Court of Queen's Bench of Alberta

Citation: Macaronies Hair Club and Laser Center Inc v. BofA Canada Bank, 2019 ABQB 181

Date:
Docket: 1203 18531
Registry: Edmonton

Between:

Macaronies Hair Club and Laser Center Inc.,
Operating As Fuze Salon

Plaintiff

- and -

BofA Canada Bank, Bank of Montreal, Bank of Nova Scotia,
Canadian Imperial Bank of Commerce, Capital One Bank (Canada Branch)
Citigroup Inc., Federation Des Caisses Desjardins Du Quebec,
MasterCard International Incorporated, National Bank of Canada Inc.,
Royal Bank of Canada, Toronto-Dominion Bank and
Visa Canada Corporation

Defendants

Supplementary Reasons for Decision
of the
Associate Chief Justice
J.D. Rooke

INTRODUCTION

[1] On July 5 and August 23, 2018, I heard the application for certification, for settlement purposes, of this class proceeding, and, by Decision released on August 30, 2018, I granted

same: 2018 ABQB 633 (***Macaronies 2018*** or, simply ***Macaronies***[1]). At that time, I indicated that further Reasons for the Decision would be released at a later time – specifically, I said:

> Reasons for this Decision will be released at a later time. They will, however, endorse the ***Coburn 2018 Decision*** of Weatherill J. [as therein and hereinafter defined] of Weatherill J., who has lived with this case, for which all proceedings are substantially the same. for much of the 7+ years of litigation in these actions against these Defendants, while proceedings in other jurisdictions, including Alberta, have been stayed, with the Courts in those jurisdictions, in effect, maintaining a "watching brief" on the British Columbia proceedings. The decision to endorse the ***Coburn 2018 Decision*** is consistent with the principles of judicial comity, based on the cases of, *inter alia*: ***Ali Holdco Inc. v. Archer Daniels Midland Company***, 2010 ONSC 3075 (CanLII), at para. 27; ***N.N. v. Canada (Attorney General)***, 2018 BCCA 105 (CanLII), at para. 82; ***McKay v. Air Canada***, 2016 BCSC 1671 (CanLII), at para. 33, ***Gill v. Yahoo Canada Co.***, 2018 BCSC 290 (CanLII), at para. 34; ***Quenneville v. Volkswagwen***, 2016 ONSC 7959 (CanLII), at paras. 20-21; ***Frohlinger v. Nortel Networks Corporation***, 2007 CanLII 696 (ON SC), 2007 CanLII 696 (ONSC), at paras. 31-32; and ***Jeffery v. Nortel Networks Corporation***, 2007 BCSC 69 (CanLII), at paras. 77-79. The Reasons will, as appropriate, add Alberta based considerations to the proceedings here, and follow, in due course.

[2] These Supplementary Reasons are the result.

APPEALS

[3] I am aware that ***Macaronies***, has, since August 30, 2018, been appealed to the Alberta Court of Appeal. Indeed, I believe that all the decisions in other jurisdictions regarding approval of this settlement, as discussed below, have been appealed. However, I have not reviewed the Notice of Appeal or any material that may have been prepared or filed in respect of the appeal of ***Macaronies***, or any of the other appeals.

[4] It my hope that, to the extent that more than one appeal is proceeding in Courts of Appeal in the five jurisdictions, all on the basis of the same trial courts' approvals of the same settlement, on the same issues, Counsel will encourage the Courts of Appeal to follow the 2018 Canadian Bar Association Protocol, for which I was critical (see para. 4 of ***Macaronies***) of Counsel not following same before the trial courts. This has the prospect of not only saving valuable judicial resources, but also counsel duplication and resulting costs, which may reduce the ultimate award to the class. While this will take some coordination by Counsel and the staff of the Courts of Appeal, saying that it is difficult to organize is not a valid excuse. Indeed, one such exercise in this regard for this settlement, may set valuable procedural precedents for future cases in following the Protocol.

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[1] In each of the cases considering these settlements, I have used the full abbreviated title in the first case, because there are a number of these names of cases, relating to various settlements over the last seven years, and then, for ease, I have used just the Plaintiff's name, the suffix, ***2018 Decision***, being implied)

ADDITIONAL COMMENTS ON THE ON *COBURN 2018 DECISION*

SETTLEMENT PRINCIPLES

[5] In ***Coburn and Watson's Metropolitan Home v BMO Financial Group***, 2018 BCSC 1183 (the ***Coburn 2018 Decision***), Weatherill J., at para. 30, cites ***AFA Livforsakringsaktiebolag v. Agnico-Eagle Mines Ltd***, 2016 ONSC 532 (Ont. S.C.J. - Belobabba. J.), at paras. 3, 5 and 17, for the proposition that: "Class action settlements should be viewed with suspicion and seriously scrutinized by judges and class counsel who have interests and incentives that may not align with the best interests of the class". Two paragraphs later (para. 32), Weatherill J. makes reference to ***Nunes v. Air Transat AT Inc.***, (2005), 20 C.P.C. (6th) 93 (Ont. S.C.J - Cullity J), at para. 7, which states, as one of the seven principles referenced (the third principle): "there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval". On first blush, these principles may seem not to align, but to be in conflict. However, I do not believe that is the case. One starts with a broad, underlying concern as recognized in ***Agnico-Eagle*** (one of the very reasons for the requirement of Court approval of class action settlements) and investigates all aspects of the proposed settlement and evidence relevant to the many principles to be reviewed before settlement approval, and then, when reviewing an "arm's length" settlement negotiation, moves to a presumption of fairness, absent any evidence to the contrary. That investigation continues with respect to the evidence applicable to that and other principles until the court makes a decision as to whether, in review of all the evidence relevant to all principles, the proposed settlement is "fair, reasonable and in the best interests of the class". Thus, the presumption referenced in ***Agnico-Eagle*** is but one of the steps in the process, and I approve both principles.

[6] As Weatherill J. noted, ***Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*** (2005), 74 O.R. (3d) 758 (Ont. S.C.J. - Cumming J), at para. 115, is one basis for the principles in ***Nunes***. To bring this back to Alberta, cases here have referenced both ***Hoffmann*** and ***Nunes***. In ***Turner v. Bell Mobility***, 2015 ABQB 169 (rev'd for other reasons: 2016 ABCA 21), I cited ***Nunes*** on another issue. ***Hoffman*** has been referenced by Thomas J. in ***T.L. v. Alberta (Director of Child Welfare)***, 2015 ABQB 815 and McMahon J in ***Northwest v. Canada (Attorney General)***, 2006 ABQB 902, at para. 86, for other principles. ***Dabbs v. Sun Life Assurance Company of Canada***, [1998] OJ No. 1598, (Ont G.D.), at para. 13, aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal denied [1998] S.C.C.A. No. 372, was referenced by Weatherill J., at para. 33. That case has been relied upon for the principles of settlement approval by Ouellette J., in ***Adrian v. Canada (Minister of Health)***, 2007 ABQB 377, paras. 12 – 13.

COMITY

[7] I wish to address the principle of comity, in the context of class actions, in relation to the decisions approving the subject settlement.

[8] By way of definition of comity, John D. Gardner and Karen M. Gardner, in **"Sanagan's Encyclopedia of Words and Phrases Legal Maxims"**, (Loose leaf, 2005, Thomson Reuters Canada Limited, Toronto) provides, *inter alia* (C-123 & Supp C-34.5):

> "Comity" is the name given to the general principle that encourages the recognition in one country of the judicial act of another. Its basis is not simply respect for other nations, but convenience and necessity, recognizing the need to

> facilitate inter-jurisdictional transactions: ***Connaught Laboratories Ltd. v. Medeva Pharma Ltd.*** (1999), 4 C.P.R. (4th) 508, at 518 (Fed. T.D. – Shadow J.), affirmed (2000), 4 C.P.R. (4th) 521 (Fed. C.A.).
>
> Comity refers to informal acts performed and rules observed by states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation: *Openheim's International Law*, at pp. 50-51. When cited by the courts, comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations": ***R v. Hape*** (2007) SCC 26, at para. 47.

[9] As is apparent from the above references, comity normally deals with respect between different nations, rather than domestically between provinces within a nation. However, it does also apply in the latter context – even more so, according to the Supreme Court: ***Morguard Investments Ltd. v. De Savoye***, [1991] 3 S.C.R. 1007, at para. 35.

[10] Comity was addressed, in the context of class actions in different Canadian jurisdictions in the Ontario Divisional Court in ***Tiboni v. Merck Frosst Canada Ltd.***, 2009 CarswellOnt 1248, at paras. 36 – 38:

> In ***Morguard***, and subsequently in ***Amchem*** and ***Hunt***[2], the Supreme Court articulated the principle that, given Canada's nature and structure as a federal state, courts in one province of Canada are bound to recognize and respect judgments of courts in other provinces. Canada's Constitution, accordingly, is designed to create a unified nation with particular shared social, economic and judicial arrangements. This requires final judgments given in each province to be enforced throughout the country (see ***Morguard***, at paras. 36-39).
>
> The principle of comity is part of, but not equivalent to, the constitutional principle of unity and consistency among judicial determinations in Canada. According to ***Morguard***, the content of comity between nations under private international law informs *the 'full faith and credit' principle applicable to interprovincial relationships.* [Emphasis added.]
>
> The constitutional principle identified in ***Morguard***, and developed in subsequent cases, reflects a broad principle requiring that order and justice be maintained in the Canadian legal system in light of the Constitution. Canada's constitutional arrangements require mutual recognition of final judgments among Canadian courts.

[11] The decisions here are "final judgments", subject to appeal. Nevertheless, as also applicable here (***Tiboni***, paras. 41-42, and 44):

> There is no precedent interpreting these decisions in the context of multi-jurisdictional overlapping class actions. The case law confirms that the principle of constitutional respect for judgments of other provinces and the principle of comity are not meant to be rigidly, slavishly followed. These principles are intended to be logical and practical, and to promote fairness and finality for litigants. We conclude that the principles that emerge from the case law are

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[2] ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board)***, [1993] 1 S.C.R. 897; and ***Hunt v. T & N plc***, [1993] 4 S.C.R. 289.

> helpful, but must be interpreted and adapted in light of the nature and intended purpose of class actions.
>
> The principles of "full faith and credit" and comity are relative and flexible, and not absolute....
>
> La Forest further emphasized in ***Hunt***, at p. 325, that "the ideas of "comity" ... are grounded in notations of order and fairness to participants in litigation with connections to multiple jurisdictions." [Emphasis in the original].

[12] The principle has been applied in the context of multi-jurisdictional class proceedings.

[13] With that background, the cases referenced by me in ***Macaronies*** on comity deserve some elaboration.

[14] One of the most relevant and germane cases is ***Ali Holdco Inc.***, where Strathey J. (as he then was) was dealing with certification approval, for the purposes of settlement, in a national class action, where approvals were required in both British Columbia and Ontario. He referred (paras. 25 - 26) to ***Nunes*** and ***Dabbs*** and the principles applicable to settlement of class actions, and then went on (para. 27) to state, in the best way possible in my view, the issue of comity as applicable, in the conduct of that – and this - case:

> I do not accept the submission of class counsel that the decision of the British Columbia Superior Court makes the issues *res judicata*, or that comity precludes me from considering the issue afresh. The settlement is conditional on the approval of both courts and each court has an independent obligation to review the settlement, to consider any objections and to make a determination of whether it is fair and reasonable and in the best interests of the class. That said, I respectfully adopt the observation of Brenner J. of the British Columbia Supreme Court, in ***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.***, 169 D.L.R. (4th) 564, [1998] B.C.J. No. 2936 (B.C.S.C.) that "judicial comity and the goal of certainty in litigation outcomes makes it essential that the courts in the class actions jurisdictions in Canada afford considerable weight to the decisions in other Canadian jurisdictions in identical class actions claims."

That is even more so, in my view, when the decision to which considerable weight is being placed, as in the case at Bar, is one by the trial justice who has lived with the case for a significant amount of time.

[15] Before I leave ***Ali Holdco***, as to the principles applicable to class actions, Strathey J. also addressed (para. 29) one additional factor that is not often present in class actions, but was there and is here:

> In assessing the reasonableness of a settlement agreement, the court is entitled to consider the non-monetary benefits, including any obligations on the part of the settling defendants to cooperate in the prosecution of the action against the remaining defendants: ***Rideout v. Health Labrador Corp.,*** 2007 NLTD 150, [2007] N.J. No. 292 (N.L.T.D.) at paras. 68 and 123; ***Crosslink Technology Inc. v. BASF Canada***, [November 30, 2007), Doc. London 50305CP (Ont. S.C.J.)], at para. 22. In the context of price-fixing litigation, the agreement of one alleged conspirator to cooperate with the plaintiffs in the action against the other defendants is of inestimable value.

[16] *N.N.* shows the breadth to which the principle of comity applies in class action settlements. There, in reference to the Indian Residential Schools Settlement Agreement (IRSSA), the British Columbia Court of Appeal observed, at para. 82, per MacKenzie J.A., for the majority:

> I agree with Canada that comity among the nine Supervising Courts that approved the pan-Canadian settlement is in the interest of all parties to the IRSSA. It is important to provide a clear and consistent interpretation of the rights afforded to IAP [Independent Assessment Process] claimants.

[17] In ***Gill***, Morellato J., at paras. 33 and 34, noted Counsel's arguments relating to:

> ... class actions in many provinces which involve the same facts and allegations. Counsel rightly raises the propriety of costly and inefficient use of court resources is such cases. Class action proceedings are intended not only to promote and improve access to justice but to also make more efficient use of scarce judicial resources: see ***Seidel v. Telus Communications Inc.*** 2011 SCC 15, at para. 52.
>
> In ***McKay v. Air Canada***, 2016 BCSC 1671 (B.C.S.C.), Chief Justice Hinkson marks the importance of promoting the more efficient use of court resources in class action proceedings by deferring, in appropriate circumstances, to courts in other jurisdictions.

[18] Belobaba J. similarly recognized the approach of ***McKay*** and other decisions, at paras 20 – 21 of ***Quenneville***. Indeed, in ***McKay***, Chief Justice Hinkson, in a decision with many considerations equally applicable to the case at Bar, specifically endorsed (at paras. 27, 29 & 33) 28 paragraphs of the reasoning of Leitch J. in the parallel settlement approval in Cathay Pacific Airlines Ltd., which he cited as 2016 ONSC 4559 [not available on CanLII], then under consideration.

[19] Comity is even more relevant in the context of fee approvals in class action settlements. In ***Jeffery***, Groberman J. stated at paras. 77 - 8:

> Multi-jurisdictional review of the fees and disbursements of all counsel presents practical difficulties....
>
> The appropriate solution, in my view, is for each court to concentrate its review on the fees and disbursements of local counsel. While each court has the jurisdiction to review the fees and disbursements of counsel from other jurisdiction, as well, it is normally appropriate, as a matter of comity, for each to defer to the courts in other jurisdictions to rule on the appropriateness of the fees and disbursements of their local counsel.

[20] In the same month, Winkler, S.R.J (as he then was) said something similar in ***Frohlinger***, at paras. 31 - 2, where he noted jurisdiction for each Court to approve fees in a multi-jurisdictional settlement, even though each jurisdictions fees might be a fraction of the total, but that:

> ...the approach taken to this review must also be tempered by the principle of comity in order to ensure that global settlements in multi-jurisdictional litigation, and their attendant benefits for class members, are not unduly impeded.

> ... adverting to the principal of comity, the decision of a particular court charged with approving specific counsel fees in its jurisdiction should be respected by each other court.

[21] Here there was one set of fees and disbursements, originating in British Columbia, for Counsel resident and appearing there for the class across all the jurisdictions. Thus, it is within the principles of both ***Jeffery*** and ***Frohinger***, as a matter of comity, to accede to the BC Court for approval of fees, which I do.

OTHER TRIAL COURT APPROVALS OF THE SETTLEMENT

[22] Referenced in ***Macaronies 2018***, was the predecessor decision, on the same settlement by Weatherill J., in the ***Coburn 2018 Decision***. Since my decision in ***Macaronies***, there have been similar approvals of the same settlement in other cases across the Country, in this order of delivery: ***Bancroft-Snell v. Visa Canada Corporation***, 2018 ONSC 5166 (Perell J.) (***Bancroft-Snell 2018 Decision***, or, simply, ***Bancroft-Snell***); ***Hello Baby Equipment Inc .v. BofA Canada Bank***, 2018 SKQB 276 (Barrington-Foote J.) (***Hello Baby 2018 Decision***, or, simply, ***Hello-Baby***); and ***9085-4886 Quebec Inc. v. Visa Canada Corporation***, 2018 QCCS 4872 (Corriveau J.) (***9085-4886 Quebec 2018 Decision***, or, simply, ***9085-4886 Quebec***).

[23] As I made my decision in ***Macaronies 2018*** before the release of the latter three decisions, they obviously cannot be said to have been in my mind at the time. Thus, my original decision must stand on its own, and its reliance on the earlier ***Coburn***, which I adopted. However, in the context of the appeals that are proceeding, in the interest of the whole class across the 5 jurisdictions, the Courts of Appeal, in my respectful view, as noted above, should apply the Protocol to come up with appropriate decisions in the context of all the trial court settlement approvals. Thus, I will take some liberties to address the subsequent decisions.

[24] After reviewing ***Coburn*** again, and the decisions in the three other jurisdictions since, I find that I need to say little more by way of reasons for my decision, because so many of the same reasons were addressed in those latter decisions. I had originally thought that in these Supplementary Reasons, I would delineate the full background of the Alberta proceedings.On seeing the other decisions, that seems entirely unnecessary. However, let me touch on the contribution of each of these three cases, briefly, as they speak for themselves.

[25] In ***Bancroft-Snell***, Perrell J., in a detailed decision, *inter alia*, set out: a great deal of the theory of the class case, in relation to conspiracy and other causes of action, defining the background components of the credit system along the way; provided the general history, across jurisdictions, of the proceedings and settlements (including in the US); was less inclined to rely on comity (see para. 115); and articulated the reason why release of future claims for continuing conduct was it the interest of the class (see below).

[26] In ***Hello-Baby***, Barrington-Foote J. (now, since November 2, 2018, J.A.): provided some history; documented the Wal-Mart and Home Depot focus on the fact (para. 16) that the "opt-out deadline expired long before the settlements were concluded" and addressed their concern about release of future claims; reviewed ***Bancroft-Snell;*** as to comity, and, at paras. 24 – 26, considered my submissions as to comity and Perell J's response as "the correct balance"; and analyzed the proposed settlement on the basis of the factors in ***Jeffery***, noting in particular (para. 34) that "the non-monetary benefits are the more significant elements of this settlement" – note the significance from ***Ali Holdco*** above. As to the releases, he, in effect, similar to Perell J.,

recognized them as merely a part of a cost-benefit analysis of all the provisions of the settlement. He said this at paras. 38 and 41 (with his conclusion at para. 46):

> The other factor that weighs in the cost-benefit analysis is the scope of the releases. ... it is my view that there is no rule that precludes a release of claims based on future conduct.... I also agree these releases are not contrary to public policy, illegal or in restraint of trade.
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> ...
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> ... the issue is not whether the releases are perfect. Further, the issue is not the scope of the releases, considered alone. The issue is whether settlement on the terms provided ... including the releases and associated provisions – are fair, reasonable and in the best interests of the class.
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> ...
>
> ... broad releases are not unusual, and these releases do not contain unprecedented provisions.

[27] While I am hampered by a very rudimentary translation, in ***9085-4886 Quebec***, Corriveau J., noting (para. 14) approval of other settlements within this litigation, focused directly on the issue of release of future conduct of the type challenged before the settlement (para. 36). She also noted (paras. 18 – 28) that Wal-Mart and Hope Depot are not class members in Quebec but only Ontario, although they would be part of the class for the continued litigation against the remaining defendants. At para. 67, she also obliquely touched on the matter of comity:

> ... like the four judges from other provinces who have addressed the same objections and understandings, the [Court] finds that the ... [settlement including future conduct] must be approved because they respect all criteria case-law in such matters. Such agreements are never perfect or ideal, they reflect an understanding at the end of a negotiation.

SPECIFIC ISSUES

[28] In all of these five decisions, the prime issues arise, through the complaints of Wal-Mart and Home Depot, namely the release of future claims. In the cases outside of Quebec, a second issue arises – the opt-out provisions.

RELEASE OF FUTURE CLAIMS

[29] As to release of future claims, I find that the argument about the releases was most substantively and significantly about releasing the Settling Defendants from future claims for continued conduct of the type settled in these settlements. In ***Coburn***, Weatherill J., at para. 55, held that "courts have found that it is not unfair to bar claims that are [in respect of] a continuation of the conduct giving rise to the existing claims that are the subject-matter of the proceeding". He relied on the decision of Perell J. in ***2038724 Ontario Ltd v Quizno's Canada Restaurant Corp***., 2014 ONSC 5812, (not considered in Alberta to this date), at paras. 50 - 56, where, in effect, he left open the question of whether or not it would be fair to bar claims that

were a continuation of the particular existing claim (presumably because it depended on the nature of the settlement terms in the context of the circumstances of the dispute in question – see his reliance, at para. 56, on ***The Owners, Strata Plan BSC 327 v. IPEX Inc.***, 2014 BCCA 237, at para. 26), but found, in ***Quizno's***, that the release was otherwise too broad in the context of all future claims.

[30] Perell J. addressed this issue at paras. 127 - 129 of ***Bancroft-Snell***, noting that, in ***Quizno's***, Perell J. ultimately "eventually approved a settlement that involved a release of future claims". He went on to point out that each settlement is different from each other, and are like "snowflakes", such that each "is not a binding precedent to approve a settlement in another class action, even of the same genre of class action". However, his reasoning, based on the evidence before him (paras. 130 – 134), is very instructive in the result, namely that a settlement, considering all the circumstances, can "sometimes forgive or licence continuing alleged wrongdoing", allowing the defendants to be "in effect ... licensed to carry on business as they had before", because "[t]here is nothing improper or illegal per se about [such] releases, and, rather, the issue was whether granting them was in the best interests of Class Members". In the result, Weatherill J., and I, considered the settlement as a whole and approved it, and subsequently Perell J., articulated a, perhaps more cogent, explanatory, reason as to why it should be so approved.

[31] Corriveau J., approved the settlement, in effect saying (paras. 37 - 39), aided by Article 2631 of the Civil Code, that it is a matter of contract, and that allowing future conduct might be part of the negotiation, for a price, and, in so doing, the Court:

> ... rejects the argument that [the release of future claims] is contrary to principles of law to prevent future recourse by ... [a release]. It is, however, quite possible to foresee that in exchange for a compensation paid, a [release] will be given for past and future actions.
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> ...
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> Thus, by an [agreement], it is possible to restrict the future of the prosecutions based on these same behaviors denounced as long as the text is precise in this regard. Otherwise, the party offering compensation would have no advantage in agreeing to a settlement agreement that involves the payment of compensation.

OPT-OUT PROVISIONS

[32] At paras. 63 and 79 of ***Bancroft-Snell***, Perell J. noted that opt-out provisions only related to the first four settlements, not this settlement – as I understand it because those were before certification of the whole action, whereas the subject settlement was after certification during which an opt-out was not allowed. He made reference, at footnote 13, to a similar situation in his decision in ***Eidoo v. Infineon Technologies AG***, 2012 ONSC 7299 and ***Nutech Brands Inc. v. Air Canada***, 2008 CanLII 1163, where Leitch J. said at para. 18:

> Section 9 of the *CPA* [Ont.] allows class members to "opt out of the proceeding in the manner and within the time specified in the certification order". That provision does not provide for a right to opt out against a particular defendant or settlement. This issue was considered by Rady J. in *Guercio v. Stone Paradise Inc.*, (December 2006), London 46460CP/45604CP (Ont. S.C.J.). I agree with her

> reasoning in that case. Opting out affects a procedural right, not a substantive right – it requires class members to choose the venue in which to pursue their substantive claims.

In other words, the certification order determines the opt-out rights.

[33] In the case of Alberta, s. 9(1) of the *Class Proceedings Act*, R.S.A. 2000, c. C – 16.5 provides that: "Where the Court makes a certification order, the Court ... must at least ... (f) state the manner in which and the time within which a class member may opt out of the proceeding." Section 17(2) further provides more options: "The Court may, in a certification order or at any time, (a) specify the manner in which and the time within which the members of a class, or any individual member of a class, may opt-out of the proceeding, and (b) impose terms or conditions subject to which the class members or an individual member may opt-out of the proceeding. See also s. 20 on opt-out provisions applicable to the Notice of Certification.

[34] Ward Branch[3], ***Class Actions in Canada*** (Loose leaf) Thomson Reuters Canada, 2018) at para. 10.70, supported by the authorities listed, postulates:

> If a member [of the class] does not opt out, then the judgement or settlement in the class action is binding on him or her.... When a lawsuit is certified as a class proceeding, the legislation requires that class members make a decision to ... opt out of the proceeding before the outcome of the litigation is known. Class members must elect to be bound by the judgment on the common issues, whether by settlement or a decision of the court, and whether favourable or unfavourable. *A class member is not permitted to wait on the sidelines and make their decision after knowing the results of the litigation.* [Emphasis added].[4]

Branch also stated, at para. 10.130, relying on ***1250264 Ontario Inc. v. Pet Valu Canada Inc., 2013 ONCA 279***, and ***Cannon***, that, with respect to authorizing new opt-outs "... the court may order special relief in extraordinary circumstances where the process is found to be compromised." I find no compromise in the case at Bar. Additionally, relying on ***Quenneville v. Volkswagen Group Canada Inc.***,2018 ONSC 1020, Branch noted that "a court may decline to allow class members to opt-out after the deadline".

[35] However, returning to the above referenced footnote in ***Bancroft-Snell***, Perrell J. also noted that "In contrast, under Quebec law each new settlement provides an opportunity to opt-out but not back into an authorized [certified] class proceeding". Corriveau J. noted this at para. 7 of ***9085-4866 Quebec***. The former situation applies here outside Quebec, because neither Walmart nor Home Depot opted out after certification. This is determinative for this action. However, for the future this should provide cautions for class members to make a decision – indeed, submissions to the court as to opt-out provisions, when the opportunity presents itself in the context of the certification order, or be bound to ride out the proceedings. Specifically, as a matter of policy, all participants in future cases should consider whether the Quebec position is a more just way to deal with this, and to ask the Court to allow, in a certification order, an ability to opt-out of a future settlement. I know of no legislative or jurisprudential reason why that could

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[3] Now Mr. Justice Branch of the British Columbia Supreme Court.

[4] ***Jones v. Zimmer GMBH***, 2016 BCSC 1847, at para. 58; ***Cannon v. Funds for Canada Foundation***, 2014 ONSC 2259.

not happen in individual cases, although that is for a future case, as it does not apply here, and, thus, these comments are merely *dicta*.

[36] In ***Hello-Baby***, Barrington-Foote J. (paras. 43 & 46) effectively rejected the objections to the form of notice and the opt-out provisions, noting that Plaintiffs' Counsel argued they were a "collateral attack on the prior orders" and that Weatherill J. had noted that the time had passed.

CONCLUSION

[37] In this analysis, I find that, even with more detailed considerations of the release of future claims and the opt-out arguments, the positions of Wal-Mart and Home Depot must be rejected and the approval of the settlement confirmed.

Heard on the 23rd day of August, 2018.
Dated at the City of Edmonton, Alberta this 13th day of March, 2019.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

Reidar Mogerman
Jen Winstanley
Chelsea Hermanson
for the Plaintiff

Robert Kwinter
Jeffrey Simpson
James Musgrove
Sean Griffin
Antoine Brylowski
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for the Defendants