COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chalmers v. AMO Canada Company,*
2010 BCCA 560

Date: 20101208
Docket: CA037232

Between:

Trina Lorraine Chalmers, an infant, by her litigation guardian, Cherie Chalmers

Respondent
(Plaintiff)

And

AMO Canada Company and Advanced Medical Optics, Inc.

Appellants
(Defendants)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, May 26, 2009
(*Chalmers v. AMO Canada Company*, 2009 BCSC 689)

Counsel for the Appellants:	M.N. Ruby and M.J. Schalke
Counsel for the Respondent:	D.A. Klein and J.Z. Murray
Counsel for the Attorney General of British Columbia:	J.G. Penner
Place and Date of Hearing:	Vancouver, British Columbia September 27, 2010
Place and Date of Judgment:	Vancouver, British Columbia December 8, 2010

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Bennett

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The defendants appeal from the order of a chambers judge dated May 26, 2009, certifying the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The claims against the defendants are in negligence and under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the *"Consumer Protection Act"*), in connection with a contact lens solution called Complete All-In-One MoisturePLUS that was sold in Canada until it was recalled in May 2007.

[2] The defendants raised six issues on the certification application, and the chambers judge ruled against them on all six issues. This appeal relates to five of these issues.

[3] For the reasons that follow, I would dismiss the appeal except to the limited extent of clarifying the order with respect to issues pertaining to the claim for punitive damages.

Background

[4] Advanced Medical Optics, Inc. is incorporated in Delaware and its Canadian subsidiary, AMO Canada Company, is incorporated in Nova Scotia and is extra-provincially registered in British Columbia. One of their products was Complete All-In-One MoisturePLUS.

[5] In May 2007, the U.S. Centers for Disease Control and Prevention published a report suggesting an association between the defendants' lens solution and a rare eye infection called Acanthamoeba Keratitis which can be treated in most cases, but may require cornea transplants, and in a small number of cases can lead to blindness. The defendants voluntarily recalled the lens solution and stopped selling it.

[6] The plaintiff alleges she contracted the eye infection from her use of the defendants' lens solution. She asserts in her statement of claim that the defendants were negligent in the research, development, testing, manufacture, distribution and sale of the lens solution. She also claims that the defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of the lens solution were deceptive acts and practices in relation to the safety and efficacy of the solution, contrary to s. 4 of the *Consumer Protection Act*. In addition to general damages, special damages and compensation pursuant to the *Consumer Protection Act*, the plaintiff seeks punitive damages from the defendants.

[7] The materials before the chambers judge at the certification hearing included an affidavit from another British Columbia resident deposing that she had used the defendants' lens solution and had been diagnosed with the eye infection. Similar affidavits were sworn by three residents of Newfoundland and one resident of Nova Scotia, who also deposed that they were willing to opt into the British Columbia proceeding if it was certified.

[8] New evidence became available after the certification hearing had been completed, and the judge held a further hearing to consider the admissibility of this evidence. He admitted the new evidence, which was to the effect that the B.C. Centre for Disease Control had confirmed 32 cases of the eye infection between January 2005 and May 2008 and that, of the 18 persons with the infection who had been interviewed, 10 had reported use of the defendants' lens solution.

[9] Both sides filed expert reports for the certification hearing and the defendants sought to adduce new evidence on this appeal in the form of a report published by the United States Centers for Disease Control and Prevention on August 8, 2009. I do not propose to discuss the expert reports, and I would not admit the new evidence, because the issue of whether there is a cause of action (as required by s. 4(1)(a) of the *Class Proceedings Act*) is to be determined on the basis of the pleadings, and the merits of the claims are not to be considered: see *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 16.

[10] By reasons for judgment dated May 26, 2009, and indexed as 2009 BCSC 689, the chambers judge certified the action as a class proceeding. His order defined the class as follows:

> All persons resident in Canada who purchased or used the Contact Lens Solution and who contracted Acanthamoeba Keratitis after using the Contact Lens Solution.
>
> The "Contact Lens Solution" means Complete™ All-In-One MoisturePLUS®, contact lens solution having Drug Identification Number 02034425.

[11] On the specific issues raised by the defendants, the chambers judge ruled as follows:

(a) the statement of claim was sufficient to support a claim under the *Consumer Protection Act*;

(b) the statement of claim was sufficient to support a claim for punitive damages;

(c) there was an identifiable class of two or more persons (as required by s. 4(1)(b) of the *Class Proceedings Act*);

(d) the court has territorial competence over the claims of residents of other provinces of Canada (but only with respect to the two negligence common issues and the punitive damages common issue);

(e) the class proceeding was the preferable procedure for the fair and efficient resolution of the common issues (as required by s. 4(1)(d) of the *Class Proceedings Act*); and

(f) the plaintiff had produced a workable plan for the proceeding (as required by s. 4(1)(e)(ii) of the *Class Proceedings Act*).

On appeal, the defendants challenge all of these rulings except item (c) dealing with an identifiable class of two or more persons. There are no issues as to whether the statement of claim disclosed a cause of action in negligence or as to the requirements of ss. 4(1)(c), 4(1)(e)(i) or 4(1)(e)(iii) of the *Class Proceedings Act*.

[12] At the certification hearing, there was a discussion about the fact that the statement of claim sought damages and statutory compensation under ss. 171 and

172 of the *Consumer Protection Act* but did not seek injunctive or declaratory relief, which is a prerequisite to the granting of compensation under s. 172(3). The plaintiff's counsel indicated that the statement of claim would be amended to claim injunctive and declaratory relief if the action was certified, and the chambers judge proceeded on the assumption that the amendment would be made.

[13] On September 14, 2009, the plaintiff filed an amended statement of claim. In addition to making the amendments relating to s. 172, the plaintiff also amended the portions of the statement of claim dealing with the claims under the *Consumer Protection Act* and for punitive damages by, among other things, providing particulars of the claims.

Discussion

(a) Claim under the *Consumer Protection Act*

[14] The test under s. 4(1)(a) of the *Class Proceedings Act* to determine if the statement of claim discloses a cause of action is the same as the test under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* (Rule 19(24)(a) of the former *Rules of Court*), which was discussed by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273. In brief, the test is satisfied unless it is plain and obvious that the statement of claim discloses no reasonable cause of action.

[15] The defendants concede that the statement of claim discloses a cause of action in negligence, but it is necessary to consider whether it also discloses a cause of action under the *Consumer Protection Act* that can be pursued as part of the class proceeding. The plaintiff's claim is that the defendants violated s. 5 of the *Consumer Protection Act*, which provides that "[a] supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction." The terms "supplier" and "consumer transaction" are defined in s. 1 of the *Consumer Protection Act* and the phrase "deceptive act or practice" is defined in s. 4 of the *Act*.

[16] The defendants make two points about the plaintiff's claim under the *Consumer Protection Act*. First, they say the claim is essentially a claim in misrepresentation, and full particulars must be pleaded. Secondly, they submit the decision of this Court in *Rushak v. Henneken* (1991), 84 D.L.R. (4th) 87, 59 B.C.L.R. (2d) 250 (C.A.), stands for the proposition that in order for a deceptive act or practice to be actionable, the supplier must have known it was deceptive. The defendants say there is no pleading or evidence that they had the intent to mislead or deceive.

[17] The chambers judge held there was sufficient particularization in the statement of claim with respect to the claim under the *Consumer Protection Act* to allow the court to assess the suitability of the action as a class action and to inform the defendants of the nature of the claim. In my view, we need not decide whether the chambers judge was correct in this regard because the statement of claim has now been amended. It would not be appropriate, in my view, for this Court to decide this issue on the basis of the statement of claim as it stood at the time of the certification hearing and to remit the matter of the amended statement of claim to the chambers judge if we were to decide that the unamended statement of claim was deficient. The Court is in as good a position as the chambers judge to decide whether the pleadings are sufficient, and it could potentially create unnecessary expense if we were to restrict our consideration to the unamended statement of claim.

[18] Whatever deficiencies may have existed in the statement of claim at the time of the certification hearing, it is my opinion that the amended statement of claim clearly gives particulars of the claim under the *Consumer Protection Act*. The amended statement of claim gives particulars of two specific representations allegedly made by the defendants, and asserts they were untrue. It also asserts that the defendants breached the *Consumer Protection Act* by failing to disclose the risk that the lens solution would not prevent the eye infection and by misrepresenting that the lens solution was safe, comfortable and effective at preventing infection.

[19] The second point raised by the defendants is also addressed by amendments made to the statement of claim. The amended statement of claim asserts that the defendants "knew or ought to have known that their product was less effective at killing amoebas" (para. 22.3). However, the defendants contend that it is not sufficient for the plaintiff to simply plead knowledge on the part of the defendants and that some evidence is required in that regard.

[20] Relying on *Hollick*, the defendants say the plaintiff must "show some basis in fact" to meet certification criteria, and they point to the lack of any evidence to prove deceptive conduct, or a knowing or misleading act or practice, sufficient to certify a common issue based on the *Consumer Protection Act*. The passage from *Hollick* relied upon by the defendants is as follows:

> [25] I agree that the representative of the asserted class must <u>show some basis in fact</u> to support the certification order. As the court in [*Taub v. Manufacturers Life Insurance Co.* (1988), 40 O.R. (3d) 379] held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, <u>other than the requirement that the pleadings disclose a cause of action</u>. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch [*Class Actions in Canada* (Vancouver: Western Legal Publications, 1996, loose-leaf December 1998, release 4)], at para. 4.60.
>
> [Emphasis added.]

[21] The first phrase I have emphasized in the above paragraph contains the words relied upon by the defendants. The second phrase I have emphasized is the exception to the requirement for evidence when the issue is whether the pleadings disclose a cause of action. The issue with which I am presently dealing falls within the exception, and there is no requirement for the plaintiff to introduce any evidence

to support her pleading that the defendants had or should have had the required knowledge.

[22] As the amended statement of claim pleads knowledge (or recklessness) on the part of the defendants with respect to the two particularized representations and as no evidence is required at this stage to substantiate the pleading, it is not necessary to decide on this appeal whether the defendant's interpretation of *Rushak v. Henneken* is correct.

(b) <u>Claim for Punitive Damages</u>

[23] The defendants also make two points with respect to the claim for punitive damages, one of which is the same as the first point they make with respect to the claim under the *Consumer Protection Act*. Relying on the comments of Mr. Justice Binnie in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 87, the defendants say that the pleading in the statement of claim in respect of punitive damages is conclusory in nature and is unsupported by material facts or particulars.

[24] In holding that the statement of claim disclosed a proper claim for punitive damages, the chambers judge noted that the defendants had not demanded particulars and that the pleading in this case was similar to the pleading in *Whiten*, where it was held to be sufficient. As with the corresponding point in relation to the claim under the *Consumer Protection Act*, I need not decide whether the chambers judge was correct in his holding because the amendments to the statement of claim included the addition of particulars with respect to the claim for punitive damages. The amended statement of claim now pleads facts with respect to the defendants' recall of the lens solution in support of the assertion that their conduct was reprehensible and departed to a marked degree from ordinary standards of decent behaviour.

[25] The defendants' second point is that recent jurisprudence holds that there is no basis for certifying a claim for punitive damages as a common issue in product

liability class proceedings that will ultimately involve individual trials to determine causation and compensatory damages. The defendants rely on the decision in *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, where Madam Justice Dardi followed the Ontario decision of *Robinson v. Medtronic, Inc.* (2009), 80 C.P.C. (6th) 87 (Ont. Sup. Ct.), in holding that the quantification of punitive damages was not amenable to resolution as a common issue in that case. I do not consider either of these decisions to stand for the general proposition that no aspect of a claim for punitive damages should be certified as a common issue in product liability class proceedings.

[26] The class proceeding in *Robinson v. Medtronic* related to wires manufactured and sold by the defendants for incorporation into implantable heart defibrillators, and the class wished to pursue a claim of punitive damages against the defendants. Mr. Justice Perell reviewed the principles articulated in *Whiten*, and he reviewed numerous decisions in which common issues in relation to punitive damages were certified. Two of the decisions he distinguished were British Columbia cases, *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, and *Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264, 14 C.P.C. (4th) 197 (C.A.).

[27] Mr. Justice Perell concluded that punitive damages should not be certified as a common issue in the circumstances before him because the entitlement and quantification of punitive damages requires quantification of compensatory damages and an appreciation of the extent of the harm caused by the defendants' misconduct and, therefore, the pre-conditions for punitive damages would not be satisfied until after individual assessments of causation and damages. He also held his conclusion was not affected by the fact that the claim of waiver of tort was being certified as a common issue because this claim did not change the situation that punitive damages could not be determined until after the individual trials. Mr. Justice Perell adopted the same reasoning in his subsequent decision in *Goodridge v. Pfizer Canada Inc.*, 2010 ONSC 1095, 85 C.P.C. (6th) 267.

[28] In *Koubi v. Mazda Canada*, the claim related to alleged defects in the door locks of a particular model of a motor vehicle. The plaintiff was seeking damages for mental distress and punitive damages on the basis that she and other class members suffered fear and upset at the prospect of their vehicles being broken into. Madam Justice Dardi refused to certify punitive damages as a common issue because the characterization of the defendants' actions could not fairly be separated from a consideration of whether class members resided in communities with a high or low incidence of auto theft. She specifically qualified her holding by stating that "[t]here may be cases where at the common issues trial the court would be in a position to determine entitlement to punitive damages" (para. 157).

[29] As I mentioned, one of the cases distinguished by Perell J. in *Robinson v. Medtronic* was *Rumley v. British Columbia*, where the Supreme Court of Canada agreed with the certification of punitive damages as a common issue in an action against the provincial government in connection with sexual, physical and emotional abuse of students by staff at a residential school for deaf children. The reasoning of Mr. Justice Mackenzie accepted by the Supreme Court of Canada was as follows (*sub. nom. L.R. v. British Columbia*, 1999 BCCA 689, 180 D.L.R. (4th) 639 at para. 48):

> The purpose of punitive damages is to punish a morally culpable defendant: see *Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (C.A.). The plaintiffs' pleading alleges conduct that if substantiated could be characterized as morally culpable. Any award for punitive damages should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment. A global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate. The plaintiffs would be required to succeed on a common issue related to sexual abuse as well as proving moral culpability to establish a foundation for punitive damages.

[30] The principal point made by Perell J. in *Robinson v. Medtronic* was that the ultimate determination of the entitlement and quantification of punitive damages cannot be made until the individual trials on causation and compensatory damages have occurred. However, this was recognized by Mackenzie J.A. in *L.R. v. British Columbia* (*Rumley*), when he said the following:

> [49] As compensatory damages also punish the defendant indirectly, any award for punitive damages should take into account the quantum of compensatory damages awarded. In the context of a class proceeding, that suggests that the assessment of any award for punitive damages should be deferred until the total amount of compensatory damages has been assessed.

Indeed, the total amount of compensatory damages awarded against a defendant may lead the court to decide that an award of punitive damages should not be made. This point was made in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, a decision issued concurrently with the decision in *Whiten*, where Binnie J. stated that "an award of punitive damages is rational 'if, but only if' compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation" (para. 87).

[31] Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct, and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

[32] In *Chace v. Crane Canada*, it was similarly recognized that the amount of the damages could not be assessed until compensatory damages had been determined. In upholding the certification of a common issue to determine whether the defendant's conduct justified an award of punitive damages, Madam Justice Huddart said the following:

> [27] The trial on the first two issues will be an examination of Crane's conduct and knowledge throughout the 11 years in issue. That conduct is the foundation of the claim for both compensatory and punitive damages. At the end of the proceedings, the trial judge will have the entire picture before him.

In *Robinson v. Medtronic*, Perell J. distinguished *Chace v. Crane Canada* on the basis that the "whole picture will not be before the judge at the common issues trial" (para. 174). With respect, I think Perell J. missed the point Huddart J.A. was making. She was saying that the conduct of the defendant in relation to the claims for both compensatory and punitive damages could be examined at the common issues trial and that, with the benefit of that evidence and the evidence adduced at the individual trials dealing with the assessment of compensatory damages, the judge would have the entire picture before him or her and would be in a position to make the final determination and assessment in relation to the claim for punitive damages.

[33] Although *Whiten* and *Sylvan Lake Golf* have articulated the prerequisites for an award of punitive damages, it is my view that they have not altered the law with respect to the certification of sub-issues in relation to punitive damages claims as common issues in class proceedings. In *Fakhri v. Wild Oats Markets Canada, Inc.*, 2004 BCCA 549, 34 B.C.L.R. (4th) 201, which was decided after *Whiten* and *Sylvan Lake Golf*, this Court followed *Chace v. Crane Canada* and *Rumley* in allowing the claim for punitive damages to be certified as a common issue despite the fact that there would have to be two stages required to decide the claim. The Court believed that the case would be advanced by deciding the preliminary question at the first stage in a general way.

[34] In his reasons for judgment, the chambers judge said that a consideration of the punitive damages claim is amenable to resolution as a common issue because it will involve an assessment of the state of knowledge of the defendants (para. 41). His order describes the common issue in relation to punitive damages as follows:

> [7] (c) Should either or both of the Defendants pay punitive damages, and, if so, to whom should they be paid, and in what amount?

During the hearing of the appeal, we raised with counsel for the plaintiff the view that the last two aspects of this issue appeared to be phrased as individual issues. As well, the wording of the clause could be interpreted to mean that all aspects related to the claim for punitive damages are to be determined at the same time. Counsel admitted the wording of the order was inelegant and suggested that either the matter be referred back to the chambers judge or the wording be rephrased by this Court.

[35] In *L.R. v. British Columbia* (*Rumley*) at para. 52, Mackenzie J.A. defined the common issues with respect to punitive damages. I would similarly define them in this case by replacing para. 7(c) of the order with the following:

> (c) If either or both of the Defendants breached a duty of care owed to class members, was either or both of the Defendants guilty of conduct that justifies punishment?
>
> (d) If the answer to common issue 7(c) is “yes” and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against either or both of the Defendants?

By wording para. 7(d) in this fashion, it will be clear that the final decision regarding punitive damages must await the outcome of the individual damage trials. The above wording may be amended as the judge having conduct of the pre-trial proceedings, or the trial judge, considers necessary and appropriate in the circumstances.

[36] I do not consider it is necessary or advisable to express, as a common issue, the issue relating to the distribution of any award of punitive damages among class members. It is not an issue in which the defendants will have an interest. It is an ancillary issue in the event punitive damages are awarded, and it will not necessarily be an issue in which all of the class members will have a common interest. If the trial judge makes an award of punitive damages, he or she can decide whether it is appropriate to deal with the distribution of the punitive damages at the same time or whether further directions should be given to facilitate the determination of the most appropriate manner of distribution.

(c) Jurisdiction over Non-Resident Claims

[37] The chambers judge held the British Columbia courts have territorial competence over the claims of non-residents against each of the defendants and that there was no basis to decline to exercise jurisdiction in favour of the courts of another province. He relied on the decision of a five-member division of this Court in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 193 D.L.R. (4th) 67, leave to appeal denied, [2001] S.C.C.A. No. 21, in concluding that the real and substantial connection between British Columbia and the claims of non-residents against the American parent, Advanced Medical Optics, Inc., was the existence of the common issues relating to claims of residents of British Columbia against the defendants and the claims of the non-residents against AMO Canada Company. The chambers judge rejected the argument that *Harrington* no longer applies due to the subsequent passage of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. The judge held that the British Columbia courts have territorial competence over the claims of non-residents against AMO Canada Company on the basis of s. 3(d) of the Act because its extra-provincial registration in British Columbia means that it is ordinarily resident in the province.

[38] On appeal, the defendants submit the jurisdictional principle in *Harrington* has been overruled by the companion decisions of this Court in *MacKinnon v. National Money Mart Company*, 2009 BCCA 103, 304 D.L.R. (4th) 331, and *Seidel v. Telus Communications Inc.*, 2009 BCCA 104, [2009] 5 W.W.R. 466, leave to appeal granted, [2009] S.C.C.A. 191. The Attorney General of British Columbia participated in the appeal because the defendants filed, “out of abundance of caution”, a notice of intent to question constitutional applicability because their submissions might affect the constitutional applicability of s. 16(2) of the *Class Proceedings Act*.

[39] The claim in *Harrington* was one in negligence against the manufacturers of silicone breast implants and the supplier of silicone. The plaintiff was a resident of British Columbia, but the certification order described a non-resident class, the members of which could elect to opt into the proceeding pursuant to s. 16(2). The

plaintiff accepted that many of the non-resident class and some of the resident class could not establish jurisdiction under a strict application of the real and substantial connection test.

[40] The majority of the Court agreed with the chambers judge that the existence of a common issue of fact constituted sufficient connection to found jurisdiction. The majority held that, while s. 16(2) did not seek to extend the jurisdiction of British Columbia courts beyond their constitutionally recognized limits, it did indicate to the courts that the Legislature accepted, as a matter of public policy, a decision to include non-residents in class proceedings. Madam Justice Huddart, for the majority, summarized her reasoning for concluding that the existence of certified common issues may provide a sufficient connection to justify jurisdiction:

> [99] New types of proceedings require reconsideration of old rules if the fundamental principles of order and fairness are to be respected. To permit what the appellants call "piggy backing" in a class proceeding is not to gut the foundation of conflict of laws principles. Rather, as I have tried to explain, it is to accommodate the values underlying those principles. To exclude those respondents who do not reside in British Columbia from this action because they have not used the product in British Columbia would, in these circumstances, contradict the principles of order and fairness that underlie the jurisdictional rules.

Harrington has been followed in numerous subsequent cases, including the appellate decision in *Ward v. Canada (Attorney General)*, 2007 MBCA 123, 286 D.L.R. (4th) 684.

[41] The decisions in *National Money Mart* and *Seidel* involved the interaction between class actions and contractual arbitration clauses. It had been held earlier in *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 473, 50 B.L.R. (3d) 291, *sub. nom. MacKinnon v. National Money Mart Company*, that if a proceeding is certified under the *Class Proceedings Act*, an arbitration clause in a contract between the class members and the defendant became "inoperative" within the meaning of s. 15(2) of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55. This meant that the class proceeding could proceed despite the agreement to arbitrate.

[42] For the reasons set out in *National Money Mart* and adopted in *Seidel*, it was held that the 2004 decision in *Instaloans Financial* had effectively been overruled by the Supreme Court of Canada in its decisions in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921. An arbitration agreement creates substantive rights and cannot be modified by the *Class Proceedings Act*, which contains only procedural provisions applicable to class actions. As a result, the court cannot refuse to stay a putative class action in the face of a binding arbitration agreement between the parties (the Court stayed the action in *Seidel* but held in *National Money Mart* that the doctrine of issue estoppel applied to preclude the Court from giving effect to the change in law brought about by *Dell* and *Rogers*).

[43] In my opinion, *National Money Mart* and *Seidel* are clearly distinguishable from *Harrington* and cannot be interpreted to have implicitly overruled *Harrington*. While *National Money Mart* and *Seidel* dealt with the jurisdiction of the court, it was within the context of an arbitration agreement, and there was no issue in those cases as to whether a real and substantial connection existed between British Columbia and the facts upon which the claims were brought. *National Money Mart* and *Seidel* do not stand for the proposition, as the defendants contend, that jurisdictional questions must be considered before procedural questions like class certification are determined. The proposition for which they stand is that arbitration agreements create substantive rights that cannot be modified by procedural statutes like the *Class Proceedings Act*. Those decisions do not prevent the court from considering the existence of a common issue as a basis for concluding that a real and substantial connection exists between British Columbia and the facts upon which the claims are brought.

[44] As *Harrington* has not been overruled, expressly or impliedly, by *National Money Mart* and *Seidel*, it continues to be binding on a three-member division of this Court. The chambers judge did not err in relying on *Harrington* in his determination that the British Columbia court has territorial competence over the claims of residents of other provinces.

(d) Preferability of Class Proceeding

[45] The chambers judge rejected three arguments made by the defendants in his assessment of whether the class proceeding was the preferable procedure for the fair and efficient resolution of the common issues. The defendant had argued there are too many individual issues, there are a relatively small number of members in the class, and a test case on the common issues relating to the negligence claim would be a preferable procedure.

[46] The standard of appellate review in respect of the preferability assessment under s. 4(1)(d) of the *Class Proceedings Act* was discussed in *Hoy v. Medtronic, Inc.*, 2003 BCCA 316, 14 B.C.L.R. (4th) 32, where Chief Justice Finch said the following:

> [38] In *Flexwatt* [*Campbell v. Flexwatt Corp.*, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (C.A.)], this Court recognized that a chambers judge has a broad discretion in determining whether a class proceeding meets the criteria of s.4 of the [*Class Proceedings Act*]. Determining whether a class proceeding would be preferable under s.4(1)(d) is an important aspect of that discretionary power. An appellate court ought not to interfere with the exercise of this discretion unless persuaded that the chambers judge erred in principle or was clearly wrong.

[47] On appeal, the defendants simply reargue the same three points. They do not point to any error in principle that they say was made by the chambers judge. In my opinion, it cannot be said that the conclusion reached by the judge was clearly wrong. Numerous medical products cases with many individual issues have been certified as class actions in Canada.

[48] I would not give effect to this ground of appeal.

(e) Workable Litigation Plan

[49] The defendants repeat the argument they made to the chambers judge that the plaintiff's litigation plan is not workable because it leaves many individual issues dormant until the common issues are determined. The defendants have not pointed to any error in principle made by the chambers judge in concluding that the litigation

plan was sufficient to support the certification application. Nor can it be said the judge's conclusion was clearly wrong.

[50] I would not give effect to this ground of appeal.

Conclusion

[51] I would dismiss the appeal except to the limited extent of replacing para. 7(c) of the order with paras. 7(c) and (d) as set out in para. 35 of these reasons. As none of the circumstances described in s. 37(2) of the *Class Proceedings Act* are present, I would not make an award of costs in respect of this appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Bennett"