IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Lieberman and Morris v. Business Development Bank of Canada,*** 2006 BCSC 242

Date: 20060216
Docket: L041024
Registry: Vancouver

Between:

Lucien Lieberman and Marjory Morris

Plaintiffs

And

Business Development Bank of Canada

Defendant

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiffs:	D.A. Klein
Counsel for the Defendant:	C.A.B. Ferris M. Vesely
Dates and Place of Trial/Hearing:	November 21–24, 2005 Vancouver, B.C.

INTRODUCTION

[1] This action is brought pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. The plaintiffs are retired employees of the defendant, Business Development Bank of Canada (the "BDC"), who now both reside in British Columbia. They seek certification of an action against the BDC concerning its role in the administration of the BDC pension plan (the "BDC Pension Plan") of which the plaintiffs are both retired members.

[2] The causes of action asserted by the plaintiffs are primarily concerned with alleged breaches of fiduciary duties said to be owed by the BDC to them and other retired members or other beneficiaries of the BDC Pension Plan.

[3] The BDC does not dispute that the plaintiffs' action meets the necessary criteria for certification as a class action. The BDC does, however, submit that the action should be certified as a class action in Quebec rather than in any common law province in Canada due to issues of *forum non conveniens* and that the plaintiffs' action in British Columbia should accordingly be stayed.

ISSUES

[4] Two issues require determination. They are:

(1) Should the plaintiffs' action be certified as a class action under s. 4 of the ***Class Proceedings Act*** to resolve the following two proposed common issues:

(a) Did the BDC breach its fiduciary duties to the class members as alleged in paragraphs 36 and 37 of the statement of claim?

(b) If the BDC did breach its duties to the class members, what relief should be granted to the class members?

(2) Should this court stay the plaintiffs' action in British Columbia under Rule 14(6.1) of the *Rules of Court* in favour of a class action proceeding to be commenced in Quebec?

BACKGROUND

[5] The BDC is a financial institution that is wholly owned by the Government of Canada. Section 4(1) of the ***Business Development Bank of Canada Act,*** S.C. 1995, c. 28 [***BDC Act***] provides that its purpose is to support Canadian entrepreneurship by providing financial and management services and by issuing securities or otherwise raising funds or capital in support of those services.

[6] In 1995, the BDC was continued as a financial institution under the ***BDC Act***, which modernized the 50 year operations of its predecessors, the Federal Business Development Bank (the "FBDB") and the Industrial Development Bank. Specifically, concerning the history of the evolution of the BDC:

(1) the Industrial Development Bank, a subsidiary of the Bank of Canada, was created in 1944 by the ***Industrial Development Bank Act***, S.C. 1944–45, c. 44;

(2) in 1974, the FBDB was established pursuant to the ***Federal Business Development Bank Act***, S.C. 1974–75–76, c. 14; and

(3) in 1995, the ***Federal Business Development Bank Act*** was repealed and replaced by the ***BDC Act***.

[7] Prior to 1976, the employees of the Industrial Development Bank and its successor, the FBDB, were members of the Bank of Canada Staff Pension Fund created by By-Law No. 57 passed by the Bank of Canada, and incorporating certain provisions of the ***Civil Service Superannuation Act***, R.S.C. 1952, c. 50. When the ***Industrial Development Bank Act*** was repealed in 1975 and the ***Federal Business Development Bank Act*** implemented, it empowered the FBDB to establish and administer its own pension plan. The FBDB did so in 1976 and the FBDB Pension Plan then evolved into the BDC Pension Plan.

[8] The BDC Pension Plan is a defined benefits pension plan registered with the federal Office of the Superintendent of Financial Institutions pursuant to the ***Pension Benefits Standards Act 1985*****,** R.S.C. 1985 (2nd Supp.), c. 32 [***PBSA***], and, pursuant to the ***PBSA***, the BDC is its administrator.

[9] There are three categories of beneficiaries under the BDC Pension Plan (the "Plan Members"):

(1) a person employed by the BDC who is a member of the BDC Pension Plan and is accruing credits under the BDC Pension Plan ("Active Members");

(2) a person who has ceased membership in the BDC Pension Plan, but the value of whose accrued benefits was left in the BDC Pension Plan such that the individual has a future entitlement to pension benefits ("Deferred Vested Members"); and

(3) a person who previously participated in the FBDB Pension Plan or the BDC Pension Plan and is receiving benefits from the Fund ("Retired Members").

[10] Important circumstances related to the evolution of the BDC Pension Plan and to the disputes that are the subject of this proceeding, include the following developments:

(1) the FBDB created the Federal Business Development Bank Pension Fund (the "FBDB Fund") by its By-Law No. 12;

(2) Rule 10.1 of By-Law No. 12 provided that the FBDB Fund was to be vested in the "Trustees", which term was defined to mean various executives of the FBDB;

(3) on July 6, 1982, the Trustees of the FBDB Fund entered into an agency trust agreement with Montreal Trust made effective September 16, 1976, pursuant to which Montreal Trust agreed to act as agent of the Trustees and to hold the FBDB Fund under the Plan;

(4) in 1987, the FBDB Pension Plan was amended (the "1987 Amendment") to provide, among other things, that the FBDB would

receive any surplus upon the termination or winding up of the FBDB Pension Plan after all liabilities were met and also that the FBDB could, on an ongoing basis, apply all or any of the surplus to reduce contribution requirements;

(5) in 1991, the Trustees of the FBDB Fund and the FBDB entered into an amended trust agreement (the "1991 Trust Agreement") vesting the FBDB Fund in the Trustees and giving the Trustees the power to administer and make payments out of the FBDB Fund (which subsequently became the BDC Fund), including the payment of benefits, fees and expenses;

(6) since 1991, the BDC has caused to be paid from the FBDB Fund and the BDC Fund certain fees and expenses that the plaintiffs allege unjustly enrich the BDC to the detriment of the plaintiffs and the proposed plaintiff class and also constitutes a partial revocation of trust;

(7) in 1994, the FBDB reduced its contributions to the FBDB Pension Plan and, in 1995 after the creation of the BDC Pension Plan, the BDC entirely ceased making contributions to the BDC Pension Plan;

(8) in 1997, by resolution effective April 9, 1997, (the "1997 Amendment"), the BDC's Board of Directors declared a "contribution holiday" that temporarily suspended the obligations of Active Members to contribute to the BDC Pension Plan;

(9) in 1998, by resolution effective May 6, 1998 (the "1998 Amendment"), the BDC's Board of Directors made the temporary contribution holiday for Active Members permanent subject to the potential for re-introduction of contributions if the surplus in the BDC Pension Plan is less than 10% of its actuarially determined liabilities or the subsequent determination of the BDC's Board of Directors to reintroduce employee contributions; and

(10) on May 6, 1998, the BDC's Board of Directors also resolved to make a one time $2 million cash distribution to then Retired Members of the BDC Pension Plan or their beneficiaries.

[11] The various amendments to the FBDB Pension Plan and the BDC Pension Plan resulted in Retired Members of the BDC Pension Plan becoming very concerned about allegedly unfair treatment by the BDC to their detriment. Various committees were formed to liaise with the BDC in relation to the effects of the various amendments on Retired Members and Active Members.

[12] From approximately 1994 to 2001, the proposed plaintiff, Lucien Lieberman, was the pensioners' representative on a pension committee of the FBDB whose mandate was to produce an annual report for Retired Members and Active Members to keep them informed about the BDC Pension Plan.

[13] Mr. Lieberman had begun working for the Industrial Development Bank in January 1965 and eventually worked in branch offices of the Industrial Development Bank and the FBDB in Calgary, Winnipeg, Montreal and Vancouver.

[14] Mr. Lieberman's posting in Vancouver was from 1975 until his retirement in 1991 and he has, since then, resided in Vancouver where he has collected his pension from both the FBDB Pension Plan and the BDC Pension Plan.

[15] The 1997 Amendment providing for the possibility of contribution holidays for the BDC and its current employees was widely criticized by Retired Members and when that criticism failed to abate, the "Pensioners' Association of the [BDC] Pension Plan" formed an "Advisory Committee", the mandate of which was to "review and present to the Board of Directors of the Association the concerns and views of the pensioners regarding various aspects of the [BDC] Pension Fund".

[16] The Advisory Committee was comprised of five members, those being a chairperson and four members at large from different regions of Canada.

[17] Mr. Lieberman was selected to represent the western region.

[18] The BDC Pensioners' Association and its Advisory Committee were unable to resolve their disputes with the BDC and since the mandate of the Advisory Committee had only been to gather and communicate the opinion of the pensioners to the BDC about surplus distribution, another committee was formed to pursue dispute resolution. A "Fairness and Equity Committee" was then formed and was given a mandate to determine the viability of launching a class action in Ontario. Neither Mr. Lieberman nor Ms. Morris, the other plaintiff in this action, was a member of that committee.

[19] The Ontario class action was filed but was discontinued shortly thereafter due to the inability of the Ontario plaintiffs to obtain funding from the Ontario Class Proceedings Fund. The defendant did not file pleadings and there was no adjudication of any kind concerning the merits of that proceeding. The Fairness and Equity Committee then disbanded.

[20] Subsequently, Mr. Lieberman, and the plaintiff Marjorie Morris, also a retired employee and pensioner of the FBDB and the BDC, sought legal counsel in British Columbia and filed this proceeding seeking certification as a class action in British Columbia.

[21] The writ of summons in this proceeding was filed on April 26, 2004, and was served on the defendant April 29, 2004. The BDC entered an Appearance on May 7, 2004 and the plaintiffs delivered their statement of claim on November 30, 2004.

[22] In their statement of claim, the plaintiffs allege that the BDC has statutory and equitable fiduciary duties, including a duty to act in the best interests of all BDC Pension Plan Members and other beneficiaries when dealing with the BDC Fund, to act impartially and with even-handedness, to administer the BDC Fund, including any surplus, in the best interests of the BDC Pension Plan Members and for the sole benefit of the BDC Pension Plan Members.

[23] Particulars of the BDC's alleged breaches of duty as set out in paragraphs 36 and 37 of the statement of claim are:

36. The BDC has breached the statutory and private duties owed to the Plaintiffs and plaintiff class by amending the Pension Plan in its own corporate interest, acting in conflict with the interests of the Plan Members and beneficiaries, and unjustly enriching itself to the detriment of the Plan Members and beneficiaries. More specifically, but without limitation:

    (a) The 1987 Amendments constitute an attempt to divert funds from the Pension Plan to the benefit of BDC and to the detriment of the Plaintiffs and the plaintiff class. The Pension Plan was impressed with an irrevocable trust for the benefit of the Plan Members and their surviving spouses and beneficiaries, and as such the 1987 Plan Amendments are an unauthorized revocation of the Pension Plan trust fund.

    (b) The Contribution Holiday for the BDC were of significant financial benefit to the BDC. The BDC breached the irrevocable trust by relieving itself of its obligation to make several million dollars in employer contributions to the financial detriment of Plan Members and survivors.

    (c) The diversion of money from the Fund, to pay the Plan Expenses is a partial revocation of trust. It unjustly enriched the BDC at the expense of the Plaintiffs and class members and constitutes a breach of fiduciary duty.

37. In breach of its duty of even-handedness, the BDC has amended the Plan in a disproportionate fashion, favouring active and future members as at April 9, 1997, to the detriment of retired and deferred vested members, and their beneficiaries as of that date. More specifically, but without limitation:

    (a) The contribution holidays created by the 1997 and 1998 Plan Amendments and other benefits to active members were of significant financial benefit to active members and future members as of the date of those amendments, but provided no benefit to the Plaintiffs and the other class members.

    (b) The BDC did not provide a corresponding benefit to the Plaintiffs and plaintiff class. The $2 million cash distribution was not equivalent to the value of

> the substantial benefits created by the contribution holidays for active members and future members.

[24] The plaintiffs also allege that as a result of the BDC's breaches of fiduciary duty they, and others similarly situated, have suffered financial loss and damages. On their own behalf and on behalf of all class members, the plaintiffs claim, among other things, an accounting; a distribution of lump sum or periodic cash distributions from the BDC Fund in accordance with the actuarial liabilities they represent; and, damages against the BDC.

[25] The BDC has not yet delivered a statement of defence. Rather, the BDC delivered a notice of motion dated February 18, 2005, together with supporting materials, seeking an order that this action be stayed on the grounds that this Court ought to decline to exercise jurisdiction.

[26] On March 3, 2005, I heard the application of the plaintiffs requesting that the stay application be adjourned to be heard at the same time as the certification application. The BDC opposed the application on the grounds that the stay application should be heard in advance of any certification application. On March 18, 2005, as the case management judge in this proceeding, I ruled that the two applications should be heard together. See: ***Lieberman v. Business Development Bank of Canada*** (2005), 11 C.P.C. (6th) 348, 2005 BCSC 389. Corrigendum: issued April 29, 2005.

[27] The BDC sought leave to appeal that decision. However, Madam Justice Prowse dismissed that application on May 6, 2005: ***Lieberman v. Business Development Bank of Canada*** (2005), 45 C.C.P.B. 321, 2005 BCCA 268.

ANALYSIS AND DISCUSSION

[28] I will first address the issue of whether the plaintiffs' action meets the criteria for certification as a class proceeding in British Columbia and then proceed to consider the BDC's *forum non conveniens* application.

ISSUE #1: Should the plaintiffs' action be certified as a class action under s. 4 of the *Class Proceedings Act?*

[29] As I have noted, the plaintiffs seek certification of this action as a class action in British Columbia to resolve the following two proposed common issues:

(a) Did the BDC breach its fiduciary duties to the class members as alleged in paragraphs 36 and 37 of the statement of claim?

(b) If the BDC did breach its duties to the class members, what relief should be granted to the class members?

[30] As I have also noted, the BDC does not suggest that the issues raised by the pleadings would not properly be the subject of class proceedings provided they were heard in Quebec. Accordingly, no argument was advanced by the BDC disputing the common issues proposed or the appropriateness of Mr. Lieberman as a proposed plaintiff.

[31] Having considered all of the evidence and the submissions of counsel as I am bound to do notwithstanding the lack of objection by the BDC (aside from its *forum*

non conveniens submissions), I am satisfied that the plaintiffs have met the burden of establishing that the action would appropriately be certified as a class action in British Columbia under s. 4 of the ***Class Proceedings Act***. I am also satisfied that the proposed plaintiff Mr. Lieberman meets the statutory requirements to be appointed as a representative plaintiff under s. 4(1)(e). He is, in my view, uniquely qualified to fulfill that role.

[32] For most of the years since Mr. Lieberman has been retired, he has been actively involved in representing the interests of Retired Members of the BDC Pension Plan as a pensioners' representative on the Pension Committee and on the Advisory Committee of the IDB/FBDB/BDC Pensioners' Association. I am satisfied that he would fairly and adequately represent the interests of the class and has produced a workable plan for advancing the proceeding on behalf of the class and of notifying class members of the proceeding. He also does not have any interest in the proposed common issues that is in conflict with other class members.

ISSUE #2: Should this court stay the plaintiffs' action in British Columbia under Rule 14(6.1) of the *Rules of Court* in favour of a class action proceeding to be commenced in Quebec?

[33] Although the BDC acknowledges that this Court has jurisdiction over it and the subject matter of the proceedings it submits that in this case "involving a pension plan governed by Quebec law, with Quebec based witnesses, with respect to acts that took place in Quebec with respect to assets located in Quebec," this Court should decline jurisdiction in favour of Quebec.

[34] In ***472900 B.C. Ltd. v. Thrifty Canada, Ltd.*** (1998) 57 B.C.L.R. (3d) 332, 168 D.L.R. (4th) 602 (C.A.) [***Thrifty Canada***], a five member panel of our Court of Appeal addressed the approach to now be taken in British Columbia in determining a *forum non conveniens* application. In doing so, Esson J.A. stated for the Court at ¶ 32:

> "*Abidin Daver*" *(The)* and *The Spiliada* laid to rest the insular English rule in both its original and modified forms and mandated the radically different approach of determining which is the more appropriate jurisdiction. Comity, which played no part in the old rule, is now a major consideration. Parallel actions dealing with the same subject matter must now be avoided unless the party resisting the application to stay can demonstrate possible loss of a juridical advantage. The right of the plaintiff to sue in the court of his choice is not now a significant factor. A primary purpose of the present rule is to avoid having two actions proceeding in different jurisdictions with the attendant risk of conflicting decisions. There is now no burden on the applicant to establish that the action would be vexatious, oppressive and/or an abuse of the process of the court. Such matters can, of course, still be relied on in aid of the application to stay because, if they can be established, the jurisdiction in which that would occur can hardly be the appropriate one. But the absence of such factors is no longer a basis for refusing the application to stay.

[35] In ***Stern v. Dove Audio Inc.*** (1994) 47 A.C.W.S. (3d) 275, [1994] B.C.J. No. 863 at ¶ 62 (S.C.), Low J. (as he then was) set forth a non exclusive list of factors that are relevant to the determination of *forum non conveniens* applications. Those factors include:

(1) Where each party resides.
(2) Where each party carries on business.
(3) Where the cause of action arose.
(4) Where the loss or damage occurred.
(5) Any juridical advantage to the plaintiff in this jurisdiction.
(6) Any juridical disadvantage to the defendant in this jurisdiction.
(7) Convenience or inconvenience to potential witnesses.
(8) Cost of conducting the litigation in this jurisdiction.

(9) Applicable substantive law.
(10) Difficulty and cost of proving foreign law, if necessary.
(11) Whether there are parallel proceedings in any jurisdiction. ("forum shopping" is to be discouraged.)

[36] These factors remain relevant and appropriate for consideration notwithstanding that ***Stern v. Dove*** was decided before ***Thrifty Canada***. They must, however, now be considered and weighed having regard to the non-insular approach approved in ***Thrifty Canada***.

[37] In determining whether the defendant's *forum non conveniens* application should succeed, I must also bear in mind the burden of proof that is applicable to this application.

[38] In ***Amchem Products Inc. v. British Columbia (Worker's Compensation Board)***, [1993] 1 S.C.R. 897 at 921, 77 B.C.L.R. (2d) 62 [***Amchem Products***], Sopinka J. stated:

> While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff. This was the position adopted by McLachlin J.A. (as she then was) in *Avenue Properties Ltd. v. First City Dev. Corp.* (1986), 7 B.C.L.R. (2d) 45. She emphasized that this had particular application where there were no parallel foreign proceedings pending. [Emphasis in original]

[39] Counsel for the plaintiffs submitted that since this is a case where there are no parallel proceedings, the burden of proof established in ***Amchem Products*** is of particular importance.

[40] In response to that submission, counsel for the BDC submitted that the fact that there are not presently parallel proceedings should not be of significant concern because to emphasize that factor in weighing all of the ***Stern v. Dove*** factors and any other relevant factors would overemphasize the plaintiffs' choice of forum, an approach that was rejected by our Court of Appeal in its decision in ***Thrifty Canada.***

[41] The BDC also submits that the lack of parallel proceedings should not be of significant concern because the BDC could have sought a declaration in Quebec concerning whether it had breached any obligations owed to the members of the class.

[42] I am satisfied that the lack of the existence of parallel proceedings in a foreign jurisdiction (in this case Quebec) is an important factor to be considered in determining whether the applicant has met its burden of establishing that Quebec is clearly a more appropriate forum for the determination of the issues raised in this class proceeding. See: ***Scalas Fashinon v. Yorkton Securities*** (2002), 21 C.P.C. (5th) 256, 2002 BCSC 173 at ¶ 66 (reversed on other grounds 17 B.C.L.R. (4th) 6, 2003 BCCA 366, 35 C.P.C. (5th) 40) and ***Her Majesty the Queen v. Imperial Tobacco Ltd***. (2005), 44 B.C.L.R. (4th) 125, 2005 BCSC 946, 13 C.P.C. (6th) 272 at ¶ 167 and cases cited therein).

[43] I also agree, however, that the lack of existence of parallel foreign proceedings is not to be treated as an overriding factor because all other relevant factors must also be considered.

[44] I turn next to my determination of whether the BDC has established that Quebec is clearly the more appropriate forum in which to determine the issues in this class proceeding.

[45] Some of the important facts relied upon by the BDC in support of its jurisdiction submissions are that:

(1) the BDC and its predecessor the FBDB have always had their headquarters in Montreal, Quebec;

(2) the BDC Plan was administered in Quebec;

(3) the BDC obtained its actuarial advice with respect to contribution holidays from the BDC Plan's actuary, Mercer & Associates, who are located in Montreal, Quebec;

(4) with the exception of one meeting held in Toronto, Ontario, each meeting of the BDC Board of Directors that approved a contribution holiday for the BDC or for the Active Members of the BDC Plan was held in BDC's head office in Montreal, Quebec;

(5) the FBDB Fund and the BDC Fund have been held in Quebec since the inception of the FBDB Fund and the BDC Fund is now held in Montreal at the offices of the custodian, Royal Trust;

(6) decisions concerning the administration of the FBDB Plan were made by the Board of Directors of the FBDB and the BDC at its head office in Montreal;

(7) payments of benefits and administrative expenses from the FBDB Fund and the BDC Fund have always been made from Quebec;

(8) there are currently seven trustees of the BDC Plan, four of whom reside in Quebec; and,

(9) Article 13.8 of the 1991 Trust Agreement provides:

> This Trust Agreement shall be governed by, and construed in accordance with, the laws of the Province of Quebec and the applicable laws of Canada.

[46] On the other hand, the plaintiffs rely, among other things, upon the facts that:

(1) the BDC operates at least 88 branch operations across Canada as a national institution located in every province and territory with 27 branches in Ontario, 22 in Quebec and 15 in British Columbia;

(2) a substantial number of the proposed class members reside in British Columbia;

(3) according to the information provided by the BDC, as of June 2003, a roughly equal number of the approximately 1,147 class members reside in British Columbia and Quebec. Although more Retired

Members live in British Columbia than Quebec, more Deferred Vested Members live in Quebec than British Columbia;

(4) although payments of benefits to class members from the BDC Plan are made from Quebec, they are received by class members in the jurisdiction in which they reside and most importantly, are derived from entitlement earned through their employment by the BDC and its predecessors in all provinces and territories of Canada; and

(5) the BDC Pension Plan, and most particularly the statutory obligations of the BDC as the administrator of the BDC Plan are subject to and governed by the ***PBSA***, a federal statute.

[47] I will now consider in more detail the factors outlined in ***Stern v. Dove*** weighed in accordance with the approach required by ***Thrifty Foods*** and ***Amchem Products*** in determining whether this Court should decline jurisdiction in this class proceeding in favour of the Quebec courts. In doing so I will consider on a combined basis those factors that I believe to be inextricably related in this case.

The residence of the parties (and where each carries on business)

[48] The BDC submits that these factors strongly favour Quebec and emphasizes that the plaintiffs seek to represent a national class, the largest percentage of whose members reside in Quebec. Further, the main corporate presence of the BDC is in Quebec since its head office and records office are located there.

[49] In response, the plaintiffs assert that the place of residence of all class members is of less significance than is the residence of the plaintiffs, and particularly Mr. Lieberman as the representative plaintiff. The plaintiffs point to the leading role that Mr. Lieberman will play in instructing counsel and communicating with the members of the class.

[50] In my view, it is important that although the BDC does have a strong corporate presence in Quebec, it is also a national institution that was set up to do business nation wide and actively carries on business in British Columbia from 15 separate locations in this province.

[51] Importantly also, this is a class proceeding that will involve class members from all provinces and while many class members reside in Quebec, they are not the majority of the total class. Further, although more Deferred Vested Members of the class reside in Quebec, more Retirement Members live in British Columbia than in Quebec. Also of importance is the fact that, no class or prospective class member who resides in Quebec has come forward to spearhead this litigation as a representative plaintiff.

[52] In all of the circumstances I am satisfied that the residence of the parties (and in the case of the BDC where it carries on business) in a case which involves a national class and a national institution are relatively neutral considerations in the assessment of whether this Court should decline jurisdiction in this class proceeding in favour of the Quebec courts.

Where the alleged causes of action arose (and where damages were allegedly suffered)

[53] The plaintiffs allege that the BDC breached its statutory and private law duties and committed a partial revocation of trust by:

(1) amending the BDC Plan to provide that the BDC would receive any surplus upon the winding up or termination of the BDC Plan;

(2) providing itself and Active Members contribution holidays; and

(3) paying administrative expenses out of the trust fund constituted for the beneficiaries of the BDC Plan.

[54] The BDC submits that if there were any such beaches of duty, they occurred in Quebec and that the damages resulting from those breaches were suffered by the BDC Fund and class members in Quebec. It submits that these factors, including the somewhat related factor of the substantive law that will ultimately determine whether there were such breaches, strongly favour Quebec as the clearly more appropriate forum for the determination of the issues in this class proceeding.

[55] The plaintiffs submit that although the first impact of the alleged breaches of duty by the BDC related to the administration and maintenance of the BDC Plan and the BDC Fund may have been sustained by a trust created and situated in Quebec, the obligations out of which those breaches arise were founded in the employment contracts of the class members which were entered into in many jurisdictions other than Quebec. They argue that damages arising from the BDC's breaches of

statutory and private law duties were ultimately suffered and will continue to be suffered by class members in those jurisdictions in which they receive their BDC Plan benefits, including British Columbia.

[56] At this stage of these proceedings, any inquiry into the substantive law that will ultimately apply in the determination of the issues raised must be a preliminary inquiry entered into for the limited purpose of determining whether there is a clearly more appropriate forum for the determination of the issues raised than that chosen by the plaintiff. The determination of the substantive law that will apply and such issues as where the cause of action arose and where damages were actually suffered are issues that can ultimately only be assessed at trial against the full factual matrix of the evidence adduced at trial informed by legal argument and analysis that is relevant to the evidence.

[57] I cannot, at this stage of the proceedings, say that the BDC's submissions that the plaintiff's claims are related solely to alleged breaches of trust will ultimately prevail. I also cannot say that the plaintiffs' submissions that the genesis of the causes of action pleaded is the employment contracts (with their related pension benefits) entered into by the class with the BDC or its predecessors will ultimately succeed in whole or in part. Similarly, I also cannot now say that the plaintiffs or the class have not suffered damages in the provinces in which they now reside or were employed as a consequence of any breaches of federal statutory duties or private law duties that may have been committed by the BDC or its predecessors in Quebec or elsewhere in Canada.

[58] In ***Moran v. Pyle National (Canada) Ltd***., [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, in considering the tort of alleged careless manufacture by a corporation involved in international commerce, the Supreme Court of Canada stated at 408–409:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers*' case and again in the *Cordova* case a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says 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.

[59] The differences between a case of potential liability for a negligently manufactured product and that of potential liability for breach of an employers' obligations to its retired employees under a pension plan are obvious.

[60] I am, however, satisfied for the purposes of this application that, given the national nature of the BDC's undertaking, it would be inappropriate, even on a preliminary basis, to find that it is likely that the alleged torts occurred only in Quebec or that the alleged damage was suffered only in Quebec. Accordingly, I do not agree with the submissions of the BDC that these factors heavily favour Quebec as a clearly more appropriate forum.

Applicable substantive law (and the difficulty and cost of proving foreign law, if necessary)

[61] The concerns that I have addressed relating to a preliminary assessment of where the causes of action alleged by the plaintiffs arose and where damages (if any) were suffered by them are of equal importance to my consideration of these related substantive law factors.

[62] As I have said, the final determination of the applicable substantive law is a triable issue and the inquiry into potentially applicable substantive law is at this stage only an inquiry to assess the extent that such issues may effect the multi-factorial determination of whether Quebec is a clearly more appropriate forum.

[63] The BDC submits that both the applicable substantive law in relation to the allegations made by the plaintiffs and the cost of proving that law as substantive law which is foreign to British Columbia weigh heavily in favour of this Court's declining jurisdiction in favour of Quebec.

[64] Concerning the application of Quebec civil law to the issues to be decided, the BDC submits that:

(1) under conflict of laws rules, the law applicable to a trust is the law expressly or impliedly chosen by the settlor except where the settlor has not chosen a law, in which case the trust will be governed by the law that is most closely connected to the trust;

(2) s. 38(1) of the ***Federal Business Development Act*** provided that the FBDB could establish a pension fund, and in doing so, the FBDB in its role as settlor chose the law of Quebec as the proper law of the trust;

(3) in Canada the law of a trust must be the law of a particular province because there is no “Canadian” law of trusts since property rights lie within an area of exclusive provincial jurisdiction;

(4) accordingly, the proper law of the BDC Plan and the BDC Fund is the law of Quebec because the BDC fund is constituted as a trust in Quebec;

(5) further, FBDB’s choice of Quebec civil law was affirmed in the 1991 Trust Agreement vesting the FBDB Fund in the Trustees and giving the Trustees the power to administer and make payments out of the FBDB Fund including the payment of benefits, fees and expenses;

(6) section 13.8 of the 1991 Trust Agreement which provides:

> This Trust Agreement shall be governed by, and construed in accordance with, the laws of the Province of Quebec and the applicable laws of Canada.

does not purport to change the proper law of the trust that had applied to the trust since its inception in 1976 but rather evidenced in writing what had always been the FBDB's intention with respect to the law governing the trust while also recognizing the role that the federal ***PBSA*** plays in matters related to the administration of the BDC Plan as a pension plan as opposed to matters effecting trust law and trust issues; and

(7) since the proper law of the trust is the civil law of Quebec, the issues in this case that relate to the trust (including those concerning whether there were breaches of trust or a partial revocation of trust by the BDC in: amending the BDC Plan to provide that the BDC would receive any surplus upon the winding up or termination; providing itself and Active Members contribution holidays; and, paying administrative expenses out of the trust fund) must of necessity be determined by application of Quebec civil law since there is no federal Canadian law of trusts.

[65] The BDC also submits that the impact of the application of Quebec civil law in this case and the difficulty of proving that law, should be of particular concern in considering issues of *forum non conveniens.* In support of that proposition, it relies

upon the decision of the Supreme Court of Canada in ***Tolofson v. Jensen (Litigation Guardian of)***, [1994] 3 S.C.R. 1022, 100 B.C.L.R. (2d) 1 where at 1064–1065 the Court stated:

> The nature of our constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction – would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the *lex loci delicti* rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces as well as the essentially unitary nature of Canada's court system, I do not see the necessity of an invariable rule that the matter also be actionable in the province of the forum. That seems to me to be a factor to be considered in determining whether there is a real and substantial connection to the forum to warrant its exercise of jurisdiction. Any problems that might arise could, I should think, be resolved by a sensitive application of the doctrine of *forum non conveniens. The doctrine of forum non conveniens would, of course, have far more occasions to be brought into play where a dispute involving the interrelation of Quebec's Civil Code is involved in a suit in some other province, or where a legal issue involving an essentially common law problem arises in Quebec*. [Emphasis added]

[66] The BDC has also filed the affidavit opinion of Mr. Gary Nachshen, of Toronto, Ontario, who is a member of both the Barreau du Quebec and the Law Society of Upper Canada concerning how the Quebec Courts might address the issues raised by this litigation. In his written submissions counsel for the BDC refers to that affidavit for the proposition that:

> Quebec has, and has always had a body of civil law capable of addressing the issues raised in this action, and that body of law differs significantly from British Columbia.

[67] The plaintiffs submit that even if the proper law of the FBDB Fund and BDC Fund created and administered under the BDC Plan is that of Quebec (an issue

which they do not concede), the issues raised by this litigation must consider not only civil law but also the common law, not only of British Columbia, but possibly of other common law provinces (to the extent that it may differ) and most importantly must consider the application of the ***PBSA***, a federal statute, concerning the impugned actions of the BDC in relation to the BDC Plan.

[68] Counsel for the plaintiffs submits that:

(1) although it is arguable that the law of Quebec applies to the interpretation of the provisions of the 1991 Amendment, the interpretation of that document is not the focus of this litigation because it is pleaded that the 1991 Amendment is itself a breach of the BDC's obligations to the plaintiffs and other class members;

(2) at trial, the Court hearing this action may ultimately determine that: the law of Quebec may apply to a part of the proceeding; federal statutory considerations will apply to or at least inform other issues; and, common law considerations will apply to or inform other issues due to the existence of the employment contracts out of which pension entitlement under the BDC Plan arose;

(3) most importantly, the pension laws affecting the interests of plaintiffs and the other class members as well as the actions of the BDC (as the Administrator of the BDC Plan) in relation to those interests will be determined by reference to the law of trusts as it relates to fiduciaries

in all parts of Canada by reason of the ***PBSA,*** ss. 8(3), (4) and (10) which provide:

> (3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.
>
> (4) In the administration of the pension plan and pension fund, the administrator shall exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> …
>
> (10) If there is a material conflict of interest between the role of an employer who is an administrator, or the role of the administrator of a simplified pension plan, and their role in any other capacity, the administrator
>
> > (a) shall, within thirty days after becoming aware that a material conflict of interest exists, declare that conflict of interest to the pension council or to the members of the pension plan; and
> >
> > (b) shall act in the best interests of the members of the pension plan.
>
> [Emphasis added]

[69] I have concluded that it is far from clear, as submitted by the BDC, that the civil law of Quebec will apply to all aspects of the plaintiffs' claims. While it appears

that civil law concepts will be important to the issues to be decided, it is also likely that common law concepts will ultimately inform the decision-making in this case.

[70] I reach that very preliminary conclusion on the basis of the argument and pleadings to date for the following reasons:

(1) s. 8(1) of the ***Interpretation Act***, R.S.C. 1985, c. I-21 provides that:

> 8.(1) Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment;

(2) ss. 8.1 and 8.2 concerning the duality of legal traditions in Canada and the application of provincial law concerning property and civil rights provide:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> 8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

(3) s. 8(4) of the ***PBSA*** (enacted in 1986) requires the administration of the BDC Plan by the BDC as a "trustee" for the benefit of amongst others, Retired Members of the BDC Plan;

(4) according to the opinion of Mr. Nachshen, prior to 1994, the applicable civil law concept of "trust" in Quebec was narrower than it is now, "applying only to certain arrangements created by gift". This gives rise to the distinct possibility that the interpretation of the duties of the BDC as a "trustee" will be informed by common law equitable principles developed outside of Quebec civil law;

(5) also, as I read Mr. Nachshen's opinion, if a Quebec Court was to determine the issues raised in this case, it would have regard to the relevant provisions of the BDC Plan, the provisions of the ***PBSA***, the provisions of the ***Civil Code of Quebec*** as well as common law jurisprudence on point;

(6) the approach suggested by Mr. Nachshen in relation to the determination of issues related to a national pension plan that is subject to the ***PBSA*** is not surprising and is similar to that recently undertaken by this Court in ***Williams v. British Columbia (College Pension Board of Trustees)*** (2005), 45 B.C.L.R. (4th) 158, 2005 BCSC 788, 254 D.L.R. (4th) 536. In that case Sigurdson J. considered the decision of the Quebec Court of Appeal in ***Association Provinciale des retraités d'Hydro-Quebec c. Hydro-Quebec*** (2005),

45 C.C.P.B. 1, [2005] R.J.O. 927, which had in turn relied upon the decision from the Supreme Court of Canada in ***Schmidt v. Air Products Canada Ltd***., [1994] 2. S.C.R. 611, 115 D.L.R. (4th) 631, that related to a case that had originated from Alberta; and

(7) that approach also appears necessary to give effect to the "choice of law" clause in the 1991 Amendment which does not purport to make the law of Quebec the only applicable law governing that agreement because it also specifically refers to the "applicable laws of Canada", a phrase which must ultimately be given some meaning.

[71] Since I am not persuaded that, as submitted by the BDC, it is clear and obvious that the civil law of Quebec will apply to all aspects of the plaintiffs' claims and since my preliminary assessment of the substantive law issues necessary for the purposes of this application leads me to conclude that the issues may well involve the application of both civil law and common law civil concepts, I have determined that issues concerning the applicable substantive law or the cost of proving foreign law are not factors that weigh heavily in favour of either British Columbia or Quebec as a more appropriate forum.

[72] I say that because, if there are significant differences between the civil law of Quebec and that of the common law provinces or any "applicable laws of Canada" concerning the issues raised in this litigation (a fact of which I am not presently convinced), it will be necessary to prove those differences in whatever forum

ultimately determines the issues. There is no evidence that the cost of proving any "foreign law" would be greater in British Columbia than in Quebec.

Potential juridical advantages to the plaintiffs or disadvantages to the BDC in British Columbia

[73] The primary competing interests concerning these factors relate to questions of costs.

[74] The plaintiffs submit that s. 37 of the British Columbia ***Class Proceedings Act*** which establishes a "no-cost" regime under which neither a successful plaintiff nor a successful defendant may recover costs or disbursements from the other except in extraordinary circumstances avails the plaintiffs of a juridical advantage in British Columbia that is unavailable to them in Quebec.

[75] The BDC submits that the combined effect on costs of the legislation and regulations that govern class proceedings in Quebec is not seriously disadvantageous to the plaintiffs.

[76] In support of that position the BDC says that in Quebec, for costs purposes, all class actions are deemed to be actions of from $1,000 to $3,000. The BDC submits that in those circumstances any cost consequences to the plaintiffs if they are unsuccessful in Quebec would be insignificant.

[77] I am also advised by counsel for the BDC that a representative plaintiff in a class action in Quebec has the option of applying under ***An Act Respecting the Class Action***, R.S.Q., c. R-2.1 to the "Fonds d'aide aux recours collectifs" (the

"***Fonds***"), for funding in the proceeding to defray the costs of paying both lawyer's fees and disbursements incurred in the class action. Also, if the BDC were to be ultimately successful in defending this proceeding as a class action in Quebec in circumstances where the representative plaintiff had applied for and been granted assistance by the ***Fonds***, the BDC could potentially obtain recourse against the ***Fonds*** for any shortfall from the "full judicial costs" not recoverable from the property of the "representative". In such a case, the ***Fonds*** would be subrogated to the BDC's right of recovery from that representative.

[78] Counsel for the BDC submits that the potential of obtaining assistance from the ***Fonds*** provides a juridical advantage to the plaintiffs in Quebec that is not available to them in British Columbia and further, that the loss of the potential of the BDC recovering any shortfall in cost recovery from the ***Fonds*** establishes a juridical disadvantage to the BDC if required to defend this action in British Columbia.

[79] I am satisfied that the "no cost" regime under the British Columbia ***Class Proceedings Act*** provides some juridical advantage to the plaintiffs in British Columbia arising from certainty and the fact that even if the costs to which the representative plaintiffs are potentially liable under Quebec law are small, they are still recoverable from the representative plaintiff personally. Further, while the Quebec costs regime offers some potential assistance, that is both uncertain and discretionary.

[80] I am also satisfied that the absence of similar "shortfall" provisions in British Columbia to those potentially available in Quebec do not create a serious juridical

disadvantage to the BDC in British Columbia because: based on the submissions of the BDC, any shortfall recovery would be minimal; and, any recovery would only be available if the plaintiffs applied for and received funding from the ***Fonds***.

Convenience or inconvenience to witnesses and cost of conducting litigation

[81] The BDC has submitted that nearly all of the key witnesses reside in Quebec. Amongst those suggested witnesses are present trustees of the BDC Plan, plan actuaries and witnesses who may give evidence on behalf of the custodian, Royal Trust.

[82] The BDC also submits that the conduct of this litigation in British Columbia would be far more costly for it than in Quebec due to the necessity of travel and the fact that most relevant documents will be located in Quebec.

[83] In addition, the BDC says that although the plaintiffs would be inconvenienced by being required to have this trial in Quebec, that problem could be overcome by appointing a new representative plaintiff in Quebec.

[84] In answer to those submissions, the plaintiffs submit that, as a national institution, the BDC has representatives in all provinces and executives who travel widely and regularly. They submit that transferring information and documentation from Montreal to a Vancouver lawyer would be “business as usual” for the BDC. They submit that, in contrast, the plaintiffs as British Columbia retirees would be dramatically adversely affected by the cost of conducting this litigation in Quebec.

[85] I have determined that the factors of cost and inconvenience of having this litigation conducted in Quebec weigh in favour of the plaintiffs.

[86] I am not convinced that all of the potential witnesses now identified by the BDC will ultimately be required to testify at trial. For example, I note that neither the trustees nor the custodian were sued by the plaintiffs. It is also my assessment of the pleadings and the evidence on this application, that if actuarial evidence is necessary, such evidence would not likely be controversial.

[87] Issues concerning the cost of pre-trial procedures and discovery of documents can, in many respects, be managed by sensitivity to the residence of a witness. For example, some discovery evidence could be taken in Quebec if a witness is not otherwise required to be in Vancouver for the BDC's usual business. Further, the availability and improvement of the quality of video conferencing technology has greatly lessened the impact of travel and distance on the litigation process.

[88] Most importantly, however, I am satisfied that the BDC's submission concerning cost and inconvenience are centered only on their interest in this litigation. That is particularly so of the suggestion that the plaintiffs could be replaced.

[89] That submission is insensitive to the plaintiffs' personal interest in this litigation and particularly insensitive to Mr. Lieberman's unique knowledge of and involvement in the history of the evolution of the BDC Plan. Further, while the BDC suggests that a different representative plaintiff could be found in Quebec, none has

come forward. The determination of these plaintiffs to have these issues tried by a court of competent jurisdiction should not be defeated by the possibility that there is no person who is both willing to come forward or appropriately qualified to take on the onerous responsibilities that Mr. Lieberman has willingly taken on in commencing these proceedings as a class action in British Columbia.

Whether there are parallel proceedings

[90] As I noted at the commencement of this analysis, I disagree with the BDC's submission that the lack of parallel proceedings in Quebec should not be of significant concern to a *forum non conveniens* application.

[91] One aspect of the BDC's submission which does, however, require some further analysis is the suggestion that to answer such concerns, the BDC could have merely sought a declaration in Quebec concerning whether it had breached any obligations owed to the members of the class.

[92] While there is a superficial attraction to that submission, in my view that attraction only arises from the fact that Quebec would also be an appropriate forum to determine the issues now raised by the plaintiffs. There are, however, significant difficulties with the proposition advanced. Those include:

(1) should the defendant be entitled to define the issues to be decided?

(2) who would be the defendants in a declaratory action commenced by the BDC?

(3) who would be the “representative defendant”?

(4) is such an entity even contemplated by class action proceedings legislation?

(5) if the BDC did not obtain the declaratory relief sought, what members of the class would obtain what relief and how would they obtain such relief?

[93] For all of those reasons as well as the fact that Mr. Lieberman is not simply a “replaceable representative”, I am satisfied that the lack of the existence of parallel proceedings in Quebec is an important factor in favour of the plaintiffs.

DECISION

[94] It is common ground that in circumstances where either of two possible jurisdictions would be suitable for the determination of the issues raised by the litigation at issue, the consideration of the numerous factors enunciated in ***Stern v. Dove***, *supra*, and any other relevant factors is neither mathematical nor mechanical. Not all factors will be of equal weight. Rather, they must be assessed individually and collectively within the context of the case under consideration.

[95] This is one of those cases described by Sopinka J. in ***Amchem Products***, *supra*, where there are at least two and likely more jurisdictions which could appropriately exercise jurisdiction over the parties and the subject matter of the disputes.

[96] Such issues as the residence of the parties, the application of the appropriate substantive law and the cost of litigation do not, as submitted by the BDC, heavily favour Quebec due to: the importance of the ***PBSA*** to the issues to be determined; the national nature of the BDC's undertaking; the national scope of the plaintiff class; and, the fact that there are no parallel proceedings in Quebec.

[97] Having considered the submissions of counsel in light of the totality of the evidence on this application and the principles enunciated in ***Amchem Products, Thrifty Canada***, *supra,* and ***Stern v. Dove,*** I have determined that the applicant BDC has not met the burden of establishing that Quebec is the clearly more appropriate forum for the determination of the issues raised by the plaintiff in these class proceedings.

CONCLUSION

[98] This action will be certified as a class action in British Columbia under s. 4 of the ***Class Proceedings Act***. The plaintiff, Lucien Lieberman, will be appointed as a representative plaintiff under s. 4(1)(e). The ancillary orders that were negotiated by counsel and are needed to continue the conduct of this litigation as a class action in British Columbia will become orders in this proceeding.

"Davies J."