

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

LOB

Citation: *Ring v. The Queen #2*, 2007NLTD213

Date: 20071211

Docket: 2006 01 T 2880

BETWEEN:

EDWARD RING, SR. AND MARY
WILLIAMS

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA
AND THE MINISTER OF NATIONAL
DEFENCE

DEFENDANTS

AND:

THE DOW CHEMICAL COMPANY
AND PHARMACIA CORPORATION

THIRD PARTIES

Before: The Honourable Mr. Justice Leo Barry

Place of Hearing: St. John's, Newfoundland and Labrador

Heard: November 1, 2007

Appearances:

Counsel for the Plaintiffs: John Legge and Casey
Churko

Counsel for the Defendants: I.H. Fraser

Counsel for the Dow Chemical Company : J. David Eaton, Q.C.

Counsel for Pharmacia Corporation : Daniel M. Boone, Q.C.

Authorities Cited:

Cases Considered: *Ward v. Attorney General of Canada*, 2007 MBCA 123; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Harrington v. Dow Corning Corp.*, 2000 BCCA 605; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.); *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63; *Muscutt v. Courcelles* (2002), 160 O.A.C. 1; *Avenue Properties Ltd. v. First City Development Corporation* (1986), 7 B.C.L.R. (2d) 45 (C.A.); *Pardy v. Bayer* (2004), 237 Nfld. & P.E.I.R. 179 (NL. T.D.).

Statutes Considered: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Class Proceedings Act*, S.N.B. 2006, c. C-5.1.

DECISION OF BARRY J.

(Whether to lift stay of certification order)

Barry, J:

[1] The main issue raised on this application is whether a class action should be stayed because claimants resident in this Province would be adequately protected by pending proceedings in New Brunswick. The action is for damages allegedly suffered by the plaintiffs, when Agent Orange and other chemicals were sprayed at Canadian Forces Base, Gagetown, New Brunswick, between 1956 and 2004. It is one of nine different class actions filed by plaintiffs' counsel in the Federal Court and in the superior courts of every province except Prince Edward Island and Alberta.

Background Facts

[2] On August 1, 2007, I filed written reasons¹ on an application to certify this proceeding under the *Class Actions Act*, S.NL. 2001, c. C-18.1.

Paragraphs 160 and 162 of my reasons state:

[160] When this matter was argued, New Brunswick had enacted class actions legislation but had not yet proclaimed it. I have since been notified that on March 29, 2007, the Lieutenant-Governor of New Brunswick in Council issued a proclamation declaring that the New Brunswick *Class Proceedings Act* would come into force on June 30, 2007. The Plaintiffs have already started actions in New Brunswick, arising from the spraying at CFB Gagetown, including real property claims and claims relating to occupiers' liability. This Court would not have jurisdiction over the real property claims and actions in that regard will have to proceed in New Brunswick. New Brunswick law will apply to the occupiers' liability claims. In these circumstances, s. 5(2)(c) becomes significant, since the proposed class action will involve claims that are or have been the subject of another action, namely the New Brunswick actions. Therefore, it is appropriate that if certification is granted, the order be stayed pending further submissions on the effect of the proclamation of the New Brunswick legislation.

[162] In summary:

(a) The requirements for certification have been met in that

.....

(iv) (subject to a decision on the effect of the New Brunswick proclamation of a *Class Proceedings Act*) a class action is the preferable procedure; ...

(b) An order for certification shall issue but is stayed pending further submissions on the effect of the proclamation of the New Brunswick *Class Proceedings Act*.

[3] The plaintiffs now apply to have the stay lifted. They argue that class members will be prejudiced by further delay, that judicial economy requires utilization of the work and effort by the Court and counsel to date, and that the benefits of discovery in this action could be applied in New Brunswick, in any event.

[4] As of October 15, 2007, approximately 66 individuals from this province and 1,297 from outside have indicated a willingness to be included

¹ See 2007 NLTD 146. The facts leading up to the action are there set out.

in this action. (I say approximately because there may be a few duplications in communications with potential class numbers.) Of these, 74 claim to have developed lymphomas as a result of the spraying. Four of the latter reside in Newfoundland and Labrador. The others claim for the cost of testing to establish whether they have elevated levels of chemicals in their systems, which might put them at risk of developing disease.

[5] A representative action for damages from spraying of Agent Orange at CFB Gagetown was commenced by other counsel in the Court of Queen's Bench of New Brunswick on June 14, 2006, and refiled as a class action on May 30, 2007, in anticipation of the proclamation of the New Brunswick **Class Proceedings Act**.² An application in that New Brunswick action to have a class action judge appointed and to obtain directions, a timeline and a date for a certification hearing, was originally set for November 21st. It has been adjourned to December 21, 2007. The Merchant Law Group, plaintiffs' counsel in the present case, also commenced a class action in New Brunswick on July 26, 2006. By an agreement reached in July, 2007, the other counsel are to have full conduct of proceedings in New Brunswick, while the Merchant Law Group is to have full conduct of proceedings in other jurisdictions.

The Party's Submissions

[6] The plaintiffs submit that parallel proceedings in 2 or more provinces are not unusual in class action situations. They say these may be effectively managed through judicial comity and co-operation amongst plaintiff's counsel. The plaintiffs note that s. 5(1)(d) of our *Act* requires certification where a class action is "the preferable procedure to resolve the common issues of the class". One factor for consideration in determining the preferable procedure is identified by s. 5(2)(c): "the class action would involve claims that are or have been the subject of another action". The plaintiffs say "preferable" involves only two assessments: (i) whether or not a class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding would be preferable in the sense of preferable to other procedures, such as joinder, test cases or consolidation. They argue that the question of more convenient forum should not come into play until our Rule 7A.04(6) is engaged and should not affect determination of the preferable procedure. That Rule provides:

² S.N.B. 2006, c. C-5.1.

7A.04(6) Where it appears that a class or representative proceeding covering all or a part of the matters to be dealt with in a class proceeding in this province has been certified in another jurisdiction in Canada, the Court in considering whether and to what extent to grant the certification application:

- (a) may consider whether it would be appropriate to define the class as excluding the class certified in the other jurisdiction or as excluding persons who do not opt out of the other proceeding;
- (b) may consider whether the other jurisdiction is a more convenient forum for the matter, and where the interests of the class resident in this province can be adequately represented in the other proceeding by the resident class members opting into that proceeding, stay the application;
- (c) may grant the application without reference to the other proceeding; or
- (d) make such other disposition as may be desirable.

The plaintiffs submit Rule 7A.04(6) does not apply because no other class action has yet been certified in another jurisdiction.

[7] The Crown's position is that this Court should determine the *forum non conveniens* issue now and that New Brunswick is the only appropriate place for the resolution of the issues in this litigation, for three reasons:

- New Brunswick is where the events giving rise to the claims occurred;
- New Brunswick law will apply to the claims, and
- New Brunswick is the only jurisdiction in which all claimants can have a trial of all the claims (property damage as well as personal injury) arising out of those events.

[8] The third parties argue the stay should remain in place on the grounds of *forum non conveniens*, comity and judicial economy. They agree with the Crown that the only proper jurisdiction, for what they say is fundamentally an economic tort concerning a single location, is the jurisdiction in which the environmental tort is said to have occurred.

[9] The third parties give the following reasons for concluding proceedings in New Brunswick are a "preferable procedure":

- (a) CFB Gagetown is in New Brunswick;

- (b) the alleged tortious acts occurred there;
- (c) New Brunswick law will govern the substantive rights of the parties;
- (d) much of the evidence is located in New Brunswick;
- (e) related property claims are being brought exclusively in New Brunswick;
- (f) counsel for the plaintiffs have commenced a proposed class action in New Brunswick;
- (g) approximately 31% of the potential class members reside in New Brunswick, more than in any other province, while only 3% reside in Newfoundland and Labrador;
- (h) there is no judicial advantage to the class members in proceeding in Newfoundland;
- (i) many of the witnesses reside in New Brunswick; and
- (j) New Brunswick is a more convenient forum for most class members and witnesses in terms of travel time, expense and the marshalling of evidence.

[10] Generally, the third parties submit that a class action in the Supreme Court of Newfoundland and Labrador would not be the preferable procedure as it would not be a fair, efficient or manageable method of advancing the plaintiffs' claims in light of the fact that another action will be proceeding in New Brunswick.

[11] The third parties argue that comity and judicial economy mandate avoidance of a multiplicity of proceedings in various jurisdictions, because of the risk of inconsistent findings on the merits and duplication in fact finding and legal analysis.

[12] The third parties also submit the non-residents' lack of any real and substantial connection with Newfoundland means that the Court has no jurisdiction to certify a non-resident class, even on an opt-in basis, for the alleged tort.

The Law and Analysis

[13] The Manitoba Court of Appeal in another pending action relating to spraying at CFB Gagetown, **Ward v. Attorney General of Canada**, 2007 MBCA 123, considered two issues:

- (i) whether the trial judge had properly held that the Manitoba Court has jurisdiction *simpliciter*, and
- (ii) whether the trial judge had properly exercised his discretion in refusing to decline the exercise of jurisdiction or accept that New Brunswick was clearly a more appropriate forum.

These same two issues of jurisdiction *simpliciter* and *forum non conveniens* arise in the present case. I am satisfied they should be resolved here as in the Manitoba Court.

(i) Jurisdiction simpliciter

[14] In **Morguard Investments Ltd. v. De Savoye**, [1990] 3 S.C.R. 1077, the Supreme Court of Canada noted the necessity for the courts of each province to ensure they have the authority to assume jurisdiction over matters with extraprovincial aspects. There the plaintiffs were permitted to enforce a judgment obtained in Alberta against a defendant then resident in British Columbia.

[15] The Court had no problem in concluding the Alberta court had jurisdiction because the defendant entered into the mortgage transaction while a resident of Alberta and the transactions involved land in that province.

[16] The Court, at p. 1103, held that “the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives”. It considered the traditional rules for the recognition and enforcement of foreign judgments and, while deciding these were ripe for reappraisal in the context of their application where the courts were all within Canada, it held that, whether based on the idea of comity or reasons of justice, necessity and convenience, the constitutional structure of the country demanded co-operation of courts and enforcement throughout the country of judgments given in other provinces.

[17] But the Court held also that fairness to the defendant required that a court of a province ought not assume jurisdiction unless there was a real and substantial connection between the damages suffered and the jurisdiction in which the actions were brought. Recognition of its judgment in other provinces is dependent upon a court having properly exercised jurisdiction in this sense.

[18] The Court, at p. 1097, noted that underlying a modern system of private international law are “principles of order and fairness, principles that ensure security of transactions with justice”. So comity, the informing principle of private international law, traditionally explained as “the deference and respect due by other states to the actions of a state legitimately taken within its territory” (p. 1095), should be viewed as “based not simply on respect for the dictates of a foreign sovereign but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind” (p. 1096). The Court stressed, however, that for comity or the principles of order and fairness to warrant recognition and enforcement of a judgment, the judgment must be issued by a court acting “with properly restrained jurisdiction” (p. 1103). The Court concluded this issue “poses no difficulty” when, in the case of judgments *in personam*, the defendant was within the jurisdiction at the time of the action (pp. 1103-1104).

[19] The presence of both the plaintiff and defendant in the jurisdiction has traditionally been a sufficient basis for assuming jurisdiction over an action for injury to the person. Dickson J. explained this in **Moran v. Pyle National (Canada) Ltd.**, [1975] 1 S.C.R. 393, at p. 397:

Traditionally, the view has been held that jurisdiction in a personal action rests upon physical power and the ability of the Court to enforce any judgment it may render. Jurisdiction, therefore, normally depends upon the presence of the defendant within the territorial limits of the Court or upon the voluntary submission of the defendant to the authority of the Court.

[20] **Moran** is also important because of the discussion on how to determine where a tort has been committed. Dickson J. concluded, at pp. 408-09, that both place of acting and place of harm theories are too arbitrary and inflexible. He stated:

... [It has been suggested that] it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant’s activities or its consequences and the law of which is likely to have been in the reasonable

contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a State has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. *By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.* [Emphasis in original.]

[21] The Crown is deemed to reside in every province of Canada. This “constructive presence”, plus the presence here of the resident class members and the plaintiffs’ allegation of damages occurring in this province, is sufficient to vest jurisdiction *simpliciter* in this Court under the **Moran** presence-based approach to jurisdiction.

[22] The Manitoba Court of Appeal in **Ward** took the same approach. It held that this jurisdiction is not lost because of the potential inclusion by opting-in of many non-residents in the defined class. This conclusion is supported by the majority decision in **Harrington v. Dow Corning Corp.**, 2000 BCCA 605, a class action where the certification order included non-residents in the class, even though they had not used the product (breast implants) in British Columbia. Huddart J.A., speaking for the majority, decided that the existence of a certified class action may provide a sufficient connection to justify assuming jurisdiction over non-residents. I agree with this conclusion.

[23] When the plaintiffs and defendant each have a presence in the province, and where the resident plaintiffs allege a connection through the sustaining of damages within the province, there is no need to show more to meet the “real and substantial connection” test of **Morguard**, and to find authority to assume jurisdiction. The full analysis under that test is normally reserved for claims where one of the parties is not resident in the province where the action is brought.

[24] Should the presence of two third parties, who do not reside in the province, influence the Court's conclusion regarding its authority to assume jurisdiction? I think not. The reasoning of Huddard J.A., speaking for the majority in **Harrington**, at para. 92, in wording similar to **Moran**, is also applicable here:

Where the traditional rules are not adequate to ensure fairness and order then other considerations will become relevant. One such consideration will be the nature of the subject matter of the action. In this case, the alleged wrongful acts are defective manufacturing or failure to warn. When a manufacturer puts a product into the marketplace in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada if it is capable of being moved. As I suggested earlier in these reasons, it is reasonable to infer that a manufacturer of a breast implant knows that every purchaser will wear that implant wherever she resides, and that if the implant causes injury then the suffering will occur wherever she resides, and require treatment in that location. By the action of sale, the manufacturer risks an action in any province. In these circumstances, there can be no injustice in requiring a manufacturer to submit to judgment in any Canadian province. The concept of *forum non conveniens* is available to deal with any individual case where a different forum is established as more appropriate. As Mr. Justice La Forest remarked in the passage I quoted from *Tolofson*, supra, in some circumstances individuals need not be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience.

Likewise in the present case, if a manufacturer of a chemical puts it into the marketplace by selling to the Crown for use on a military base in New Brunswick, it must be assumed the manufacturer knows that, if the product causes injury, the suffering will occur in whichever province the injured person ultimately resides and the Crown may be sued there and join the manufacturer as a third party. In these circumstances there is no injustice in requiring a manufacturer to submit to judgment in any Canadian province, subject to considerations relating to the more appropriate forum, particularly when one considers that members of the military on the base have probably been drawn from every province in the country, have a high mobility, and are likely to have returned to their province of original residence before the injury is discovered.

[25] As Sharpe, J.A. explains in **Muscutt v. Courcelles** (2002), 160 O.A.C. 1, at paras. 29ff., the “damage sustained” rule is subject to the principles articulated in **Morguard** regarding the need for a real and substantial connection and the need for order, fairness and jurisdictional restraint. The Supreme Court of Canada in **Amchem Products Inc. v.**

British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, at p. 917, looked to United Kingdom jurisprudence to identify some of the principal connecting factors as "factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the place where the parties respectively reside or carry on business". I need not go in depth, however, into the real and substantial connection analysis in the present case because I agree with Goudge J.A. in **McNichol Estate v. Woldnik** (2001), 15 O.A.C. 68, that this test should not be applied to nonresident parties as though this were a separate lawsuit from the claims against resident parties (in this case the Crown). Goudge J.A. stated, at paras. 12-13:

I do not agree that where an action has some claims with an extra-territorial dimension, and others which have none, the former must be separated and tested in isolation. To do so would, in my opinion, be contrary to the direction set by Morguard and Hunt. It would be a step backwards, towards a focus on territoriality and away from the recognition of the increasingly complex and interdependent nature of the modern world community which lies at the heart of LaForest J.'s reasoning. Moreover, it would introduce a rigidity to a test clearly designed to be flexible. Finally, it would mute the influence of the underlying requirements by preventing an assessment of the entire action against these requirements to determine whether they made it proper to take jurisdiction over the action as framed by the plaintiffs, including the extraterritorial claim.

Rather, I think that the approach prescribed by Morguard and Hunt requires the court to evaluate the connection with Ontario of the subject matter of the litigation framed as it is to include both the claim against the foreign defendant and the claims against the domestic defendants. In doing so, the courts must be guided by these requirements of order and fairness. If it serves these requirements to try the foreign claim together with the claims that are clearly rooted in Ontario, then the foreign claim meets the 'real and substantial connection' test. This is so even if that claim would fail the test if it were constituted as a separate action. This approach goes beyond showing that the foreign defendant is a proper party to the litigation. It rests on those values, namely order and fairness, that properly inform the real and substantial connection test and allows the court the flexibility to balance the globalization of litigation against the problems for a defendant who is sued in a foreign jurisdiction.

This reflects the approach of Huddart J.A. in **Harrington**. See as well the other authorities cited in **Muscutt**, at paras. 69-71, which moved away from the "personal subjection" approach for assuming jurisdiction over defendants and accepted that a real and substantial connection could be based on a connection with the subject matter of the litigation (here the spraying by the Crown).

[26] The “damage sustained” approach discussed in **Harrington** was also adopted in **Oakley v. Barry** (1998), 158 D.L.R. (4th) 679 (N.S.C.A.), discussed in **Muscutt**, at paras. 63-66, where Pugsley J.A. stressed that Nova Scotia had a significant financial interest in the plaintiff, who was being treated in that province after being allegedly misdiagnosed in New Brunswick. Similarly, the Province of Newfoundland and Labrador has a significant financial interest because of the need for treatment of resident plaintiffs who may have developed lymphoma as a result of the spraying at CFB Gagetown and because of the possible need for treatment of individuals who say they are at risk and seek the costs of testing. This financial interest provides a sufficient connection with the spray manufacturers to warrant the assumption of jurisdiction by this Court over them.

(ii) *Forum non conveniens*

[27] Having found this court has jurisdiction *simpliciter*, the question becomes should I exercise it. The Supreme Court of Canada in **Unifund Assurance Co. v. Insurance Corp. of British Columbia**, [2003] 2 S.C.R. 63, stated, at para. 137:

... the proper test is to ask whether the existence of a more appropriate forum has been clearly established to displace the forum selected by the plaintiff.

[28] Sharpe J.A., in **Muscutt**, at para. 41, compiled a list of factors to be considered in determining the most appropriate forum. These include:

- the location of the majority of the parties;
- the location of key witnesses and evidence;
- the avoidance of a multiplicity of proceedings;
- the applicable law and its weight in comparison to the factual questions to be decided;
- geographical factors suggesting the natural forum; and
- whether declining jurisdiction would deprive the plaintiff of a legitimate judicial advantage available in the domestic court.

[29] The Manitoba Court of Appeal in **Ward** was dealing with issues of jurisdiction and *forum non conveniens* prior to a certification application. It held that the trial judge had sound reason to assume jurisdiction in an action

by a single plaintiff against the Crown and to exercise his discretion in favour of Manitoba as a *forum conveniens* given:

- (i) the presence there of the plaintiff;
- (ii) his as yet unchallenged assertion of damage sustained there;
- (iii) the presence there of the Crown;
- (iv) the clear judicial advantage to the plaintiff of prosecuting a class action in that province (because of a favourable costs regime and “opt-out” class action legislation); and
- (v) no apparent significant judicial disadvantage to the Crown.

Apart from the “opt-out” legislation, all these factors apply to the present case.

[30] I have previously noted the many connections between the tortious events, the parties and New Brunswick, including the location of CFB Gagetown, the applicable New Brunswick law, the larger percentage of class members there resident, and the presence of more witnesses. On the other hand, I agree with the plaintiffs that the proposed class of plaintiffs is national in scope, the alleged negligence is that of the federal Crown, which can be sued in any province, the majority of potential class members probably do not reside in New Brunswick, and, therefore, that province is probably not the most accessible or central geographic locations. Also, many of the records regarding the CFB Gagetown incidents are stored in Ottawa, not New Brunswick. Expert witnesses will probably not be based in New Brunswick. Plaintiffs who are ill will be greatly inconvenienced by having to sue in a jurisdiction where they do not reside. On a balancing of these factors, I am satisfied this is a case where there is more than one appropriate forum.

[31] As noted by Sharpe J.A. in **Muscutt**, I must also take into account any juridical advantage flowing to the plaintiffs from proceeding in this Court. One which has been identified by them is the more favorable costs regime in this Province. In New Brunswick there are no special costs provisions regarding representative plaintiffs such as found in our s. 37(1), which provides that costs normally may not be awarded in class actions. This advantage weighs in favour of permitting the plaintiffs to proceed in this

Court. As McLachlin J.A. noted in **Avenue Properties Ltd. v. First City Development Corporation** (1986), 7 B.C.L.R. (2d) 45 (C.A.), at para. 23:

... in order to succeed in an application for a stay of proceedings or a declaration of jurisdiction, two conditions must be satisfied:

- (a) The party applying for the stay (the defendant) must satisfy the court that there is another forum to whose jurisdiction he was amenable and in which justice can be done between the parties at substantially less inconvenience and expense;
- (b) If the first condition is met, the plaintiff may still prevent a stay being granted if he can show that a stay would deprive him of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the court where the stay is sought.

See also, Sopinka J. in **Amchem**, at p. 920, where he identified loss of juridical advantage as one of the factors in choosing the most appropriate forum and in deciding whether proceeding there would result in injustice to a party.

[32] In addition to the costs advantage, another juridical advantage for the plaintiffs proceeding in this Court is that the certification hearing has been completed (except for the issue now being decided). Also, much work has been done by counsel in this jurisdiction and that would be lost if the stay continues.

[33] The strongest factor weighing in favour of proceeding in this jurisdiction is the delay which would result for the plaintiffs if they have to await a decision on certification in New Brunswick, before being able to see pleadings completed and discovery proceed. In considering what is best for the plaintiffs resident in this Province, I decided in **Pardy v. Bayer** (2004), 237 Nfld. & P.E.I.R. 179 (N.L. T.D.), that the potential for significant delay mandated in favour of permitting a parallel proceeding in this province, even though another action was proceeding in Ontario. Similarly, in the present case the resident plaintiffs have a right to a class action in their own jurisdiction without undue delay.

[34] As for non-resident plaintiffs, our province's **Class Actions Act** permits non-residents to "opt-in" to the class action. In my August decision on certification, I defined the class as "all individuals who were at CFB Gagetown between 1956 and the present and who claim they were exposed

to dangerous levels of dioxin or HCB while on the Base.” This definition includes non-residents. In my prior decision, I also noted that recovering the cost of testing as damages in the present case would not be an economically viable claim to pursue on an individual basis. The same is true for a small class of residents. Permitting non-residents to opt-in was adopted by our legislature as a means of promoting access to justice by improving the economic viability of claims. I recognized this at paragraph 131 of my earlier decision, where I stated:

There is a financial advantage to the Newfoundland residents to pool resources with non-residents to pursue their claims. So certification will promote improved access to justice.

[35] Judicial economy is also promoted by having common issues involving both resident and non-resident plaintiffs resolved in the same action.

[36] On the approach I have taken it does not matter whether, as the plaintiffs claim, the effect of the New Brunswick action should not be considered until after a decision on certification. In considering whether the New Brunswick action should prevent certification in this province or in deciding whether certification should proceed but be stayed, I arrive at the same conclusion, the action in New Brunswick, which is at a less advanced stage than ours, should not impede the right of the plaintiffs to proceed with a class action here. My decision may have been different had the New Brunswick **Class Proceedings Act** been proclaimed before I commenced the hearing on the application for certification.

Summary and Disposition

[37] In summary:

- (i) This Court has jurisdiction *simpliciter* because of the presence of the plaintiffs and the defendant in this province, the allegation of damage occurring here, and the real and substantial connection of non-residents with this jurisdiction because of our **Class Actions Act** and the nature of the action commenced by residents.
- (ii) I am not persuaded New Brunswick is the more appropriate jurisdiction in which to have this matter heard, despite the spraying having occurred there and its law probably applying,

after considering that potential class members, key witnesses and evidence are located at various locations in Canada, the proposed class is national in scope, the alleged negligence is that of the federal Crown, which can be sued in any province, class actions have been commenced in nine jurisdictions, and the plaintiffs here have juridical advantages in this province because of a more favourable costs regime and a completed certification hearing in this Court and because of the potential unfairness to resident plaintiffs from considerable delay and great inconvenience to those who are ill if the matter does not proceed here.

- (iii) The stay imposed by my decision of August 1, 2007 is lifted.
- (iv) The parties have leave to seek further directions, if necessary, on the form of the certification order, on the content and means of giving notice to potential class members, and on the timeline for closing pleadings and discovery.



L. Barry, J.