CITATION: Waterston v. CBC, 2010 ONSC 4319
COURT FILE NO.: 04-CV-278718CP
DATE: 20101025

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

BETWEEN:	)	
	)	
Donald Waterston	)	*Anthony Guindon/Ari Kaplan*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
Canadian Broadcasting Corporation	)	*David Stamp*, for the Defendant
Defendant	)	
	)	*Andre Claudé/Anne Sheppard/Mario Évangelisté*, for the Moving Parties SCRC and Messrs. Hebert and Bernard
	)	
	)	
	)	**HEARD:** February 22, 2010, June 3, 4, 2010 and July 27, 28, 2010

REASONS FOR DECISION

POLLAK, J.

Introduction and Overview

[1] This is a motion pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*") for the approval of the settlement ("Proposed Settlement") of a certified class proceeding between the Canadian Broadcasting Corporation ("CBC") and Donald Waterston ("Mr. Waterston") with respect to the CBC Pension Plan ("the Plan") and the use of its surplus. The Defendant CBC is the sponsor and administrator of the Plan. There is also a motion for

approval of the counsel fees of Class Counsel. The Representative Plaintiff, Mr. Waterston, is a retiree of the CBC. He is the former president of the CBC Pensioners National Association ("PNA"), the group that constitutes many - but not all - of the members of the class in this class action.

[2] The PNA represents Plan pensioners and spouses of deceased retirees who are in receipt of a joint and survivor pension from the Plan. It acts on behalf of retirees (without union status) in a consultative capacity to communicate issues and concerns of the retirees to the CBC. It has approximately 5,330 members throughout Canada, which is equivalent to approximately 60% of Plan members (8,834 as of September 30, 2009).

[3] The PNA is on the Board of Trustees of the Plan and is a member of the Consultative Committee on Staff Benefits ("CCSB"), which has status under each collective agreement with the CBC to make certain recommendations to the CBC.

[4] The CCSB is comprised of both union and non-union representatives, including the PNA and the Syndicat des Communications de Radio-Canada's ("SCRC"), which, as will be seen, seeks intervenor status in this class action. Pursuant to the collective agreements between the CBC and its unions, the CCSB may make recommendations to the CBC regarding benefit plans and the Plan.

[5] The SCRC is a union that represents some of the active employees of the CBC, and it submits that it also represents some retired employees who were formerly active unionized employees. Its right to represent these retired employees is disputed by the parties. It brings a cross-motion for:

(a) leave to intervene;

(b) a stay of these proceedings under s.106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and rule 21.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

(c) alternatively, an order dismissing the Proposed Settlement; and

(d) in the further alternative, an order dismissing the action.

[6] At the previous hearing of the settlement approval motion on December 11, 2009, Cullity J. held that an adjournment was appropriate to allow the court to hear the SCRC's submissions. The motions were adjourned to me for a bilingual hearing.

[7] The SCRC submits that neither the PNA nor Mr. Waterston have authority to bargain with the CBC with respect to the Plan and the use of its surplus. It submits that: (a) this Court has no jurisdiction in the subject matter of this proceeding; (b) there has already been a decision rendered on the issues raised in this litigation; and (c) that the Proposed Settlement is illegal.

[8] Mr. Ubald Bernard and Mr. Celestin Hubert (the "Appearing Objectors"), members of the certified class and the PNA, object to the settlement. They have not opted out of this proceeding. They are represented here by the SCRC, and they also seek intervenor status.

[9] The parties to the certified class proceeding object to the SCRC's and the Appearing Objector's requests to intervene, and the parties to the class action submit that the SCRC has no right to make any submissions with respect to the Proposed Settlement.

[10] The Plaintiff submits that the SCRC has no status to represent pensioners and that because no objection to the PNA's representation of pensioners in this action, now through Mr. Waterston, has been made until now, the pensioners are represented by Mr. Waterston and not by the rival unions for the purposes of settling the class proceeding.

[11] For the reasons that follow, I conclude that SCRC's cross-motion should be dismissed and that the settlement should be approved.

Factual Background

[12] In order to explain why I am dismissing the cross-motion and approving the settlement, it is necessary to discuss not only the background to the class proceeding but also the history of a grievance proceeding that is taking place in Québec.

History of Class Proceedings

[13] On November 10, 2004, the PNA brought an action against the CBC for breach of an alleged collateral agreement between the CBC and its pensioners, breach of fiduciary duty, breach of trust, misappropriation, and unjust enrichment. This action was commenced as a proposed representative proceeding under Rule 10. The PNA claimed $3 million in exemplary damages and damages equivalent to 30% of the Plan's surplus for certain specific years.

[14] The PNA alleges that in a collateral agreement the CBC had, through its past conduct, entered into an agreement with pensioners on the use of those surplus funds in the Plan and is now required to share pension surpluses for the year 2002 and thereafter, based on a 60/40 sharing formula.

[15] It will important to note that in this action, there is no claim made under or based on a collective agreement.

[16] The statement of claim was subsequently amended to be a proceeding under the *C.P.A.* and Mr. Waterston replaced the PNA as the proposed representative plaintiff. The matter was certified as a class proceeding by Cullity J. on March 10, 2006, with Mr. Waterston as the representative plaintiff: see *CBC Pensioners' National Association v. CBC* (10 March, 2006), Toronto 04-CV-2778718 CM1 (Ont. S.C.J.) (the "certification decision"). The class was defined as:

> ... those people, wherever resident, together with their survivors, who were in receipt of an annuity or pension from the Canadian Broadcasting Corporation under the CBC Pension Plan on December 31, 2002 and/or on December 31, 2005.

[17] The class definition has been amended as follows:

> ... those people, wherever resident, together with their survivors, who were in receipt of an annuity or pension from the Canadian Broadcasting Corporation under the CBC Pension Plan, or who were former employees of the Canadian Broadcasting Corporation and who had a deferred future entitlement to an annuity or pension under the CBC Pension Plan, on December 31, 2002 and/or December 31, 2005 and/or at any time between December 31, 2005 and the date of the Court Order approving the settlement of this action.

[18] The SCRC submits that on May 18, 2006, three months after the certification of the class, the Supreme Court of Canada released its decision in *Bisaillon v. Concordia*, [2006] 1 S.C.R. 666 ("*Bisaillon*") and that this decision affects the legality of the certification decision. In *Bisaillon,* the majority of the court held that labour arbitrators have exclusive jurisdiction over matters such as pension plan disputes since the essential character of such disputes arises out of the interpretation, application, administration or violation of a collective agreement. The SCRC argues that this decision was a change in the law that established that this court does not have jurisdiction over the use of surplus in the Plan, which is the subject matter of this action.

[19] Three years after the *Basaillon* decision, the parties settled this action in a Memorandum of Agreement ("MOA") on May 22, 2009. The MOA is a broad agreement that addresses the sharing of future Plan surpluses (Part I), supplementary health care for active employees (Part II), and the powers and responsibilities of the CCSB (Part III). The parties' motion for the approval of the Proposed Settlement is based on Schedule H of the MOA.

[20] The parties to the MOA are: the CBC, the Syndicat Canadian de la Fonction Publique, the Association of Professionals and Supervisors of the Canadian Broadcasting Corporation, the Syndicat des technicien(nes) et artisan(e)s du Reseau Français de Radio-Canada, the Canadian Media Guild, the Association des Realisateurs, the PNA, and Donald Waterston.

[21] The SCRC is not a party to the MOA.

Summary of the Québec Grievance Proceedings

[22] Commencing before and continuing throughout the time of the proposed class action, there has been a grievance proceeding in Québec.

[23] The SCRC has had intervenor status in a grievance arbitration. The grievance was filed (by another union representing CBC employees, CUPE) on March 27, 2003. The grievance was heard by Arbitrator Nadeau in Québec. The grievance was a claim that the CBC ought not have rejected a recommendation by the CCSB that an additional $202 million of the surplus in the pension plan be allocated to active and retired employees.

[24] On June 23, 2006, Arbitrator Nadeau allowed CUPE's grievance, finding that CBC had breached the collective agreement. Arbitrator Nadeau remained seized of the appropriate remedy if the parties could not agree on a remedy for the breach by the CBC.

[25] However, on April 11, 2008, upon judicial review, the Superior Court of Québec reversed Arbitrator Nadeau's decision: see *Societe Radio-Canada c. Nadeau*, [2008] J.Q. no

2797, 2008 QCCS 1341. CUPE and SCRC sought leave to appeal to the Québec Court of Appeal.

[26] On May 22, 2009, CUPE and CBC signed the MOA which resulted in CUPE abandoning its appeal.

[27] As already noted above, the SCRC was not a party to the MOA and continued with the appeal and leave to appeal to the Québec Court of Appeal was granted on May 27, 2009: see *Syndicat des communications de Radio-Canada c. Societe Radio-Canada*, [2009] J.Q. no 5553, 2009 QCCA 1105.

[28] The SCRC and Appearing Objectors ask this court to stay this action until the decision of the Québec Court of Appeal is made. Additionally, there are a few objectors who have sent letters to this court. No objectors, however, sought to make any submissions other than the Appearing Objectors.

***Res Judicata* and Jurisdiction**

[29] The SCRC submits that this court does not have jurisdiction to approve the Proposed Settlement because the Plan arises out of the collective agreement over which, according to *Bisaillon*, Arbitrator Nadeau has exclusive jurisdiction. The SCRC also characterizes the effect of the Proposed Settlement as an illegal modification of the collective agreement.

[30] Further, the SCRC argues that the doctrine of *res judicata* applies in this case and precludes this court from ruling on the distribution of the surplus. It is argued that Arbitrator Nadeau, in his decision, rejected the existence of a historical practice regarding a distribution of a surplus based on a 60/40 split in favour of the employer. The SCRC emphasizes that there were many intervenors, including the parties to the present action, who made submissions before Arbitrator Nadeau.

[31] The parties to the class proceeding, however, argue that *res judicata* does not apply since the subject matter of the two proceedings is not the same. As will be seen, the parties also argue that the court has subject matter jurisdiction and that, in any event, the SCRC is estopped from challenging this court's jurisdiction.

[32] The grievances before Arbitrator Nadeau were focused on whether the CBC had the obligation to follow the recommendations made by the CCSB with respect to a different surplus, which was identified on December 31, 1999, in the amount of $616,000,000.

[33] The Plaintiff argues that the nature of the claim before this court is different than the nature of the claim in the grievance: the parties are different, the legal regime is different, and the remedy sought is different. In the matter before this court, the Plaintiff alleges that the CBC breached the terms of an agreement between the CBC and the class members regarding the pension surplus. The Plaintiff argues that pensioners relied on the agreement, for which they gave consideration (namely that they would be ambassadors for the CBC and speak highly of their former employer), and for which they had received payments three times prior by way of the surplus being divided 60/40 in the 1990s. The relief sought is that the agreement should be adhered to.

[34] Counsel for CBC argued that the labour arbitrator did not have exclusive jurisdiction over this matter because the decision of the arbitrator was dealing with a narrow issue, driven by an interpretation of the collective agreement, namely in determining when the CBC must follow the recommendations of the CCSB.

[35] By way of counter-argument, the SCRC submits that both proceedings are essentially about the distribution of surplus in the Plan, but the parties counter that although the grievances claim the right to surpluses in the same pension plan in both proceedings, the issue before Arbitrator Nadeau was clearly centred around the powers of the CCSB and the CBC's obligations to follow the CCSB's recommendations.

[36] In any event, it is important to note that Arbitrator Nadeau remains seized with respect to the issue of the appropriate remedy in the event that the Québec Court of Appeal reverses the decision of the Québec Superior Court and restores the arbitration decision.

[37] I agree with the parties' argument. Upon review of the decision of Arbitrator Nadeau, I find that the subject matter of the grievances and the within action is not the same. I agree with the submissions of the Plaintiff and the CBC.

[38] With respect to the finding regarding the alleged collateral agreement, Arbitrator Nadeau states as follows in his decision at page 97:

> Mais, comme je l'indiquais précédemment, cette question de répartition 60 – 40% n'est pas déterminante dans le présent débat puisque la question en litige consiste a déterminer si la proposition du CCAS relative à un allocation de 202 millions de dollars en faveur des participants "engage une dépense supplémentaire".

[39] Arbitrator Nadeau finds that the issue of the existence of the 60/40 formula with respect to the use of the surplus is not "determinative of the issue before him". The subject matter in this action is not identical to that of the grievance arbitration. Put shortly, the grievance was about obligations under a collective agreement; this class action is about a historical agreement allegedly outside of the collective bargaining. I, therefore, find that the doctrine of *res judicata* is not applicable as is submitted by the SCRC.

[40] It is also worth noting that if *res judicata* did apply, unless Arbitrator Nadeau's decision is restored, there is at the moment no decision favouring the allocation of the surplus of the Plan sought by the intervenors.

Issue Estoppel

[41] It is submitted by the parties that SCRC's motion, in so far as it challenges this court's subject matter jurisdiction, can be dismissed on the basis of the doctrines of issue estoppel and abuse of process of this court without the need to decide on the merits of their motion.

[42] Through the doctrine of issue estoppel, a party is prevented from re-litigating a legal or factual issue that has been conclusively resolved in a prior proceeding. In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 33, the Supreme Court of Canada set out a two-step test to determine if the doctrine of issue estoppel should apply:

> The first step is to determine whether the moving party . . . has established the preconditions to the operation of issue estoppel. . . . If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

[43] Once the preconditions of the first step of issue estoppel are met, the court must use its discretion to decide whether or not the doctrine of issue estoppel should apply. "Special circumstances" may apply which, in the interest of fairness, may require the court to apply or refuse to apply issue estoppel. In *Arnold v. National Westminster Bank*, [1991] 3 All E.R. 41 at p. 50 (H.L.), Lord Keith wrote:

> [T]here may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result.

[44] An example of a "special circumstance" is given in *Minott v. O'Shanter Development Company* (1999), 42 O.R. (3d) 321 (C.A.): if the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent re-litigating that issue in subsequent proceedings. As the discussion below will show, however, it is a matter of the court's discretion whether to permit re-litigation of a decided point.

[45] In *Danyluk*, above, the Supreme Court upheld three preconditions for the first step from *Angle v. Canada (Minister of National Revenue)*, [1975] 2 S.C.R. 248, at p. 254:

(i) the same question has been decided in the prior proceeding;

(ii) the judicial decision which is said to create the estoppel was final; and,

(iii) the parties to the judicial decision or their privies were the same persons as the parties or privies to the proceedings in which the estoppel is raised.

(i) Has the same question been decided in a prior proceeding?

[46] The parties argue that the court's jurisdiction in this motion has been decided by the court in the certification decision. They submit that Cullity J. held that the court had territorial jurisdiction and implicitly determined that this court had *ratione materiae* jurisdiction. Cullity J. held that a cause of action existed in this court pursuant to Section 5(1)(a) of the *C.P.A.* and that a class proceeding constituted a preferable procedure for hearing of this matter pursuant to Section 5(1)(d) of the *C.P.A.*

[47] They further rely on the case of *Bennett v. British Columbia*, [2007] B.C.J. No. 4 (BCCA), which established that any issue related to the applicability of an arbitration provision is to be determined in the context of a preferable procedure analysis.

[48] SCRC argues that this court does not have the jurisdiction to approve the settlement since *Bisaillon* changed the law with respect to the jurisdiction of the court in pension matters. This case, however, was not released until three months after the certification hearing. SCRC concedes that there could not have been an objection to jurisdiction at the time of the certification hearing because, in the SCRC's view, prior to *Bisaillon*, this court did have jurisdiction over the subject matter of this litigation.

[49] I agree that with respect to the issue of jurisdiction, the certification decision determined that this court has jurisdiction to hear this matter. For the reasons that follow, it is my opinion that this issue is now *res judicata*.

(ii) Was the Certification Decision Final?

[50] The parties submit that the certification decision is final and that the action proceeded through examinations for discovery on the basis that the court had jurisdiction. It has not been appealed. I agree that the certification decision was a final decision on the matter of the court's jurisdiction.

(iii) Were the SCRC or the Appearing Objectors Privies to the Certification Decision?

[51] The parties submit this test has also been met as SCRC counsel was present at the certification hearing and could have objected at that point. Counsel for SCRC advised Cullity J. that it did not object to the relief sought in the action and that it did not seek to intervene or to make submissions at that time. In the certification decision, Cullity J. stated, at para. 16, with respect to this issue:

> Mr. Michael Wright, counsel for five trade unions that are said to represent a substantial majority of the unionized employees at the CBC, attended at the hearing of the motion and informed the court that they would seek to intervene in the proceedings if they consider that this is required after the disposition of the motion. He indicated further that his clients are not opposed to the relief claimed on behalf of the Pensioners.

[52] On the other hand, the SCRC argues that since they were neither parties nor intervenors at the certification hearing, they cannot be considered parties or privies to that decision and as a result issue estoppel cannot apply in this situation.

[53] . In my opinion, in the circumstances of this case, SCRC should be considered to be privies and bound by the certification decision.

[54] In *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div) Farley J. held, at p. 739 that:

> For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding, as discussed above, where that non-litigant party has sufficient interest in those original proceedings to intervene but instead chooses to stand by and have the

> battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-litigant abide by that previous decision

[55] The fact that SCRC was represented at the certification hearing and had informed the court that it may seek to intervene in the proceedings, depending on the disposition of the certification hearing, indicates that it accepted that this decision would be binding on it should a subsequent proceeding arise. The SCRC did, instead of intervening at an earlier time, stand by and watch the proceedings in which it had a practical and legal concern. The SCRC does not deny that it was aware that the parties were negotiating a settlement, but it emphasizes that it did not make the decision to take action until it knew what the actual terms of the MOA were.

[56] I do not see how waiting for the outcome of the settlement negotiations affects whether SCRC is a privy. Accordingly, I find that the SCRC and Appearing Objectors were privies to the certification decision and that the preconditions for issue estoppel have been met. Thus, the first step of the test for applying an issue estoppel has been satisfied.

[57] The second step with respect to whether or not this court should exercise its discretion to not apply the issue estoppel will be discussed below, after I discuss the parties' alternative submission based on abuse of process.

Abuse of Process

[58] The SCRC requests that this court should stay this action notwithstanding the certification decision because of the alleged change in the law following the *Bisaillon* decision by the Supreme Court of Canada. The parties argue that this alleged change in the law does not justify the exercise of the Court's discretion to relieve the SCRC from the applications of the doctrine of issue estoppel or abuse of process. The parties submit that there are no special circumstances in this action that would justify the court's interference with the certification decision.

[59] The parties also urge this court to use its inherent and residual discretion to prevent an abuse of the court's process and to preclude SCRC from challenging this court's subject matter jurisdiction at this late date. They refer to the case of *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77 at para. 37 wherein it was held that the doctrine of abuse of process should be used "to preclude the relitigation in circumstances where the strict requirements of issue estoppel . . . are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."

[60] The parties submit that this motion to stay by the SCRC, which is brought three years after the certification decision, is a collateral attack on the certification and therefore constitutes an abuse of process. They rely on *Toronto (City)*, above, where it was held that someone who is not technically a party to a first proceeding, but who had notice of the proceeding and had the opportunity to participate, cannot bring a second proceeding as a result of the failure to raise the issue in the first proceeding.

[61] The SCRC argues that this doctrine of abuse of process does not apply. It argues that Cullity J. did not address the issue of the jurisdiction of this court in the certification decision. I have already found, however, that the certification decision does address the jurisdiction issue.

[62] The parties rely on *Toronto (City)*, above, at para. 37 quoting *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.)"
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added in *Toronto (City)*.]

[63] As mentioned above, the SCRC was represented by counsel at the certification hearing. Counsel for the SCRC offered explanations for the failure to intervene or make submissions at the certification hearing. As *Bisaillon* had not been decided at the time of the certification hearing, any intervention by the SCRC at that time would have failed. SCRC advises that it did not seek to intervene right after the change in the law as a result of the ruling in *Bisaillon* but waited until December 2009, because it was not until then that it became aware of the "written terms" of the MOA. As soon as they were able to obtain access to the terms of the MOA they took immediate action.

[64] With respect to these allegations that SCRC's motion is a collateral attack on the final certification decision of this court and therefore an abuse of process, the SCRC argues that its challenge to the jurisdiction of this court does not constitute an abuse of process as there has been a change in the law subsequent to the certification decision.

[65] The parties submit, however, that as the SCRC was aware that settlement negotiations were taking place and the fact that they waited two and a half years before objecting to the jurisdiction of the court constitutes a further abuse of process, in addition to the collateral attack on the certification decision. The parties submit that although the SCRC was not a party at the certification hearing, it had an interest in and adequate notice of the proceeding. It also specifically had the opportunity to intervene or to make submissions at the certification hearing. In these circumstances, the court has jurisdiction to apply the doctrines of issue estoppel, estoppel by conduct, and/or abuse of process to prevent a challenge almost three years later of the court's decision that it had jurisdiction.

[66] To refute this allegation, the SCRC relies on its explanation that it was not aware of the precise terms of the MOA as a justification for its failure to challenge the jurisdiction of the court after it became aware of the change in the law. The SCRC relies on problems getting access to the MOA, claiming that in 2009, Mr. Bonhomme refused to disclose the terms of the MOA because they were confidential. When the SCRC was able to download the MOA from the Koskie Minsky website, they immediately began this intervention process.

[67] The cases relied upon by the Plaintiff have held that a non-party who attends at a proceeding and refuses to participate through intervenor status will be estopped from later challenging an earlier finding of a court even though it is not strictly bound by the doctrine of *res*

judicata. That later challenge may be prevented by reason of estoppel by conduct. In the case of *De Morales v. LaFontaine-Rish Medical Group Ltd.*, [2009] O.J. No. 2572 (S.C.J.) at para. 25 Thorburn J. held as follows:

> Where a privy of another party has knowledge of prior proceedings, a clear interest in the proceedings, and the ability to intervene as a participant to protect its interest, but chooses to stand by, the non-party will be estopped by its conduct from proceeding to a trial in a subsequent proceeding on the same issue or issues that have already been determined.

[68] The parties argue that the Supreme Court of Canada in *Bisaillon* did not change the law that would be applicable to the case at bar, and they rely on the case of *Smith Estate v. National Money Mart* (2008), 92 O.R. (3d) 641 (C.A.) to argue that even if the law changed, the court should not reconsider the matter. In that case, it was held that there is no automatic right to re-litigate on an issue where there is a subsequent change in the law.

[69] Although the parties submit there has been no change in the law, for the purposes of this analysis of whether there has been an abuse of process, I will assume that the Supreme Court of Canada ruling in *Bisaillon* did change the law with respect to this court's jurisdiction to hear this matter.

[70] A number of cases have stated that parties may take advantage of changes in the law despite prior adverse rulings: see *Hunt v. Atlas Turner Inc.*, [1995] 5 W.W.R. 518 (B.C.C.A); *Hockin v. Bank of British Columbia* (1999), 123 D.L.R. (4th) 538 (B.C.C.A.); and *Stellar v. Botham Holdings Ltd.*, [1994] 8 W.W.R. 639 (B.C.C.A). This was also noted in the Ontario Court of Appeal decision of *Robb v. St. Joseph's Health Care Centre* (2001), 5 C.P.C. (5th) 252, [2001] O.J. No. 606 (C.A.) at para. 6, in which it was stated that:

> In a significant number of recent cases, it has been accepted that issue estoppel or res judicata may not apply to bar a claim where there has been a change in circumstances, including a change in the law.

[71] The parties rely on the *National Money Mart* case to submit that the SCRC does not have an unfettered right to re-litigate an issue on account of a change in the law. The court has jurisdiction to ensure that the finality principle is applied in a manner consistent with the interests of justice.

[72] The parties argue that the present case must be contrasted with a situation where an argument based on a change in the law is brought promptly, such as was the case in *Seidel v. Telus Communications Inc.*, 2009 BCCA 104. In that case, the BC Court of Appeal found that because the application for a stay was filed promptly after the issuance of the relevant Supreme Court of Canada decisions, issue estoppel was found not to apply. It is submitted here by the parties that the SCRC's explanation for the unreasonable delay is not valid.

[73] Further, CBC submits that the SCRC has no right to challenge the jurisdiction of this court because of the alleged change in the law. This issue as to whether the finality principle will be applied in a manner that is consistent with the interests of justice is within the court's discretion to decide. The discretionary analysis is part of the application of *res judicata* principles such as issue estoppel, estoppel by conduct and/or abuse of process.

[74] I agree with the parties that the SCRC's explanation for its three-year delay in the challenge of the certification decision is not a valid reason for the court to exercise its discretion to ignore the collateral attack on the certification order.

[75] The SCRC knew about the "assumed" change in the law approximately two months after the decision to certify. It deliberately did not take any action to intervene for almost three years. The decision to intervene and challenge the court's jurisdiction was made only when the "actual" terms of settlement were known by the SCRC.

[76] The SCRC's decision to challenge the jurisdiction of this court was motivated by the SCRC's review of the terms of the MOA and not the knowledge that there had been a change in the law. Applying the analysis in the *National Money Mart* case, I find that this is not an appropriate case to allow the certification decision to be reconsidered on jurisdictional grounds. It is an abuse of process and there is no justification for the court to exercise its discretion to allow what would be a collateral attack.

The SCRC Request for a Stay

[77] The SCRC seeks a temporary stay under s. 106 of the *Courts of Justice Act* and rule 21.01(3). Section 106 provides:

> A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[78] Rule 21.01(03) states that:

> A defendant may move before a judge to have an action stayed or dismissed on the ground that:
>
> (a) the court has no jurisdiction over the subject matter of the action;
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter.

[79] To grant a stay under s. 106, the court must be satisfied that the continuance of the action would result in an injustice because it would be oppressive or vexatious or an abuse of the process of the court and that the stay would not cause an injustice to the plaintiff: see *Kelly v. Hays* (1994), 120 D.L.R. (4th) 746 (Gen. Div.) and *Gruner v. McCormack*, [2000] O.J. No. 789 (S.C.J.) at para. 30.

[80] With respect to prejudice, the SCRC submits that it is possible that through Arbitrator Nadeau's decision the pensioners could be awarded 100% of the surplus and not be restricted to the lesser benefit of the Proposed Settlement. This argument has, among other problems, the problem that at the moment and subject to what may happen in the Québec Court of Appeal, Arbitrator Nadeau's decision has been set aside.

[81] Ignoring that problem, the SCRC also submits that the Plan funds are one fund which is indivisible. It argues that its active and retired members are prejudiced if this indivisible fund is depleted by the use of the surplus funds.

[82] I do not accept that this argument demonstrates the prejudice required to justify a stay of this action. The SCRC's members affected by Arbitrator Nadeau's award, assuming it is restored, still have not yet had the opportunity to make their legal argument on the appropriate remedy for the breach of the collective agreement with the CBC. Arbitrator Nadeau has therefore not made a decision on the appropriate remedy to be awarded.

[83] There is no evidence with respect to what that award would be if the Québec Court of Appeal reinstates the award of Arbitrator Nadeau. The class members who believed they were potentially being affected by Arbitrator Nadeau's award had the right to "opt out" of this action and they did not do so.

[84] The parties argue that the practical effect of granting the stay would be to delay the distribution of the surplus. This would cause great prejudice to the class members given their age and the unpredictability of the outcome of the Québec decision related to this matter.

[85] I have already found that the SCRC cannot collaterally attack the certification decision. The SCRC, therefore, cannot satisfy the above-noted requirements for the stay they request.

[86] Further, with respect to rule 21.01(3), I find that the SCRC does not have standing to bring such a motion. The relief is only open to a Defendant. Furthermore, subsection (c) does not apply here because the parties in both proceedings are different.

[87] I therefore find that the stay should not be granted under s. 106 of the *Courts of Justice Act*.

Intervenor Status

[88] On the basis of the findings already made, there is no justification or reason to grant the SCRC Intervenor status. Its application to challenge this court's jurisdiction is barred by an issue estoppel and by the doctrine of abuse of process.

Settlement Approval Motion

[89] I now turn to the settlement approval motion of the Representative Plaintiff and the Defendant CBC. The parties bring this motion to approve the Proposed Settlement pursuant to Section 29 of the *C.P.A.*

[90] The parties submit that the settlement is fair, reasonable, and in the best interests of the class as a whole. As previously noted, class members Messrs. Bernard and Hubert are objectors who are represented by the SCRC. They take the position that the settlement is illegal and not fair as it discriminates against SCRC members. The Plaintiff and the CBC do not seek court approval of the entire MOA, only Schedule H which constitutes the Settlement Proposal, Part I of the MOA which details the surplus-sharing agreement, and Part IV which contains general provisions such as the valuation effective dates for determining the actual amount of the surplus.

[91] The MOA provides that if there is a future surplus, it will be shared on a 50/50 basis between eligible class members and other beneficiaries of the plan and CBC. The CBC's portion will be used to reduce CBC's contributions to the plan.

[92] On the final day of argument, counsel for the Plaintiff stated that the current number of class members is 11,975. 64 members had opted out of the original class, and 12 opted out after the class was amended. 29 people revoked their opt-outs, for a total number of 47 opt-outs at the time of this motion.

[93] The court must look at both the terms of the settlement and the negotiation process to see if the Proposed Settlement is fair, reasonable and in the best interests of the class: see *Farkas v. Sunnybrook and Women's College Health Sciences Centre* (2009), 82 C.P.C. (6th) 222, [2009] O.J. No. 3533 at paras. 43-46 (S.C.J.) and *Dabbs v. Sun Life Assurance Co.* (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811 (Gen. Div.) per Sharpe J. at para. 30. "Reasonable" implies that the settlement should be a product of considered judgment and not arbitrary. "Adequate" implies that the settlement should provide relief to the class sufficient in magnitude and be rationally related to the harm alleged. "Fair" implies that the settlement should not discriminate between similarly situated class members, and also suggests that the bargaining process must be at arm's length.

[94] In determining whether a settlement is fair and reasonable and in the best interests of the class members, an objective and rational assessment of the pros and cons of the settlement is required: see *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191, [2007] O.J. No. 2819 (S.C.J.) at para. 23. Reasonableness is a continuum, and allows for a range of possible resolutions depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

[95] In assessing the settlement, the court should not make findings of fact on the merits of the litigation: see *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[96] I have concluded that the following factors should be considered to determine if the proposed settlement should be approved:

- likelihood of recovery or likelihood of success;
- amount and nature of discovery, evidence or investigation;
- settlement terms and conditions;
- recommendation and experience of counsel;
- future expense and likely duration of litigation and risk;
- recommendation of neutral parties, if any;
- number of objectors and nature of objections;
- the presence of good faith, arms length bargaining and the absence of collusion;
- the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

- information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

See *Parsons v. Red Cross Society* (1999), 40 C.P.C. (4th) 151, [1999] O.J. No. 3572 (S.C.J.) at para. 71; and *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117.

[97] As well, the existence of arms-length negotiation creates a strong initial presumption of fairness: see *Vitapharm Canada Ltd.*, above, at paras. 113 to 114.

[98] The Plaintiff argues that the Proposed Settlement is fair, reasonable and in the best interest of the class. He submits that in the absence of the Proposed Settlement, any final determination of the merits of the claims through a common issues trial will likely take several years and would likely cost another $500,000 in legal fees. Further, he submits that considering the average age and composition of the class, namely that many of the pensioners are advanced in age, a resolution of this matter is in the best interests of the class. In terms of likelihood of success, reference is made to Justice Cullity's preliminary reservations regarding the strength of the case, the unfavourable case law in Québec and the uncertainty of the outcome if the matter proceeded to trial. With respect to the actual settlement terms, it is emphasized that like in the case of *Smith v. Labatt Brewing Company Ltd.*, [2009] O.J. No. 117 (S.C.J.), the proposed settlement represents an important principle of restoration of a contractual entitlement to the pensioners by the CBC. It is noted that class counsel in this case have a great deal of experience in pension surplus matters and in class proceedings, and recommend the settlement.

Appearing Objectors

[99] In this case, it must be emphasized that the fairness analysis pertains only to the class members and not to the active employees represented by the SCRC who are not members of the class. The objectors Messrs. Hubert and Bernard and the SCRC submit that the Proposed Settlement is "illegal."

[100] For the purposes of these reasons, although I have not given any status to the SCRC, I am considering their submissions as objectors.

[101] The SCRC also argues that the provisions of the proposed settlement illegally modify the collective agreement.

[102] This motion for the approval of the proposed settlement is pursuant to the provisions of the *C.P.A.* Court approval is required in order to ensure that the best interests of the class are satisfied. These interests do not include a consideration of whether or not terms of the proposed settlement are in violation of the collective agreement between the CBC and the SCRC. This court has no jurisdiction to deal with such a dispute. Such dispute must be dealt with under their individual collective agreements. This is not a proper factor for the court to consider on this motion. I therefore make no finding in this regard.

[103] Some objections have been communicated to counsel and counsel have undertaken extensive communications with class members throughout the litigations, including notices of the initial and amended certification hearings to class members, and the maintenance of a website and toll-free number. Most of the objections relate to the approval of counsel fees. Both

parties have prepared detailed submissions regarding each of the above-noted factors which I have considered.

[104] A consideration of all of these above-noted factors favours this court's approval of the Proposed Settlement. Having considered all of the submissions of the parties and the objectors, I am satisfied that the Proposed Settlement is fair and reasonable and in the best interests of the class.

Approval of Counsel Fees

[105] It is common in class actions for legal fees to be agreed to on a contingency fee basis.

section 32(2) of the *C.P.A.* requires court approval of counsel fees in a class action.

[106] The two broad factors to be considered in assessing counsel fees are risks undertaken and degree of success: see *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.) at paras. 12-14, 62.

[107] Other factors courts have taken into account in deciding whether to approve the proposed counsel fees include:

- time expended by the solicitor
- complexity of the matters to be dealt with
- degree of responsibility assumed by the solicitor
- monetary value of the matters in issue
- importance of the matter to the client
- skill and competence demonstrated by the solicitor
- ability of the client to pay
- the client's expectation as to the amount of the fee

See *Windisman v. Toronto College Park* (1996), 3 C.P.C. (4th) 369, [1996] OJ No 2897 at paras. 11-12, 21 (Gen Div); *Vitapharm v. F Hoffmann-La Roche* [2005] OJ No. 1117 (S.C.J.) at para. 67; *Lawrence v. Alta Cold Storage Holdings Inc.* (2009), 311 D.L.R. (4th) 323, [2009] O.J. No. 4067 at para. 15 (C.A.); *Marcantonio v. TVI Pacific*, [2009] O.J. No. 3409 at para. 28 (S.C.J.); *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417, [1998] O.J. No. 4182 at para. 14 (C.A.); *Fantl v. Transamerica Life* (2009), 83 C.P.C. (6th) 265, [2009] OJ No. 4324 at para. 81(S.C.J.) per Perrell J.

[108] In this case, the counsel fees have been paid by the PNA. Section 6(b) of the MOA provides for reimbursement of these fees on the first and any subsequent actuarial valuation date, if necessary, to be deducted from the first Eligible Member Group Surplus Share, prior to the payment of any surplus to current and former plan members.

[109] Having regard to the relevant factors, I find the counsel fee arrangements fair and reasonable. Given the fact that the class proceeding counsel will only receive payment if there is a surplus, and considering the complexity of this matter, I approve the counsel fees of $325,590.40 and disbursements of $15,280.07.

Costs

[110] If the parties cannot agree about the matter of costs, they may make brief submissions in writing beginning with the parties within 20 days of the release of these Reasons for Decision. SCRC's submissions shall follow within a further 20 days.

Pollak J.

Date: October 25, 2010

CITATION: Waterston v. CBC, 2010 ONSC 4319
COURT FILE NO.: 04-CV-278718CP
DATE: 20101025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Donald Waterston

Plaintiff

– and –

Canadian Broadcasting Corporation

Defendant

REASONS FOR JUDGMENT

Pollak J.

Released: October 25, 2010