SUPERIOR COURT
(Class Actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000738-159

DATE: November 16, 2017

BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

ROGER CHASLES
KRISTOPHER CHASLES
Petitioners
v.
BELL CANADA INC.
BELL MOBILITY INC.
VIRGIN MOBILE CANADA
Respondents

JUDGMENT ON PETITIONERS' AMENDED MOTION TO STAY
THEIR MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
AND TO OBTAIN THE STATUS OF REPRESENTATIVE

INTRODUCTION

[1] The Petitioners seek to stay a proposed Québec class action in favour of a proposed national class action in Ontario.

[2] The Respondents oppose the motion.

JH5439

CONTEXT

[3] On April 14, 2015, the Petitioners filed a Motion to Authorize the Bringing of a Class Action against the Respondents with respect to an alleged misuse of customers' personal information. The proposed class was limited to customers in Québec.

[4] Two days later, on April 16, 2015, Settimo Tocco filed a Statement of Claim in Ontario with Court File Number CV-15-00022122-00CP. The Statement of Claim was amended on April 21, 2015 to add as plaintiff Travis Briggs.[1]

[5] The Ontario Statement of Claim alleges the same misuse of personal information over essentially the same period of time. It includes as defendants Bell Canada Inc. and Bell Mobility Inc., but not Virgin Mobile Canada, which it describes as a division of Bell Mobility. The proposed class in the Ontario proceedings is a national class excluding Québec.

[6] The Petitioners are represented by Charney Lawyers and Legal Logik Inc. The Ontario plaintiffs are represented by Sutts, Strosberg LLP and Charney Lawyers.

[7] In October 2016, the Ontario plaintiffs proposed to the Respondents to proceed with a national class action in Ontario. As part of this proposal, the Québec proceedings would be stayed.

[8] Pursuant to this proposal, the Petitioners filed a motion to stay the Québec proceedings on January 6, 2017.

[9] However, the parties were unable to reach any agreement.

[10] The Ontario plaintiffs nevertheless decided to proceed with the national class in Ontario. On March 7, 2017, they served an Amended Amended Statement of Claim[2] in order to (1) add the Petitioners as plaintiffs, (2) add Québec customers to the class and create a Québec subclass, and (3) plead the relevant provisions of the Québec *Act Respecting the protection of Personal information in the Private Sector*,[3] the *Civil Code of Québec* and the Québec *Consumer Protection Act*.[4]

[11] The parties agreed to adjourn the Ontario motion to amend *sine die*. As part of that agreement, the Respondents agreed to consent to the amendments, if the Québec proceedings were stayed, subject to their right to contest the class definition and the Québec subclass at the certification hearing.[5]

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1 Exhibit R-1.
2 Exhibit R-2.
3 CQLR, c. P-39.1.
4 CQLR, c. P-40.1.
5 March 17, 2017 Endorsement of Justice Bondy (Exhibit R-5).

[12] The certification motion in Ontario is now scheduled to be heard January 22 to 24, 2018.

[13] The Petitioners amended their motion to stay the Québec proceedings on October 3, 2017. The parties proceeded on the motion on October 24, 2017.

POSITION OF THE PARTIES

[14] The Respondents argue that the motion to stay the Québec proceedings is a motion for *lis pendens* under Article 3137 *C.C.Q.*

[15] Moreover, because the motion is in the context of a class action, the Respondents argue that Article 577 of the *Code of Civil Procedure* also applies and requires the Court to consider the protection of the rights and interests of Québec residents.

[16] As a result, the Respondents argue that, for the motion to stay to be granted, the Court must be satisfied that all of the conditions of Article 3137 *C.C.Q.* are met and that the rights and interests of Québec residents are protected.

[17] The Respondents argue that the conditions of Article 3137 *C.C.Q.* are not met and that the rights and interests of the Québec members are not protected. As discussed below, the Respondents do not, however, rely on the fact that the Québec proceedings were filed first.

[18] The Petitioners, on the other hand, argue that the conditions of Article 3137 *C.C.Q.* must be somewhat modified in the context of a class action. They also suggest that the Court has jurisdiction to stay proceedings under article 49 *C.C.P.* even if the conditions of Article 3137 *C.C.Q.* are not met, provided that the rights and interests of the Québec residents are protected.

[19] The Petitioners argue that the conditions of Article 3137 *C.C.Q.* as modified are met and that in any event the rights and interests of the Québec members are protected and the motion to stay should be granted.

ANALYSIS

[20] Article 3137 *C.C.Q.* provides as follows:

> **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.

[21] The conditions of Article 3137 *C.C.Q.* are as follows:

- Both actions are between the same parties;
- Both actions are based on the same facts;
- Both actions have the same subject;
- The foreign action was filed first;[6] and
- The foreign action can result in a decision (or a decision has already been rendered) which may be recognized in Québec.

[22] Once those conditions are met, Article 3137 *C.C.Q.* gives the court the discretion ("a Québec authority may stay its ruling") as to whether to stay the action in Québec.

[23] Article 577 *C.C.P.* provides as follows:

> **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.
>
> 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.
>
> 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 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.

[24] Article 577 *C.C.P.* provides that the court "is required to have regard for the protection of the rights and interests of Québec residents" in exercising its discretion as to whether to grant a stay of an application for authorization to institute a class action. The second paragraph provides "If asked [...] to stay an application for authorization to institute a class action [...]", which suggests that the request to stay must be based on some other provision, such as Article 3137 *C.C.Q.*

[25] In principle, this would mean that, for the motion to stay to be granted in the present matter, (1) the Court must be satisfied that all of the conditions of Article 3137 *C.C.Q.* are met and (2) the Court must consider the protection of the rights and interests of Québec residents in the exercise of its discretion.

[26] The difficulty is that the conditions of Article 3137 *C.C.Q.* are designed for the typical litigation where one or more plaintiffs sue one or more defendants. They do not

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6 Article 3137 *C.C.Q.* says only that the foreign action is "pending". The Court of Appeal has interpreted this to mean that the foreign action must have been filed first (*Fastwing Investment Holdings Ltd.* c. *Bombardier inc.*, 2011 QCCA 432, par. 30-32).

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".[7]

[27] Although the courts were inclined to apply Article 3137 *C.C.Q.* more strictly in some early cases,[8] more recently the courts have applied the conditions of Article 3137 *C.C.Q.* quite liberally in the context of class actions and the courts have frequently stayed Québec class actions in favour of national class actions in other provinces on the basis of *lis pendens*.[9] The courts have recognized that staying a Québec class action when there is a national class action in another province prevents a multiplicity of proceedings and thereby saves time, energy and judicial resources and avoids the risk of conflicting judgments, and is therefore consistent with the principle of proportionality enshrined in the *Code of Civil Procedure*.

[28] There are several ways to get to this outcome: (1) the motion is made under Article 3137 *C.C.Q.*, but the conditions of Article 3137 *C.C.Q.* are somewhat modified in the context of a class action;[10] (2) the Court has jurisdiction to stay proceedings under article 49 C.C.P even if the conditions of Article 3137 *C.C.Q.* are not met;[11] or (3) the motion is made under Article 577 *C.C.P.*, but the conditions of Article 3137 *C.C.Q.* as modified form part of the analysis under Article 577 *C.C.P.*

[29] In any event, the Court will review the five conditions of Article 3137 *C.C.Q.* and the sixth condition provided by Article 577 *C.C.P.* as they apply to the facts of the present matter. The Court will assess for each of the five conditions of Article 3137 *C.C.Q.* whether that condition applies as is in the context of a class action, whether it must be modified or whether it does not apply.

1. Same parties

[30] The question of identity of parties can be somewhat awkward in the context of class actions. It is rare that the two proceedings will have the same petitioners or plaintiffs or the exact same class definition. This is particularly true if the two proceedings are in different jurisdictions or are not at the same stage, such that one is

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7 *Conseil pour la protection des malades* c. *Biomet Canada inc.*, 2016 QCCS 4574, par. 19. See also *Boucher* c. *Boston Scientific Corporation*, 2014 QCCS 6395, par. 12.

8 *Melley* c. *Toyota Canada inc.*, 2011 QCCS 1229; *St-Marseille* c. *Proctor & Gamble inc.*, 2012 QCCS 5419, par 15-16.

9 *Boucher, supra* note 7, par. 25; *Arsenault* c. *Bard Canada inc.*, 2015 QCCS 2530, par. 8; *Gagnon* v. *General Motors of Canada*, 2016 QCCS 1421, par. 25-26; *Biomet, supra* note 7, par. 35; *Boehmer* v. *Bard Canada Inc.*, 2016 QCCS 4702, par. 34, 39; *Saumur* v. *Avid Life Media Inc.*, 2016 QCCS 6304, par. 14. See also *Pro-Sys Consultants Ltd.* v. *Microsoft Corporation*, 2013 SCC 57, par. 106.

10 *Boucher, supra* note 7, par. 12; *Biomet, supra* note 7, par. 19.

11 *Gagnon, supra* note 9, par. 22. See also *Marshall* v. *Ticketsnow Entertainment Group Inc.*, 2010 QCCS 2672, par. 9.

authorized or certified and the other is not. As stated by Justice Poisson, « L'identité des parties n'a pas à être parfaite. »[12]

[31] The key question is whether the proposed Québec members are included in the other proposed class and not whether the classes are identical or whether the Québec petitioners or representatives are also petitioners or plaintiffs in the other class action.[13]

[32] In the present matter, the proposed class definition in the Québec proceedings is as follows:

> All persons in Quebec who were Customers between November 16, 2013 and April 14, 2015. Excluded from the Class are the Respondents' employees, board members, officers and directors;

[33] The proposed class definition in the Ontario proceedings is as follows:

> "Class" or "Class Members" means all persons in Canada, except in the Province of Québec, who had Bell Mobility and Virgin Mobile Canada accounts with data service between November 16, 2013 and April 13, 2015, excluding officers, directors and employees of the defendants;

[34] Once the various defined terms are added to the definitions, they are essentially identical except for the geographic scope. As a result, once the Ontario class definition is amended to remove the words "except in the Province of Québec", the Québec class members will be included in the proposed class in Ontario.

[35] This is sufficient to meet the same parties test.

2. Same facts

[36] It is clear that both proceedings allege the same factual basis. This is not contested by the Respondents.

3. Same subject

[37] The question of the two proceedings having the same "subject" ("objet" in the French version of Article 3137 *C.C.Q.*) is also problematic, because the class actions may not be at the same stage:

> [19] [...] Cette action se scinde en plusieurs phases dont la première est celle dite d'autorisation d'exercice. Au stade de l'autorisation, le véritable objet ne porte pas sur les demandes d'indemnisation des membres du groupe mais sur l'autorisation d'exercer une action collective. Une fois cette première étape

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12 *Biomet*, *supra* note 7, par. 27.

13 *St-Marseille, supra* note 8, par. 4; *Boehmer*, *supra* note 9, par. 19, 21; *Boucher*, *supra* note 7, par. 18.

> franchie avec succès, l'objet du litige porte sur les demandes d'indemnisation. L'identité d'objet sera néanmoins présente si l'objet de la seconde action est semblable à celui de la première ou en est la conséquence nécessaire.
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> [...]
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> [27] [...] Quant à l'identité des objets, bien que la Demande d'autorisation et le Recours collectif national Ontario ne soient pas rendus au même stade, il y a néanmoins identité d'objet puisque les actions collectives sont connexes et leur objet ultime est semblable.[14]
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> [References omitted]

[38] In the present matter, neither proceeding has been authorized (Québec) or certified (Ontario). The Québec proceeding is a motion to authorize the bringing of a class action, while the Ontario proceeding is a statement of claim seeking a series of conclusions including certification of the action as a class proceeding. Notwithstanding the procedural differences, the conclusions of the two proposed class actions are similar.

[39] This is sufficient to establish that the proceedings have the same subject.

[40] The Court therefore concludes that the three identities are substantially met.

4. The foreign action was instituted first

[41] When faced with two motions for authorization of class actions in Québec, the courts have held that the conditions of *lis pendens* require the courts to stay the subsequently-filed proceedings and to allow the first proceeding to go ahead.[15] If the first proceeding does not move forward, the court can allow the substitution of a new petitioner who can appoint new attorneys.[16]

[42] This simple "first to file" rule may have benefits for intra-provincial class actions, in particular in avoiding carriage battles that are common elsewhere in Canada. However, it is not clear that a "first to file" rule makes sense in dealing with overlapping multi-jurisdictional class actions.

[43] The present case is a good illustration of the problem.

[44] The Québec class action was instituted first, on April 14, 2015, in large part because the "first to file" rule forces lawyers to file in Québec quickly before anyone else. The Ontario class action was filed two days later on April 16, 2015. Because the

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14 *Biomet*, *supra* note 7, par. 19 and 27.

15 *Hotte* c. *Servier Canada inc.*, [1999] R.J.Q. 2598 (C.A.); *Schmidt* c, *Johnson & Johnson inc.*, 2012 QCCA 2132.

16 *Cohen* c. *LG Chem Ltd.*, 2015 QCCS 6463.

Québec class action was already filed, the Ontario class action carved Québec residents out of its proposed class. The amendment of the Ontario class action to include Québec residents is conditional on the Québec class action first being stayed.

[45] The result is that the strict conditions for *lis pendens* are not met: the Québec proceedings were filed first, and moreover the Ontario class action does not yet include the Québec residents. The Respondents raised these grounds in their written arguments but stated in oral argument that they did not rely on them.

[46] The Court is of the view that it would be better not to apply a strict "first to file" rule in dealing with overlapping multi-jurisdictional class actions.[17] There are more important considerations than who filed first in these situations. As a result, the Court will not dismiss the motion to stay in the present matter simply because the Québec proceedings were filed first or because the Ontario class action does not yet include the Québec residents.

5. Recognition of the foreign judgment

[47] The question of whether an Ontario judgment on the proposed national class action would be recognized and enforced in Québec is the key question in the present matter. It is explicitly a condition under Article 3137 *C.C.Q.* "that the latter action [the foreign action] can result in a decision which may be recognized in Québec". Independently of that, it is clearly a factor to be considered in assessing whether the rights and interests of Québec residents are protected under Article 577 *C.C.P.* or whether the Court should exercise its jurisdiction under Article 49 *C.C.P.* Simply put, it would not be fair to the Québec members to stay a Québec class action in favour of an Ontario national class action which would not result in a judgment enforceable in Québec.

[48] The Court will assume for the first part of its analysis that the rule set out in Article 3137 C.C.Q, applies strictly in the context of class actions and that it is a condition to the stay of proceedings in the present matter.

[49] This analysis requires the application of Articles 3155 and following of the *C.C.Q.* Article 3155 C.C.Q. sets out the limited grounds on which a Québec court can refuse to recognize a foreign judgment:

> **3155.** A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:
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> (1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;

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[17] *Boehmer, supra* note 7, par. 5 and 7. Contra *St-Marseille*, *supra* note 8, par. 15

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

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

(4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;

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

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

[50] The Respondents plead that the first ground applies: the Ontario court does not have jurisdiction. The issue is not whether the Ontario court has jurisdiction under its rules. The Court presumes that the Ontario court will only hear a national class action if it has jurisdiction to do so under Ontario law. The issue is whether, under the Québec rules, we consider the Ontario court to have jurisdiction. In that analysis, the focus will be the Ontario court's jurisdiction over the Québec members included in the national class action. The Supreme Court held in *Lépine* that the analysis is limited to whether the foreign court had jurisdiction and not whether it should have declined to exercise its jurisdiction under the doctrine of *forum non conveniens*.[18]

[51] The relevant Québec rules are set out in Articles 3164 to 3168 *C.C.Q.* The key provision is Article 3168 *C.C.Q.:*

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

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

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

(3) injury was suffered in the State where the decision was rendered and it resulted from a fault which was committed in that State or from an injurious act or omission which occurred there;

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

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[18] *Canada Post Corp. v. Lépine*, 2009 SCC 16, par. 34-36.

> (5) the parties have submitted to the foreign authorities the present or future disputes between themselves arising out of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
>
> (6) the defendant has submitted to the jurisdiction of the foreign authorities.

[52] The first five criteria in Article 3168 *C.C.Q.* do not appear to be available:

- The Respondents' head offices are in Québec, so they are domiciled in Québec;
- Although the Respondents have places of business in Ontario, there is no evidence that the dispute relates to their activities in Ontario;
- The Québec members suffered their injuries in Québec;
- There is no evidence as to where the fault, injurious act or omission occurred;
- The contracts of the Québec members do not provide for the obligations to be performed in Ontario; and
- There is no choice of Ontario jurisdiction.

[53] The only ground which may apply is submission by the Respondents to Ontario jurisdiction with respect to the Québec members.

[54] Justice Bich explained the difficulty of applying the notion of submission in the context of a class action in *Hocking* c. *Haziza*:

> [190] De manière classique, la reconnaissance du jugement étranger est demandée par celui qui, ayant intenté l'action dans le ressort étranger, a eu gain de cause contre un défendeur résidant ou possédant des biens au Québec; elle peut être aussi demandée par le défendeur non québécois qui a eu gain de cause à l'encontre de l'action intentée contre lui devant le for étranger par un justiciable québécois. Dans l'un et l'autre cas, cependant, il est important de souligner que l'action ainsi intentée manifeste l'acquiescement du demandeur à la compétence du for étranger.
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> [...]
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> [193] Or, notre affaire, parce qu'il s'agit d'un recours collectif, se distingue de ce scénario usuel, puisque ceux pour le compte desquels le recours est institué n'y ont pas préalablement consenti et n'ont habituellement rien eu à voir, dans les faits, avec le choix du for ni même, le plus souvent, avec la désignation de celui qui est appelé à les représenter. De ce point de vue, la logique sous-jacente au recours collectif est tout autre que celle du recours individuel, particulièrement lorsque la personne qui institue le recours cherche à représenter un groupe comprenant des non-résidants ou des justiciables qui, individuellement, ne relèvent pas de la compétence du for saisi. À mon avis, pareille situation nécessite l'adaptation des règles qu'on applique ordinairement en matière de reconnaissance de jugements étrangers et, en particulier, requiert

> que l'on examine la question de la compétence sous l'angle des non-résidants ou des justiciables qui, si ce n'était du recours collectif, ne relèveraient pas du for saisi.[19]

[55] This does not mean that the submission of the defendant will never be relevant in the context of a class action. It is important at this stage to distinguish between two situations:

- a judgment in favour of the national class which the Québec members seek to enforce against the defendant in Québec; and
- a judgment in favour of the defendant which the defendant seeks to set up against Québec residents to prevent a new class action in Québec.

[56] If Québec members are seeking to enforce a foreign judgment against the defendant, the submission of the defendant to the foreign court will be sufficient. However, if the defendant is seeking to set up a foreign judgment against the Québec members, submission by the defendant should not be sufficient. In those circumstances, the issue should be whether the Québec members submitted to the jurisdiction of the foreign court. Unlike the case of a typical plaintiff, the submission of the Québec members cannot be assumed because they did not institute the proceedings in the foreign court. In other words, Article 3168(6) *C.C.Q.*, which refers only to submission by the defendant, needs to be read differently in the context of a class action as referring to submission by the defendant when the judgment is being enforced against the defendant or to submission by the members when the judgment is being enforced against the members.

[57] In the present matter, the Respondents argue first that they did not submit to Ontario jurisdiction.

[58] It is clear that the Respondents have submitted to the jurisdiction of the Ontario court with respect to the proceedings as currently drafted: those proceedings were instituted on April 16, 2015 and the Respondents have been contesting them without raising the issue of jurisdiction. The certification hearing is scheduled for January 22 to 24, 2018.

[59] The Respondents have also consented to the amendment of the Ontario Statement of Claim to add the Québec residents to the class, if the Court grants the stay. However, they have reserved their right to contest the class definition at the certification hearing in January.

[60] If the Respondents are successful in convincing the Ontario court to exclude Québec members from the class, then the Ontario action will continue with a national class excluding Québec. In that event, the Court will lift the stay of the Québec proceedings and they will continue in parallel to the Ontario proceedings.

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[19] 2008 QCCA 800, par. 190 and 193.

[61] However, if the Respondents are unsuccessful and the Ontario court decides that the class includes Québec members, the Respondents cannot then raise a jurisdiction argument. They submitted to the jurisdiction of the Ontario court and the Ontario court decided that the class action included Québec members.

[62] The Court therefore concludes that, if the Court grants the stay and if the Ontario court defines the class as including Québec members, then the Respondents will have submitted to the jurisdiction of the Ontario court with respect to the Québec members.

[63] This means that a judgment rendered against the Respondents in Ontario will be enforceable in Québec. The Respondents can hardly complain that an Ontario judgment is being enforced against them, even by Québec residents, if they voluntarily participated in the litigation. In any event, the concern is largely theoretical in the present matter in that it seems inconceivable that the Respondents Bell Canada and Bell Mobility would ignore an Ontario judgment or that the lawyers representing the class would not simply execute the judgment in Ontario.

[64] Further, the Respondents argue that even if their submission to Ontario jurisdiction makes an Ontario judgment against them enforceable in Québec, it may not be not sufficient to make an Ontario judgment in their favour enforceable against Québec members who decide to institute a new action in Québec. They plead that it would not be fair to expose them to a second suit after they win the first one.

[65] They rely on the decisions of the Québec Court of Appeal in *Hocking*[20] and the decision of the Supreme Court of Canada in *Lépine.*[21] In both cases, the courts ultimately refused to enforce an Ontario settlement against Québec members.

[66] In *Hocking*, the Court of Appeal found that the defendant had submitted to the jurisdiction of the Ontario courts but held that submission was insufficient to make the settlement enforceable against the Québec members:

> [214] Le paragraphe 3168(6) C.c.Q., comme toute cette disposition d'ailleurs, repose, comme on l'a vu, sur la prémisse d'un choix de for effectué par celui qui a institué l'action : la reconnaissance par le défendeur de la compétence du tribunal étranger (« attornment ») prend alors tout son sens, se trouvant à avaliser le choix fait par le demandeur.
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> [215] Or, comme on l'a vu également, la présente affaire bouscule cette prémisse, puisqu'une partie des personnes pour le compte desquelles on prétend instituer le recours en cause n'y ont pas consenti (n'ayant même jamais été consultées) et n'ont pas davantage collaboré ou participé au choix du for.
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> [216] Évidemment, il y a dans cette situation l'effet même de la nature du recours collectif : celui ou celle qui entend instituer un recours collectif n'a pas à

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20 *Hocking*, *supra* note 19.
21 *Lépine*, *supra* note 18.

> solliciter l'approbation préalable, le concours ou le consentement des membres du groupe qui sera représenté. Mais cela, qui va de soi lorsque tous les membres du groupe relèvent de la même compétence juridictionnelle, soulève une difficulté importante lorsque l'instigateur du recours, qui n'est pas le mandataire des membres du groupe et n'est pas encore leur représentant, a des visées multi provinciales, nationales ou mêmes internationales et prétend soumettre à la compétence du for saisi des personnes qui ne relèveraient normalement pas de la juridiction de ce dernier.
>
> [217] À mon avis, le seul acquiescement du défendeur à une telle procédure ne saurait lier des personnes qui n'ont pas choisi le for en question et l'utilisation du recours collectif, qui rompt avec la logique sous-jacente à l'article 3168 C.c.Q., ne peut avoir pour conséquence, grâce au consentement du défendeur, de donner au tribunal étranger compétence sur ces personnes, les assujettissant de surcroît à une procédure judiciaire et, surtout, à un droit substantiel qui ne s'appliqueraient pas à elles, individuellement considérées.
>
> [218] Conclure autrement serait, il me semble, dénaturer l'article 3168, paragr. 6, C.c.Q. et lui donner une extension que le législateur n'a pu vouloir.[22]
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> [References omitted]

[67] The facts in *Hocking* are important.

[68] The Ontario plaintiff instituted a national class action in Ontario against the defendant. The defendant's head office was in British Columbia. The parties agreed on a settlement whereby nothing was paid to the class members:

> [10] Les 7 et 8 mars 2005, M. Hocking et HSBC Bank Canada signent le texte final de leur entente. HSBC Bank Canada paiera 50 000 $ à l'avocat de M. Hocking, 67 500 $ à Centraide (la somme devant être divisée entre les différents chapitres provinciaux de l'organisme), 41 500 $ au Public Interest Advocacy Center et enfin, 16 000 $ au Class Proceedings Fund.[23]

[69] A Québec resident opposed the settlement on behalf of all Québec residents. He filed a motion for authorization to institute a class action in Québec for a class limited to Québec residents. He attempted to intervene in the Ontario action to contest the jurisdiction of the Ontario court with respect to Québec residents. His opposition was dismissed by the Ontario court. When the defendant asked the Québec court to recognize and declare enforceable the Ontario judgment approving the settlement, the Québec resident opposed the recognition and enforcement of the Ontario judgment.

[70] It was in those circumstances that the Court of Appeal held that the submission to Ontario jurisdiction by the defendant did not make the settlement enforceable against the Québec residents.

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22 *Hocking*, *supra* note 19, par. 214-218.
23 *Hocking*, *supra* note 19, par. 10.

[71] Moreover, the Court of Appeal found that the Ontario judge had failed to consider the interests of the Québec members and her jurisdiction over the Québec members and that the various notices that had been given to the Québec residents were insufficient, such that the Ontario judgment was rendered in contravention of the fundamental principles of procedure and thereby triggering the exception to recognition and enforcement in Article 3155(3) *C.C.Q.*

[72] The Supreme Court of Canada's decision in *Lépine*[24] is similar.

[73] Lépine filed a motion for authorization to institute a class action in the Quebec against Canada Post Corporation on behalf of Quebec residents. Soon after, an Ontario plaintiff instituted a national class action in Ontario and a British Columbia plaintiff did the same in British Columbia on behalf of British Columbia residents. A settlement was reached in Ontario and British Columbia, but Lépine rejected the defendant's offers.

[74] The Ontario settlement included a national class, except British Columbia residents, despite Lépine's class action in Quebec. Contradictory judgments were rendered: the Ontario court declared that the claims by the class (which included Quebec residents) against the defendant had been settled, whereas the Quebec court authorized the Québec class action to proceed. The defendant sought before the Quebec court to have the judgment of the Ontario court recognized and declared enforceable.

[75] In the context of parallel class actions, the Supreme Court of Canada stated that the notice must be clear to ensure that the recipients understand the impact of the foreign court's judgment and the mode of publication of the notice must be adequate to make it likely that the information will reach the intended recipients. The Supreme Court found that the Ontario notice was unclear as to the situation of the Quebec residents regarding the Ontario judgment. The lack of clarity, "could have led those who read it in Quebec to conclude that it simply did not concern them"[25]. Therefore, the Quebec court could not recognize and declare enforceable the Ontario judgment as the lack of clarity constituted a contravention of the fundamental principles of procedure generating the exception in Article 3155(3) *C.C.Q.*

[76] These decisions are doubtless correct on their facts, but they should not be taken as establishing a general principle that judgments rendered in national class actions outside Québec will not be recognized and enforced in Québec, and therefore that Québec class actions will not be stayed in favour of national class actions in another province.

[77] One key issue is that in *Hocking* and in *Lépine*, the Québec courts were reviewing judgments by the Ontario courts. They were able to review the notices sent to the Québec members and the way in which the Ontario courts had dealt with the

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24 *Supra* note 18.

25 *Lépine*, *supra* note 18, par. 46.

Québec members. The Québec courts (and the Supreme Court in *Lépine*) decided that the notices given in Ontario to the Québec members were confusing and were inadequate in the circumstances. As a result, the Québec members clearly had not submitted to the jurisdiction of the Ontario court. Moreover, there were competing class actions in Québec and the proposed representatives objected to the settlements. As a result, the Ontario proceedings had not resulted in a judgment that could be recognized in Québec.

[78] In the present matter, the proceedings are at a preliminary stage, both in Québec and in Ontario. It is not a question of enforcing an Ontario judgment, but only of staying the Québec proceedings. There is no issue of inadequate notices or a failure by the Ontario court to protect Québec members.

[79] The test under Article 3137 *C.C.Q.* is whether the national class action in Ontario "can result in a decision that may be recognized in Québec" [emphasis added]. The answer is yes. If the notices are published in such a way that they will reach the Québec members and if they explain clearly to Québec members how they will be treated and what they must do to opt out of the Ontario proceedings and give them a reasonable opportunity to opt out of the Ontario proceedings, the Québec court could conclude that the Québec members, by not opting out, have submitted to the jurisdiction of the Ontario courts and that a judgment is enforceable against them.

[80] The Court should not assume that the notices to Québec residents will be inadequate. The Ontario plaintiffs have set up a bilingual website that will improve communication with Québec members.[26] Moreover, the new consultation draft of the Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice provides rules on the content of the notice for a proposed settlement designed to avoid the problems in *Hocking* and *Lépine*.

[81] Another important distinction is that there were competing class actions in *Hocking* and in *Lépine*. In *Hocking*, the Québec class action had not been authorized, but the petitioner was objecting to the Ontario settlement. In *Lépine*, the Québec class action was authorized the day after the Ontario court approved the settlement. In the present matter, there is no competing class action in Québec. Rather, the Québec proceedings were brought by the same attorneys as the Ontario proceedings, the Petitioner in the Québec proceedings will be added as a plaintiff in the Ontario proceedings, and the Petitioners ask that the Québec proceedings be stayed. No other member of the class has to date sought to intervene in the Québec class action or to institute a new one. The only parties opposing the motion to stay are the Respondents, who cannot be said to have the interests of the Québec members at heart.

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[26] Exhibit R-3.

[82] In these circumstances, the appropriate solution is to stay the Québec class action and see if the Ontario class action results in a judgment enforceable in Québec against the Québec members.

6. Protection of the rights and interests of Québec residents

[83] The Court is of the view that the rights and interests of the Québec members of the class can be adequately protected in the Ontario class action. Again the Court should not assume that their rights and interests will not be adequately protected. The Ontario court can apply the Québec *Act Respecting the protection of Personal information in the Private Sector*, the *Civil Code of Québec* and the Québec *Consumer Protection Act*.[27]

[84] It is in the interests of all parties to the Ontario proceedings to ensure that the rights and interests of the Québec members are protected in the Ontario proceedings because all parties are hoping for a judgment favourable to their position that will be recognized and enforced in Québec. The Court assumes that they will be vigilant in this regard.

[85] Moreover, there are safeguards in the new consultation draft of the Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice to ensure that there is coordination amongst the courts in the different jurisdictions. Justice Gagnon, the coordinating judge for class actions in the District of Montréal, wrote to Justice Bondy, the judge hearing the matter in Ontario, about his concerns regarding the protection of the rights and interests of Québec residents. Justice Bony assured Justice Gagnon that he would endeavour to ensure that Justice Gagnon's concerns were "considered and dealt with appropriately".

[86] Finally, the Court will retain jurisdiction to ensure that the rights and interests of the Québec members are protected.

[87] The Petitioners suggest that the Québec proceedings be stayed only until the final judgment on certification of the Ontario national class and that they be discontinued or dismissed at that time. The Court is of the view that the Québec proceedings must be stayed until final judgment on the merits in Ontario.[28] If at any stage in the proceedings, any party is of the view that the rights and interests of the Québec members are not being protected in Ontario, that party can make a motion in Québec to lift the stay and resume the Québec proceedings. Similarly, any other member of the Québec class who is of that view can make a motion to be substituted as representative and can ask that the stay be lifted and the Québec proceeding resumed.

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[27] *Biomet, supra* note 7, par. 29.
[28] *Boehmer, supra* note 9, par. 35-36.

[88] If it became necessary to lift the stay, the issues litigated in Ontario would be have to be relitigated in Québec. That would not be a good outcome. However, refusing the stay to avoid that risk means that there will necessarily be parallel proceedings in Québec and Ontario, which is worse.

[89] For all of these reasons, the Court will grant the stay of the Québec proceedings until final judgment in the Ontario proceedings, and will retain jurisdiction over the matter until then.

FOR THESE REASONS, THE COURT:

[90] **GRANTS** the Petitioners' Amended Motion to Stay the Petitioners' Motion to Authorize the Bringing of a Class Action and to Obtain the Status of Representative;

[91] **STAYS** the Petitioners' Motion to Authorize the Bringing of a Class Action and to Obtain the Status of Representative until final judgment on the merits of the class proceedings brought before the Ontario Superior Court of Justice in Ontario Court File Number CV-15-00022122-00CP;

[92] **RETAINS** jurisdiction to lift the stay on application by a party or by a member of the proposed class defined in the Petitioners' Amended Motion to Stay the Petitioners' Motion to Authorize the Bringing of a Class Action and to Obtain the Status of Representative;

[93] **THE WHOLE** with costs to follow.

STEPHEN W. HAMILTON, J.S.C.

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Hearing date: October 24, 2017