

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
SHEILA WILSON)	<i>Joel Rochon and Vincent Genova,</i>
)	for the Plaintiff
)	
- and -)	
)	
)	
SERVIER CANADA INC. and)	<i>William McNamara and Stephen</i>
BIOFARMA S.A.)	<i>Scholtz,</i> for the Defendants
)	
)	
Defendants)	
)	HEARD: May 30,31, July 12, 13,
)	14, and 31, 2000

CUMMING J.

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

REASONS FOR DECISION

The Motion for Certification

[1] The plaintiff moves to have this class proceeding certified as a class proceeding in accordance with s. 5 of the *Class Proceedings Act*, S.O. 1992, c.6 (“CPA”). The action involves allegations that single-purpose anorectic drug products, Ponderal and Redux, are inherently defective.

Background

[2] The plaintiff was prescribed Ponderal, a weight loss drug, by her family physician, between August 15,1995 and August 29,1996. The generic form of this drug is “fenfluramine,” but the drug is known in Canada by the brand name “Ponderal.” A similar drug, “dexfenfluramine,” is known in Canada and the United States as “Redux.”

[3] The defendant Servier Canada Inc. (“Servier”) is a Canadian corporation established July 7, 1975, with its head office in Laval, Quebec. Servier is the distributor of Ponderal and Redux in Canada. The defendant Biofarma S.A. (“Biofarma”) is the parent corporation of Servier, a wholly owned subsidiary. Biofarma, a corporation pursuant to the laws of the Republic of France, has its head office in Neuilly-sur-Seine, France.

[4] The drugs are allegedly manufactured by affiliates of Servier and Biofarma. The French trademark for Ponderal was registered by Biofarma in France October 30, 1958 (the “French trademark”). The Canadian trademark for Ponderal was granted to Biofarma June 17, 1966, and transferred to Servier October 24, 1978.

[5] The Second Amended Statement of Claim (“the Claim”) alleges Biofarma has a cluster of privately held subsidiaries and that, in effect, the actions of Servier were the actions of Biofarma notwithstanding the formality of separate corporate entities.

[6] The Claim alleges that Ponderal is unsafe for human consumption and in fact causes life threatening diseases, including primary pulmonary hypertension (“PPH”), valvular heart disease and valvular regurgitation.

[7] The plaintiff was diagnosed in February, 1998, as having PPH. This is confirmed by a specialist, Dr. James Granton. PPH is reportedly a progressive disease for which there is no known cure. Dr. Granton opines that 50% to 60% of patients suffering from PPH will die within two years. Given the plaintiffs deteriorating health, she has given evidence in a hearing *de bene esse*.

[8] Ponderal was withdrawn from the Canadian market September 15, 1997. Prior to that time, some 1,407,000 prescriptions (some 452,000 in Ontario) for Ponderal were filled in Canada. The plaintiff received nine prescriptions in total, each involving 60 pills. Based on the assumption that each person using Ponderal received 9 prescriptions, there might be in the order of 155,000 individuals across Canada (some 56,000 in Ontario) who are potential class members.

[9] Several thousand actions concerning diet drugs containing fenfluramine or dexfenfluramine have been brought in American state and federal courts since these drugs were withdrawn from the U.S. market on September 15, 1997. See in *Re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation* 990 FSupp 834 (Judicial Panel on Multidistrict Litigation 1998); *Barbara Jeffers and Johnna Day, on behalf of themselves and all others similarly situated v. American Home Products Corporation*, 1999 U.S. Dist. Lexis 13228 (Pennsylvania) - an order has been made certifying the nationwide settlement class and approving a November 19, 1999 settlement agreement: *Sheila Brown, et al v. American Home Products Corporation*, Memorandum and Pretrial Order No. 1415 (U.S. Dist. Ct. Pa., 28 August 2000).

[10] Biofarma has brought jurisdictional motions seeking a stay of the class proceeding against it. They are based upon:

- (1) *forum non conveniens* pursuant to s. 106 of *the Courts of Justice Act* R.S.O. 1990, C.43, as amended [“*Courts of Justice Act*”] and rule 17.06(1) and (2) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, as amended [“*Rules of Civil Procedure* “] and because of Article 15 of France’s *Code Civil*; and
- (2) the *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters*, 15 November 1965, 658 U.N.T.S. 163, 16 Int’l Legal Materials (I.L.M.) 1339 (1977) [“*Hague Convention*”].

[11] There have been a number of pre-certification motions. The plaintiff brought a motion for a *de bene esse* hearing; a motion for a *pro hac vice* order (ultimately withdrawn); and a motion for an order requiring the defendants to answer undertakings, questions under advisement, and questions refused on the cross-examination of the affiant of the defendants in respect of the certification motion.

Biofarma’s motion that the action should be stayed or dismissed on the grounds that Ontario is *forum non conveniens* and on the basis of Article 15 of France’s *Code Civil*

[12] The defendant Biofarma asserts that the action should be stayed or dismissed pursuant to s. 106 of *the Courts of Justice Act* and rule 17.06 (1) and (2) of the *Rules of Civil Procedure* on the grounds that Ontario is *forum non conveniens*.

[13] First, Biofarma submits that to justify service upon a non-resident corporate defendant under rule 17.02 a plaintiff must demonstrate a good and arguable case. See *Canadian Westinghouse Co. v. Davey* (1964), 2 O.R. 282 at 284 (C.A.). In my view, this asserted requirement relates at most to a situation where *leave* must be obtained for service outside Ontario under rules 17.03 and 17.04(2) or to a situation where the court is deciding a motion to set aside service under rule 17.06 on the ground that the claim does not fall within rule 17.02. Neither situation applies in the case at hand. See *Ecolab Ltd. v. Greenspace Services Ltd.* (1998), 38 O.R. (3d) 145.

[14] The essence of the Claim against Biofarma is that the corporation committed a tort against class members both directly and through Servier acting as Biofarma’s agent. Rule 17.02 (g) allows for service outside Ontario *without leave* "in respect of a tort committed in Ontario." In my view, the Claim alleges facts that, if proven, establish a tort or torts having been committed in Ontario by the defendants. The allegations of fact, if proven, establish a real and substantial connection with Ontario in respect of the tort alleged in the cause of action pleaded. The evidence to this point in time establishes that but for Biofarma the diet drugs in question would not be marketed in Canada. The requirements of rules 17.02 and 17.04 (1) are met. See *Furlan v. Shell Oil Co.*, [2000] B.C.J. No. 1334 (C.A.) (QL) at para. 15, aff’g (1999), 11 W.W.R. 261 (B.C.S.C.).

[15] A Notice of Intent to Defend and a Notice of Defence were filed on behalf of both defendants on January 19, 1999. At the initial case conference held on September 24, 1999, Biofarma advised that motions might be brought contesting the jurisdiction of this Court. Biofarma not only filed a Notice of Intent to Defend, but also waited eight months, until the first case conference, to advise the plaintiff that it might assert that Ontario is *forum non conveniens* and that its further involvement in the proceedings was on a without prejudice basis. In my view, Biofarma has not raised its motion in a timely manner.

[16] Second, Biofarma asserts that the Rules of Civil Procedure have not been complied with in terms of service upon it of the Claim. However, an originating notice need not be served upon a party who has delivered a notice of intention to defend: rule 16.01 (2). As well, rule 17.06 (1) provides that a party served with an originating process outside Ontario may move “. . . before delivering a defence, notice of intent to defend or...” for an order setting aside the service or to stay the proceeding on the basis Ontario is not a convenient forum for the hearing of the proceeding (my emphasis).

[17] The delivery of a Notice of Intent to Defend may be evidence of attornment to the jurisdiction: see *Charmasson v. Charmasson* (1981), 34 O.R. (2d) 498 (C.A.) where filing an unconditional appearance constituted a submission to the jurisdiction. In my view, the unconditional appearance by Biofarma constitutes a submission to the jurisdiction of the Ontario court. Moreover, Biofarma, a party served *ex juris*, is precluded from bringing a motion under rule 17.06 because the motion is brought after the filing of its Notice of Intent to Defend. Therefore, Biofarma is precluded from seeking an order setting aside the service of the statement of claim.

[18] If I am not correct in my finding that Biofarma has attorned to the jurisdiction, then Biofarma’s motion requesting the court to invoke the doctrine of *forum non conveniens* under s. 106 of the *Courts of Justice Act* must be considered: see *ABB Power Generation Inc. v. CSX. Transportation* (1996), 47 C.P.C. (3d) 381 (Ont. Gen. Div.) [“*ABB Power*”].

Forum non conveniens

[19] Is Ontario the appropriate forum for the adjudication of the plaintiffs claim against Biofarma? A determination must be made about the extent of the connection between the asserted action and Ontario: see *Frymer v. Brettschneider et al.* (1994), 19 O.R. (3d) 60 at 79 per Arbour J. A.; *ABB Power, supra* at para. 33.

[20] Biofarma asserts that its only relationship to the alleged factual situation is that it is the sole shareholder of Servier. However, the Claim alleges direct negligence on the part of Biofarma in respect of Ponderal and Redux and their use by the putative Canadian class members. The Claim asserts that both defendants committed torts in Ontario.

[21] The evidentiary record is undisputed that Ponderal and Redux were marketed in Canada. The representative plaintiff resides in Ontario. She received her prescription from a physician, and purchased and ingested Ponderal in Ontario. The evidence.

establishes that a good number (in the order of 43 percent) of putative class members reside in Ontario. Servier, the distributor of the drug to Ontario, is a Quebec corporation, but some of the ingredients for Ponderal were produced in Ontario. In my view, there is a real and substantial connection between the subject matter of the action, founded in tort, and Ontario.

[22] The Claim also alleges that Servier is in reality an agent of Biofarma such that the corporate veil of Servier can be pierced and Biofarma can be held directly liable for the allegedly defective drugs marketed in Canada. The autonomous and independent existence of the corporate entity as a juristic person separate and apart from its shareholders is a cornerstone of Canadian law. A stringent test must be satisfied before one may pierce the corporate veil of a subsidiary corporation and impose liability upon a parent corporation on the basis of an asserted agency relationship: see for example *Aluminum Co. of Canada Ltd. v. Toronto*, [1944] 3 D.L.R. 609 (S.C.C.) at 614; *Trident Leasing (Canada Ltd.) v. Saskatoon Market Mall Ltd.* (1995), 24 B.L.R. (2d) 105 at 113 (Sask. C.A.); and *Smith, Stone and Knight, Ltd. v. Birmingham Corpn.*, [1939] 4 All E.R. 116 (K.B.). However, the protection provided by the corporate veil is not absolute: see for example *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 at 10; *Shibamoto v. Western Fish Producers Inc.*, [1991] 3 F.C. 214, 43 F.T.R. 1 (Fed. Ct. T.D.), affd (1992), 145 N.R. 91 (F.C.A.).

[23] No statement of defence has been filed by Biofarma and no affidavit as to documents has been sworn as of yet. At the least, it has been established that, historically, the French and Canadian trademarks with respect to Ponderal were registered to Biofarma. It is admitted that one of the active ingredients in Ponderal is made in France by Oril S.A., an affiliate of Biofarma. There is evidence from which to infer that quite probably Biofarma had a role in the design and creation of Ponderal and Redux. There is a paucity of knowledge at this time as to the history of any patent and any licensing arrangements. However, very little information has been offered to date by Biofarma and Servier, and their affiliates, as to their respective roles in the manufacture and marketing of Ponderal and Redux. Their position has been to resist providing any comprehensive explanation as to the corporations involved in the production of Ponderal and Redux, and then to say there is insufficient evidence to include Biofarma in the Claim, as Biofarma is simply a passive parent corporation of Servier. It is far too early to put the plaintiff to the task of unraveling the apparently complex corporate web of Biofarma and its affiliates, and of proving her case.

[24] Biofarma argues that its employees, and hence its key witnesses, all reside in France. However, to this point Biofarma has named only one witness, Mr. Marc Milward, corporate counsel. The evidentiary record suggests he may also be corporate counsel for Servier and for other affiliates of Biofarma. Mr. Milward is a witness in proceedings in the United States involving Les Laboratoires Servier S.A. (“LLS”), an affiliate of Biofarma. It appears that the documentary discoveries in the United States’ proceedings have been reduced to electronic form and should be readily available for transmission and use in Canadian proceedings. The record suggests that corporate officers of Biofarma and its affiliate LLS travel regularly to the United States and Canada.

Article 15 of France's *Code Civil*

[25] Biofarma also argues that, due to Article 15 of France's *Code Civil*, the proposed class plaintiff would gain no juridical advantage by having the action proceed in Ontario. Article 15 provides that French citizens "may be sued before a French court" for obligations entered into by them in a foreign country.

[26] The French courts have construed this article to mean that a French citizen, whether an individual or a legal entity, "shall have the right" to have a claim adjudicated by a French court: see for example *Missouri v. O.R.TF., Cour de cassation, Chambre civile*, December 10, 1974. Article 15 seems to apply whatever the nature of the claim: see *Lebasch v. Reisacher, Cour de cassation, Chambre civile*, November 17, 1981, French courts have refused to enforce foreign judgments when French citizens have properly invoked the benefits and protections of Article 15. Therefore, the defendants submit that a judgment from this court could not be enforced in France.

[27] The defendants argue that since Biofarma has expressly claimed the full benefits and protections of Article 15 with respect to this litigation, Biofarma has the right to have the plaintiffs claims heard and determined by a French court. I disagree.

[28] Article 15 of the French *Code Civil* flies in the face of the principles, of comity as discussed by LaForest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 10.77 ["*Morguard*"]. See also *Hunt v. T & N plc*, [1993] 4 S.C.R. 289. It is also an affront to the due process of the courts outside of France. If the subject matter of this action has a real and substantial connection to Ontario, there is no reason why an Ontario court should stay this proceeding so that it can be heard in France. It would be unfair to deprive the representative plaintiff and the putative class members of the right to have this matter heard in Ontario simply because Article 15 of the French *Civil Code* would prevent the enforcement of an Ontario judgment against Biofarma in France. When it properly has jurisdiction, an Ontario court should not refuse to hear a case because France refuses to accede to the accepted norms of international law and, in particular, the principle of comity.

[29] The defendants further argue that the Ontario action should be stayed because, should the plaintiff be successful in Ontario, the plaintiff would have to relitigate in France. In my view, that is not a factor with which this court should concern itself. It is for the plaintiffs to weigh the advantages and disadvantages of commencing an action in Ontario knowing that it may not be enforced in France. Moreover, as it seems as though not all of Biofarma's assets are located in France, should the plaintiff be successful, it may be possible to recover upon a judgment outside of France.

[30] In my view, a 'blocking statute' like Article 15 of the French *Code Civil* has no place in the contemporary, interconnected world of globalization and global trade, which depends upon mutual recognition and respect for settled international norms, including the principle of comity.

[31] American courts will not adhere blindly to the directive of such a blocking statute, *See for example Societe Nationale Industrielle Aerospatiale et al v. United States District Court for Southern District of Iowa (1987)*, 482 U.S. 522 at 544.

[32] An assertion of jurisdiction by this Court will require Biofarma to litigate in a foreign court. This will necessitate bringing witnesses and documents to Ontario and may result in costs for translation. However, as Servier would remain in the action as a defendant even if the action were to be stayed as against Biofarma, presumably all the relevant scientific and medical witnesses and documents in France would have to come to Ontario in any event.

[33] The class members are Canadian residents. The Claim alleges injuries and damages from the ingestion of Ponderal and Redux in Canada. There are several thousand putative class members, some of whom will be in ill health and many of whom will have only modest means. In such circumstances it is not easy to establish that another forum is clearly more appropriate than the one chosen by the plaintiff. *See Ontario New Home Warranty Program v. General Electric Co. (1998)*, 36 O.R. (3d) 787 (Gen. Div.); *Connelly v. R.T.Z. Corp. plc*, [1997] 4 All ER 335, [1997] 3 W.L.R. 373 (H.L.).

[34] France does not have class proceedings legislation. To require that the class members travel to France to present individual claims in protracted, expensive and extremely complex litigation would effectively deny them access to justice. When a stay would lead to a denial of justice to the plaintiff, a stay will not be granted. *Lubbe et al. v. Cape plc*, [2000] H.L.J. 42 (20 July, 2000) at para. 26 per Lord Bingham of Cornhill. The plaintiffs have a very strong interest in obtaining a resolution of their claims in an Ontario court. There would be a very significant loss of juridical advantage if they were not permitted to proceed with their action against Biofarma in Canada.

[35] Ontario has an interest in adjudicating claims brought by its residents and in facilitating the resolution of the claims of other Canadian residents in a manner that meets the underlying policy objectives of the CPA. The action at hand will continue against Servier in all events. Canadians should not be required to bring litigation in France against one defendant when litigation is proceeding in Ontario against another defendant --in particular, when the latter is the subsidiary of the former, and the evidence required for the two actions will largely be the same. The defendants invite a multiplicity of proceedings through this motion. *See Jannock Corp. v. RT Tamblyn & Partners Ltd.* (1975), 8 O.R. (2d) 622, 58 D.L.R.(3d) 678 (C.A.) leave to appeal to Supreme Court of Canada refused [1975] 1 S.C.R. xiii, 8 O.R. (2d) 622n.

[36] In my view, and I so find after considering all the factors, this court's jurisdiction over Biofarma is not unduly burdensome and is in accord with accepted norms of fairness and justice. It has not been established that France is a more appropriate forum. It has not been established that Ontario is not a convenient forum.

Disposition of this motion

[37] For the reasons given, Biofarma's motion that the action should be stayed or dismissed on the ground that Ontario is forum non conveniens and on the basis of Article 15 of France's *Code Civil* is dismissed.

Biofarma's motion for a stay of proceedings on the basis of non-compliance with the *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters* ("*Hague Convention*")

[38] There is no dispute that Biofarma was served with the plaintiffs statement of claim. However, this was done in Paris by Federal Express, a commercial courier service. Biofarma asserts this service is not in conformity with the *Hague Convention* and, therefore, the proceeding is a nullity as against Biofarma.

[39] Both France (since September 1, 1972) and Canada (since May 1, 1989) are contracting states to the *Hague Convention*. The *Hague Convention* imposes a legal regime for the service ex *juris* of a statement of claim filed in Canada. Rule 17.05 (3) of the Rules of *Civil Procedure* implements the *Hague Convention* requirements in Ontario: *see Zupancich v. Zupancich*, [1998] O.J. No. 6166 (QL) at para. 70.]

[40] Article 10 of the *Hague Convention* provides that if the state of destination does not object, judicial documents may be served "by postal channels" ("*par la voie de la poste* "). France has not objected to this form of service. Article 1 of the *Hague Convention* provides that the *Convention* " shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extra-judicial document for service abroad." Biofarma submits that delivery by a commercial courier does not meet the mandatory requirement of the *Hague Convention*.

[41] Biofarma says that rule 16.01 (2), which allows that an originating process need not be served on a party who has delivered a notice of intent to defend, cannot give relief, as rule 17.05 (3) (b) makes it an absolute requirement that an originating process "shall be served...in a manner that is permitted by Article 10 of the Convention and that would be permitted by these rules" (my emphasis): *see for example Dofasco Inc. v. Ucar Carbon Canada Inc.* (1998), 27 C.P.C. (4th) 342 (Ont. Gen. Div.) at 344. Biofarma submits that the Court cannot override the *Hague Convention's* requirements by dispensing with service under rule 16.01 (2) or validating the service under rule 16.08 on the basis that the Claim has come to the notice of Biofarma.

[42] In my view, Biofarma fails in this motion. First, in my view, by filing a Notice of Intent to Defend and waiting some eight months before advising that it might challenge Ontario's jurisdiction, Biofarma has attorned to the jurisdiction of Ontario. Second, I read rule 17.06 (1) as stating that a party must move for an order to set aside any actual service (and even if the service is in non-compliance with the *Hague Convention*) before delivery of a defence or notice of intent to defend or notice of appearance. The position of Biofarma, that the proceeding is inevitably a nullity when service under the literal requirements of the *Hague Convention* is not met, logically would lead to the absurd

result that, Biofarma could proceed through to the conclusion of a trial in this action and then disavow the result on the assertion that there was never service in accordance with *the Convention*.

[43] The essence of the provisions in rule 16.01 (2) and rule 17.06 (1) is that a party who files a Notice of Intent to Defend is then estopped from asserting that the service should be set aside. When a party in effect waives a defective service by its conduct in attorning to the jurisdiction or in not moving to set aside service under rule 17.06 *before* filing a Notice of Intent to Defend it may not later claim the proceeding is a nullity because it was not served in accordance with the strict requirements of the *Hague Convention*. Once Biofarma filed a Notice of Intent to Defend, it was precluded from challenging the manner of service.

[44] Second, there is no evidence before this Court as to whether or not France considers delivery by a commercial courier as insufficient to meet the criterion of “postal channels” set forth in Article 10. In my view, the onus rests upon Biofarma to establish that there has not been service in compliance with *the Hague Convention*. In the absence of any evidence as to what is the scope of meaning for “postal channels” within France, Biofarma has not met that onus.

Disposition of this motion

[45] For the reasons given, Biofarma’s motion for a stay of proceedings on the basis of non-compliance with the *Hague Convention* is dismissed.

The Criteria for Certification

[46] Section 5 of the *CPA* sets forth five criteria that, if met, require a court to certify a class proceeding. The defendants submit the plaintiff has failed to satisfy the requirements of each one of these five criteria.

Section 5(1)(a): Does the Amended Statement of Claim disclose a cause of action?

[47] The Claim alleges negligence, failure to warn and breach of warranty on the part of the defendants. Assuming the facts as stated in the Claim can be proven, is it “plain and obvious” that the pleading does not disclose any cause of action?: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 975 and 977; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) application for leave to the S.C.C. dismissed [1999] S.C.C.A. No. 476 [“*Anderson*”]. The inquiry at this stage is simply to determine whether the plaintiff has a claim sustainable at law on the face of the pleading.

[48] The medical literature in the evidentiary record suggests there is “strong evidence that fenfluramine may cause pulmonary hypertension”: see J.G. Douglas *et al.*, “Pulmonary hypertension and fenfluramine” (October 3, 1981) 283 *British Medical Journal* 88 in Abstract at 1; L. Abenhaim *et al.*, “Appetite-Suppressant Drugs and the Risk of Primary Pulmonary Hypertension” (August 29, 1996) 335:9 *N Eng J Med* at 609.

The literature also concludes that the use of fenfluramine or dexfenfluramine over several months is associated with an increased risk of cardiac-valve disorders, particularly aortic regurgitation: see H. Jick et al., “A Population-Based Study of Appetite-Suppressant Drugs and the Risk of Cardiac-Valve Regurgitation”(September 10, 1998) 339:11 N Eng J Med 719. Dr. G. Curfinan wrote an editorial in (August 28,1997) 337:5 N Eng J Med at 629 suggesting there are serious health hazards associated with anorectic drugs and calling for a moratorium on their use for the purpose of cosmetic weight loss. In an editorial, Dr. G. Curfman suggested there are serious health hazards associated with anorectic drugs and called for a moratorium on their use for the purpose of cosmetic weight loss: “Editorial: Diet Pills Redux” (August 28, 1997) 337:5 N Eng J Med at 629.

[49] In warning consumers not to take Ponderal or Redux, Health Canada issued an advisory on September 15, 1997:

Health Canada urges individuals who may have consumed these products to consult their doctor immediately for appropriate patient follow-up.

The first indication of the development of valvular heart disease is usually the occurrence of a new heart murmur (abnormal sound as the blood flows over a valve). More severe symptoms of the disease include shortness of breath, loss of tolerance to physical activity and fluid retention in the legs and lungs.

[50] The Claim alleges that the defendants negligently misrepresented the safety of the drugs to the Health Protection Branch of Health Canada. The Claim also alleges, that, after having received information as to the potential of the drugs to cause serious health effects, the defendants failed to advise that the drugs should be immediately withdrawn.

[51] The evidence adduced to date establishes that Biofarma transferred the trademark for Ponderal to Servier; that Servier did not invent the drug and does not manufacture the drug but is the distributor in Canada for the drug; and that Servier is one of a large number of subsidiaries of Biofarma in an international pharmaceutical enterprise. The evidence establishes Biofarma and Servier knew and intended that Ponderal and Redux would be marketed and consumed in Ontario. It was reasonably foreseeable to both corporations that, if there was negligence in the manufacture of the products with the result that they were unsafe for consumption, there could be harm to persons in Ontario. *See Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at para. 28.

[52] In my view, it is not plain and obvious that the claims against the defendants, as pleaded, cannot succeed. The criterion of s.5(1)(a) has been met.

Section 5(1)(b): Is there an identifiable class?

[53] The purpose of this criterion is to identify ‘the persons with a potential claim, define the parameters of the action so as to identify all the persons who will be bound by

the result, and determine who is entitled to notification. The precise numbers or identities of the individual class members need not be known as a prerequisite to certification.

[54] Paragraphs 7 and 8 of the Claim identify the putative class-members. In my view, and I so find, the class is identifiable. The proposed class definition. is:

All persons resident in Canada (excluding Quebec) who were prescribed and ingested the diet drugs marketed under the brand name Ponderal (generic name: fenfluramine) and/or Redux (generic name: dexfenfluramine), these being diet drugs designed, developed, fabricated, manufactured, imported, distributed, marketed, sold or otherwise placed into the stream of commerce in Canada by Servier Canada Inc. and/or Biofarma S.A.; and

All persons including, but not limited to, executors, administrators, personal representatives, spouses and relatives who on account of a relationship to any one or more of those persons described in the above class, have a derivative claim for damages resulting from the treatment with Ponderal and/or Redux.

[55] The plaintiff submits that medical and pharmaceutical records can be utilized to provide the documentary evidence to establish membership in the class.

[56] The defendants assert that some of the class members will have consumed Ponderal or Redux without any adverse effects. Thus, they submit, the proposed class definition is excessively inclusive and improper: *see Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 at 68 (Gen. Div.). However, the Claim seeks a return of the monies paid for the drugs by members of the class who suffered no disease as a result of ingestion on the assertion that nothing of value was received by anyone who took either drug. As well, the Claim seeks to recover the medical expenses necessary for screening and diagnosis to determine whether a person has medical problems as a result of ingesting either drug. In my view, the proposed class is not excessively inclusive and improper.

The defendants’ motion to disallow the certification of a “national class” on the basis that certification would be unconstitutional

[57] The plaintiff seeks to have this action brought on behalf of a “national class.” The defendants object to the certification of a national class on the basis that proposed class members who reside outside of Ontario have no connection to Ontario. These individuals obtained prescriptions for Ponderal and Redux from physicians practicing outside of Ontario, purchased Ponderal or Redux from pharmacists carrying on business outside Ontario, and allegedly sustained injury and damages outside Ontario.

[58] The defendants submit that under the principles of constitutional law and private international law, this court lacks jurisdiction with respect to claims of proposed class.

members who reside outside Ontario. In the alternative, they argue that, in light of the class actions commenced in Quebec and British Columbia, the claims of the proposed class members who are residents of those provinces should be excluded from the Ontario proceeding. The plaintiff no longer seeks to include the residents of Quebec.

[59] Thus, two issues are raised by the defendants. First, is the CPA *ultra vires* the Legislative authority of the Province of Ontario to the extent it may purport to allow for a national class? Second, does this Court lack jurisdiction with respect to the claims of non-Ontario class members?

[60] The defendants refer to the territorial limitation in respect of legislative powers in the *Constitution Act, 1867* (U.K.), 30 & 31 Vict.; c. 3; reprinted in R.S.C. 1986, App. II, No. 5 [“1867 ACT”] seen in section 92:

s.92(13) - “property and civil rights *in the Province*,

s.92(14) - “the administration of justice *in the Province*; [and]

s.92(16) - “all matters of a merely local or private nature *in the Province*;

[emphasis added]

[61] The pith and substance of provincial legislation must relate to matters within provincial legislative powers, while extra-provincial effects must be merely collateral or incidental: *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at 332.

[62] Any Ontario statute must, of course, be construed to apply only to matters in relation to which the provincial legislature has the constitutional power to legislate: see for example, *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 103-105.

[63] The CPA is procedural and remedial in nature. There is nothing in the CPA to prevent non-residents from being included in an Ontario class proceeding subject to constitutional requirements being met. On its face, the CPA authorizes the formation of classes unlimited by the territorial boundaries of Ontario.

[64] The defendants submit that the individual claims based in tort by the out-of-Ontario residents do not have a real and substantial connection to Ontario. Therefore, this argument proceeds, non-residents cannot meet the test for jurisdiction by an Ontario court. I disagree.

[65] As already discussed, there is a real and substantial connection between the alleged cause of action in tort by Ontario residents against the defendants. In my view, this court’s jurisdiction is well-founded in respect of the claims of Ontario residents. (Indeed, this jurisdiction is not challenged by the defendant Servier.)

[66] The *CPA* is merely a *procedural* statute. It affords the latitude to a court to establish a “national class” in a class proceeding. In my view, the *CPA* is not unconstitutional on the basis that the Ontario Legislature is legislating extraterritorially. The *CPA* allows this court to include non-residents as parties in an action in which Ontario has unquestioned jurisdiction with respect to Ontario residents.

[67] It is to be noted that s.129 of the 1867 *Act* provides that the court retains its pre-Confederation jurisdiction except as altered by Parliament or the Legislature of the respective province under the new Constitution. Section 92 sets forth the exclusive powers of provincial Legislatures. Section 92 does not limit the pre-Confederation jurisdictional reach of the courts. The third “Whereas” clause in the preamble makes it clear that it is the authority of Parliament and the provincial Legislatures, together with the nature of the Executive Government, that is being provided for in the 1867 *Act*. Thus, the referenced provisions of s.92 have no relevance in limiting the court’s jurisdiction. The *CPA* recognizes and affirms the *court’s* jurisdiction to include non-resident claimants within an Ontario action.

[68] The principle of comity *was* found in *Morguard, supra*, to underlie the recognition of foreign judgments. Writing for the Supreme Court of Canada, La Forest J. stated that modern times require that wealth, skills and people flow across boundaries in a fair and orderly manner (page 1098). A modern system of private international law must therefore ensure security of transactions through principles of order and fairness. The Court held that the principle of comity must be adjusted in light of the changing world order, since it would be unfair for a person to avoid legal obligations arising in one province by moving to, another. *See also Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897 at 934.

[69] The Court also stated in *Morguard* that the courts should’ give “full faith and credit” to the judgments given in other provinces or territories as long as the court has properly and appropriately exercised jurisdiction in the action. The “real and substantial connection” test was adopted as the appropriate test for determining if the court of another province appropriately exercised its jurisdiction (page 1108).

[70] In a dispute involving persons outside the province where the dispute is being heard, the power of the presiding court to assume jurisdiction is limited by the principles of order and fairness. These principles are satisfied when there is a “real and substantial connection” between the province assuming jurisdiction and the defendants or the subject-matter of the litigation.

[71] In *Hunt, supra*, the Supreme Court of Canada held that, although *Morguard* was not argued in constitutional terms, its principles were constitutional in that they could not be overridden by provincial legislation. The failure of provincial legislation to respect the minimum standards of order and fairness could lead to its constitutional review.

[72] In *Hunt* the Supreme Court of Canada reviewed Quebec legislation that purported to give Quebec courts exclusive jurisdiction over matters that may have had a real and

substantial connection with another province. The legislation, because it prevented a court with a real and substantial connection from *having* jurisdiction, was found to offend the principles of order and fairness stated in *Morguard*.

[73] As a result of the decisions in *Morguard* and *Hunt*, it has been suggested that "any constitutional concerns about territorial limitation *are now addressed though the* 'principles of order and fairness,' and the 'real and substantial connection test'" (emphasis in original): see G.D. Watson and F. Au "Constitutional Limits on Service Ex Juris: Unanswered Questions from *Morguard*" (2000) 23 *Advocates' Q*, 167 at 177-178 ["Constitutional Limits"]. The limitation imposed by s.92 of the 1867 Act should be considered after determining whether there exists a real and substantial connection: see "Constitutional Limits" at 178. The real and substantial connection test becomes additional and distinct from the territorial limitation of s.92.

[74] In her article "Interprovincial Sovereign Immunity Revisited" (1997) 35 *Osgoode Hall L.J.* 379, Professor Janet Walker states at page 396:

The notion that the Canadian provinces are "sovereign" vis-à-vis one another as this relates to court jurisdiction appears, then to have been a passing view, applied with little critical consideration of the differences between inter-provincial and foreign relations, and now overtaken by recent developments in the law of interprovincial comity in court jurisdiction. The increasing demands for litigation convenience and judicial economy, especially as witnessed in the advent of multi-province class proceedings, promise to provide a strong practical impetus to overcome the barriers to consolidating claims arising in the distribution of products and services throughout Canada.

According to Professor Walker, *Hunt* articulated the principle that the relationship between the superior courts of the provinces should reflect Canadian federalism.

[75] National classes have been certified by Ontario courts on the principles in *Morguard* and *Hunt*: see *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.), ["Nantais"] application for leave to appeal to the Div. Ct. dismissed (1995), 129 D.L.R. (4th) 110 (Gen. Div.); *Carom vs Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 4411 Gen. Div. ["Bre-X"]; *Webb v. K-Mart Canada Ltd* (1999), 45 O.R. (3d) 389 ["K-Mart"]. They have also been certified in British Columbia: see *Harrington v. Dow Corning Corp.* (1997), 29 B.C.L.R. (36) 88, 8 C.P.C. (4th) 262 (B.C.S.C.) ["Dow Corning"].

[76] In *Bendali v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen.Div.), Montgomery J. certified an Ontario class, thereby providing access to the legal system to Ontario women who had received silicone breast implants. He stated that certification is

fluid and flexible and always subject to decertification if the class is defined too broadly (p. 747),

[77] In *Nantais, supra* the defendants manufactured and marketed leads for pacemakers. The leads were manufactured outside Canada but marketed in Canada, through Ontario, by members of the corporate family of the defendants. Relying upon the reasoning in *Morguard* and *Hunt* and the underlying policy reasons of the CPA, Brockenshire J. found it was appropriate to include persons outside of Ontario in the class.

[78] In *Nantais*, certification of a national class was proposed only for the determination of the issue of liability. Brockenshire J. found it was sensible to have the question of liability determined as far as possible for all Canadians. He noted that nothing in the CPR prevented the certification of a national class. Non-residents of Ontario had the option to participate in the class proceeding or to opt-out. He examined the U.S. Supreme Court's decision in *Phillips Petroleum Company v. Shutts et. al*, 105 S.Ct. 2964 (1985) ["Shutts"], which concluded that an opting-out provision would avoid any doubt as to jurisdiction. In *Shutts*, Justice Rehnquist stated that reasonable notice plus an opportunity to opt out of the national class provides "at 3 minimum" sufficient due process for the judgment of one state to be given full faith and credit by the courts of other states with the result that class members in the first state would be prevented from taking action in their own state,

[79] The defendants applied for leave to appeal Brockenshire J.'s reasons in *Nantais* to the Divisional Court. Affirming Brockenshire J's decision and dismissing the application, Zuber J. made the following comments at p. 114:

It is also argued that other class proceedings may be certified in other provinces relating to the matter which is the subject of this class proceeding, In my respectful view any of these practical difficulties which may develop as the matter proceeds can be met by amending the order in question to adjust the size of the class. If it is shown that the law of another province is so substantially different as to make the trial with respect to class members from that province very difficult, the class can be redefined. Additionally, if a class is certified in another province that group can be deleted from the Ontario class.

[80] In *Bre-X, supra*, the plaintiffs alleged they had been wronged by the promotion and sale of Bre-X shares in Canada. The proposed class included all persons-wherever they resided within Canada-who fell *within* the class definition, unless they affirmatively opted out. of the class pursuant to the provisions of the CPA, Some of the defendants objected to the proposed national class on the grounds that: 1) the CPA does not provide for a class which includes extra-provincial plaintiffs and that such a class conflicts with sections of the CPA; and 2) that it is unconstitutional and contrary to the presumption under the principle of territoriality that legislation operates extra-territorially.

[81] ‘In *Bre-X*, Winkler J. found that there was no merit to the argument that, since the CPA is silent with respect to non-resident plaintiffs, its application is limited to the residents of Ontario. On the contrary, the absence of a provision limiting its application to Ontario residents permits the inclusion of non-residents, subject to the constitutional considerations (p. 447). Winkler J. compared the CPA to the *British Columbia Class Proceedings Act* R.S.B.C. c. C. 50 (“BCCPA”) and adopted the reasoning in *Dow Corning, supra*, where MacKenzie J. stated that an opt-in provision like the one contemplated in the BCCPA makes the BCCPA more limiting and less far-reaching than the CPA. In *Bre-X* Winkler J. concluded that *Nantais* was correctly decided and adopted its reasoning.

[82] *Morguard* and *Hunt* require Canadian courts to apply the principle of territoriality within the context of the Canadian federal system. Winkler J. stated that “*Morguard and Hunt* permit the extra-territorial application of legislation where the enacting province has a real and substantial connection with the subject matter of the action and it accords with order and fairness to assume jurisdiction” (p. 450). In *Bre-X*, Winkler J. found a “real and substantial connection” between the defendants and the subject matter of the action in Ontario. The notice requirements and opt-out provision of the CPA were seen as preventing any prejudice to the non-resident class members.

[83] I prefer to restate this view of the law as follows. *Morguard* and *Hunt* stand for the proposition that if there is a real and substantial connection between the subject matter of the action and Ontario, then the Ontario court has jurisdiction with respect to the litigation and can apply Ontario’s *procedural* law. Ontario may not necessarily apply its substantive law since there must be a determination of the choice of law that applies. In cases where Ontario has properly assumed jurisdiction, other jurisdictions on the basis of the principle of comity should recognize the Ontario judgment. (In my view, this analysis does not involve any extra-territorial application of Ontario law, and *Morguard* and *Hunt* do not stand for the proposition that Ontario law should be applied extra-territorially.)

[84] In determining procedurally whether non-Ontario residents are to be included within an Ontario class action, a court must be guided by the requirements of order and fairness: see *Hunt* at 326.

[85] In *K-Mart, supra*, Brockenshire J certified a class including non-residents of Ontario with the exception of those in Quebec and British Columbia. The action involved the decision of a corporation carrying on business across the country and the corporation’s employees, living throughout the country, who had been dismissed from their employment. Brockenshire J. observed that there should not be a great disparity in treatment arising solely because of the place of residence. The lack of comparable class action legislation in provinces other than Quebec and British Columbia was an additional reason to include non-residents of Ontario within the class (p. 404). Finally, Brockenshire J. found that the opt-out provision in the CPA provided adequate protection.

to those claimants who would prefer to make a claim. in their own province. Brockenshire J. concluded at page 404:

I regard the common interests of the class members, the commercial realities of the situation, and the broad objectives of the Ontario Act, as outweighing any concerns expressed over extra territorial involvement of the Ontario Court.

[86] In *Dow Corning*, the proposed class was defined as “all women who have been implanted . . . and are resident in Canada, anywhere other than Ontario and Quebec, or were implanted in Canada, anywhere other than Ontario or Quebec” (p. 90). Although the defendants did not manufacture the breast implants in British Columbia, some of the plaintiffs had received their implants in that province. The defendant opposed the inclusion of non-residents in the class because some of the plaintiffs had received their implants in provinces other than British Columbia and therefore had no real and substantial connection to the province of British Columbia. The court concluded that there was no utility in having the same factual issues litigated in several jurisdictions if the claims could be dealt with in British Columbia. The common issues were therefore found to be sufficient to establish a real and substantial connection to British Columbia.

[87] When considering the impact of the Supreme Court of Canada decisions in *Morguard* and *Hunt*, the Manitoba Law Reform Commission indicated in its report titled *Class Proceedings* (January 1999, Report #100) that Manitoba courts would recognize a decision from another province if the province has taken jurisdiction appropriately. The Commission stated at page 31:

Recent Supreme Court of Canada jurisprudence on conflicts of law strongly supports the principle that, as a matter of constitutional federalism, federally appointed courts should reflect and foster Canadian federalism by co-operating with each other. If litigation has “a real and substantial connection” (a term not fully defined) to a province, that province’s courts may assume jurisdiction over the litigation, and this assumption should be tolerated and accepted by courts in other provinces even if those provinces also have a real and substantial connection to the case. The effect of this is that Manitoba courts are likely to recognize and enforce a class proceeding decision from an Ontario court that affects’ Manitoba residents, as long as the proceeding had a real and substantial connection with Ontario, even if Manitoba would have been a preferable jurisdiction from the point of view of the class members resident in Manitoba.

[88] The Alberta Law Reform Institute published a *Class Actions Consultation Memorandum No. 9* in March 2000. When discussing the jurisdiction of courts to decide class proceedings involving non-residents, it opined that “a plaintiff who seeks to certify a class action will have to convince the court that it has jurisdiction over the dispute”

(para, 52). I read this as meaning that the court must have jurisdiction over the subject matter of the dispute.

[89] The defendants state at page 13 of their factum that the court must determine whether there is “a real and substantial connection between the subject matter of an action and the jurisdiction in which the action is commenced.” However, in paragraph 15 of their factum, they state that the subject matter of claims by the non-Ontario plaintiff has no real and substantial connection with Ontario because: 1) the defendants do not reside in Ontario or have any offices in Ontario; 2) the defendants do not have assets in Ontario; 3) the defendants do not operate or carry on business in Ontario; and 4) the defendants do not market, promote or sell Ponderal or Redux in Ontario.

[90] In my view, these factors at most may show that there may not be a real or substantial connection between *the defendants* and Ontario. However, this is not the test. The test is, whether, there is a real and substantial connection between the *subject matter of the claims* and Ontario.

[91] The defendants argue that the decisions in *Nantais*, *Bre-X* and *K-Mart* should not be followed because they involved a closer connection between the subject matter of the litigation in Ontario than the present action does.

[92] More than one province can have a real and substantial connection to the subject matter of a law suit while only one could be the more appropriate forum: see *Constitutional Limits*,” *supra* at 190. The questions of whether a court *can* assert jurisdiction and whether the court *should* exercise jurisdiction are conceptually distinct: see *Tolofson v. Jensen*, [1994] 120 D.L.R. (4th) 289 (S.C.C.), rev’g [1992] 89 D.L.R. (4th) 129 (B.C.C.A.) [*”Tolofson”*]. Professor J-G. Castel in his book *Canadian Conflict of Laws* (4th ed.) (Toronto: Butterworths, 1997) at 55 states that the test for determining whether a real and substantial connection exists is not demanding or rigid. The court needs to find only a real and substantial connection, not the *most* real and substantial connection, to assume jurisdiction.

[93] This approach is efficacious in extending the policy objectives underlying the *CPA* for the benefit of non-residents. If there are common issues for all Canadian claimants, this approach facilitates access to justice and judicial efficiency, and tends to inhibit potentially wrongful behaviour. This is to the advantage of all Canadians and to Canada as a federal state. This procedural flexibility serves in the nature of oil in the institutional and jurisdictional machinery of Canadian federalism. Courts in Australia and the United States, both federal states, have addressed similar issues in like manner. See generally *Femcare Ltd. v. Bright*, [2000] FCA 512 (19 April 2000) (Australia); *Shutts*, *supra*.

[94] Mass torts and defective products do not respect provincial boundaries. Complex and costly litigation is not viable for individual claimants. The procedural latitude of the *CPA* recognizes the authority of all provinces and the rights of their individual residents. If a non-resident of Ontario wishes to commence an action in another province, that.

person can opt, out of the Ontario action. If a class action is commenced and certified in either British Columbia or Quebec, that certified class proceeding will take precedence for the residents of that province.

Disposition of this motion

[95] For the reasons given, the defendants' motion to disallow certification of a "national class" is dismissed. Certifying a national class in this case is not unconstitutional.

Other proposed class proceedings against Servier Canada

[96] There are other actions concerning Servier Canada: in Quebec, *Hotte v. Servier Canada*, [19991 J.Q. No. 4371 (C.A. Que.) (QL)]; and in British Columbia, *Mathews v. Servier Canada* 2000 CarswellBC 892 [*"Mathews"*]. Counsel for the plaintiff have been in communication with Quebec and British Columbia counsel. These two actions have not yet been certified. The proposed class in the Quebec action is limited to the residents of Quebec. The decision has been made in the class proceeding at hand to exclude Quebec residents from the proposed national class.

[97] In British Columbia, the BCCPA provides a different procedure for non-residents. It contemplates the creation of a subclass for persons who are not resident in British Columbia and who wish to opt-into the class, Counsel for the representative plaintiff in *Mathews, supra*, has advised that, if the action at hand is certified in Ontario, then the British Columbia representative plaintiff will not opt out, but rather seek to have the class members in British Columbia constituted as a sub-class in the instant action.

[98] The *CPA* contemplates the decertification of a class in whole or in part, as circumstances in a given case may change. If, ultimately, the *Mathews* case in British Columbia becomes certified, then the class members for that province can be deleted from the national class in the case at hand.

Section 5(1)(c): Does the claim raise common issues?

[99] The central element to any class proceeding is the commonality of issues. "Common issues," as defined in s. 1 of the *CPA*, are common but not necessarily identical issues of fact or law. Also inherent in this criterion is the question whether a resolution of the common issues through the class proceeding will advance the progress of the action. The common issues ". . . need only involve a matter, that if determined, would move the litigation forward": *see Anderson, supra*, at 683.

[100] The defendants categorically deny any wrongdoing. They deny that their products can cause the cited diseases in anyone. They claim there is no cause and effect relationship between their products and the diseases in any human being.

[101] In my view, there are a number of common issues relating to scientific and medical evidence, including the chemical composition and biological effect of Ponderal and Redux, the labeling and warning included with the drugs, the communications with prescribing physicians, and the defendants' knowledge of the alleged adverse effects of the drugs. In the absence of class treatment, the class members would be unable to obtain the benefit of the collection of medical and scientific data and research that addresses issues relating to the diseases asserted to be caused by ingestion of the drugs.

[102] Punitive damage claims are generally appropriate for treatment as a common issue when the claim is based upon product liability: *see* for example, *Chace v. Crane* (1997), 14 C.P.C. (4th) 197 (B.C.C.A.) at 204. Such claims relate to the conduct of the defendant rather than the individual circumstances of class members.

[103] Biofarma claims that, as a separate corporate entity, it is impervious in law to any claim by any Canadian that might be successful against Servier. To date, Biofarma has declined to provide information identifying the various corporate entities involved in the overall enterprise of the manufacturing and distribution chain for the products and the inter-relationship of these corporations.

[104] The defendants claim they breached no duties in the design, manufacture distribution and marketing of their products. They claim they owed no duty to warn and did not breach any such duty if owed. They claim their products were fit for the purpose intended and for which they were marketed.

[105] The defendants seeks to isolate each individual claimant who might come forward with a personal injury claim and put that person to the horrendous cost of dealing with these complex and protracted issues.

[106] In my view, there are common issues which, for reasons of fairness and efficiency, ought to be determined in a single proceeding. A resolution of these issues would be determinative for the entire class.

[107] There are questions of both fact and law common to the class. I determine the common issues to be:

1. Whether Ponderal and/or Redux can cause primary pulmonary hypertension (PPH), valvular heart disease or valvular regurgitation;
2. Whether Ponderal and/or Redux are defective or unfit for the purpose for which they were intended as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed, or otherwise placed into the stream of commerce in Canada by one or both of the defendants;
3. Whether the defendants knowingly, recklessly, or negligently breached a duty to warn or materially misrepresented any of the risks of harm from Ponderal or Redux;
4. Whether Biofarma is responsible in law for the acts of Servier in respect of the sale and marketing of Ponderal and Redux in Canada;

5. Whether the defendants negligently misrepresented the safety of the drugs after having received information as to the potential of the drugs to cause serious health effects;
6. Whether class members are entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Ponderal and Redux;
7. Whether class members are entitled to equitable relief whereby they are reimbursed for the purchase price of Ponderal or Redux; and
8. Whether the class members are entitled to aggravated or punitive damages.

Section 5(l)(d): Is the class proceeding the preferable procedure for the resolution of the common issues?

[108] The crux of the defendants' response to the motion for certification is that there are a number of individual issues that must be addressed for each member of the class. Hence, the defendants submit that the class proceeding is not the preferable procedure for a resolution of the common issues. The defendants state that, within the class, there will be significant variation from individual to individual with respect to the factors that are relevant to determining medical conditions and the causation of particular medical problems, and the nature of the medical advice and treatment received and the damages suffered.

[109] The defendants assert there are a number of individual issues that arise in respect of anyone who is claiming that a disease resulted from the use of Ponderal or Redux.

[110] The defendants submit that individual issues include:

- (a) Does the class member suffer from valvulopathy or pulmonary hypertension?
- (b) Did the class member suffer from pre-existing valvulopathy or pulmonary hypertension?
- (c) If not, was the class member's valvulopathy or pulmonary hypertension caused or contributed to by the consumption of Ponderal or Redux?
- (d) If the class member suffered from pre-existing valvulopathy or pulmonary hypertension, was it exacerbated by consumption of Ponderal?
- (e) What other medications has the class member consumed?
- (f) What was the class member's pre-Ponderal or pre-Redux condition?
- (g) Was the class member pre-disposed to acquire valvulopathy or pulmonary hypertension?
- (h) Was the class member a smoker at any time?
- (i) How obese was the class member when Ponderal or Redux was first prescribed?
- (j) How long was the class member on Ponderal or Redux?
- (k) Did the class member receive any information from any sources regarding possible risks and/or side effects associated with Ponderal or Redux?

- (l) What, if anything, did the class member's prescribing physician tell the class member about possible risks and/or side effects associated with Ponderal?
- (m) What instructions did the class member receive regarding dosage and timing?
- (n) Did the class member comply with these instructions?
- (o) Were the instructions and/or warnings received from the prescribing physician appropriate and adequate?
- (p) Would the class member have taken Ponderal or Redux if advised of the risk of valvulopathy or pulmonary hypertension?
- (q) Did the class member report any changes or symptoms to her/his physician while on Ponderal or Redux?
- (r) Did the prescribing physician adequately monitor the class member while on Ponderal or Redux?
- (s) Did the class member remain on Ponderal or Redux longer than was medically indicated?
- (t) What damages, if any, has the class member suffered?
- (u) Is the class member contributorily negligent and, if so, to what degree?

[111] Undoubtedly, a large number of individual issues will arise for each member of the class who claims that a disease has resulted from the consumption of the diet pills. Indeed, there will probably have to be individual discovery of these class members. The *CPA* contemplates a bifurcated process as necessary and appropriate to accomplish this.

[112] However, the existence of individual issues does not detract from the reality that there are significant common issues, the resolution of which will advance the progress of the litigation.

[113] The individual issues may well make it somewhat difficult to treat all the claims in a single class. This may be particularly evident in connection with affirmative defences that the defendants may seek to assert. However, the potential difficulties are not insurmountable. They can be dealt with as the litigation progresses and unfolds, either through the creation of subclasses or through exclusions to the class asserted. Given the potential number of claimants, it is important to recognize at the outset that the Court has the statutory authority to make appropriate orders as the litigation progresses. The defined class can be modified through the further inclusion, exclusion or subclass treatment of class members: s. 10 (1) of the *CPA*.

[114] There are reportedly at least twenty-two actions in four other Canadian jurisdictions, as well as an individual action in Ontario, already commenced against the defendants in respect of their products. The claimants in those proceedings can of course opt out of a certified national class action.

[115] The essence of the plaintiffs claim is that everyone in the class has been exposed to a significant risk of disease because of the use of the Ponderal or Redux, and that some people have contracted or will contract one or more of the diseases allegedly associated with its consumption.

[116] The CPA provides for a bifurcated procedure whereby 'common issues' "can be resolved on a class-wide basis and follow-up individual issues dealt with on an individual basis. The CPA has several provisions to accommodate the necessary flexibility required. See for example ss. 11-15, 18, 19 and 24-26.

[117] Section 6 states that the court shall not refuse to certify on certain grounds. Certification shall not be refused because the relief claimed includes a claim for damages that would require individual assessment; because different remedies are sought for different class members; because the number of class members or the identity of each is not known; or because the class includes a subclass. The fact that a class proceeding, such as the one at hand, includes several of these factors does not mean it cannot be certified: see *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at par-as. 27 to 30; *Anderson* at 682.

[118] Product liability cases generally lend themselves to class proceeding treatment: see *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at para. 95.

[119] The criterion in s. 5(d) requires a two-fold analysis. First, is a class proceeding the preferable procedure because it constitutes a fair, efficient and manageable way of determining the common issues presented by the claims of the proposed class members?

[120] Second, will such determination of the common issues advance the proceeding in accordance with the policy objectives underlying the CPA--objectives such as access to justice, judicial economy and the modification of the behaviour of those who might otherwise be wrongdoers?

[121] A court must consider the following factors: whether the class is such that a class proceeding will be unmanageable or impractical; whether common issues of fact or law are significant as compared with questions affecting only individual members; whether many of the members of the class have a valid interest in individually controlling the prosecution of separate actions; whether the administration of the class proceeding will create significantly more difficulties than those likely to be experienced if a remedy were to be sought by other means; and whether one or more of the factors referred to in s. 6(1) are present.

[122] Problematic cases for certification occur when there are large number of class members, as there potentially could be in the case at hand. Even though there may be common issues, the individual issues may overwhelm the common issues such that a class proceeding would not facilitate achievement of the underlying policy objectives of the CPA: see *Bre-X*.

[123] That individual issues will remain after the common issues are tried is not an obstacle to certification. Those class members who have damages related to catastrophic.

personal injury may well require mini-trials to determine causation of disease given their particular health and damages.

[124] In my view, the policy objectives underlying the CPA will be furthered if this action is certified as a class proceeding. Access to justice is extended to persons who may have been injured by a defective product. There would be a very significant cost to any claimant pursuing an individual claim given the tremendous complexities of evidence and issues, the extensive scientific and medical evidence and discoveries, and the protracted nature of the litigation: *see Bendall* at para. 50. But for a class proceeding, the defendants (if responsible) would in all probability be effectively isolated from the individual claims.

[125] Judicial economy and efficiency will be achieved if the common issues are resolved in a single proceeding. It is only by spreading and sharing the cost through the scale efficiencies of a class action that members will have an opportunity to resolve their claims. Moreover, by resolving common issues through a single proceeding, the danger of producing inconsistent results through a multiplicity of trials is avoided: *see Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at 472,473 [*"Abdool"*].

[126] Finally, the policy objective of behaviour modification is fostered through a class proceeding. If a drug is defective and liability attaches to a manufacturer or seller, a significant incidental result is that the pharmaceutical industry is more likely to take greater care in the development and testing of new products to ensure their safety before marketing them. The thalidomide catastrophe is illustrative of the public interest in ensuring 'safe drugs. The CPA 's goal has been described as inhibiting "misconduct by those who might ignore their obligations to the public": *see Abdool, supra* at 472. The CPA serves to assist in regulating the pharmaceutical industry for an important public policy objective through class proceedings commenced in the private sector. The claim for the costs of medical screening

[127] The plaintiff also seeks to recover as special damages the costs of medical screening and diagnosis for class members to determine whether they have suffered any adverse health effects from ingesting Ponderal or Redux. Such claimed special damages include subrogated claims by provincial and private health benefit insurers. Where rights of subrogation are created by statute with respect to expenses incurred through Canada's public health care system, they can be claimed through the individual plaintiffs action even though the plaintiff has no direct liability to pay: *Dambrowsky v. Olson* (1953), 8 W.W.R. (N.S.) 716 (Alta. C.A.), *varying* (1952), 6 W.W.R. (N.S.) 493 (Alta. S.C.). See for example Ontario's *Health Insurance Act*, R.S.O. 1990, c. H 6, ss. 30 (1) and (2), which provide that there is subrogation for the recovery of costs incurred when a person has suffered "personal injuries."

[128] The Claim seeks special damages for medical costs for two groups. First, there are class members who have contracted diseases, allegedly due to the ingestion of Ponderal or Redux, who claim their medical costs. Second, the Claim includes the costs for the medical screening of persons who need to determine whether they do *not* have the diseases allegedly resulting from the ingestion of Ponderal or Redux. The defendants

object to this proposed inclusion of a claim for the medical costs for screening and diagnosis in respect of persons who ingested Ponderal or Redux but who do not evidence any symptoms of any disease allegedly caused by the consumption of those drugs.

[129] The defendants argue that tort law provides that a claim can be advanced for economic loss where the damages flow from personal injury or property damage. Klar, *Remedies in Tort*, vol. 3 (updated to 2000-Rel. 4) at paras. 69, 76-79. However, they submit a claim cannot be advanced where medical expense is incurred to detect possible injury or damage when, in the result, it is determined not to have arisen.

[130] Merely creating a risk of injury is not actionable; an injury must have occurred. Fleming, *The Law of Torts*, 9th ed. (1998) at 2 16-2 17.

[131] The defendants assert that, to this point in time, the medical studies concerning persons who have used anorectic agents show that these agents at most create a low-level of increased risk, for developing PPH or other heart disease. See Abenheim *et al.*, *supra*; N.J. Weissman, *et al.*, “An Assessment of Heart-Valve Abnormalities in Obese Patients Taking Dexfenfluramine, Sustained -Release Dexfenfluramine, or Placebo” (September 10, 1998) 339: 11 N Eng J Med 725; Jick *et al.*, *supra*.

[132] American courts have reached conflicting decisions on whether a cause of action exists for the recovery of medical monitoring costs for a disease that is determined through the monitoring not to have occurred. Plaintiffs have been successful in recovering the cost associated with medical monitoring in situations where they have proved that their exposure to a toxic substance constitutes the proximate cause of a significantly increased risk of contracting a serious latent disease. See *Barnes v. American Tobacco Co.*, 161 F.3d 127 at 138-139 (C.A.3 (Pa.) 1998); *Ayres v. Jackson Tp.*, 525 A.2d 287 at 298, 311 (NJ. 1987). The differing views of the competing interests and public policy considerations are discussed by the United States Supreme Court in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997) at 441-444.

[133] In my view, there is a common issue as to whether a subrogated claim can be maintained for the cost of medical screening conducted to determine whether persons who ingested either Ponderal or Redux did *not* contract any of the allegedly associated diseases. If it is proven that exposure to a toxic substance significantly increases the risk of contracting a serious disease it is arguable that persons exposed to that toxic substance--even if medical screening ultimately determines that they have *not* contracted the associated disease--should be compensated for the cost of medical screening made necessary by their exposure. (It has been noted that Health Canada’s advisory issued September 15, 1997 recommended that persons who had taken either drug should consult with their physician immediately.)

[134] The defendants also assert that the medical screening issue raises extremely complex issues of fact that are idiosyncratic to individual asymptomatic class members. A class member would have to prove the basic elements of a tort claim, including that the consumption of the drug was the proximate cause of the individual’s asserted “injury”--

the injury being the need for medical screening. In addition, a class member would have to prove that there was significant ingestion of the drug; that, as a proximate result of the exposure there is a significantly increased risk of contracting a serious latent disease; and that the prescribed monitoring regime is therefore reasonably necessary. The drugs and combinations of drugs consumed, the duration of the drug consumption, the knowledge and reasoning of the treating physician, and the existence or absence of symptoms--all of these considerations would be relevant to determinations made in respect of individual class members.

[135] However, the undoubted complexity of follow-on individual issues does not detract from the merit in resolving a preliminary common issue--whether asymptomatic class members as a matter of law can be entitled to special damages for medical costs incurred in the screening, diagnosis and treatment of diseases related to Ponderal and Redux. The problematic individual issues of fact for this category of claimant, and the preferable procedure for their resolution, can not and need not be addressed at this time. Plaintiffs counsel has not led any evidence on the return of the motion at hand as to whether the public health system can even identify asymptomatic individuals who received medical screening and diagnosis because of concerns relating to the ingestion of Pondera and Redux.

[136] A further comment is appropriate. A premise underlying the submissions of plaintiffs counsel is that the latency period for contracting the diseases allegedly associated with the subject drugs continues indefinitely. There is no evidence before the Court on this question. The length of the latency period will be one sub-issue inherent to the determination of when medical screening and diagnosis is reasonable. The Court has not been made aware of any follow-on advisory by Health Canada or any advisory by the medical profession for ongoing medical screening.

Section 5(1)(e): Does the representative plaintiff meet the specified criteria for the CPA?

[137] This criterion involves a determination of three matters. First, I find the proposed representative plaintiff, Sheila Wilson, would fairly and adequately represent the interests of the class members. She is intelligent and articulate. Given her serious illness and her allegation that Ponderal is the cause, she of course has a very significant interest and stake in this court action. The defendants' assertion that Mrs. Wilson does not suffer from valvulopathy is of no import. The medical evidence indicates she suffers from PPH, one of the main illnesses allegedly caused by the ingestion of Ponderal. The defendants' assertion that the plaintiff is too ill to be a representative plaintiff is also of no import. While Ms. Wilson's health may deteriorate in the future, that is not a present problem. If her health should render her unable to continue as a representative plaintiff at some point in time, class counsel will have to address that issue.

[138] Second, the putative representative plaintiff has produced a plan for proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of

notifying class members of the proceeding. (The time-line for scheduled events will have to be modified to reflect the fact that the dates for certification and notice to class members will be later than those originally contemplated in drafting the plan.) The defendants submit the plan is unworkable, in particular, because of the time line proposed for the various steps in the proceeding. For example, the defendants say that Ponderal was marketed for over 30 years in countries all over the world. Thus, they submit, documentary production on the issue of the development and manufacture of Ponderal necessarily involves retrieving and reviewing extensive documentation, including scientific analyses of a highly technical nature. Further, the defendants point out that actions have been commenced in other jurisdictions and say the vast majority of the documents are located in France. Finally, the defendants emphasize that expert reports will be required which will take considerable time to prepare.

[139] The defendants have had considerable time to prepare for the litigation at hand. The original statement of claim was filed on November 17, 1998. Indeed, Les Laboratoires Servier, an affiliate of Biofarma, and Servier itself, have been involved in diet-pills litigation in the United States for some time. The extensive document production underway in those proceedings will facilitate early production in the action at hand. Finally, Canadians should not have to wait for claims in the United States to be resolved before their claims can be heard. This point has special importance for someone in the position of the representative plaintiff, who has a life-threatening illness.

[140] Third, I find that the proposed representative plaintiff does not have any interest in conflict with the interests of other class members in respect of the common issues for the class.

Notice of the class proceeding

[141] Two issues arise in respect of the notice to be given to the class members: first, who should pay for the cost of the notice; and second, how much advertising is appropriate to ensure effective notice to class members?

The cost of notice

[142] Section 22 (1) of the CPA gives the Court a broad discretion in respect of an order as to the costs of notice, including apportioning costs among parties. Ontario courts have on occasion required defendants to pay the entire cost of notice. See *Bywater v. Toronto Transit Commission* (1999), 30 C.P.C. (4th) 131 (Ont. Gen. Div.); *Joncas v. Spruce Falls Power & Paper Co.*, [1999] O.J. No. 2359 (Gen. Div.), online: QL.

[143] Health Canada issued an advisory to the public on September 15, 1997, when Ponderal and Redux were withdrawn from the market. However, there is no evidence of the defendants taking any steps to notify class members, physicians or pharmacists about the withdrawal from the market and the possible risks associated with Ponderal and Redux. Nor is there any evidence as to any extensive research effort by the defendants after September 15, 1997, to bring clarity to the issues arising from the concerns

expressed in the medical 'literature that caused the drugs to be withdrawn from the market. The published medical literature raises real and legitimate public health and safety concerns about the use of the drugs.

[144] Given the evidentiary record to date in respect of this proceeding, given the fact that the defendants were ultimately responsible for the marketing of the drugs in Canada; and given the primary policy objective underlying the CPA--that of affording access to justice to claimants--in my view, and I so find, the defendants should pay the cost of notice to class members.

The appropriate notice to be given

[145] Submissions have been made by counsel as to the form and content of appropriate notice in the event of certification of the class proceeding. The requisite notice can now be finalized quickly through a case conference with counsel.

[146] How much advertising is necessary to provide effective notice is the remaining issue. The plaintiffs retained a class-notification expert, Mr. Todd Hilsee, to provide advice and to design an appropriate class action notice plan for this proceeding. Mr. Hilsee's credentials and expertise are impressive. The defendants accepted him as an expert witness. Mr. Hilsee provided evidence through an extensive report by way of an affidavit, upon which he had been cross-examined. His report meets the criteria for admissibility as expert evidence. *R. v. Lavallee*, [1990] 1 S.C.R. 852.

[147] Mr. Hilsee opines that with an expenditure of \$410,800.00 and a properly targeted notice, effective notice would be given to approximately 77% of putative class members. His plan contemplates, *inter alia*, advertising in some 70 Canadian newspapers and nine Canadian magazines.

[148] In my view, notice on a more modest scale than that proposed by plaintiffs counsel is appropriate. As I have already stated, plaintiffs counsel has acted upon the premise that the latency periods for the alleged diseases continue and that a function of notice is to alert class members of a continuing possible health risk. To this point in time there is no evidence as to the latency period for any of the diseases allegedly associated with the ingestion of Ponderal and Redux. It is noted that, in 1997, physicians reported to Health Canada only four cases in which patients had acquired PPH in circumstances where the ingestion of diet products containing fenfluramine or dexfenfluramine had occurred. If a continuing health risk to pre-September 15, 1997, users of the drugs is reasonably perceived, then the regulatory authorities are the ones properly responsible to give notice to the public at large. The primary purpose of a notice in this proceeding is to alert class members of their legal rights.

[149] Notice is to be sent by mail to the counsel for all known plaintiffs in Canada in litigation underway, or known to be contemplated, involving individuals suffering from diseases allegedly associated with the ingestion of Ponderal or Redux.

[150] The notice is to be published in a Saturday edition of each of the *Globe & Mail* and *National Post* newspapers. The notice is also to be published once in each of the *Readers' Digest* and *Chatelaine* (English language) magazines. The notice is to be published once in the *Canadian Medical Association Journal*. Publication is to be completed by October 31, 2000. A press release is to be sent to Canadian press outlets via PR Newswire at the time of the initial publication in the paid media. An opting-out period lasting until January 31, 2001 is to be provided for class members.

Disposition of the motion for certification

[151] For the reasons given, I order that the action be certified as a class proceeding in accordance with these Reasons for Decision.

Released: September 13, 2000

Court File No. 98-CV-158832
DATE: 20000913

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

SHEILA WILSON

Plaintiff

-and-

SERVIER CANADA INC. and
BIOFARMA S.A.

Defendants

REASONS FOR DECISION

CUMMING J.

RELEASED: September 13, 2000