Federal Court

CANADA

Cour fédérale

Ottawa, Ontario
K1A 0H9

May 10, 2006

REGISTERED

Mr. E. F. Anthony Merchant
Merchant Law Group
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8

Dear Mr. Merchant:

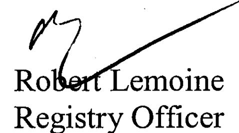
RE: Kenneth Dobbie et al v. Attorney General of Canada
Court File No: T-1193-05

Enclosed you will find the following document:

- Certified Copy of Reasons for Order and Order

of the Honourable Mr. Justice Kelen filed on May 3, 2006.

Yours truly,



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Federal Court

Cour fédérale

Date: 20060503

Docket: T-1193-05

Citation: 2006 FC 552

Ottawa, Ontario, May 3, 2006

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

KENNETH DOBBIE, CHARLES MCLEOD, STEWART MCLEOD, DERRICK WILLIAMS, JOHN WILLIAMS, and MARY WILLIAMS

Plaintiffs

and

**ATTORNEY GENERAL OF CANADA
MINISTER OF NATIONAL DEFENCE**

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion by the defendants for a stay of proceedings pursuant to section 50.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act) on the ground that the Crown desires to institute third party proceedings against Dow Chemical Company and Monsanto Company in respect of which the Federal Court lacks jurisdiction. In the event that the defendants are found liable to the plaintiffs in this proposed class action for the use of products manufactured by Dow and Monsanto, the defendants will claim contribution and indemnity from those manufacturers under the common law of negligence and applicable legislation of the province of New Brunswick. This motion raises the issue of whether the defendants' third party claim is outside the Federal Court's jurisdiction,

resulting in a mandatory stay of this action under section 50.1 of the Act to allow the plaintiffs to recommence the proceeding in a provincial court, which may be the Court of Queen's Bench of New Brunswick.

[2] The underlying proceeding is a proposed class action against the Crown commenced on July 12, 2005 by the six plaintiffs who claim to have sustained injurious health effects by reason of the defendants' negligent spraying of harmful chemicals including Agent Orange at the Canadian Forces Base (CFB) located at Gagetown, New Brunswick from 1965 to 1983. The named plaintiffs are residents of Nova Scotia, Newfoundland and Labrador, New Brunswick, and Ontario who suffer various personal harms because the defendants directly or indirectly exposed them to harmful chemicals.

Statement of Claim

[3] The plaintiffs' statement of claim alleged that the defendants are liable in tort for, *inter alia*, negligence and occupier's liability. The plaintiffs seek compensatory damages, punitive and aggravated damages, and costs. The relationships of the defendants to the plaintiffs claimed to give rise to a duty of care are, or are analogous to:

A. an employer to employee to provide a reasonably safe working environment;

B. a negligent builder to subsequent owner for reasonable costs of repairing dangerous defects;

C. a neighbour to other neighbour to take reasonable care to avoid acts that injure property;

D. an occupier of land to invitee;

E. a defendant to plaintiff where the defendant's act foreseeably causes physical harm or damage to property; and

F. a negligent tortfeasor to the foetus of a pregnant mother.

[4] The plaintiffs claim the defendants repeatedly sprayed carcinogenic chemicals (the chemicals) and deposited barrels containing those chemicals in soil on and around CFB Gagetown over a 27-year span from 1956 to 1983. Agent Orange, Agent White and Agent Purple are alleged to have been sprayed over several weeks in 1966 and 1967 on the base by aircraft (test sprayings). Other chemicals are alleged to have been approved and used by the defendants in an annual defoliant program on the base. The chemicals, including Agents Orange, White and Purple, are defoliants and desiccants containing dioxin, a known cancer-causing agent. The plaintiffs' statement of claim alleged that the chemicals cause deleterious health effects:

> 33. The Defendant sprayed Agent White at Gagetown at various times between 1965 and 1983. Agent White contains picloram. Picloram contains Hexachlorobenzene (HCB).
>
> 34. HCB is a white crystalline solid which is a persistent, bioaccumulative, toxic chemical which causes severe health problems in humans including damage to bones, kidneys, blood cells, immune system, and which lowers the survival rates of young children, causes abnormal foetal development, harms the liver endocrine, and nervous system, and causes cancer.
>
> [...]
>
> 36. Agent Orange causes cancer. Agent Purple contains three times the cancer causing material found in Agent Orange. Both contain dioxin, a well known carcinogen. Exposure to small amounts can lead to devastating illnesses in men, women, and children including the prevention of birth, birth with deformities, and premature and wrongful death.

[5] The plaintiffs' statement of claim alleged that the chemicals caused them personal harm, including, *inter alia*:

i. plaintiff Kenneth Dobbie was directly exposed to the chemicals on his skin and in his lungs while employed at CFB Gagetown, and suffered peptic ulcers, toxic hepatitis, stomach ailments, acne, seizure, blackouts, pancreatitis, micronodular cirrhosis of the liver, prostatitis, a kidney stone and type-2 diabetes. To date, he has been hospitalized 16 times and requires periodic cancer screening tests every 3 months;

ii. plaintiff Stewart McLeod was employed by the defendants in the Black Watch at CFB Gagetown, was directly exposed to the chemicals on his head and clothes, and suffered injury to his sperm;

iii. plaintiff Charles McLeod, son of plaintiff Stewart McLeod, was born with deformed legs, knees and ankles, and suffered from scoliosis, abnormal curvature of the spine, abnormal red blood cell count, and a urinary tract infection. At the age of four months he required heart surgery, and was repeatedly hospitalized throughout his life;

iv. plaintiff Mary Williams was indirectly exposed to the chemicals and suffered type-2 diabetes;

v. plaintiff John Williams, son of Mary Williams, was indirectly exposed to the chemicals and suffered type-2 diabetes; and

vi. plaintiff Derrick Williams represents his father, John Williams, who was exposed to the chemicals, suffered hernias, arthritis and gout, and died in 1995 from a heart blockage.

Abridged Statement of Claim

[6] Since filing the original statement of claim, the plaintiffs have filed an amended statement of claim in anticipation of certification of a national class represented by plaintiff Kenneth Dobbie.

Third Party Claim

[7] On March 24, 2006 the defendants filed a *pro forma* third party claim against Dow and Monsanto. The defendants' third party claim alleged that the manufacturers were liable to the Crown for full contribution and indemnity and costs at common law and under applicable legislation of the province of New Brunswick because they produced the Agent Orange and other herbicides that were used in 1966 and 1967:

> 5. The third parties manufactured the Agent Orange and other herbicides identified in the *Amended Statement of Claim* as having been used in the 1966 and 1967 test sprayings.
>
> [...]
>
> 10. The third parties are liable to the defendants at common law, and under the New Brunswick *Tortfeasors Act*, R.S.N.B., c. T-8, for:
>
> (a) full contribution and indemnity in the event that the defendants are found liable to pay any amounts to any of the plaintiffs in the main action, including any amounts allowed for interest and costs; and
>
> (b) the defendants' costs of defending the main action.

The motion to stay proceedings in Federal Court

[8] The Crown brought this motion pursuant to section 50.1 of the Act which provides for a mandatory stay of a claim against the Crown, where the Crown desires to institute third party proceedings outside the jurisdiction of the Federal Court:

Stay of proceedings	Suspension des procédures
50.1 (1) The Federal Court shall, on application	**50.1** (1) Sur requête du procureur général du

of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction.

Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande reconventionnelle ou procéder à une mise en cause pour lesquelles la Cour n'a pas compétence.

Accordingly, the Crown must establish two preconditions for a stay:

1. a desire to institute a third party proceeding; and

2. its third party claim against Dow and Monsanto is outside the jurisdiction of the Federal Court.

Constitutional Question

[9] On April 3, 2006 the plaintiffs filed a Notice of Constitutional Question challenging the legality of section 50.1 of the Act, in the event that the Court grants the defendants' stay. The plaintiffs contend that section 50.1 interferes with the Federal Court's purpose for the better administration of the laws of Canada in national class actions and violates the constitutional imperative of fair and orderly working of the unified Canadian legal system set out by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. The Attorney General of Canada has responded to the constitutional challenge, whereas the Attorneys General of each province and territory have made no submissions to the Court.

ISSUES

[10] The four issues on this motion are:

1. Does the Crown genuinely intend to commence third party proceedings against Dow and Monsanto? ;

2. Does the Federal Court have jurisdiction to hear and determine the Crown's third party claims against Dow and Monsanto? ;

3. If the Federal Court lacks jurisdiction over the third party claim, does section 50.1 of the *Federal Courts Act* make the granting of a stay mandatory? ; and

4. Is section 50.1 of the *Federal Courts Act* unconstitutional and of no force and effect?

ANALYSIS

Issue No. 1: Does the Crown genuinely intend to commence third party proceedings against Dow and Monsanto?

[11] To satisfy the requirement for a stay under section 50.1 of the Act, the Crown's desire to institute the third party claim must be genuine. (See *Fairford First Nation v. Canada (Attorney General)*, [1995] 3 F.C. 165 (T.D.), aff'd 205 N.R. 380 (F.C.A.) per Justice Paul Rouleau at paragraph 11; and *Charalambous v. Canada* (2004), 128 A.C.W.S. (3d) 282 (F.C.) per Prothonotary Hargrave at paragraphs 4-6). In determining genuineness, the Court will consider:

1. the evidence of the desire to commence a third party proceeding;

2. whether the information provided about the proposed third party claim is clear or if it is vague and un-particularized; and

3. does the third party claim have any possible likelihood of success.

[12] In *Fairford*, Justice Rouleau stated at page 170:

> ...To begin with, I am not at all persuaded by the sincerity of the defendant' s desire to commence the third-party proceedings in question. The pleadings in this matter were closed on January 21, 1994, the date on which the defendant filed its statement of defence. ...However, no steps were taken by the Attorney General to initiate a third-party proceeding or a section 50.1 application at that time or any time prior to December 7, 1994. ...It would be improper however to deny the plaintiffs their right to a trial and possible remedy when there is no evidence before this Court to indicate the Attorney General is going to commence third-party proceedings against Manitoba.

In this case the defendants have actually filed a third party claim against Dow and Monsanto on March 24, 2006. The Crown has not delayed, as it did in *Fairford*, filing its third party claim or making this section 50.1 motion.

Evidence of desire to institute third party proceedings

[13] In the third party claim against the manufacturers Dow and Monsanto, the defendants plead elements of a cause of action in negligence:

> 5. The third parties manufactured the Agent Orange and other herbicides identified in the *Amended Statement of Claim* as having been used in the 1966 and 1967 test sprayings.
>
> 6. If any harm has been caused to any of the plaintiffs or proposed class members as alleged in the *Amended Statement of Claim*, then that harm was caused by the products manufactured by the third parties.
>
> 7. The use of these products as alleged in the *Amended Statement of Claim* was one of the uses that the third parties knew or ought to have known would be made of the products they manufactured.
>
> 8. The third parties knew or ought to have known that use of these products as alleged in the *Amended Statement of Claim* was likely to cause the harm as alleged in the *Amended Statement of Claim*.

9. Liability for any harm that has been caused to any of the plaintiffs or proposed class members rests entirely with the third parties.

In my view, this is sufficient to establish that the Crown intends to take third party proceedings against the manufacturers.

Vague and un-particularized allegations

[14] In *Fairford*, above, Justice Rouleau found that the Crown's information about an intended third party claim was "extremely vague" and did not contain any particulars. In *Charalambous*, Prothonotary Hargrave found that the Crown's intent to commence third party proceedings was so vague and un-particularized that he found that the Crown did not really intend to commence third party proceedings. In the case at bar, the third party claim has actually been filed *pro forma*. While it is lacking in particulars, it is sufficient to show the general basis of the claim. The plaintiffs submit that the third party claim does not properly plead a cause of action in negligence, and relies upon the Federal Court of Appeal in *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.* (2005), 144 A.C.W.S. (3d) 726 (F.C.A.). I agree but at the stage of this motion for a stay the Court does not require that the third party notice plead the particulars of the negligence that would satisfy the ordinary rules of pleading.

[15] Further evidence that the claim has a rational basis is in the U.S. class action against Dow and Monsanto by Vietnam veterans for damages suffered as a result of their exposure to Agent Orange and other chemicals. This action was settled for 180 million dollars. While this settlement is no precedent for liability, it illustrates the rationale for the claim.

[16] The plaintiffs submit that the defendants' third party claim is disingenuous because it is limited to chemicals supplied during two years of the 18 years alleged in the statement of claim. In its third party claim, the Crown claims against Dow and Monsanto because it believes that Agent Orange and the other dangerous chemicals were only used during the test aerial sprayings in 1966 and 1967. At the hearing, the defendants stated that if the facts demonstrate that chemicals manufactured by Dow and Monsanto were used for a longer period, its third party claim would accordingly expand. It is not for this Court to speculate on whether the third party claim is likely to account for the defendants' liability in totality or only in part. The fact remains that the defendants seek to claim against third parties in a cause of action. The defendants' intent to do so is not any less genuine by reason that the parties are not certain of the scope of the third parties' liability.

Likelihood of success in third party proceeding

[17] The Court will not deny the stay by reason that the plaintiffs allege the third party claim is without reasonable chance of success. It would be inappropriate for the Court to assess the reasonable likelihood that the claim will succeed because it falls to the provincial superior court to decide the merits. In this regard, I agree with the comments of Justice Hugessen in his Order dated November 25, 2005 denying a motion to dismiss third party notices in *Aussant v. Canada (Minister of Health and Welfare)* (Court File No. T-2442-98) where the applicable superior court was the Saskatchewan Court of Queen's Bench:

> ... In those circumstances any opinion I may have as to the possible success or failure of the third party claims, besides being an *obiter dictum*, could only be a source of embarrassment and mischief to the Saskatchewan courts which would then in any event be called upon to deal anew with the same questions.

In deciding this motion, any speculation of this Court as to the merits of the defendants' claim against Dow and Monsanto would similarly obstruct the superior court in the exercise of its jurisdiction. For this reason, I take no view as to the merits of the Crown's third party claim.

[18] At the same time, the Court will find the third party claim disingenuous if it plainly has no possibility of success. That is a much lower threshold which the Court should examine in deciding whether a third party claim is genuine. In this case, I cannot say that the third party claim has no possibility of success.

[19] For these reasons, I conclude that the Crown's desire to institute a third party claim is genuine.

<u>Issue No. 2</u>: Does the Federal Court have jurisdiction to hear and determine the Crown's third party claims against Dow and Monsanto?

[20] For the Federal Court to have jurisdiction, a cause or matter must satisfy the three-part test articulated by Mr. Justice McIntyre for the Supreme Court of Canada in *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 766:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament;
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction;
>
> 3. The law on which the case is based must be a "law of Canada" as the phrase is used in s. 101 of *The Constitution Act, 1867*.

[21] It is common ground that this action between the plaintiffs and defendants is within the jurisdiction of the Federal Court under subsection 17(1) of the Act, which grants Federal and Superior Courts concurrent original jurisdiction in cases where relief is claimed against the Crown:

Relief against the Crown	Réparation contre la Couronne
17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.	**17.** (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

[22] In this case, the Crown claims third party relief against other parties in a civil proceeding. Parliament has granted the Federal Court concurrent original jurisdiction over these matters under paragraph 17(5)(a) of the Act:

17. [...]	**17.** [...]
Relief in favour of Crown or against officer	Actions en réparation
(5) The Federal Court has concurrent original jurisdiction	(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées:
(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; [...]	a) au civil par la Couronne ou le procureur général du Canada; [...]

However, this statutory grant of jurisdiction is limited to those matters satisfying the balance of the *ITO* test, being causes governed by an existing body of federal law essential to their disposition, which law is a "law of Canada" within the meaning of section 101 of *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.).

[23] In *Stoney Band v. Canada (Minister of Indian Affairs and Northern Development)* (2005), 337 N.R. 265 (F.C.A.), Chief Justice Richard reaffirmed the principle in *Roberts v. Canada*, [1989] 1 S.C.R. 322 that the second and third parts of the ITO test overlap. In *Stoney Band*, the Chief Justice wrote for the majority of the Court (Justice Noël concurring; Justice Nadon dissenting on other grounds) at paragraph 24:

> ¶ 24 In Roberts v. Canada, [1989] 1 S.C.R. 322, the Supreme Court of Canada recognized that there is an overlap between the second and third elements of the ITO test, and in particular:
>
> > ... the second element requires a general body of federal law covering the area of the dispute ... and the third element requires that the specific law which will be resolutive of the dispute be a "law of Canada" within the meaning of s. 101 of the Constitution Act, 1867.

[24] There is no general body of federal law covering the area of the dispute in this case. The Crown's third party claim against the manufacturers Dow and Monsanto is governed entirely by the common law of negligence and New Brunswick's *Tortfeasors Act*, R.S.N.B., c. T-8. The *Tortfeasors Act* is a law passed by the legislature of New Brunswick in relation to property and civil rights in the province under subsection 92(13) of *The Constitution Act, 1867*, for which reason it is not a "law of Canada". Therefore, the Crown's third party claim against Dow and Monsanto does not meet the second and third parts of the *ITO* test and is outside the jurisdiction of the Federal Court.

[25] The plaintiffs submit that the provincial laws are only incidentally necessary to resolve the third party issues. If this were the case, the Court could assume jurisdiction over the third party claim. The Federal Court of Appeal considered this issue in *Stoney Band*. The Chief Justice found

the common laws of the province in that case (conversion, conspiracy and negligence) cannot be characterized as "incidentally necessary". Chief Justice Richard held at paragraph 41:

> They are, in fact, the very laws under which Canada asserts its entitlement to indemnity, contribution, or damages. Canada's claims are in "pith and substance" based on provincial common law. If anything, it is the federal law component that is incidental to Canada's claims against the third parties.

[26] In *Stoney Band*, Mr. Justice Nadon dissented because he was satisfied that the third party claim was based on the federal *Indian Act and Indian Timber Regulations*, which provide the source of the rights and obligations of the parties and therefore support the Federal Court's jurisdiction. This federal statutory framework together with the federal common law of Aboriginal title meant that the third party claim, in the opinion of Mr. Justice Nadon, was based on the laws of Canada. I can make no similar finding in this case. The third party claim at bar is in "pith and substance" based simply on the law of negligence and the New Brunswick statutory law with respect to indemnification and contribution by tortfeasors.

<u>Issue No. 3</u>: If the Federal Court lacks jurisdiction over the third party claim, does section 50.1 of the *Federal Courts Act* make the granting of a stay mandatory?

[27] This proposed class action would be the first to be stayed in Federal Court. However, in *Aussant v. Canada (Minister of Health and Welfare)* (2002), 226 F.T.R. 25 (T.D.), Mr. Justice James Hugessen dismissed a motion by the plaintiffs to lift a stay of a Federal Court representative action against the Crown under the former Rule 114 of the *Federal Court Rules, 1998*, SOR 98/106 for negligently granting regulatory approval for breast implants. In part, the motion was dismissed because the Crown stated it would bring third party claims against the

manufacturers of these breast implants, which would necessarily stay the action under section 50.1 of the Act. Justice Hugessen stated at paragraph 4:

> ¶ 4 ... [T]here are strong indications that this action will necessarily be stayed under the provisions of section 50.1 of the Federal Court Act by reason of the Crown making third party claims against the various manufacturers of the breast implants, claims which would be beyond the jurisdiction of this Court. The plaintiffs' contention that the Crown is "estopped" from bringing third party proceedings because it has pleaded to this action is obviously untenable. [...] The claims by the Crown against the manufacturers (some of whom have settled class claims against them) will raise difficult questions which this Court cannot resolve and which may go to the very essence of the plaintiffs' claim against the Crown.

[28] By Order dated November 25, 2005, Justice Hugessen stayed the action in *Aussant* under section 50.1 of the Act. In unreported reasons (Court File No. T-2442-98), Justice Hugessen held that the Crown's third party claims against the manufacturers for contribution and indemnity were outside the Federal Court's jurisdiction, resulting in an automatic stay of proceedings. At pages 2-4 of his reasons, Justice Hugessen stated:

> ... [T]he Crown has launched third party proceedings. It has also asked that I make an Order pursuant to s. 50.1 of the *Federal Courts Act* staying the action and referring the third party claims to the appropriate provincial superior court, in this case the Saskatchewan Queen's Bench. <u>Since the language of that section is mandatory, I will be obliged to make such an order if I find that the third party claims are outside the Court's jurisdiction</u>. [...]
>
> That brings me to the question of jurisdiction itself. In my view, and despite the plaintiffs' urgings to the contrary, <u>I have no doubt that the claims against the manufacturers for contribution and indemnity are not matters governed by federal law</u>. They are purely a matter of civil law between the Crown and the manufacturers governed by the statute law and common law of Saskatchewan. There is no federal common law relating to the regulation of medical and health products. The fact that regulatory liability in this as in other areas may be a matter of national importance is no basis for asserting Federal Court jurisdiction. <u>Under our federal system many matters of vital interest to all Canadians are left to the exclusive control of the provinces and that is the basis upon which this country operates</u>.
>
> (Emphasis added)

While the plaintiffs in the case at bar propose to certify a class action against the defendants, the proceeding is analogous to a representative action and in my view Justice Hugessen's decision equally applies to the Crown's third party claim against the manufacturers Dow and Monsanto in this case.

[29] In *Fédération Franco-ténois v. Canada (A.G.)*, [2001] 3 F.C.R. 641, at 680-681 (C.A.) at paragraphs 86 and 87 per Décary J. the Federal Court of Appeal has confirmed that the Court has no choice but to order a stay of the proceedings in a claim against the Crown where the Crown desires to institute a third-party proceeding in respect of which the Court lacks jurisdiction:

> ¶ 86 Should the [plaintiff] Franco-ténois decide to amend their statement of claim and to claim relief only against Her Majesty, she could cite on her behalf subsection 50.1(1) [as enacted by S.C. 1990, c.8, s.16] of the Federal Court [*sic*] Act, which reads: ...
>
> ¶ 87 The Court would then have no choice but to order a stay of the proceedings once the Attorney General of Canada so requested. As one will easily imagine in light of the third-party proceeding already filed in this case, the Attorney General of Canada would file a motion under subsection 50.1 even if the statement of claim of the Franco-ténois were amended, so a stay of the current proceedings seems to me inevitable for all intents and purposes. It is better to accept this now.

As Justice Hugessen has said in *Aussant*, such a stay is mandatory in these circumstances.

[30] The plaintiffs submit that the Court has residual discretion not to grant the stay even if the two preconditions for a stay were met. I cannot agree. Parliament has removed that discretion when it uses the word "shall" in subsection 50.1(1).

<u>Issue No. 4</u>: Is section 50.1 of the *Federal Courts Act* unconstitutional and of no force and effect?

[31] The plaintiffs submit that:

1. section 50.1 of the *Federal Courts Act* is unconstitutional to the extent that it impedes the fair and orderly resolution of this nationwide class action in the Federal Court;
2. a procedural statute is unconstitutional if it impedes the constitutional imperatives of "order and fairness" for participants in multi-jurisdictional litigation; and
3. section 50.1 impedes the efficient and orderly litigation of national issues in the Federal Court. As a result, multiple proceedings may be required in provincial jurisdictions across Canada because more than one provincial jurisdiction can certify a national class action.

[32] The Supreme Court of Canada in *Morguard* and *Hunt*, above, has described as a "constitutional imperative" that there be "order and fairness" in legislation governing the recognition and enforceability of judgments across Canadian jurisdictions. In *Hunt*, Mr. Justice LaForest held at paragraph 57:

> The basic thrust of Morguard was that in our federation a greater degree of recognition and enforcement of judgments given in other provinces was called for. Morguard was careful to indicate, however, that a court must have reasonable grounds for assuming jurisdiction. One must emphasize that the ideas of "comity" are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions.

The purpose of section 50.1 is to prevent duplicitous litigation which would be required if the main action proceeded in the Federal Court. The third party proceeding would require a second action be

commenced in a provincial superior court regarding the same subject matter. In this case, orderly and fair litigation tempers the plaintiffs' interest in access to justice in their forum of choice with the defendants' interest in having their third party claim decided. In *Morguard*, Mr. Justice LaForest stated at paragraph 42 that "fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction." Accordingly, the object of section 50.1 is to bring "order and fairness" to both proceedings by requiring they be heard together in one action.

[33] The Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 held that all provincial superior courts have the inherent power to allow class actions to proceed. Therefore, in addition to the Federal Court, all provinces have the capacity to certify a class proceeding. In Ontario and Québec, there are no residency requirements for the plaintiffs. The plaintiffs from outside these two provinces are included in the class and need not "opt-in". In the other provinces with class action rules, there are "opt-in" provisions where non-residents can "opt-in" to the class if there is a real and substantial connection between the subject matter of the action and that province to ground jurisdiction in its superior court.

[34] The plaintiffs are concerned that resort to provincial superior courts would give rise to numerous parallel class proceedings resulting in unnecessary cost and delay. This subject was considered in an academic article in the new *Canadian Class Action Review* entitled "Chaos or Consistency? The National Class Action Dilemma". This article discusses the "potential chaos" of class action claimants across Canada commencing class actions in multiple jurisdictions. The article writes that the answer is "obvious and impossible". The "obvious" answer is for Parliament to give

the Federal Court exclusive jurisdiction over all class actions in which class members are resident in multiple jurisdictions and which involve issues of national scope. It is "impossible" because it would require a constitutional amendment, and the academics recognize that this is unlikely because, as they write, there is still no national securities regulator after all the years where "right-thinking individuals acknowledge the need for such a body" (see *Chaos or Consistency? The National Class Action Dilemma*, by Ward Branch and Christopher Rhone, The Canadian Class Action Review, Vol. 1, No. 1, January 2004, at page 4). Accordingly, while it would be desirable if the Federal Court could assume jurisdiction over this proposed class action, including the third party claim, it would require a constitutional amendment.

[35] The plaintiffs have referred the Court to other cases where more than one class action has been started in different provincial jurisdictions on the same subject matter but for plaintiffs residing in different provinces. These cases are cited as authority that parallel class proceedings in different provincial superior courts impose undue hardship and expense on litigants. However, in *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695 the Supreme Court of Canada upheld the constitutionality of the antecedent *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, as amended, which conferred exclusive jurisdiction to the Federal Court of Canada over proceedings against the federal Crown. Mr. Justice Cory held that while the legislation "can create unnecessary hardships, delays, and additional unnecessary expense for litigants", the statutory grant of jurisdiction was nevertheless constitutional (see *Rudolph Wolff* at paragraphs 21 and 22). Assuming without deciding that the plaintiffs in the case at bar would suffer unnecessary expense and delay recommencing class proceedings in provincial superior courts, these hardships do not impede the orderly and fair resolution of their cause in a court with jurisdiction to decide the entire action,

including the third party claim. In contrast, the plaintiffs' action could not be fairly and orderly resolved in the Federal Court because it lacks jurisdiction to decide the third party claim against Dow and Monsanto, in which case the dispute could not be resolved without resorting to provincial superior courts in any event.

[36] The Court finds that this proposed class action could be commenced, amongst other provincial superior courts, in the New Brunswick Court of Queen's Bench under rule 14 of the *Rules of Court of New Brunswick*, N.B. Reg. 82-73:

RULE 14 CLASS ACTIONS	RÈGLE 14 RECOURS COLLECTIF
14.01 Class Actions	14.01 Recours collectif
Where there are numerous persons having the same interest in one cause or matter, one or more of them may sue or be sued, or may be authorized by the court to defend, on behalf or for the benefit of all persons so interested.	Lorsque plusieurs personnes ont un même intérêt dans une cause ou affaire, l'une de ces personnes ou plusieurs d'entre elles peuvent poursuivre ou être poursuivies en justice, ou peuvent être autorisées par la cour à présenter une défense, au nom ou pour le compte de tous les intéressés.

[37] New Brunswick may have a "real and substantial connection" to this lawsuit because it is where any wrongful acts were committed. In this way, the application of section 50.1 of the *Federal Courts Act* is not contrary to the constitutional imperative of "order and fairness" in our national judicial system because New Brunswick has jurisdiction to hear a national class action including the third party claim. The fact that other provinces also have jurisdiction with respect to a national class action in this matter is a reality in our federalist structure, but the costs of such duplicate litigation in this case may deter any other such class action. Accordingly, section 50.1 of the *Federal Courts Act* does not violate order and fairness in our federal structure.

CONCLUSION

[38] For these reasons, the Court concludes that:

1. the Crown genuinely intends to commence third party proceedings against Dow and Monsanto;
2. the Federal Court does not have jurisdiction to hear and determine these third party claims;
3. section 50.1 of the *Federal Courts Act* makes the granting of a stay in this case mandatory; and
4. section 50.1 of the *Federal Courts Act* is constitutional, and does not violate the constitutional principles of "order and fairness" as set out by the Supreme Court of Canada.

COSTS

[39] The defendants do not seek costs and I agree that the plaintiffs should not bear the costs of the Crown's motion for a stay. The plaintiffs accommodated the scheduling of this motion in Ottawa instead of Regina, the location of their counsel. For this reason, it is reasonable that the plaintiffs be awarded their travel disbursements for attending this hearing in Ottawa.

ORDER

THIS COURT ORDERS that:

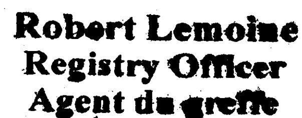
1. The motion for a stay of this action is granted to permit the commencement of this class action in a provincial superior court; and

2. There will be no order as to costs except the travel disbursements of counsel for the plaintiffs will be paid by the Crown.

"Michael A. Kelen"
Judge

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 3 day of May A.D. 20 06

Dated this 16 day of May 20 06



FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1193-05
STYLE OF CAUSE:	KENNETH DOBBIE ET AL. v. ATTORNEY GENERAL OF CANADA AND MINISTER OF NATIONAL DEFENCE
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 24, 2006
REASONS FOR ORDER AND ORDER:	Kelen J.
DATED:	May 3, 2006

APPEARANCES:

Mr. E.F. Anthony Merchant, Q.C. Mr. Casey Churko	FOR THE PLAINTIFFS
Mr. Ian H. Fraser Mr. Jason Brannen	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

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