Translated from the original French

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-106683-199

DATE: February 23, 2022

PRESIDING: THE HONOURABLE ANDRÉ PROVOST, J.S.C.

ALISON JANE STEEL
-and-
MARILYN RAPPAPORT
Plaintiffs

v.
ATTORNEY GENERAL OF CANADA
-and-
ROYAL VICTORIA HOSPITAL
-and-
McGILL UNIVERSITY HEALTH CENTRE
Defendant

JP1827

JUDGMENT
(APPLICATIONS TO DISMISS [#12 AND #15])

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[1] The plaintiffs are acting in their personal capacities and on behalf of some 95 individuals who have mandated them for the purposes of these proceedings (the "Mandators"). They seek damages from the defendants arising from experimental treatments administered by Dr. Ewen Cameron to members of their families between 1948 and 1965 (the "Experimental Treatments").

[2] The Attorney General of Canada ("AGC") presents an application to dismiss in part, as do the Royal Victoria Hospital ("RVH") and the McGill University Health Centre ("MUHC"). They seek a dismissal of the action in respect of the Mandators.

[3] They allege primarily that the plaintiffs and Mandators lack a common interest and that the allegations of fact pertaining to the latter in relation to the conclusions sought are insufficient.

[4] A summary of the facts alleged and the conclusions sought in the Modified Originating Application[1] is in order.

BACKGROUND

[5] The plaintiffs are family members of former patients of Dr. Cameron who underwent Experimental Treatments at the Allan Memorial Institute ("AMI") between 1948 and 1965.[2] The government of Canada allegedly funded Dr. Cameron's research.

[6] The Experimental Treatments administered by Dr. Cameron and his team, which were intended to treat schizophrenia, aimed to take control of the patient's psyche and rebuild it. They included the use of powerful medications, shock therapy, and repeated audio messages, among other things.

[7] The technique was later harshly criticized by the scientific community. The Canadian government went so far as to appoint a lawyer, George Cooper, to conduct an inquiry. He found that the Experimental Treatments had no therapeutic benefits. In 1992, upon his recommendation, and without admitting any liability whatsoever, the Canadian government implemented an *ex gratia* compensation program for patients who had undergone these treatments.

[8] The plaintiffs submit that the defendants committed faults, either by allowing or authorizing the Experimental Treatments, which violated respect for and the integrity of the patients, or by encouraging the treatments by providing funding. They assert that these treatments caused them injury in that they were deprived of the support and care they could have reasonably expected from the members of their respective families had they not been treated by Dr. Cameron's.

[9] The plaintiffs were mandated by 95 other individuals allegedly in a similar position to theirs. The circumstances that led to the filing on February 13, 2019,

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[1] Modified Originating Application, December 29, 2020

[2] At the time, the AMI was the psychiatric unit of the RVH, which is now part of the MUHC.

of the originating application in the form provided for in article 91 of the *Code of Civil Procedure* (CCP) are described as follows:[3]

> 4. The present procedure is a joint direct action of two mandated Plaintiffs, Ms. Alison Steel and Ms. Marilyn Rappaport in accordance with Article 143 al. 2 of the Code of Civil Procedure ("CCP");
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> 5. Ms. Alison Steel has been mandated by the children of former patients ("Mandators") of the Allan Memorial Institute ("Allan Memorial") in accordance with Article 91 CCP, the whole as appears from the Mandate List, **Exhibit P-1**;
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> 6. Ms. Marilyn Rappaport has been mandated by the siblings of former patients ("Mandators") of the Allan Memorial in accordance with Article 91 CCP, the whole as appears from the Mandate List, **Exhibit P-1**;
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> 7. All the here encompassed Mandators were among the numerous individuals who have originally mandated the undersigned attorney, Me. Alan Stein, to institute a Class Action on May 20th 2018, as appears from the CBC News Article, **Exhibit P-2**;
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> 8. However, due to the vast publicity of the mounting Class Action, including a documentary report on the CBC's Fifth Estate as well as other miscellaneous investigative documentaries broadcast on television and over the internet, another law firm, unaffiliated with Me. Stein captured the attention of some of the putative group members and, without any forewarning, preceded Me. Stein in submitting an Application for Class Authorization;
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> 9. Viewing the above pre-empt as unscrupulous, those putative group members desiring to remain with Me. Stein as counsel in whom they have upmost confidence and trust, have decided to proceed by way of a direct action in order to avoid multiplication of Class proceedings, to ensure and protect their access to justice, as well as out of respect for the efficient and expedient administration of justice;
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> 10. It is on this basis that the Plaintiffs hereby submit the present action;

[10] The application for authorization to institute a class action was filed by the Consumer Law Group ("CLG") on behalf of Julie Tanny on January 24, 2019, under file number 500-06-000972-196.[4] Ms. Tanny and two other individuals behind the mandate given to CLG attended the meeting of May 20, 2018.

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[3] *Supra* note 1. Article 91 CCP provides:

> **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.
>
> 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.

[4] P-67.

[11] That application generally concerns the same facts as those at issue in this case. However, it includes an additional defendant, the Attorney General of the United States, for faults alleged against the Central Intelligence Agency ("CIA"), which they claim also helped fund Dr. Cameron's research. A preliminary application to dismiss was filed by the Attorney General of the United States on March 25, 2021, but has not yet been decided.

[12] In short, the application for authorization to institute a class action has not yet been heard.

[13] The undersigned judge intervened in this case for the first time on September 11, 2019, in a case management conference to establish a case protocol. Certain orders were rendered at the time to make it easier to obtain medical files relating to the cases of each of the Mandators. It was also agreed that, no later than March 31, 2020, the defendants would file a modified originating application to include the specific facts relating to each of the Mandators and specifying the damages each of them sought. In the end, the time limit for filing the case protocol was postponed to May 18, 2020.

[14] The plaintiffs finally filed their modified originating application on December 29, 2020 (the "Application"). Their tardiness can be explained by accumulated delays caused by the process of obtaining the medical files. The case protocol had not yet been filed by that date.

[15] Another case management conference was held on January 29, 2021, The AGC announced that it would file another application to dismiss based primarily on the lack of common interest between the plaintiffs and the Mandators. It stated that this application would also raise a judicial policy argument, since two actions have been brought concerning the same facts against the same defendants. The RVH and the MUHC also announced that they would file an application to dismiss based on the same grounds. At that point it appeared preferable to set down the terms of filing the applications to dismiss and the hearing of those applications, and to postpone the deadline for filing the case protocol until after the judgment on these applications. In addition, the undersigned judge made certain orders to complete the disclosure of the medical files of some of the Mandators.

[16] The AGC's application to dismiss in part was filed on April 30, 2021, and that of the RVH and the MUHC on June 30, 2021. The grounds raised in support of both of these applications are the following:

a. The plaintiffs have not produced mandates for all of the Mandators;

b. There is no common interest between the plaintiffs and the Mandators within the meaning of article 91 CCP;

c. The Application as worded deprives the defendants of the possibility of mounting a full defence and is likely to lead to unfair results;

d. Clear allegations of faults committed by the defendants are absent or insufficient;

e. An application under article 91 CCP may not be used to duplicate a class action concerning the same facts.

[17] Shortly before the hearing, the plaintiffs completed the disclosure of the mandates, save one, thereby disposing of the first ground of inadmissibility raised by the defendants.

[18] The hearing was held on December 13, 2021.

ANALYSIS

[19] An analysis of the applications for dismissal requires that the following questions be considered:

i. What are the criteria applicable to an application for dismissal brought under article 168 CCP?

ii. Do the plaintiffs and the Mandators have a common interest?

iii. Is the right to make full answer and defence undermined by the plaintiffs' choice to bring an action under article 91 CCP or by the lack of sufficient allegations covering the case of each Mandator?

iv. Is there a duplication of actions giving rise to the inadmissibility of the Action?

[20] Each of these questions will be addressed in turn.

i. <u>The criteria applicable to an application for dismissal brought under article 168 CCP</u>

[21] The defendants seek the dismissal of the Application brought on behalf of the Mandators under articles 85, 91, and the first paragraph, subparagraphs (2) and (3), of 168 CCP. These provisions provide for the following:

> **85**. To bring a judicial application, a person must have a sufficient interest.
> The interest of a plaintiff who intends to raise a public interest issue is assessed on the basis of whether the interest is genuine, whether the issue is a serious one that can be validly resolved by the court and whether there is no other effective way to bring the issue before the court.

> **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.
> 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.
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> **168**. A party may ask that an application or a defence be dismissed if
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> (1) there is lis pendens or res judicata;
> (2) **one of the parties is incapable or does not have the necessary capacity to act; or**
> (3) **one of the parties clearly has no interest.**
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> The party may also ask that an application or a defence be dismissed if it is unfounded in law even if the facts alleged are true. Such an exception may pertain to only part of the application or defence.
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> The court may, on the face of the record, deny an application for dismissal based on the grounds that it has no reasonable chance of success.
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> The party against which the exception is raised may be allowed a period of time to correct the situation but if, on the expiry of that period, the correction has not been made, the application or defence is dismissed.
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> The dismissal of an application may be urged even if the exception to dismiss was not raised before the first case management conference.
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> [Emphasis added by the Court.]

[22] The argument based on the capacity of the applicants relied primarily on the failure to produce the mandates. This issue is now resolved. Therefore, inadmissibility concerns primarily interest and, secondarily, the lack of sufficient allegations in the Application.

[23] The defendants dispute the plaintiffs' interest to act on behalf of the Mandators. They argue that the plaintiffs and the Mandators do not have the common interest required for this purpose under article 91 CCP. Hence the application to dismiss brought under article 168 CCP.

[24] It should be noted that the Application may not be dismissed due to a lack of interest at the preliminary stage unless the lack is clear.[5] This is the very

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[5] *Société d'habitation du Québec c. Leduc*, 2008 QCCA 2065; *Vision Sillery inc. c. Réseau Vision School World inc.*, 2019 QCCS 4937

wording of paragraph 1, subsection (3) of article 168. The Court must therefore act with prudence before limiting a party's right to take legal action.[6]

[25] This same prudence is necessary when it comes to the absence or insufficiency of allegations in the Application.[7]

[26] The common interest provided for in article 91 CCP will now be analyzed.

ii. Do the plaintiffs and the Mandators have a common interest ?

[27] The Application is based on the extracontractual liability of the defendants in connection with the Experimental Treatments.

[28] Ms. Steel claims damages sustained as the child of a patient (her mother) who was subjected to the Treatments. She is mandated by the Mandators who are also children of patients who were similarly treated to argue their claim.

[29] Ms. Rappaport claims damages sustained as the sister of a patient who received the Experimental Treatments. She is mandated by the Mandators who are siblings or grandchildren of patients who were similarly treated to argue their claim.

[30] The faults alleged against the defendants are described in detail in paragraphs 27 to 60 of the Application.

[31] The plaintiffs emphasize the disproportionate, exploitative, and harmful nature of the Experimental Treatments, which did nothing other than aggravate the mental conditions of the patients.

[32] They fault the defendant institutions for approving and encouraging the continued provision of these treatments by Dr. Cameron and other physicians, nurses, technicians, and orderlies of the AMI. They allege that they not only displayed negligence towards the patients, they also failed to ensure compliance with ethical rules that were intended to protect the integrity of the patients subjected to the Experimental Treatments, which did not meet with the medical standards of the time, and to obtain their informed consent.

[33] As for the AGC, they allege that it not only approved the Experimental Treatments, it also encouraged them by providing significant funding with no concern for the risks they posed to the patients. The AGC also failed to perform

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[6] *Brunette c. Legault Joly Thiffault, S.E.N.C.R.L.*, 2018 SCC 55 at para.18.

[7] *Province canadienne de la Congrégation de Sainte-Croix c. Centre de services scolaires Chemin-du-Roy*, 2022 QCCA 227 at paras. 9–11.

certain verifications required to ensure that they complied with the generally applicable rules.

[34] The injury sustained by the plaintiffs is described in paragraphs 61 to 119 of the Application, and that suffered by the Mandators is outlined in the "Mandators' Victim Impact Statements" in paragraphs 138 to 677. Generally, the injury is described as follows:

> 120. The families hereby seeking relief consist of daughters, sons, brothers and sisters of the victim patients subjected to the experimental and unethical treatments suffered at the Allan Memorial Institute;
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> 121. After being subjected to the above, many of the patients were left in a depleted mental, emotional and physical state, having lost their ability to function in society and as well as within their families;
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> 122. The damaging side-effects of the experiments on the patients included varying degrees of amnesia, impaired cognitive functioning, chronic organic brain syndrome, extreme passivity and lack of affect, delusions, profound sense of helplessness, inability to act, severe mood swings, incapacitation, shame, self-blame and feelings of guilt, and paranoia;
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> 123. The families, helpless, confused and guilt-ridden witnesses of the same, endured their own strains of injury including, but not limited to, loss of support, guidance, care, consortium, intimacy, stability, and companionship that they might reasonably have received if the injuries had not occurred;
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> 124. The subsequent care-taking falling on the already fragilized families brought on another series of emotional injuries including pain, suffering, anxiety, distress, los of quality and enjoyment of life, depression, apathy, loss of stability, emptiness. The varying degrees of these injuries proliferated cyclical family discord that destabilized households;
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> 125. Frequently, bouts of shame and embarrassment accompany the care of a psychologically unstable family member; the stigma attached to mental illness transcends individuals and latches onto families whose sense of alienation from society often matches that of the actual victims themselves;
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> 126. Aggravating the above, were the 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 neverfinancially support themselves;
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> 127. However, multifaceted as the monetary burdens may be, they pale in comparison with the sense of irretrievable loss of a loved one; no price can be placed on the stolen memories and identities of parents and siblings. These damages .are sadly, beyond restitution;

[35] The questions of fact that the Mandators have in common with the plaintiffs are set out in paragraphs 135 and 136 of the Application:

i. The Mandators are all children (or siblings) of men and women who were admitted to the Allan memorial Institute for treatment;

ii. The Mandators' parent (or sibling) underwent experimental treatments which included depatterning through the abovementioned means;

iii. The treatments were inflicted without knowledge and/or consent of the patients nor their families;

iv. The treatments resulted in life-long detrimental damages to the physical, psychological, social and emotional states of the patients;

v. The Mandators were thus robbed of their parents (or siblings as well as the care and attention of their parents) and incurred personal, emotional, psychological and/or financial injuries

[36] The plaintiffs and the Mandators also have the following questions of law in common:

a. The interruption of prescription, first because of the judgments of the Supreme Court and the Court of Appeal in *Kastner v. Royal Victoria Hospital*,[8] and second due to the announcement of the settlement between the federal government and Ms. Steel regarding the *ex gratia* payments owed to her deceased mother;

b. The violation of the rights of the patients recognized in the *Universal Declaration of Human Rights*, the *Act respecting health services and social services*, and the *Quebec Charter of human rights and freedoms*; and

c. The defendants' violation of their duty to act in accordance with the rules of conduct arising from custom and law.

[37] The defendants, for their part, begin by submitting that article 91 CCP must be given a restrictive interpretation because it is an exception to the principle that no one can plead for another person.

[38] They go on to argue that the plaintiffs and the Mandators do not have the common interest required by that provision, since the facts and the circumstances differ from one case to another. In other words, success for one of the plaintiffs in one action does not necessarily mean success for all.

[39] In this respect, they raise the difference between the restrictive notion of a "common interest in a dispute" in article 91 CCP and the broader concept of

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[8] 2000 CanLII 17987 (QC CS); 2002 CanLII 63769 (QC CA).

"common issues" (identical, similar or related issues of law or fact) referred to in article 575 CCP in the Title relating to class actions.

[40] In short, in the defendants' view:[9]

> 49. At a minimum, they [the Plaintiffs] would need to establish a link between each Plaintiff and Purported Mandator and a former AMI [Allan Memorial Institute] 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.

[41] The position of the defendants on the interpretation of "a common interest in a dispute" in article 91 is inspired largely by the authors R. Savoie and L.P. Tachereau in their 1973 book entitled *Traité de procedure civile*, which provided the following commentary on article 59 CCP, the predecessor of the current article 91:[10]

> [TRANSLATION]
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> Given the strict conditions it refers to and especially the general principle in the first paragraph, this new provision constitutes an exception and its interpretation may only be restrictive... this interest must be related to each of the individuals who want one of them to represent them in a legal action. We therefore believe that, in cases of indivision, co-ownership, or succession, one of the undivided co-owners, co-owners, or co-heirs may be given the mandate to represent them all in a legal proceeding as plaintiff, defendant, or intervener.

[42] On this basis, the defendants conclude that article 91 CCP is not easily applied to an application for extracontractual damages, given the distinctions relating to fault, injury or causation that may exist in the respective situations of the persons covered by the application.

[43] They also draw a parallel between article 91 CCP and representative actions under the common law, in respect of which the courts have historically applied a restrictive interpretation of the term "same interest", a prerequisite to such actions. They also distinguish *Western Canadian Shopping Centres v. Dutton*,[11] where the Supreme Court broadened the interpretation of the preconditions for representative actions, particularly with respect to the common interest, suggesting that, in doing so the Court simply wished to ensure that

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[9] Outline of argument of the Attorney General of Canada, September 17, 2021.

[10] Réginald Savoie & Louis Philippe Tachereau, *Traité de procédure civile*, t. 1 (Montreal: Guérin, 1973) at 62. This passage is cited by Gascon J., then of the Superior Court, in *9096-0105 Québec c. Construction Cogela inc.*, 2003 CanLII 546 (QC CS) at para. 53.

[11] [2001] 2 SCR 534.

provinces that had not yet adopted class actions could benefit from the flexibility of the rules applicable to them.

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[44] Article 91 CCP echoes article 59 of the former CCP.[12] The commentary of the Minister of Justice on this provision reads as follows:[13]

> This provision repeats prior law. It is important to note that a court hearing an application to authorize a class action must, as provided in subparagraph 3 of the first paragraph of article 575, consider whether the composition of the class allows for proceeding by way of such a mandate without too much difficulty.

[45] Article 575 CCP, under the Title on class actions, sets out the conditions for authorization:

> **575**. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
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> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
>
> (3) **the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and**
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> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.
>
> [Emphasis added by the Court.]

[46] Thus, the legislature established an *a priori* correlation between articles 91 and 575 CCP. Accordingly, in cases where the applications raise identical, similar or related issues of law or fact, and the facts alleged appear to justify the conclusions sought, the court should, before authorizing the class action, consider whether the composition of the class makes it difficult or impracticable to apply the rules for mandates to take legal action on behalf of others under article 91 CCP or for consolidation of proceedings (article 210 CCP). If the answer is affirmative, the court must designate a representative plaintiff because that individual will act on behalf of all members of the class without receiving a mandate from them.

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[12] *Le Grand Collectif - Code de procédure civile - Commentaires et annotations*, 2021, vol. 1, 6th ed. (Yvon Blais) at 756

[13] *Ibid*.

[47] The case law analyzing the condition in subparagraph 3 of the first paragraph of article 575 (formerly subparagraph (c) of article 1003 CCP) emphasizes the existence of an identifiable class and the difficulty for the representative to obtain a mandate from the members to represent them. In *D'Amico c. Procureur Général du Québec* the Court of Appeal stated:[14]

> [TRANSLATION]
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> [48] The third criterion in article 575 CCP imposes a requirement of utility in relation to two proceedings: the application of the rules relating to the two alternative proceedings must be difficult or impracticable because of the composition of the class. The wording expressly refers to two situations that are devoid of utility or are impracticable: mandates to take part in judicial proceedings on behalf of others and the consolidation of proceedings.
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> ...
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> [51] The reason underlying the criterion in subparagraph 3 of the first paragraph of article 575 CCP is in the difficulty of creating a class to take legal action that would obtain a benefit for each class member by proceeding in the usual fashion. The provision identifies two situations where proceeding the usual way would be of little or no use for several applicants. To make it easier to group them together and move forward with their action effectively, the *Code of Civil Procedure* authorizes them to come together in a class action.
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> [Emphasis added by the Court.]

[48] Generally, the number of class members, the difficulty for geographical or economic reasons that identifying them represents, and the practical constraints associated with obtaining a mandate from each individual are the grounds analyzed to fulfil the condition in subparagraph 3 of the first paragraph of article 575 CCP and obtain authorization to proceed by way of class action.[15]

[49] With respect for the position advanced by the defendants, the courts did not establish a distinction between bringing an action under article 91 CCP and the satisfaction of the criterion in subparagraph 3 of the first paragraph of article 575 CCP by contrasting a "common interest in a dispute" with "common issues".

[50] Article 91 CCP also does not define "common interest in a dispute", and the defendants' interpretation of the term as indicating that the success of one means the success of all the others is not explicitly stated. The comments of Gascon J. (then of the Superior Court) in *9096-0105 Québec c. Construction*

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[14] 2019 QCCA 1922.

[15] *Godin c. Aréna des canadiens inc.*, 2020 QCCA 1291 at paras. 128–129; *Dubois c. Municipalité de Saint-Esprit*, 2018 QCCA 1115 at paras. 26–30 (leave to appeal to SCC refused); *Black c. Place Bonaventure inc.*, J.E. 2004-1695 at para. 19; *Ramacieri c. Bayer inc.*, 2015 QCCS 4881 at paras. 61–80 (leave to appeal to CA refused).

Cogela inc.[16] on which they rely do not justify confirming this interpretation wholeheartedly.

[51] In that case, 9096-0105 Québec ("9096"), in its capacity as principal contractor, had a condo-hotel building built. The building contained 30 suites held in divided co-ownership by various owners, as well as commercial and management lots belonging to 9096 or to Gestion Hôtel Quintessence (Gestion), a corporation held by 9096.

[52] Construction Cogela ("Cogela") was the general contractor who performed the construction work at the request of 9096. Because it was not fully paid for its work, Cogela registered a notice of legal hypothec in the land registry.

[53] The owners of the private portions and Gestion mandated 9096 to seek the cancellation of the legal hypothec and the substitution of other security in its place. Cogela filed an application to dismiss on the grounds of lack of common interest between 9096, Gestion, and the other co-owners.

[54] Cogela's position is described as follows:

> [TRANSLATION]
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> [48] According to Cogela, because the mandators and their mandatary are respectively co-owners of the commercial lots, management lots and undivided portions, their interests are separate because their actions have different foundations: 9096 is debtor of the obligation to give clear title to its purchasers, the co-owners of the undivided portions are creditors of 9096's obligation, and Gestion is creditor or debtor of nothing at all.
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> [49] In short, Cogela concludes that 9096 and its mandators should have each separately brought a different action to reduce the legal hypothec, substitute other, sufficient security for the hypothec, and to cancel it. Basically, 32 actions instead of one.

[55] Gascon J. found that, from the outset, the mandators and the mandatary had a common interest to have the legal hypothec registered by Cogela cancelled and to substitute other security for it. He explained:

> [TRANSLATION]
>
> [54] In their capacity as co-owners, it is clear that the mandators and their mandatary have a common interest in the conclusions seeking to give their building clear title. Whether under article 804 CCP or article 2731 CCQ, their action concerns the immovable charged by a legal hypothec and seeks conclusions related to this security, which affects all co-owners simultaneously.

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[16] *Supra* note 10.

> [55] It is true that the second paragraph of article 59 CCP creates an exception to the principle that no one may plead for another person and that this exception must consequently be given a restrictive interpretation. However, no authorities have been submitted to the Court to justify a purported lack of common interest in a case like this one.
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> [56] Cogela's position seems to overlook the fact that this is a single legal hypothec and that the conclusions sought target the security itself, directly and solely. The Court is not persuaded that it would serve the interests of justice and of all the parties involved, including Cogela, to require 32 separate actions all seeking the same conclusion to be brought, instead of a single action where a duly designated mandatary acts for all the others.
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> [57] At a time when not only are rules of procedure intended to make the law clear and facilitate the normal trial process, but pleadings must also be selected on the basis of "proportionality" criteria, it is difficult to see how such a narrow view of the notion of common interest in article 59 can serve either the spirt or the letter of the *Code of Civil Procedure*.
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> [Emphasis added by the Court.]

[56] As Gascon J. noted, their interest is common because it is in the cancellation the legal hypothec charged on the immovable of which they are co-owners. The fact that each has a different basis for their action does not affect this common interest.

[57] Is it possible to conclude on this basis, as the defendants do, that applications under article 91 may be brought in only similar cases? The Court does not believe so.

[58] First, Gascon J.'s comments in paragraphs 55 and 57 of his judgment suggest that the interpretation of article 91 CCP should not be so rigid as to undermine the principle of proportionality prescribed by articles 2 and 18 CCP.

[59] Second, the interpretation put forward by the defendants seems, at least at first glance, to contradict the correlation that exists between articles 91 and 575 CCP and the interpretation the case law has so far given to these provisions. In this respect, the authorities submitted by the AGC on representative actions under the common law do not appear to be of any assistance.

[60] In this case, in light of the allegations of the Application, which are supplemented by the exhibits in the record, the common interest of the plaintiffs and the Mandators in the dispute is in the punishment of the allegedly faulty conduct of the defendants in connection with the Experimental Treatments administered to one of their relatives which consequently caused them injury. There are likely certain variations in the types of injury suffered from one case to another but, in the view of the Court, this does not undermine their common interest in the dispute.

iii. Is the right to make full answer and defence undermined by the plaintiffs' choice to bring an action under article 91 CCP or by the lack of sufficient allegations covering the case of each Mandator?

[61] The infringement of the right to make full answer and defence advanced by the AGC is based on the fact that, according to article 221 CCP, the defendants do not have an automatic right to conduct a pre-trial examination of the Mandators. Given the individual and variable nature of the claims, the defendants argue that they are therefore not able to verify the relevant facts in the record and this places them in a disadvantageous position.

[62] At this stage of the proceedings, this argument cannot stand.

[63] First, at the defendants' request, the Court required the plaintiffs to detail the specific features of the cases of each of the Mandators in a modified application, which was filed on December 29, 2020. These details appear in paragraphs 138 to 677 of the Application.

[64] Second, further to the orders of the undersigned judge, all of the medical records relating to each of the Mandators' cases have already all been disclosed.

[65] Third, while it is true that article 221 CCP does not confer a strict right to conduct a pre-trial examination of the Mandators, the third paragraph of that provision provides that such an examination can be conducted with the consent of the plaintiffs or with the judge's authorization, subject to the conditions the judge determines.

[66] There is no doubt that in either of these cases, the principle of proportionality will guide the parties or the judge in determining the number of examinations and the conditions under which they may be conducted, if any.

[67] In short, at this stage, the defendants cannot validly argue that their right to make full answer and defence is undermined in any way.

[68] For the reasons stated above in paragraphs 63 and 64, the argument of the insufficiency of the allegations relating to each of the Mandators must also be rejected at this stage.

[69] Finally, the allegations of fault against the defendants set out in paragraphs 27 to 60 of the Application appear sufficient for the purposes of the analysis of the applications to dismiss in part.

iv. Is there a duplication of actions giving rise to the inadmissibility of the Action?

[70] The defendants argue, and this is admitted, that the Application was brought under article 91 only because the plaintiffs and their lawyer were caught off-guard by the earlier filing of an application for authorization to institute a class action based on the same facts.

[71] As a result, it is claimed that the Application is inadmissible or at least should be considered contrary to the proper administration of justice.

[72] At the outset, the Court notes that no application to dismiss has been brought under the first paragraph of article 168 CCP alleging *lis pendens* or *res judicata*. This can be explained by the fact that, when the Application was filed and even still today, the class action in file number 500-06-000972-196 has not been authorized.

[73] We will now discuss the argument relating to the proper administration of justice.

[74] Article 9 CCP defines the mission of the courts as follows:

> **9.** It is the mission of the courts to adjudicate the disputes brought before them, in accordance with the applicable rules of law. It is also their mission to make a ruling, even in the absence of a dispute, whenever the law requires that an application be brought before the court because of the nature of the case or the capacity of the persons concerned.
>
> That mission includes ensuring proper case management in keeping with the principles and objectives of procedure. It further includes, both in first instance and in appeal, facilitating conciliation whenever the law so requires, the parties request it or consent to it or circumstances permit, or if a settlement conference is held.
>
> The courts and judges enjoy judicial immunity. Judges must be impartial and, in their decisions, they must have regard to the best interests of justice.
>
> [Emphasis added by the Court.]

[75] The principle of proportionality is stated in article 18 CCP:

> **18.** The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

> Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.
>
> [Emphasis added by the Court.]

[76] At this stage, there is no legal rule other than those relevant to admissibility in article 169 CCP that justifies dismissing the Application in respect of the Mandators.

[77] The principle of proportionality is one of the tools at the judge's disposal to ensure the proper administration of justice. But it applies in the context of case management,[17] and it cannot be used to deny a person's right to take legal action.

[78] If the class action is authorized and the plaintiffs and the Mandators opt out under article 580 CCP, certain measures may be applied to prevent or minimize the duplication of proceedings and ensure the proper administration of justice.

FOR THESE REASONS, THE COURT:

[79] **DISMISSES** the defendants' applications to dismiss in part;

[80] **DECLARES** that the case protocol should be filed within 45 days of this judgment;

[81] **WITH LEGAL COSTS**;

[17] *Webasto c. Transport TFI6*, 2019 QCCA 342; St-*Louis c. La Presse ltée*, 2021 QCCA 1782.

[Digital signature of André Prévost]
Date : 2022.02.03
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ANDRÉ PRÉVOST, J.S.C.

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Date of hearing: December 13, 2021