche titanesque pour les parties et pour le Tribunal. C'est mal comprendre la portée du débat d'autorisation au Québec que de penser le contraire. Pour ce qui est de la suite du dossier au mérite si autorisé, il est présentement prématuré de le considérer, puisqu'il y a encore trop d'éléments inconnus;

6) Argument : La proportionnalité et le pouvoir de gérer l'instance commandent la suspension du présent dossier. Réponse du Tribunal : Cet argument est rejeté pour les mêmes motifs que l'argument 5 et pour le motif que l'emploi du mot « proportionnalité » à toutes les sauces sans explication détaillée ne convainc pas. De plus, dans le présent dossier, avant que l'autorisation ne soit plaidée, il reste seulement à décider d'une demande des défenderesses pour permission de produire une preuve appropriée, qu'elles ont annoncée verbalement. L'audition sur une telle demande prend moins qu'une journée. En comparaison,

l'échéancier en Cour fédérale comprend plusieurs étapes réparties sur au moins quatorze mois, incluant le dépôt de déclarations assermentées détaillées de part et d'autre, de documents et d'interrogatoires des déclarants. La proportionnalité penche donc en faveur que le présent dossier progresse. L'intérêt des membres penche également du même côté;

7) Argument : Il existe la possibilité que l'action collective québécoise, si autorisée, ne vise pas un groupe national mais uniquement un groupe purement québécois. Réponse du Tribunal : Cet argument est rejeté car prématuré et car il n'appartient pas au Tribunal d'évaluer au présent stade la définition potentielle d'un groupe. Cet exercice se fait lors du débat sur la demande d'autorisation, et pas avant;

8) Argument : La Cour fédérale a compétence pour rendre des ordonnances qui sont exécutoires dans toutes les provinces et pour protéger de façon adéquate les intérêts des membres situés au Québec. La Cour fédérale est mieux placée que la Cour supérieure pour protéger les membres hors Québec. Réponse du Tribunal : Cet argument est rejeté car il existe des procédures pour rendre exécutoire ailleurs au Canada les décisions de la Cour supérieure. Quant à la protection des membres en général, il ne suffit pas de le dire, il faut le démontrer, ce qui n'a pas été fait ici par les défenderesses;

9) Argument : Toute conclusion de fait ou de droit de la Cour fédérale aura éventuellement un impact et une application dans le présent dossier en Cour supérieure. Réponse du Tribunal : Cet argument ne peut être retenu en soi, car l'inverse est aussi vrai : toute conclusion de fait ou de droit de la Cour supérieure aura éventuellement un impact et une application dans le dossier Jensen en Cour fédérale;

10) Argument : L'intérêt des membres milite en faveur de la suspension du présent dossier au profit du dossier Jensen en Cour fédérale. Réponse du Tribunal : Cet argument est rejeté car il ne suffit pas de le dire, il faut le démontrer, ce qui n'a pas été fait ici par les défenderesses. De plus, le dossier québécois va progresser plus rapidement et va comporter un dossier moins complexe, d'où l'intérêt des membres. Enfin, il est possible que le dossier Jensen soit lui-même suspendu, ce qui est contre tous les intérêts des membres;

11) Argument : La Cour fédérale a une expertise plus pointue en droit de la concurrence que la Cour supérieure. Réponse du Tribunal : Cet argument est rejeté car il repose sur une considération que la loi et la jurisprudence ne prévoient pas nulle part dans aucun débat sur les demandes de suspension;

12) Argument : Dans le dossier ontarien *Abesdris v. Samsung Electronics Co. ltd. et al.*, dans lequel le groupe proposé est national, les parties ont indiqué que

> leur dossier n'avancera pas en attendant le sort du dossier Jensen en Cour fédérale, démontrant un effort de coordination de tous les intervenants impliqués au Canada, à l'exception du demandeur ici. Réponse du Tribunal : Cet argument est rejeté car les positions des avocats de la demande en Ontario et eux de la défense ne changent rien à la décision du Tribunal.[27]

[Footnotes omitted]

[66] While I do not agree with all of the reasons for which the judge dismissed the arguments, I agree that the arguments are not sufficient, at this stage, to justify a suspension of the Respondent's application for authorization in Superior Court.

[67] In my view, it is largely an issue of timing.

[68] Some of the arguments could be considered at this stage. The Federal Court has a pan-Canadian jurisdiction, both in terms of a national class and execution of an eventual judgment against the Appellants. However, it also has a narrower subject-matter jurisdiction than the Superior Court. Those are factors which the judge could consider.

[69] However, there are simply too many unknowns:

- Will the class actions be authorized in Superior Court and certified in the Federal Court?

- What will be the classes? The two proposed class definitions are essentially identical. Both have national classes and cover the same period, the same activities and the same defendants. However, the Appellants say that they will challenge the national class proposed by the Respondent and they suggest that the Superior Court will limit the class definition to residents of Quebec. That issue will only be decided at the authorization stage.

- What issues will be litigated? The Federal Court and the Superior Court have concurrent jurisdiction over a civil action in damages for breach of the criminal provisions of the *Competition Act* including price-fixing,[28] which is the principal claim in both proposed class actions. The Quebec Proceedings also invoke provincial consumer protection legislation generally and the Quebec *Consumer Protection Act* and the *Civil Code* in particular, and advance a claim for punitive damages, presumably under the *Consumer Protection Act*. The claim under provincial law is not and cannot be included in the Federal Court Proceedings, because the Federal Court does not have jurisdiction over

[27] Motion judgment, *supra*, note 1, at para 64.
[28] *Supra*, note 3, s. 36.

a claim under a provincial statute. However, in his proceedings, the Respondent mentions only the *Civil Code* in relation to the calculation of interest on the award, and the allegations in relation to the consumer protection legislation are vague. When asked at the hearing which provisions of the *Consumer Protection Act* were breached, counsel for the Respondent was unable to give a clear answer. The importance of the claim under provincial law cannot be assessed at this stage.

- What will be the timetables for the proceedings in Federal Court and in Superior Court? The judge concluded that “le dossier québécois va progresser plus rapidement et va comporter un dossier moins complexe”, but it is not clear on what evidence this finding was based.

Conclusion

[70] Based on the foregoing, I am of the view that the judge correctly refused to stay the Quebec Proceedings under the principle of *lis pendens* because they were filed before the Federal Court Proceedings but that he should also have considered the possibility of suspending the Quebec proceedings under the court’s inherent power. The application to suspend the Quebec Proceedings should not have been dismissed for the sole reason that the Quebec Proceedings were filed before the Federal Court Proceedings, but it would be premature to suspend the Quebec Proceedings at this stage. The matter should be allowed to proceed to authorization. If the Superior Court authorizes the class action and the Federal Court certifies the Federal Court Proceedings as a class action, it might be appropriate to revisit the issue at that time.

[71] The Respondent’s request that the Appellants be ordered to reimburse his disbursements in the amount of $7,807.71 should also be dismissed as premature. The Superior Court should deal with the disbursements in the ordinary course.

STEPHEN W. HAMILTON, J.A.