IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Kelly Anne Wood & Joanne Sirois v. Desjardins Financial Security Life Assurance Company et al.
2025 NBKB 041 ***MC/265/2022***

BETWEEN:

KELLY ANN WOOD & JOANNE SIROIS,

– and –

DESJARDINS FINANCIAL SECURITY LIFE ASSURANCE COMPANY, ALLSTATE INSURANCE COMPANY OF CANADA, AVIVA GENERAL INSURANCE COMPANY, AIG INSURANCE COMPANY OF CANADA, CAA INSURANCE COMPANY, CO-OPERATORS GENERAL INSURANCE COMPANY, PAFCO INSURANCE COMPANY, INTACT INSURANCE COMPANY, TD HOME AND AUTO INSURANCE COMPANY, SONNET INSURANCE COMPANY, ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, SECURITY NATIONAL INSURANCE COMPANY, THE PERSONAL INSURANCE COMPANY, PEMBRIDGE INSURANCE COMPANY, RBC INSURANCE COMPANY OF CANADA, DEFINITY INSURANCE COMPANY, and THE WAWANESA MUTUAL INSURANCE COMPANY

DECISION

BEFORE: Chief Justice Tracey K. DeWare

AT: Moncton, New Brunswick

DATE OF HEARING: January 30, 2025

DATE OF DECISION: February 18, 2025

APPEARANCES: Basia Sowinski & Michael Dull, for the Plaintiff;

John O'Cain, D. Geoffrey Machum, Remi Boudreau & Jason Woycheshyn, for Desjardin Financial & The Personal Insurance Company;

Leslie Mercer, for Allstate Insurance Company, Pafco Insurance Company & Pembridge Insurance Company;

Paul Martin, for Aviva General Insurance;

Erin Best & David Barry, for Co-operators General Insurance;

Jillian Kean, for CAA Insurance Company & Wawanesa Mutual Insurance Company;

Monica Zauhar & Stephanie Charlton, for TD Home and Auto Insurance Company & Security National Insurance Company;

Brenda Lutz, for Sonnet Insurance Company & Definity Insurance Company;

Renée Fontaine, for Intact Insurance Company & Royal & Sun Alliance Insurance Company.

DEWARE, C.J.

INTRODUCTION

[1] This is a motion pursuant to Rule 23.01(1)(a) of the New Brunswick ***Rules of Court*** seeking a determination of a question of law.

FACTS

[2] The Plaintiff, Kelly Ann Wood ("Ms Wood") is a resident of Prince Edward Island. On August 21, 2020, Ms. Wood was injured in an accident on an all-terrain vehicle in New Brunswick. The vehicle was insured under a New Brunswick Standard Automobile Owner's policy. As a result of injuries sustained, Ms. Wood received weekly indemnity benefits from the Defendant, Desjardins Financial Security Life Assurance Company ("Desjardins").

[3] Desjardins is one of several of the named defendants who are all insurance companies that have issued New Brunswick Standard Automobile Owner's Policies in the Province of New Brunswick. Desjardins is the moving party on this motion and the other defendants all support Desjardins' motion and corresponding relief sought.

[4] On May 2nd, 2022, Ms. Wood filed a Notice of Action with Statement of Claim Attached pursuant to the ***Class Proceeding Act***, RSNB 2011, c.125

("The ***CPA***"). Ms. Wood seeks to bring the action on behalf of a purported group of individuals who allege the defendant insurers have unlawfully deducted certain disability benefits from the weekly indemnity benefits they are entitled to under their respective Standard Automobile Owner's Policies.

[5] On February 26, 2024, Ms. Wood sought leave to amend the original action filed on May 2nd, 2022 to add Paula Joanne Sirois as an additional plaintiff. The Court granted Ms. Wood's request and allowed the amendment to add Ms. Sirois as a plaintiff in a written decision dated April 18th, 2024. Ms. Sirois is a resident of the Province of New Brunswick.

ISSUES

[6] The order sought by Desjardins is set out in the Notice of Motion at paragraphs 1-4 as follows:

> 1. Pursuant to Rule 23.01(1)(a) of the *Rules of Court*, NB Reg. 82-73 (the "*Rules of Court*"), determining the following question of law raised by the Statement of Claim and Amended Statement of Claim:
>
>   (a) is the within purported class proceeding a nullity by virtue of being commenced by an individual who is not a resident of New Brunswick, contrary to s. 3(1) of the Class Proceedings Act, RSNB 2011, c 125 (the "CPA")?
>
> 2. pursuant to Rule 37.10(a), disposing of the class proceeding portion of the action as against the Defendants and converting the within motion into a motion for judgment and granting judgment in favour of the Defendants;
>
> 3. pursuant to Rule 59.08(1)(b), for costs on the within motion payable to the Desjardins Defendants by the Plaintiffs forthwith; and
>
> 4. for such further and other relief as this Honourable Court deems just.

POSITIONS OF THE PARTIES

[7] Desjardins suggests the current action is fatally flawed and is in fact a nullity. Desjardins maintains a condition precedent to the commencement of any class proceeding is the requirement under section 3(1), that an individual who wishes to commence an action pursuant to the ***CPA*** must be a resident of New Brunswick. Desjardins asserts the fact Ms. Wood is unable to meet this threshold requirement renders the May 2022 Notice of Action with Statement of Claim Attached, as well as the subsequent amendment, null and void.

[8] Ms. Wood rejects the position of Desjardins and points out the ***CPA*** is a procedural vehicle which sets out the process for class actions in New Brunswick. Ms. Wood argues Desjardins is asking this Court to strike this claim, which would have a significant impact on the substantive rights of Ms. Wood, Ms. Sirois and all potential class members based upon a procedural irregularity. Ms. Wood submits any irregularity in the pleading as originally filed can be cured by the various provisions of the ***CPA*** which grant the Court discretion in dealing with class proceedings to make such orders, which are necessary to ensure the litigation can be fairly and efficiently adjudicated in compliance with the remedial nature of the ***CPA***. Finally, Ms. Wood points out she was injured in New Brunswick and has received benefits under a New Brunswick Standard Automobile Owner's

Policy. The only jurisdiction where Ms. Wood can seek the relief as set out in this action is New Brunswick.

LAW AND ANALYSIS

[9] There are several sections of the ***CPA*** that are germane to the current question before the Court. In particular, the following:

> 3(1) One member of a class of persons **who are resident in New Brunswick** may commence a proceeding in the court on behalf of the members of that class.
>
> (…)
>
> 3(5) The court may appoint a person who is not a member of the class as the representative plaintiff for the class only if, in the opinion of the court, it is necessary to do so in order to avoid a substantial injustice to the class.
>
> (…)
>
> 8(2) A class that comprises persons resident in New Brunswick and persons not resident in New Brunswick shall be divided into resident and non-resident subclasses.
>
> (…)
>
> 11 If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may
>
> (a) order the addition, deletion or substitution of parties,
>
> (b) order the amendment of the pleadings or the Notice of Application, and
>
> (c) make any other order it considers appropriate.
>
> (…)
>
> 14 **At any time, the court may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms or conditions the court considers appropriate.**
>
> (…)

18(3) Subject to subsection (5), a person who is not a resident of New Brunswick and who would otherwise be a member of a class involved in the class proceeding may opt into the class proceeding

> (a) in the manner and within the time specified in the certification order, or
>
> (b) with leave of the court and on the terms or conditions the court considers appropriate.

(…)

18(5) A person shall not opt into a class proceeding under subsection (3) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements set out in paragraphs 8(1)(a), (b) and (c).

41(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when

> (a) a ruling is made by the court refusing to certify the proceeding as a class proceeding,
>
> (b) the class member opts out of the class proceeding,
>
> (c) an amendment is made to the certification order that has the effect of excluding the class member from the class proceeding,
>
> (d) a decertification order is made under section 12,
>
> (e) the class proceeding is dismissed without an adjudication on the merits,
>
> (f) the class proceeding is discontinued with the approval of the court, or
>
> (g) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

41(2) If there is a right of appeal in respect of an event described in paragraphs (1)(a) to (g), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

41(3) If the running of a limitation period is suspended under this section and the period has less than six months to run when the suspension ends, the limitation period, despite anything in this section, is extended to the day that is six months after the day on which the suspension ends.

[Emphasis mine]

[10] Desjardins seeks relief pursuant to section 23.01 of the New Brunswick ***Rules of Court*** which provides as follows:

> 23.01 Where Available
>
> (1) The plaintiff or a defendant may, at any time be- fore the action is set down for trial, apply to the court
>
> (a) for the determination prior to trial, of any question of law raised by a pleading in the action where the determination of that question may dispose of the action, shorten the trial, or result in a substantial saving of costs,
>
> (b) to strike out a pleading which does not disclose a reasonable cause of action or defence, or
>
> (c) for judgment on an admission of fact in the pleadings, in the examination of an adverse party, or in answer to a Request to Admit Facts;
>
> (2) A defendant may, at any time before the action is set down for trial, apply to the court to have the action stayed or dismissed on the ground that
>
> (a) the court does not have jurisdiction to try the action,
>
> (b) the plaintiff does not have legal capacity to commence or continue the action, or
>
> (c) another action is pending in the same or another jurisdiction between the same parties and in respect of the same claim.
>
> (d) New Brunswick is not a convenient forum for the trial or hearing of the proceeding.

[11] Desjardins suggests that section 3(1) of the ***CPA*** requires the representative plaintiff to be a resident of New Brunswick. Desjardins points the Court to jurisprudence from other provinces where similar residency requirements are found in their legislation governing class proceedings. Desjardins highlights the comments of Justice Fitzpatrick in ***Dominguez v. Northland Properties Corp***, 2012 BCSC 539 at paragraphs 11 and 12:

> [11] A starting point is to consider the provisions of the Act. Section 2(1) provides: "One member of a class of persons who are resident in

> British Columbia may commence a proceeding in the court on behalf of the members of that class."
>
> [12] It is readily apparent that **the only requirement under the Act is that a person be a resident at the time of the commencement of the litigation**, rather than that person being a resident throughout the entirety of the litigation. Accordingly, there is no statutory bar to Ms. Dominguez continuing as the representative plaintiff for the resident class.
>
> [Emphasis mine]

[12] Both parties directed the Court to the British Columbia Court of Appeal's consideration of the residency requirements under their class proceedings statute in ***MM Fund v. Excelsior Mining Corp.***, 2024 BCCA 163, ("***MM Fund***"). Desjardins relies upon ***MM Fund*** as authority for the proposition that the residency requirement set out in section 3(1) of the ***CPA*** is a standing provision. Desjardins directs the Court to paragraphs 80 and 81 of the ***MM Fund*** as follows:

> [80] The purpose of a standing provision is to delineate who is entitled to bring an action to court for decision. As I noted at the outset, limitations on standing may be necessary for many reasons. These include helping to ensure the effective operation of the court system as a whole and prevent it from becoming overburdened: Downtown Eastside Sex Workers at paras. 1, 26.
>
> [81] In my view, **the purpose of s. 2(1) of the Class Proceedings Act is to limit standing** to bring a putative class action to the British Columbia courts for decision to members of the public of British Columbia, namely, British Columbia residents. Although, as discussed in Harrington CA and reflected in the Class Proceedings Act, non-residents may be entitled to "piggyback" onto such claims and thus gain access to this attractive forum, ***s. 2(1) is intended to limit entitlement to initiate them to members of the public served by the courts of British Columbia***.
>
> [Emphasis mine]

[13] Desjardins likewise directs the Court to Justice Gerein's consideration of the Saskatchewan class proceedings legislation in ***Frey v. BCE Inc.***, 2006 SKQB 331 at paragraph 13:

> [13] The argument reads into the section something which is not there. From an ordinary reading of the section one can reasonably conclude that what is intended is four things. That there be a class and that the class action be commenced by at least one person. See Hoffman v. Monsanto Canada Inc. (2002), 2002 SKCA 120 (CanLII), 227 Sask. R. 63 (C.A.) at para. 13. **However, that person must meet two conditions: namely, be a member of the class and be a Saskatchewan resident**. It must be remembered that the section is concerned only with commencement of the action and not who may participate in it.
>
> [Emphasis mine]

[14] Desjardins submits the failure to comply with section 3(1) of the ***CPA*** at the time of the filing of the action renders the procedure null and void with no ability to cure the fatal defect. Desjardins refers the Court to various decisions on the law of nullity in support this proposition. The Court is directed to the observations of Lord Denning in ***MacFoy v. United Africa Co. Ltd.***, [1962] A.C. 152, [1961] 3 AII E.R. 1169 at paragraph 3:

> The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So, will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.

[15] Desjardins similarly refers the Court to the English Court of Appeal's consideration of "classes of nullity" in ***Re Pritchard; Pritchard v. Deacon et al.***, [1963] Ch. 502, [1963] 2 W.L.R. 685, [1963] 1 AII E.R. 873 at p. 883:

> The authorities do establish one or two classes of nullity such as the following. There may be others, through for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with: see e.g., Whitehead v. Whitehead (otherwixe Vasbor), [1962] 3 AII E.R. 800; (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement; see e.g., Finnegan v Cementation Co. Ltd., [1953] 1 AII E.R. 1130

[16] There is also precedent from our own province dealing with the issue of nullity. In ***New Brunswick Electric Power Commission v. Irving Oil Ltd.***, [1979] 34 NBR (2d) 42, 1979 CarswellNB 98 (NBCA), Chief Justice Hughes dismissed a proceeding on the basis that it was a nullity as it had been improperly initiated. Chief Justice Hughes noted at paragraph 33 as follows:

> [33] In my opinion there was in the instant case a fundamental defect in the way the proceedings were commenced, and that the application should have been dismissed on that ground.

[17] In ***Doyle v. Parkhill***, [1982] 39 NBR (2d) 598, 1982 CanLII 4222 (NBCA), Chief Justice Hughes again considered the issue of nullity determining that when there is a legislative requirement which sets a pre-condition for a cause of action, failure to satisfy those pre-conditions renders the proceeding null. The issue in ***Doyle*** was the plaintiff required and sought an order to serve the action outside the jurisdiction but proceeded to effect service before the requested order was obtained. In concluding that the matter was rendered a nullity, Chief Justice Hughes stated at paragraph 15 as follows:

> 15 I have already stated that in my opinion a writ of summons for service out of the jurisdiction which has been issued without leave of the court or a judge is a nullity because the order is a condition precedent to

> the issue of the writ. It follows that an order made subsequent to the issue of the writ cannot validate what in law is a nullity. In my opinion this case falls clearly within the second class of nullities referred to by UpJohn, L.J., in Re Pritchard (…)

[18] Desjardins suggests the Supreme Court of Canada's guidance in ***CIBC v. Green***, 2015 SCC 60, where Justice Côté discussed the consequences of failing to comply with the statutory prerequisites to the commencement of class proceedings at paragraphs 48-50 as follows is helpful to the current analysis:

> [48] Section 28 CPA requires "a cause of action asserted" in order for the limitation period to be suspended in favour of the class members "on the commencement of the class proceeding". Section 138.8(1) OSA is clear, however: "No action may be commenced under s. 138.3 without leave of the court . . . ." On its face, the timing is clear. Unless leave is granted, a statutory action may not be commenced under Part XXIII.1 OSA, and it is not until the action commences that a limitation period can be suspended under s. 28 CPA. In short, I am of the view that, under s. 138.8(1) OSA, a statutory action commenced without having first obtained leave is a nullity and a statutory claim under Part XXIII.1 OSA cannot be validly commenced without leave of the court. Therefore, the limitation period cannot be suspended in favour of the class members under s. 28 CPA before leave is granted.
>
> [49] The Court of Appeal's ruling in the instant cases, if accepted, would create unnecessary inconsistencies between the two pieces of legislation and within the OSA itself. The result of Feldman J.A.'s interpretation is that a plaintiff proceeding by way of a class action would have more rights than a plaintiff suing in his or her individual capacity. Yet class actions are merely procedural vehicles, designed to extend the substantive rights of the representative plaintiff to the entire class, not to create substantive rights for the class which an individual plaintiff would not otherwise enjoy since they do not exist.
>
> [50] It is also quite troubling that the effect of the Court of Appeal's ruling in the instant cases is that a class proceeding asserting a statutory cause of action can commence before a judge has granted the initial leave to allow the statutory action itself to commence. This is plainly putting the cart before the horse: a class proceeding cannot commence before the action itself commences.

[19] Ms. Wood asserts Desjardins has erroneously equated statutory prerequisites such as the need to obtain leave of the Court to proceed as

was considered in ***CIBC*** with the residency requirement under section 3(1) of the ***CPA***, which is merely a regulatory measure. Ms. Wood points out her substantive right to bring her claim exists independently of the ***CPA***. Ms. Wood maintains that section 3(1) of the ***CPA*** is procedural, not substantive. Ms. Wood suggests Desjardins' reliance on ***CIBC*** in support of the assertion the present action is a nullity is misplaced. Ms. Wood points out findings of nullity are reserved for defects that strike at the heart of a cause of action. However, in the current matter, the alleged defect before the Court is one which can be remedied within the various provisions of the ***CPA***.

[20] The Supreme Court of Canada considered the argument that a standing issue precluded an action from proceeding as a class action in ***Bank of Montreal v. Marcotte***, 2014 SCC 55, [2014 2 SCR 725. In ***Marcotte***, a class action was launched by consumers to recover conversion charges from several banks related to the credit cards they issued. The defending banks argued that since the representative plaintiff did not have a direct cause of action against each of them, the representative plaintiff did not have standing to sue all of them. The Supreme Court of Canada in ***Marcotte*** set out the following observations concerning questions of standing as they relate to class proceedings at paragraphs 42, 43 and 44 as follows:

> [42] Standing in the context of class actions must be analyzed through the lens of the criteria for authorization of class actions set out in the CCP. That analysis must have the same outcome regardless of whether it is conducted before or after the class action is authorized. As stated above, determining whether art. 55 of the CCP is satisfied requires interpreting that provision harmoniously with the class action authorization criteria of art. 1003 in order to take into account the collective nature of class actions. The nature of the interest necessary to establish the standing of the

representative must be understood from the perspective of the common interest of the proposed class, and not solely from the perspective of the representative plaintiffs. The legal principles that govern a challenge to standing should be the same whether the challenge occurs at the authorization stage or at the merits stage, because, at both stages, the court must look to the authorization criteria of art. 1003 to resolve the issue. The difficulty of concluding otherwise is well illustrated in this case, where, by this reasoning, the entire class action could have been halted at the authorization stage had the Banks contested standing at that time instead of at the merits stage.

[43] Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action. **The focus under art. 1003 of the CCP is on whether there are identical, similar or related questions of law or fact; whether there is someone who can represent the class adequately; whether there are enough facts to justify the conclusion sought; and whether it is a situation that would be difficult to bring with a simple joinder of actions under art. 67 of the CCP** or via mandatary under art. 59 of the CCP. As noted in Infineon Technologies AG v. Option consommateurs, 2013 SCC 59, [2013] 3 S.C.R. 600, this Court has given a broad interpretation and application to the requirements for authorization, and "the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation" (para. 60). Article 1003(d) still requires the representative plaintiff to be "in a position to represent the members adequately". **Under this provision, the court has the authority to assess whether a proposed representative plaintiff could adequately represent members of a class against defendants with whom he would not otherwise have standing to sue**.

[44] In addition, reading art. 55 of the CCP harmoniously with the requirements of art. 1003 is in line with this Court's jurisprudence on art. 4.2 and proportionality more generally. In Vivendi Canada Inc. v. Dell'Aniello, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court recently confirmed that the principle of proportionality is an important factor in civil procedure, one that "must be considered in the assessment with respect to each of [the] criteria" found under art. 1003 (para. 66). This principle reinforces the judicial discretion already found in the language of art. 1003 (Vivendi, at paras. 33 and 68). The importance of the proportionality requirement of art. 4.2 has been underlined in Marcotte v. Longueuil (City), 2009 SCC 43, [2009] 3 S.C.R. 65, in a passage that seems particularly apt in the context of the function of class actions:

> Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. [para. 43]

[Emphasis mine]

[21] Th Supreme Court of Canada confirmed the procedural nature of class action legislation in ***Bou Malhab v. Diffusion Métromédia CMR inc.***, 2011 SCC 9 (CanLII), [2017] 1 SCR 214 at paragraph 52 as follows:

> [52] **This Court has stated on several occasions that a class action is merely a procedural vehicle** and that its use does not have the effect of changing the substantive rules applicable to individual actions (Bisaillon v. Concordia University, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 105-8; St. Lawrence Cement, at para. 111). In other words, the class action mechanism cannot be used to make up for the absence of one of the constituent elements of the cause of action. A class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings.
>
> [Emphasis mine]

[22] In determining whether or not the residency requirement as set out in section 3(1) of the ***CPA*** is indeed a threshold standing provision as argued by Desjardins, it is necessary to consider the object and spirit of the legislation. In the context of class proceedings, the Supreme Court of Canada had the opportunity to consider how this type of legislation should be approached in the context of interpretation. In ***Endean v. British Columbia***, 2016 SCC 42 (CanLII) at paragraphs 29 and 30. Justice Cromwell noted as follows:

> [29] The grammatical and ordinary sense of these provisions leaves little doubt that the legislatures **intended judges in class proceedings to have, and to exercise, broad, discretionary powers to manage the proceedings to ensure their "fair and expeditious determination**".
>
> [30] The object and scheme of the Acts also support this broad interpretation of s. 12 of the Acts. As this Court observed in Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534, class proceedings are intended to improve access to justice through the efficient and judicially economical disposition of litigation: paras. 27-28. A broad interpretation of s. 12 of the Acts furthers this object of class action legislation: ibid. A broad interpretation of these provisions is also faithful to this Court's interpretation of the Ontario legislation in Hollick v.

> Toronto (City), 2001 SCC 68, [2001] 3 S.C.R. 158, where it found that the Ontario Class Proceedings Act, 1992 "**should be construed generously**": para. 14. As this Court noted in that same case, "it is essential therefore that courts not take an overly restrictive approach to the legislation, **but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters": para. 15.**
>
> [Emphasis mine]

[23] In ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42, 2002 CarswellBC 851, Justice Iacobucci reviewed the modern approach to statutory interpretation commenting at paragraphs 26 and 27 as follows:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, Stubart Investments Ltd. v. The Queen, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, at p. 578, per Estey J.; Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours, 1994 CanLII 58 (SCC), [1994] 3 S.C.R. 3, at p. 17; Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at para. 25; R. v. Araujo, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> 27 **The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute**: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". **This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive**. In such an instance, the application of Driedger's principle gives rise to what was described in R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52,

> as “the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter”. (See also Stoddard v. Watson, 1993 CanLII 59 (SCC), [1993] 2 S.C.R. 1069, at p. 1079; Pointe-Claire (City) v. Quebec (Labour Court), 1997 CanLII 390 (SCC), [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J
>
> [Emphasis mine]

[24] Ms. Wood argues the interpretation of section 3(1) of the ***CPA***, as is suggested by Desjardins, flies in the face of the spirit and intent of the class proceedings legislation. Ms. Wood refers the Court to the Hansard report from the New Brunswick Legislature a the time the ***CPA*** was enacted. In particular, Ms. Wood draws the Court’s attention to the following commentary:

> Bill 50: This Act establishes a legal framework for bringing class actions in New Brunswick. It is designed to provide a cost-effective way of handling litigation in which large numbers of people have the same claim against the same defendant, especially if the claims, individually, are small. The legislation is based on a model that is already operational in several other provinces. New Brunswick will, therefore, have the benefit of precedents from elsewhere as they apply this legislation to claims brought in New Brunswick.
>
> …
>
> The general structure of the Act is to allow a single member of the affected class to come forward, seeking appointment as the representative plaintiff and asking the court to certify the proceedings as a class proceeding. The Act sets out the factors that the court must consider in deciding whether to certify the proceedings or not. If the court does certify the proceedings as a class proceeding, the representative plaintiff then handles the proceeding on behalf of all member of the class. Some parts of the proceedings will involve common issues — the issues that affect all class members equally. The common issues will be determined by a single ruling that binds all class members. In addition, in many cases, there may also be individual issues that affect different members of the class differently. These will be determined in the most cost-effective way possible, and this will often require individual class members to become directly involved in proving the details of their own individual claims.
>
> …
>
> That is just an example. Had this bill been brought in earlier, there is the possibility that when individuals across this province felt they were being destroyed economically by auto insurance companies gouging them, those individuals could have brought a class action and got to the root of

> this. They could have had as many good reports and disbursements and lawyers on this as the insurance industry would have had. While it is tardy, it is worthy of passage.

[25] Chief Justice Drapeau, as he then was, had the opportunity to consider the nature and scope of the ***CPA*** in determining certification of the first class action in the Province was appropriate in ***Gay et al. v. Regional Health Authority 7 and Dr. Menon***, 2014 NBCA 10. In determining the motion's judge erred in refusing to certify a class proceeding under the ***CPA***, Chief Justice Drapeau commented at paragraphs 5, 6 and 46 as follows:

> [5] Class action legislation has been part of the legal landscape of this Province since 1982, beginning with Rule 14, a provision that admittedly suffered from sketchiness and vagueness. Since mid-2007, class actions are governed by statute. An action has yet to be certified as a class proceeding under the original statute or its successor, the Class Proceedings Act, R.S.N.B. 2011, c. 125, the Court of Queen's Bench having declined certification in all contested cases submitted for its consideration (see Bryson v. Canada (Attorney General), 2009 NBQB 204, 353 N.B.R. (2d) 1; O'Neill v. St-Isidore Asphalte Ltee, 2013 NBQB 72, 400 N.B.R. (2d) 111; and the case at bar).
>
> [6] Without in any way impugning the correctness or reasonableness of the first two decisions, that history stands in stark contrast with the Supreme Court of Canada's record of liberal interpretation and generous application of certification legislation to a wide array of alleged mass wrongdoing: Hollick v. Toronto (City), 2001 SCC 68, [2001] 3 S.C.R. 158, Rumley v. British Columbia, 2001 SCC 69, [2001] 3 S.C.R. 184, Western Canadian Shopping Centres Inc., 2001 SCC 46, [2001] 2 S.C.R. 534, Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57, [2013] S.C.J. No. 57 (QL), Sun-Rype Products Ltd. v. Archer Daniels Midland Company, 2013 SCC 58, [2013] S.C.J. No. 58 (QL), Infineon Technologies AG v. Option consommateurs, 2013 SCC 59, [2013] S.C.J. No. 59 (QL), and AIC Limited v. Fischer, 2013 SCC 69, [2013] S.C.J. No. 69 (QL**). It should go without saying that all courts are duty bound to do more than pay lip service to the principles that emanate from that authoritative jurisprudence.**
>
> [...]
>
> [46] **The provisions of the Class Proceedings Act stand to be interpreted with a view to furthering its objects: facilitating access to justice, modifying harmful behaviour and conserving judicial resources**. The Supreme Court of Canada has emphasized that the requirements for authorization of a class action under Quebec law have "on a consistent basis been interpreted and applied broadly" (see Marcotte v. Longueuil (City), 2009 SCC 43, [2009] 3 S.C.R 65, at para. 22 and

> Infineon Technologies, at para. 60). As was noted in those two cases**, the jurisprudence favours "easier access" to class actions as a means of achieving the twin goals of deterrence and victim compensation**. Despite the particular wording of Quebec class action legislation, there is no principled basis for a less generous approach to the interpretation and application of s. 6 of this province's Class Proceedings Act: Hollick, at paras. 14-16; Western Canadian Shopping Centres Inc., at paras. 26-29; Cloud v. Canada (Attorney General), v. Canada, 2004 CanLII 45444 (ON CA), [2004] O.J. No. 4924 (C.A.) (QL), at para. 37, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50; and Bryson, McNally J., at para. 7.
>
> [Emphasis mine]

[26] The Court of Appeal had the opportunity to more recently restate the necessity the ***CPA*** be construed generously in ***Scott, on behalf of herself and other class members v. Regional Health Authority B, Horizon Health Network, and Ruest***, 2024 NBCA 146 at paragraph 37 as follows:

> [37] We begin with a closer review of Hollick to underscore the fundamentals of why class proceedings have become a valuable procedural tool to efficiently and on a principled basis, deal with complicated cases involving plaintiffs whose potential claims have some basis in fact for common disposition. McLachlin C.J.C. writing for the Court, begins with the legislative history of the Ontario Act at issue in that case, which is very similar to the New Brunswick Act. **She makes clear that the legislation should be construed generously.** At para. 14, she notes it was adopted "to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era." She then turns to the three important advantages of a class action as a procedural tool as opposed to a multiplicity of individual proceedings:
>
> 1. To serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis;
>
> 2. To spread litigation costs amongst class members to make the prosecution of claims more economical given that any one class member would find it too costly to prosecute on his/her own;
>
> 3. To promote efficiency and justice by ensuring wrongdoers modify their behaviours to take full account of the harm caused to the public.
>
> [Emphasis mine]

[27] The interpretation of section 3(1) of the ***CPA*** as suggested by Desjardins would seem to fly in the face of the mandated approach to the interpretation of class action proceedings legislation. The determination Ms. Wood, as a non-resident, is unable to commence the action, thus rendering all proceedings to date a nullity, defeat the goals of the ***CPA*** and run counter to the procedural scope of the ***CPA***. Reading section 3(1) in conjunction with section 14 and 18(3) of the ***CPA*** provides this Court with some assurance there is an opportunity to correct the defect in this cas.

[28] It is necessary to consider the provisions of the ***CPA*** in their entirety. Section 14 of the ***CPA*** grants the Court wide discretion to issue necessary orders to ensure class proceedings may proceed to ensure the fair and expeditious determination of the matter. As pointed out by Ms. Wood, other courts have used similar discretionary authority under class proceedings legislation. In particular, Ms. Wood again refers the Court to the comments of Justice Cromwell in ***Endean v. British Columbia***, at paragraphs 27 to 30 as follows:

> [27] Section 12 of the Class Proceedings Act, 1992 in Ontario provides:
>
> > 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> [28] Section 12 of the Class Proceedings Act in British Columbia reads:
>
> > 12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious

> determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.
>
> [29] **The grammatical and ordinary sense of these provisions leaves little doubt that the legislatures intended judges in class proceedings to have, and to exercise, broad, discretionary powers to manage the proceedings to ensure their "fair and expeditious determination**".
>
> [30] **The object and scheme of the Acts also support this broad interpretation of s. 12 of the Acts**. As this Court observed in Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534, class proceedings are intended to improve access to justice through the efficient and judicially economical disposition of litigation: paras. 27-28. A broad interpretation of s. 12 of the Acts furthers this object of class action legislation: ibid. A broad interpretation of these provisions is also faithful to this Court's interpretation of the Ontario legislation in Hollick v. Toronto (City), 2001 SCC 68, [2001] 3 S.C.R. 158, where it found that the Ontario Class Proceedings Act, 1992 "should be construed generously": para. 14. As this Court noted in that same case, "***it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters": para. 15.***
>
> [Emphasis mine]

[29] It cannot be overlooked that the wording of section 14 of the ***CPA*** follows almost verbatim the wording of section 12 from the Ontario and British Columbia legislation. There is no doubt section 14 of the ***CPA*** accords this Court "*broad, discretionary power*" to manage proceedings filed pursuant to the ***CPA***, both prior and subsequent to certification. This is an important distinction.

[30] It is perhaps appropriate to pause for a moment and consider the provisions of the ***CPA*** which provide for the appointment of a non-resident representative plaintiff to represent the interests of a sub-class of non-resident members of the class. Section 8 of the CPA provides as follows:

> 8(1) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members

> requires that they be separately represented, the court, in addition to appointing the representative plaintiff for the class, may appoint for each subclass a representative plaintiff who, in the opinion of the court,
>
> (a) would fairly and adequately represent the interests of the subclass,
>
> (b) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the subclass and of notifying subclass members of the class proceeding, and
>
> (c) does not have, with respect to the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.
>
> 8(2) A class that comprises persons resident in New Brunswick and persons not resident in New Brunswick shall be divided into resident and non-resident subclasses.
> 2006, c.C-5.15, s.8

[31] Pursuant to section 8(2), Ms. Wood could be appointed as a representative plaintiff of the subclass of non-resident class members. Therefore, while undoubtedly section 3(1) of the ***CPA*** looks for a New Brunswick resident to be the representative plaintiff, the participation of non-resident representative plaintiffs is not a foreign concept within the legislation. The participation of non-resident representative plaintiffs has been contemplated within the ***CPA***.

[32] In the event the Court accepts Ms. Wood's submission that the ***CPA*** in its entirety is procedural, and any defect should be corrected by the Court to allow the action to proceed in furtherance of the goals of the ***CPA***, the question needs to be addressed as to how such an interpretation can be reconciled with decisions such as ***Dominguez***, ***MM Fund*** and ***Frey***.

[33] In ***Dominguez***, while Justice Fitzpatrick commented upon the residency requirement under the BC legislation, she did not review this issue in the context of a standing question as has been advanced in this matter. Further, Justice Fitzpatrick's comments in her decision lend themselves to a conclusion she considered the residency requirement a procedural issue. Further, Justice Fitzpatrick identified the statutory jurisdiction accorded to her under section 12 of the British Columbia legislation which is identical to section 14 under the New Brunswick ***CPA***. Justice Fitzpatrick states at paragraphs 20, 21 and 22 as follows:

> [20] Notwithstanding my comments as set out above, it is my view that it is entirely open to me at this time to revisit the matter of Ms. Dominguez's status as a representative in this proceeding. This is based not only on her changed circumstances, but also the recasting of the arguments and authorities that have been presented to me by Ms. Dominguez. **It is also consistent with my continuing statutory jurisdiction under s. 12 of the Act to make any order I consider appropriate regarding the conduct of a class proceeding to ensure its fair and expeditious determination.**
>
> [21] The argument of Ms. Dominguez that the Court may appoint her as the representative plaintiff in these circumstances without having to show "substantial injustice" in accordance with s. 2(4) of the Act was not one raised or addressed by the courts in Kotai, Frey or Pearson.
>
> [22] As at the certification hearing, the defendants rely again on the decision in L. (T.) v. Alberta (Director of Child Welfare), 2009 ABQB 96 at paras. 6-16. In that case, Mr. Justice Thomas held that it was necessary at that time following certification to appoint a representative for the non-resident class, preferably from its own ranks. He held that there was insufficient evidence upon which he could make a finding of "substantial injustice" which would have allowed the proposed representative plaintiff (who was not a non-resident) to continue. He directed that class counsel make further efforts to identify a suitable representative plaintiff from the ranks of the non-resident class members.
>
> [Emphasis mine]

[34] The ***Frey*** decision went to the Saskatchewan Court of Appeal for the consideration of other issues. The Court of Appeal in ***Frey*** makes it clear

the plaintiffs were given an opportunity to identify more suitable representative plaintiffs. The question of the suitability of the proposed representative plaintiff appears to have been considered as a procedural issue. In reviewing the history of the matter, Justice Smith of the Saskatchewan Court of Appeal in ***Frey v. Bell Mobility Inc.***, 2010 SKCA 38 (CanLII) stated at paragraph 2 and 6 as follows:

> [2] **Certification of the proposed action was initially denied by the certification judge in a fiat dated July 18, 2006** (2006 SKQB 328), on the basis that, although all the other criteria of s. 6 [now s. 6(1)] of The Class Actions Act, S.S. 2007, c. C-12.01 had been met, **the plaintiffs had failed to satisfy the requirements of s. 6(e), as all of the proposed representative plaintiffs were found to be unsuitable and the proposed litigation plan was inadequate**. The plaintiffs were given leave to renew their application to further address these deficiencies. In this fiat, Gerein J. held that a number of proposed causes of action were not supported by the pleadings. These included breach of contract, breach of duty to inform, deceit, misrepresentation and negligence, collusion and conspiracy, breach of fiduciary obligation, and breach of competition and consumer protection legislation. However, he concluded that the pleadings did disclose a cause of action for unjust enrichment in that, if the facts as pleaded were accepted as true, it was open to a court to find that the defendants had unlawfully obtained monies from the plaintiffs and must account for it.
>
> […]
>
> [6] Approximately eleven months later, **the plaintiffs renewed their application for certification, putting forward new proposed representative plaintiffs and a new litigation plan. By fiat dated September 17, 2007 [2007 SKQB 328] Gerein J. determined that the s. 6(e) deficiencies had been met and ordered that the action be certified**. Colin Chatfield, a resident of Saskatchewan, was designated as the sole representative plaintiff.
>
> [Emphasis mine]

[35] Ms. Wood argues the applicability of the ***MM Fund*** case must be considered in light of the differences between the British Columbia and the New Brunswick class proceedings legislation. Further, Ms. Wood points out that Desjardins relies upon ***MM Fund*** in support of their assertion that Ms.

Wood's failure to meet the residency requirements renders the proceeding null and void. Justice Fitzpatrick, who was the first instance judge, made the following observations ***in MM Fund v. Excelsior Mining Corp.***, 2022 BCSC 1541 (CanLII) at paragraphs 68 and 69 as follows:

> [68] Section 2(4) provides the Court with discretion to certify a non-member of the class as the representative plaintiff: Araya at para. 510. However, it must be shown that it is necessary to do so to "avoid a substantial injustice to the class". Vulnerability has been considered a potentially relevant factor in respect of that requirement: Bhangu #1 at para. 161, citing Dominguez v. Northland Properties Corp. (c.o.b. Denny's Restaurants), 2012 BCSC 539. MM has not brought forward such an application; nor are any aspects of vulnerability apparent in respect of MM or the class members. MM argues that any such application should be made at certification, not before. Accepting that is the case, MM has not indicated any such intention to do so and the Certification Application makes no mention of s. 2(4) of the CPA.
>
> [69] It is also unclear how ss. 4.1 and 12 of the CPA assist MM here. Neither of these sections can be said to alter the plain effect of s. 2(1) of the CPA. **Further, as this proceeding has not been certified as a class proceeding, s. 12 does not provide a basis upon which to exercise the Court's discretion at this time**: Apotex CA at para. 40.
>
> [Emphasis mine]

[36] While a subtle difference, the distinguishing features of the definition of "*class proceedings*" under the statutes of New Brunswick and British Columbia are important to consider. The ***CPA*** describes a class proceeding as follows:

> "Class proceeding" means a proceeding under the Act, even if a motion for certification of the proceeding **as a class proceeding has not yet been determined** by the court.
>
> [Emphasis mine]

The ***Class Proceeding Act***, RSBC 1996 C.50, in British Columbia describes a class proceeding as follows:

> "class proceeding" means a proceeding, including a multi-jurisdictional class proceeding, that **is certified** as a class proceeding under Part 2;

[Emphasis mine]

[37] The provisions as found in section 12 of the British Columbia ***CPA*** and section 14 of the New Brunswick ***CPA*** are identical and worthy of restating:

> 14 At any time, the court may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms or conditions the court considers appropriate.

[38] The New Brunswick ***CPA*** allows the Court to avail itself of the provisions of section 14 either before or after certification. This is in significant contrast to the British Columbia ***CPA*** which affords the Court the assistance of section 12 only in the context of certified class actions. The lower court judge in ***MM Fund*** acknowledged the provisions of section 12 of the British Columbia ***CPA*** were not available to her as the matter had not yet been certified. The situation is very different in the current matter as this Court is able to avail itself of the provisions of section 14 prior to certification.

CONCLUSION AND DISPOSITION

[39] In all of the circumstances and mindful of the guidance of the New Brunswick Court of Appeal and Supreme Court of Canada that class action legislation must be interpreted "*generously*" in order to ensure the goals of such legislation are met, Desjardins' motion is denied. I am unable to conclude pursuant to Rule 23.01(1)(a) of the ***Rules of Court*** that the purported class proceeding is a nullity by virtue of being commenced by an individual who is not a resident of New Brunswick. Section 3(1) of the ***CPA***

is a procedural requirement capable of correction in the event of non-adherence if in the discretion of the Court, such correction is appropriate to ensure the fair and expeditious determination of the issues. In the current circumstances, Ms. Wood is not precluded from participation in the class action, if certified, as a non-resident. The ***CPA*** envisions a situation where Ms. Wood can in fact be named as a representative plaintiff. While section 3(1) is unquestionably found in the ***CPA*** in order to incorporate some guardrails on who can commence a proceeding under the ***CPA***, it is not in my view a threshold or standing issue. In circumstances such as this where the individual proposed in the normal course is an appropriate participant in the proceedings, the potential harm perhaps sought to be caught by section 3(1) of the ***CPA*** is not triggered. Ms. Wood is otherwise not a stranger to the proceedings. In my view, the circumstances warrant an order pursuant to section 14 of the ***CPA*** to allow the action to proceed despite the procedural irregularity.

[40] For all the aforementioned reasons, it is the order of the Court as follows:

(a) The purported class proceeding is not a nullity by virtue of the fact that it was commenced by a non-resident, and therefore, Desjardins' request for a determination of a question of law pursuant to rule 23.01(a) of the ***Rules of Court*** is denied;

(b) Desjardins' request that the class proceedings portion of the action be dismissed pursuant to rule 37.10(a) is dismissed;

(c) Pursuant to section 14 of the ***CPA***, the purported class proceeding may continue with Joanne Sirois acting as a representative plaintiff, and pursuant to section 14 of the ***CPA***, Ms. Sirois shall be deemed to be the proposed representative plaintiff at the time of the initial filing on May 2, 2022, as well as at the time of any subsequent amendments;

(d) In the event this action is certified under section 6(1) of the ***CPA***, nothing in this decision shall preclude Ms. Wood's participation in the action as a class member, nor as a potential representative plaintiff of non-resident class members; and

(e) In all of the circumstances, there shall be no order as to costs.

DATED at Moncton, New Brunswick this 18th day of February 2025.

_____

Tracey K. DeWare,
Chief Justice of the Court of King's Bench
of New Brunswick