CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
No : 500-17-106683-199

SUPERIOR COURT
(Civil Division)

ALISON JEAN STEEL

-and-

MARILYN RAPPAPORT
Plaintiffs
-vs.-

ATTORNEY GENERAL OF CANADA
-and-
ROYAL VICTORIA HOSPITAL
-and-
MCGILL UNIVERSITY HEALTH CENTRE

Defendants

OUTLINE OF ARGUMENT OF THE ATTORNEY GENERAL OF CANADA (RE: APPLICATION FOR PARTIAL DISMISSAL OF THE PLAINTIFFS' MODIFIED ORIGINATING APPLICATION)

Overview

1. The Attorney General of Canada (AGC) asks that the Court render an order under s. 168 of the *Code of Civil Procedure* dismissing the Plaintiffs' action insofar as they seek to advance the claims of 102 other individuals, from whom they claim to have received a mandate (Purported Mandators).

2. The Plaintiffs do not meet the conditions in s. 91 of the *Code of Civil Procedure* for bringing an action founded upon a mandate and lack the required legal interest:

   i. The Plaintiffs have not produced a written mandate from around half of the Purported Mandators;

   ii. Importantly, the Plaintiffs and Purported Mandators do not share a "common interest in a dispute" within the meaning of s. 91 of the *Code of Civil Procedure*.

3. To have a "common interest in a dispute", the Plaintiffs and Purported Mandators must have a common interest related to each element of a cause of action against the Defendants.

4. It is clear on the face of the Modified Originating Application that this is not the case.

5. While the Plaintiffs and the Purported Mandators may each have or have had a family member who was a patient of Dr. Cameron at the Allen Memorial Institute, they are each presenting a distinct personal claim against the Defendants, based on facts that are specific to each of them.

6. Alternatively, the Plaintiffs' claims and allegations on behalf of the Purported Mandators fail to disclose a cause of action against the AGC and are unfounded in law.

I. The facts alleged in the Plaintiffs' Modified Originating Application

7. The Plaintiffs are family members of former patients of Dr. Ewen Cameron, who conducted research and provided psychiatric care at the Allan Memorial Institute (AMI) of the Royal Victoria Hospital between 1948 and 1965.

    - Modified Originating Application dated December 29, 2020 (Application), at paras 61-79 **[AGC Book of Pleadings and Exhibits (BOPE), Tab 1]**

8. The Plaintiffs allege that the treatments provided by Dr. Cameron "caused permanent psychological damage to the patients" and were "performed on numerous unwitting individuals without any serious psychological medical conditions."

    - Application, paras 7-9 **(BOPE, Tab 1)**

9. The Plaintiffs list a series of alleged faults committed by the Defendants, including but not limited to:

    a) negligently failing to take reasonable care to ensure safety and respect for human integrity, free from intrusion by way of hazardous experiments and risk of harm inflicted on patients without their informed consent;

    b) failing to protect victims from unethical, intentional, and negligent conduct and allowing its continuation despite knowledge that they involved nontherapeutic and hazardous human experimentation;

c) neglecting to ensure that patients and their families were properly informed of the nature of the treatments as well as of the risks of such, and of any alternatives thereto.

- Application, paras 33, 34 and 36 **(BOPE, Tab 1)**

10. The Plaintiffs allege that, if not for the misconduct of the Defendants, the former AMI patients related to the Plaintiffs and by extension, their families, would not have suffered damages.

- Application, para 128 **(BOPE, Tab 1)**

11. The Plaintiffs submit that the prejudice they suffered includes but is not limited to:

a) loss of support, guidance, care, consortium, intimacy, stability, and companionship that they might reasonably have received if the injuries had not occurred;

b) emotional injuries including pain, suffering, anxiety, distress, loss of quality and enjoyment of life, depression, apathy, loss of stability, emptiness brought on by the care-taking of their relatives;

c) financial burdens of provision of care by way of medication, further treatments, nursing, housekeeping and other services, compounding the already felt strain of supporting the afflicted victim patients, most of whom could never financially support themselves.

- Application, paras 123, 124 and 126 **(BOPE, Tab 1)**

12. The Plaintiffs allege having been mandated by the Purported Mandators to act on their behalf in the present proceeding. Like the Plaintiffs, the Purported Mandators are also family members of former AMI patients.

- Application, paras 1-6 **(BOPE, Tab 1)**

13. The Modified Originating Application also contains allegations concerning a number of the Purported Mandators (paras 138-677), essentially describing the contents of their "Victim Impact Statements", which were produced as Exhibits P-14 to P-63.

14. These allegations describe the relationship of each of these Purported Mandators with a family member who was a former AMI patient, state that he or she is mandating the Plaintiffs in the present proceeding, and describe various damages allegedly suffered by the Purported Mandators.

15. The Plaintiffs and the Purported Mandators are claiming $850,000 "per family" in compensatory damages as well as $150,000 in punitive and exemplary damages.

- Application, paras 681-682 **(BOPE, Tab 1)**

II. The Plaintiffs do not meet the conditions for an action founded upon a mandate pursuant to section 91 of the *Code of Civil Procedure* and lack the required legal interest

A) The Plaintiffs have not produced a written mandate from around half of the Purported Mandators

16. Section 91 CCP states as follows:

91. Plusieurs personnes ayant un intérêt commun dans un litige peuvent mandater l'une d'elles pour agir en justice pour leur compte. Il doit être fait état du mandat dans la demande introductive d'instance ou dans la défense.	91. Two or more persons who have a common interest in a dispute may mandate one of them to act in a proceeding on their behalf. The mandate must be mentioned in the originating application or in the defence.
Le mandat emporte la solidarité des mandants quant aux frais de justice; il demeure valable malgré le changement d'état des mandants ou leur décès; il ne peut être révoqué qu'avec l'autorisation du tribunal.	The mandators are solidarily liable with the mandatary for the legal costs. The mandate is not affected by the death or change of status of any mandator, and cannot be revoked except with the authorization of the court.

17. A person wishing to act in a proceeding on behalf of a mandator under s. 91 of the *Code of Civil Procedure* must not only plead that they have receive a mandate, but also produce such written mandate.

- *Code of Civil Procedure*, CQLR c 25.01, s. 91 (CCP) **[AGC Book of Authorities (BOA), Tab 1]**;
- *Re GR*, 2020 QCCS 1632, at para 39 **(BOA, Tab 3)**;
- *Carle v CBC/Radio Canada*, 2019 QCCS 3166, at paras 25-26 and 35 **(BOA, Tab 4)**;
- *Association des agents distributeurs des messageries dynamiques v Messageries dynamiques division du groupe Québecor*, 1989 CanLII 608, [1989] RDJ 187, at paras 8 and 12 (QCCA) [*Association des agents distributeurs des messageries dynamiques*] **(BOA, Tab 5)**

18. The Modified Originating Application dated December 29, 2020 refers to 60 individuals, including 51 individuals formally designated as Purported Mandators, and nine (9) other individuals who appear to be family members of these designated individuals.

    - Application, at paras 138-677 **(BOPE, Tab 1)**

19. For its part, Modified Exhibit P-1 (that purports to lists those individuals on behalf of which the Plaintiffs claim to act) lists 95 individuals, including the 60 individuals named in the Application, as well as 35 other individuals not named in the Application, who again appear to be family members of these named individuals.

    - Modified Exhibit P-1 ("Rep and Family List"), notified to Defendants on February 26, 2021 (The AGC has recently been made aware that Plaintiffs' counsel has informally circulated a more recent list dated April 2021, but it appears to contain slightly less names and, for this reason, is not considered here.) **(BOPE, Tab 2)**

20. Finally, there are seven (7) other individuals who are neither mentioned in the Application nor listed in Exhibit P-1, but for which Plaintiffs have produced "Victim Impact Statements".

    - See Annex A, listing the 95 individuals in Exhibit P-1, as well as the seven (7) other individuals, for which Plaintiffs have produced "Victim Impact Statements", but are not mentioned in the Application or Exhibit P-1 **(BOPE, Tab 3)**

21. Thus, on a liberal reading of the Application and supporting exhibits, there are 102 individuals whom the Plaintiffs are purportedly seeking to represent in these proceedings.

22. However, Plaintiffs have so far failed to produce written mandates for 50 of these 102 Purported Mandators.

    - See Annex B, column 4, indicating for each of the Purported Mandators if a written mandate has been received or not. The information is based on Exhibit P-1A (which includes written mandates from *some* of the Purported Mandators) and additional mandates communicated to the Defendants on February 23, 2021 **(BOPE, Tab 4)**

23. These problems are also compounded by the fact that there are nine (9) individuals for which written mandates have been produced, but who are not mentioned anywhere in the Application, Exhibit P-1 (the list of Purported Mandators), or any of the "Victim Impact Statements" (see Annex A). Given that Plaintiffs do not make any allegations regarding these individuals, the AGC maintains they cannot be considered as Purported Mandators.

B) The Plaintiffs and Purported Mandators do not share a "common interest in a dispute" within the meaning of section 91 CCP

i. *The lack of a common interest in a dispute can be raised by way of a preliminary motion*

24. Section 91 CCP authorizes a person to act in a proceeding on behalf of a mandator provided they have a "common *interest* in a dispute" (our emphasis).

- See also: *Code of Civil Procedure*, CQLR, c 25, s. 59 (repealed) **(BOA, Tab 2)**

25. For its part, s. 168(3) CCP allows a party to raise a preliminary exception to dismiss when another party "clearly has no interest".

- Section 168(3) CCP **(BOA, Tab 1)**;
- *Brunette v Legault Joly Thiffault*, 2018 SCC 55, [2018] 3 SCR 481, at para 15 [*Brunette*] **(BOA, Tab 7)**

26. A sufficient interest is one of the conditions of admissibility of an action.

- Section 85 CPP **(BOA, Tab 1)**;
- *Brunette*, at para 15 **(BOA, Tab 7)**

27. The existence of sufficient interest is not presumed and must be specifically alleged. As such, vague and general allegations are insufficient.

- *Brunette*, at para 16 **(BOA, Tab 7)**

28. The combined effect of ss. 85, 91 and 168(3) CCP means that a lack of a common interest in a dispute can be raised as a preliminary matter to bar the presentation of an action brought under s. 91 CCP.

- *SMBD - Jewish General Hospital v Kummermann*, 2004 CanLII 13776, at paras 21-23 and 32 (QC CS), conf'd 2007 QCCA 452 **(BOA, Tabs 8-9)**;
- *742381 Canada v Fermes Brimmond*, 2000 CanLII 17838, at paras 30-32 (QC CS) **(BOA, Tab 10)**

ii. ***A Plaintiff and Mandator must share a "common interest" on each element of the cause of action***

29. The existence of a mandate is not sufficient for an individual to act for a mandator in a proceeding under s. 91 CCP . Importantly, that individual and the mandator must share a "common interest in a dispute".

- Le grand collectif (L. Chamberland dir.), *Code de procédure civile – Commentaires et annotations – Vol. 1 (Art. 1-390)*, 2015, Thomson Reuters, Montréal, pp. 564-567 **(BOA, Tab 30)**;
- *Omega Leasing Canada v Mitchell*, 2002 CanLII 23814, at para 20 (QC CS) **(BOA, Tab 11)**
- *Association des agents distributeurs des messageries dynamiques*, at paras 8 and 12 (QCCA) **(BOA, Tab 5)**;
- *Placements Euromart v Québec (Régie de l'assurance-maladie)*, EYB 1980-137847, [1980] C.S. 817, J.E. 80-661, at paras 23-24, 30 and 35 **(BOA, Tab 6)**

30. Section 91 CCP must be interpreted restrictively, the general rule being that a party can only plead in their own name.

- *Exfo v ISQ Téléphonie*, 2014 QCCQ 8479, at para 34 [*Exfo*] **(BOA, Tab 12)**;
- *Benoit v 9120-6813 Québec*, 2007 QCCQ 12216, para 9 [*Benoit*] **(BOA, Tab 13)**;
- *9096-0105 Québec v Construction Cogela*, 2003 CanLII 546, at paras 53 and 55, citing: R. Savoie et L.P. Taschereau, *Traité de procédure civile*, tome 1, Montréal, Guérin, 1973, p. 62 (QC CS) [*Construction Cogela*] **(BOA, Tabs 14 and 35)**

31. To have a "common interest in a dispute", the person receiving the mandate and the mandator must must have the same cause of action. Indeed, s. 91 refers to a « common interest *in a dispute*» (our emphasis). As such, the common interest has to relate, not just to a part of the claim, but to all its constituent elements .

- *Exfo*, at paras 28, 35 and 55 **(BOA, Tab 12)**;
- *Benoit*, at paras 8-14 **(BOA, Tab 13)**;
- *Construction Cogela*, at paras 51, 52, 54 and 56 **(BOA, Tab 14)**

32. In a civil liability case, this means the plaintiff and mandator should have the same legal interest in each element of the claim, that is, the alleged fault, prejudice and causal link should be the same (or essentially the same) for both plaintiff and mandator.

- *Association des Propriétaires des Jardins Taché et al. v* Entreprises Dasken, 1971 CanLII 187 (SCC), [1974] SCR 2, at p. 10 (referring to a required « préjudice collectif ») **(BOA, Tab 15)**

iii. ***The narrow approach adopted by courts in Quebec is consistent with the historical development of the representative action in Common Law provinces***

33. A useful parallel can be made beween an action founded upon a mandate in s. 91 CCP and the common law "representative action", which has been adopted by all other Canadian provinces as part of their rules of civil procedure.

- W.K. Branch, M.P. Good, *Class Actions in Canada*, 2nd ed.,Thomson Reuters, § 2:1 (electronic edition) [*Class Actions in Canada*] **(BOA, Tab 31)**;
- Y. Lauzon, B. Johnson (coll.), *Traité pratique de l'action collective*, 2021, Éd. Thomson Reuters, Montréal, p. 5 **(BOA, Tab 32)**

34. As in Quebec, the courts in Common Law provinces have also historically taken a restrictive approach to the conditions for a representative action, especially the requirement that the parties have the "same interest" in the litigation.

- *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46, [2001] 2 SCR 534, paras 19-24 [*Dutton*] **(BOA, Tab 16)**;
- *Araya v Nevsun Resources*, 2016 BCSC 1856, at para 499 [*Nevsun*]; aff'd 2017 BCCA 401 but not on this point **(BOA, Tabs 17-18)**;
- *Class Actions in Canada*, § 2:1 **(BOA, Tab 31)**;
- *Traité pratique de l'action collective*, p. 5 **(BOA, Tab 32)**

35. For instance, in *Naken*, the Supreme Court held in 1983 that a representative action was not open to a plaintiff who wished to advance an action in breach of warranty on behalf of thousands of other owners of a car that was said to be defective.

- *G.M. (Canada) v Naken*, [1983] 1 SCR 72, p. 103 [*Naken*] **(BOA, Tab 19)**

36. The Supreme Court held it was "not enough that the group share a "similar interest" in the sense that they have varying contractual arrangements with the appellant which give rise to different but similar claims in contracts relating to the same model of automobile."

- *Naken*, p. 103 **(BOA, Tab 19)**;
- See also: *Hayes v British Columbia Television Broadcasting System* (1990), 1990 CanLII 1525, 46 B.C.L.R. (2d) 339, 40 C.P.C. (2d) 21 (B.C.C.A.) [*Hayes*] **(BOA, Tab 20)**

37. In fact, the courts in Common Law provinces have specifically refused to permit representative proceedings in which damages are claimed, especially where the

entitlement of each member of the class to damages would require individual assessment in subsequent proceedings involving the defendant and each class member.

- *Report on Class Actions – Volume 1*, Ontario Law Reform Commission, 1982, at p. 24 **(BOA, Tab 33)**;
- *Sandburg v Prysiazniuk*, 1985 CanLII 607, 1985 CarswellBC 289, [1985] B.C.W.L.D. 3361, 34 A.C.W.S. (2d) 165, 66 B.C.L.R. 392, at para 11 (CanLII) (BCSC) **(BOA, Tab 21)**

38. Similarly to Québec, other Canadian provinces have established class action regimes in their legislation specifically to alleviate the strictures traditionally imposed by the Courts on the representative action.

- P.-C. Lafond, *Le recours collectif : entre la commodité procédurale et la justice sociale*, (1998-1999) 29 RDUS 3, p. 19 **(BOA, Tab 34)**;
- *Traité pratique de l'action collective*, pp. 5-7 **(BOA, Tab 32)**;
- *Class Actions in Canada*, § 2:1 **(BOA, Tab 31)**

39. While the Supreme Court in *Dutton* in 2001 relaxed its approach to representative actions in Common Law provinces, by effectively "reading in" the requirements in class action legislation into the traditional rule, this was designed to allow litigants to reap the benefits of a class action in those jurisdictions where a statutory class action regime has not yet been adopted.

- *Dutton*, at paras 30-41 **(BOA, Tab 16)**

40. Importantly, the decision in *Dutton* does not bring about a change as to how the traditional criteria for an action under s. 91 CCP should be interpreted and applied in Quebec, which already has its own class action regime. As such, care should be taken not to dilute the criteria applicable to an action under s. 91 CCP so as to effectively create a parallel system of class actions in Quebec.

- *Nevsun*, at para 511 **(BOA, Tab 17)**

iv. *The Plaintiffs and Purported Mandators are each presenting a distinct and separate personal claim in damages against the Defendants, based on facts that are specific to each of them*

41. In light of the above, in order to determine if the Plaintiffs and the Purported Mandators share a "common interest in a dispute" within the meaning of s. 91 CCP, a useful question to be asked is whether success by the Plaintiffs in establishing a claim against the Defendants would automatically translate into success for all the Purported Mandators.

- *Naken*, p. 86 **(BOA, Tab 19)**;
- *Hayes* at para 26 **(BOA, Tab 20)**

42. Clearly, this would not be the case in the present proceedings.

43. As appears from the allegations in the Application and supporting exhibits, the Plaintiffs and Purported Mandators are each presenting a distinct and separate personal claim in damages against the Defendants, based on facts that are specific to each of them.

44. Even if the Plaintiffs had properly pleaded a civil fault, a causal link or a prejudice for each of the Purported Mandators, such alleged fault, causal link or prejudice clearly vary from one individual to another. This is especially true of the allegations of prejudice.

    - Annex B, columns 7-8, which summarize the allegations concerning each of the Purported Mandators.

45. The following summaries relate to the first three (3) individuals named as Purported Mandators in the Modified Originating Application and are illustrative of the problems affecting all of the Purported Mandators' claims:

    - Ingunn May Kemble (paras 138-149, Exhibit P-14)

      She is the daughter of Anna Marteinsson, a former patient of the AMI. It is alleged that the Purported Mandator has suffered from depression and anxiety during her life, and after her mother's admission to the AMI. Her siblings and herself had a difficult childhood because of their mother's state when she returned from the AMI, as she was no longer the loving and caring mother she used to be. She feels that Dr. Cameron betrayed "the trust of all". She wants to honor her mother's memory.

    - Albert Gomberg (paras 150-159, Exhibit P-15)

      He is the son of Esther Ram Gomberg, a former patient of the AMI. It is alleged that the Purported Mandator feels guilty about his mother's pain and suffering. He has never trusted the medical system nor the government after his mother's treatments at the AMI. His guilt has affected his ability to be a good father and husband for his own family.

    - George Lynes (paras 160-170, Exhibit P-16)

      He is the brother of John David Lynes, a former patient of the AMI. It is alleged that the greatest impact of his brother's hospitalization on him was learning that he was subjected to electroconvulsive treatments (ECTs). He also mentions that his parents experienced emotional and financial stress that

created tension in the family home and caused his other brother to leave home abruptly.

46. While the Plaintiffs allege their action is based on certain "common issues of fact and law", it appears they have confused the stringent "common interest" requirement under s. 91 CCP, with the more liberal "common issues" requirement in class actions under ss. 571 and foll. CCP.

    - Section 575(1) CCP **(BOA, Tab 1)**;
    - *Nevsun*, at para 511 **(BOA, Tab 17)**;
    - *Traité pratique de l'action collective*, p. 130 **(BOA, Tab 32)**

47. Indeed, under s. 575 CCP, it is only necessary that the claims as part of a class action raise "identical, similar or related issues of law or fact". It is not necessary that such common question even be predominant.

    - Section 575(1) CCP **(BOA, Tab 1)**;
    - *Desjardins Financial Services Firm v Asselin*, 2020 SCC 30, at para 85 **(BOA, Tab 22)**

48. Clearly, there is no "common interest" between the Plaintiffs and Purported Mandators, let alone "common issues" arising from each of their claims. As the allegations in the Application and the supporting exhibits make clear, particularized evidence would need to be submitted by Plaintiffs on each element of the legal test and this, for each of the Plaintiffs and Purported Mandators.

49. At a minimum, they would need to establish a link between each Plaintiff and Purported Mandator and a former AMI patient; a fault by any of the Defendants having regard to the circumstances of each former AMI patient and their families; a prejudice being incurred by each Plaintiff and Purported Mandator; and a direct, causal link between the alleged fault and prejudice. This could require complex expert evidence in each case.

50. The fact that the Plaintiffs are seeking the same amount of damages "per family" would not obviate the necessity of conducting a particularized inquiry into this issue for each of the Purported Mandators

    - Application at para 681 **(BOPE, Tab 1)**;
    - *Naken*, at pp. 73 and 96 **(BOA, Tab 19)**

51. The issue of prescription is also raised by the proposed action. However, such a defense would depend on the knowledge and conduct of each Plaintiff and Purported Mandator.

This element alone shows that there cannot be a "common interest in [the] dispute" as between the Plaintiffs and the Purported Mandators.

- Application at para 137 **(BOPE, Tab 1)**;
- Ker v Auto Marine Electric, 1990 CanLII 266, 1990 CarswellBC 516, [1990] B.C.W.L.D. 2344, [1990] C.L.D. 1131, [1990] B.C.J. No. 2188, 23 A.C.W.S. (3d) 283, 43 C.P.C. (2d) 278 (CanLII) (B.C.S.C.), at para 23 **(BOA, Tab 23)**

C) The proposed action would compromise the Defendant's ability to present a full and complete defense and lead to inequitable results

52. In addition to not meeting the legal test for an action under s. 91 CCP, the Plaintiffs' proposed action would raise many practical challenges, especially of an evidentiary nature and potentially would impinge on the Defendants' procedural rights.

53. These problems would arise at least at the preliminary examinations and the trial stages.

54. Preliminary examinations are an essential element of a fair procedure in that they allow a defendant to know all the relevant facts so as to permit them to prepare their defense.

- *Crane Canada v Sécurité nationale, cie d'assurance*, 2004 CanLII 48772 (QC CA), paras 11-12 **(BOA, Tab 24)**;
- *See also* : *Imperial Oil v Jacques*, 2014 SCC 66, [2014] 3 SCR 287, at para 26 **(BOA, Tab 25)**

55. However, the CCP does not afford a defendant an automatic right to conduct a preliminary examination of a mandator in the context of an action under s. 91 CCP.

- Section 221 al 3 CCP **(BOA, Tab 1)**

56. There is a logic to this situation. In a proper action under s. 91 CCP, where there is truly a "common interest in a dispute" between a plaintiff and a proposed mandator, it should be possible, in theory, to know all of the relevant facts by examining only the plaintiff.

- *Exfo*, at paras 54-55 **(BOA, Tab 12)**;
- *Construction Cogela*, at para 56 **(BOA, Tab 14)**

57. In the present case, however, given the highly individualized and variable nature of each of the claims by the Plaintiffs and the Purported Mandators, an examination of only the Plaintiffs claims would not enable the Defendants to ascertain all of the relevant facts and would thus place them at a clear disadvantage.

58. In order to prepare their defense, Defendants must be able to know, for each of the Plaintiffs and Purported Mandators, the fault allegedly committed by the Defendants, the prejudice allegedly suffered by each of the Plaintiffs and Purported Mandators, the causal link, if any, between the alleged damages and the alleged fault, as well as the moment when each Purported Mandator became aware of the relevant facts.

59. However, the present action ultimately would not allow the Defendants to properly assess the nature, the extent and the seriousness of all the claims made by the Plaintiffs and the Purported Mandators.

60. The procedural mechanism of an action under s. 91 CCP should not be used by a plaintiff so as to deprive a defendant of their rights to mount a full and complete defense.

- *Exfo*, at para 54 **(BOA, Tab 12)**

61. In the case at bar, the same types of evidentiary challenges as detailed above would also arise at the trial of the action, as the Plaintiffs do not have personal knowledge of the facts related to the claims of the Purported Mandators, especially the damages allegedly incurred by each of them.

D) An action founded upon a mandate under s. 91 CCP cannot be used as a mere duplicate of a class action under ss. 571 and foll. CCP

62. The Application makes clear that the Plaintiffs would have preferred to file a class action, but chose to file an action under s. 91 CCP because a class action had already been filed in another case raising similar issues.

- Application, paras 7-9 **(BOPE, Tab 1)**;
- *Tanny v Royal Victoria Hospital et al.*, 500-06-000972-196.

63. The present action raises legitimate questions as to the respective roles of an action under s. 91 CCP and a class action in the province of Quebec, and, at a broader lever, considerations related to the proper administration of justice.

64. The Court should not countenance the filing of an action under s. 91 CCP whose apparent purpose is to perform an "end-run" around the filing of parallel class action and avoid the limitations associated with the "first to file" rule.

- *Micron Technology v Hazan*, 2020 QCCA 1104, at paras 23-28 **(BOA, Tab 26)**

65. Actions founded upon a mandate and class actions serve distinct purposes and should not be viewed as interchangeable.

66. Actions based upon a mandate are reserved to the narrow class of cases where the claims raise essentially the same issues of fact and law. They are typically subject to the stricter requirement of a "common interest" in the dispute.

- *Traité pratique de l'action collective*, p. 130 **(BOA, Tab 32)**

67. For their part, class actions are more appropriate to the resolution of claims that involve both common and individual issues. Typically, they are subject to more liberal requirements.

68. Thus, in a class action, a court may rule on a common issue - which need not be predominant - and leave individual issues to be decided through the procedure of individual recovery of claims under ss. 599-601 CCP.

69. Indeed, there is no similar procedure, in context of an action founded upon a mandate under s. 91 CCP, for the individual recovery of claims, as is already provided for in the case of a class action.

- Sections 599-601 CCP **(BOA, Tab 1)**;
- By analogy, see *Naken*, p. 99 **(BOA, Tab 19)**

70. The absence of such a mechanism confirms the legislature's intent that a narrow construction be given to the expression "common interest in a dispute" applicable to an action under s. 91 CCP.

71. Only where a plaintiff and a mandator have identical or very similar claims should they be allowed to use the procedural vehicle afforded by the action under s. 91 CCP.

72. An action based upon a mandate under s. 91 CCP is not the appropriate procedure for an action involving multiple personal damage claims.

III. Alternatively, the claims and allegations related to the Purported Mandators do not disclose a reasonable cause of action against the AGC and are unfounded in law

73. The Court may also dismiss an action at the preliminary stage "if it is unfounded in law even if the facts alleged are true".

- Sections 99 and 168 al 2 CCP **(BOA, Tab 1)**

74. While the Court should exercise caution in examining a motion to strike a claim, it should not hesitate to act if it is plain and obvious that the claim lacks a basis in law.

- *Canada (Attorney General) v Confédération des syndicats nationaux*, 2014 SCC 49, [2014] 2 SCR 477, at para 17 **(BOA, Tab 27)**;
- *St-Eustache (Ville de) v Régie intermunicipale Argenteuil Deux-Montagnes*, 2011 QCCA 227, at para 25 **(BOA, Tab 28)**;
- *Canada (Procureur général) v Imperial Tobacco*, 2012 QCCA 2034, at para 91 **(BOA, Tab 29)**

75. The absence of any particularized allegations in the Application concerning several of Purported Mandators is fatal to their claim. The Court should not have to guess what are the essential facts supporting any claim.

    - Modified Annex B, columns 2 and 3 **(BOPE, Tab 3)**;
    - See for instance no. 2, Hanea Kamea, who is listed in P-1. No information about her is given in the Application or any other supporting exhibit. Her claim would also have to be dismissed on the basis of the absence of a written mandate;
    - See also: Nos. 4, 20, 22, 23, 24, 26, 27, 29, 30, 36, 42, 51, 55, 56, 57, 58, 59, 64, 65, 70, 83, 84, 86, 87, 90, 91, 98 and 102

76. While the Application contains *some* allegations concerning the injuries allegedly suffered by the rest of the Purported Mandators, it does not contain allegations establishing that the AGC has committed any fault against each of the Purported Mandators personally nor that there is any causal link between such fault and the damages allegedly suffered.

    - Modified Annex B, column 9 **(BOPE, Tab 3)**

77. Using the same examples as discussed above, the allegations related to the first three individuals named as Purported Mandators in the Modified Originating Application suffer from the following deficiencies, which can be applied to all of the Purported Mandators' claims:

    - Ingunn May Kemble (paras 138-149, Exhibit P-14) **(BOPE, Tab 1)**

      While it is alleged that the Purported Mandator suffered from depression and anxiety or had a difficult childhood, it is not indicated if and how this is linked to any actions by the AGC. Further, while it is alleged that the Purported Mandator "feels as if Dr. Cameron betrayed "the trust of all", it is not indicated whether and how this was a fault attributable to the AGC.

    - Albert Gomberg (paras 150-159, Exhibit P-15) **(BOPE, Tab 1)**

While it is alleged that the Purported Mandator has suffered from guilt and a feeling of mistrust towards the medical system or government, it is not indicated if and how this is linked to any actions by the AGC.

- George Lynes (paras 160-170, Exhibit P-16) **(BOPE, Tab 1)**

While it is alleged that the Purported Mandator suffered during his childhood due to tensions in the family home caused by emotional and financial stress, it is not indicated if and how this is linked to any actions by the AGC.

78. Indeed, it is noteworthy that the list of "common issues of fact and law" enunciated by the Plaintiffs in their Application does not reference to <u>any</u> conduct by the Canadian Government.

    - Application at paras 135-136 **(BOPE, Tab 1)**

79. The Plaintiffs were provided with a sufficient opportunity to modify their Application to add the allegations necessary to support the claims of the Purported Mandators.

80. To conclude, it bears repeating that the dismissal of the Plaintiffs' action on behalf of the 102 Purported Mandators would not affect the actions of the Plaintiffs themselves, which would be allowed to go on.

81. Nor would such a dismissal prevent the Purported Mandators from pursuing their claims by other appropriate means, which could include the presentation of individual actions.

IV. <u>Orders sought</u>

82. The AGC asks that the Court:

- **DISMISS** the Plaintiffs' action on behalf of the Purported Mandators;
- **STRIKE** paragraphs 4-10, 120-127 and 135-682 from the Modified Originating Application;
- **THE WHOLE** with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 17th day of September 2021

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