

CANADA / JUDGMENT

British Columbia v. Apotex Inc.

2020 BCSC 412

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 412 British Columbia v. Apotex Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia v. Apotex Inc.,

2020 BCSC 412

Date: 20200319

Docket: S189395

Registry: Vancouver

Between:

Her Majesty The Queen in Right of the Province of British Columbia

Plaintiff

And

Apotex Inc., Apotex Pharmaceuticals Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Jannssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Mylan Pharmaceuticals ULC, Mylan N.V., Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company, Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, West-Ward Columbus Inc., Sanis Health Inc., Sandoz Canada Inc., Sandoz International GMBH, Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., Actavis Pharma Company, Valeant Canada LP/Valeant Canada S.E.C., Bausch Health Companies Inc., Gamma Wholesale Drugs Limited, Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc., McKesson Corporation, McKesson Canada Corporation, Nu-Quest Distribution Inc., Abbott Laboratories

Inc., United Pharmacists Manitoba Inc., Procuracy Inc., Procuracy Pharmacy Services Inc., Shoppers Drug Mart Inc., Loblaw Companies Limited, Unipharm Wholesale Drugs Ltd., and LPG Inventory Solutions

Defendants

Before: The Honourable Mr. Justice Brundrett

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Place and Dates of Hearing:

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Introduction

- [1] This ruling in the early stages of a putative class proceeding addresses the timing or sequencing of various motions relative to the anticipated certification hearing, as well as the timing of the filing of responses to civil claim.

- [2] The plaintiff, Her Majesty the Queen in Right of the Province of British Columbia, has brought this action under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] by way of a Notice of Claim filed August 29, 2018, and an amended Notice of Claim on June 20, 2019 (the "Amended Claim").
- [3] The plaintiff's action is brought on behalf of itself and "all federal, provincial and territorial governments and agencies". It alleges that, during the period from 1996 to the present, it paid healthcare, pharmaceutical, and treatment costs related to the use and abuse of opioids, which the plaintiff refers to as the "opioid epidemic". The plaintiff seeks to recover substantial funds spent on healthcare services associated with opioid-related illnesses, which it says are recoverable "health care benefits" under the Opioid Damages and Health Care Costs Recovery Act, S.B.C. 2018, c. 35 [ORA].
- [4] The 48 defendants are all involved in the manufacturing, marketing, distribution or sale of opioid drugs and opioid products in Canada, including British Columbia. The defendants comprise 33 pharmaceutical manufacturers and 15 retailers and distributors of various products. The plaintiff alleges, inter alia, that the defendant manufacturers misrepresented the risks and benefits of opioid products and that the defendant distributors delivered opioid products to pharmacies and hospitals in quantities that they knew or should have known exceeded any legitimate market.
- [5] The American entities of Purdue Pharma have filed for bankruptcy. On September 29, 2019, the Ontario Superior Court of Justice granted an application for recognition in Canada of Purdue Pharma's bankruptcy proceedings in the United States. The same court issued an endorsement on December 30, 2019, staying and suspending all proceedings against the Canadian entities of Purdue Pharma: *Purdue Pharma L.P., Re.*, 2019 ONSC 7042. As a result, the B.C. proceedings concerning the Purdue-related defendants have been put on hold.
- [6] In early 2019, this case was assigned to me for judicial case management. While several case management conferences have been held since June of 2019, this proceeding has moved slowly and remains in its early stages. The issue of the timing of each defendant's response to civil claim ("Response") has been taken up by the case management process. The plaintiff's certification materials have not yet been filed, and no date has been set for a certification hearing.
- [7] The defendants seek to litigate three groups of applications prior to the certification hearing.
- [8] First, a substantial number of the defendants have filed or expressed an intention to apply to strike all or part of the Amended Claim. In addition, a small number of defendants have indicated their desire to bring a motion for summary judgment before the certification hearing.

- [9] Second, many defendants have filed objections or expressed an intention to challenge this Court's jurisdiction with respect to the claims against them in the Amended Claim. These objections all raise jurisdiction simpliciter or territorial competence issues that dispute the Court's jurisdiction over the non-B.C. defendants. As well, the Quebec-based defendants submit that even if this Court has authority over them, it ought to decline jurisdiction because Quebec is a more appropriate forum for the dispute.
- [10] Third, several defendants have indicated their intention to challenge the constitutionality of the ORA. It appears these arguments will focus on s. 11(1)(b) of the ORA, which permits the Province to act on behalf of other governments in Canada.
- [11] Finally, the parties disagree as to the time for filing of Responses. None of the defendants have yet filed a Response. The defendants suggest that the filing of Responses is best deferred until later in the proceedings. The plaintiff asks for a direction that the defendants who have not filed jurisdictional objections file Responses forthwith.

issues

[12] The issues for my determination at this time are:

- 1) Which, if any, motions should be heard before the certification hearing? and
- 2) When should the defendants' Responses be filed?

GENERAL positionS of the parties

The Plaintiff

- [13] The plaintiff's position is that the certification hearing should proceed first before any pre-certification motions. In support of its submission, the plaintiff argues that these proceedings are set against the backdrop of an opioid epidemic. It says the proceedings carry urgency in that they are brought on behalf of public health insurers as a rational, consolidated means to recover their costs and impose consequences upon the conduct of the defendants.
- [14] The plaintiff submits that the bankruptcy or potential bankruptcy of the defendants provides an impetus to get to a certification hearing, which would crystalize the issues against the defendants. The plaintiff points to the potential for significant delay, costs, and added complexity if the defendants' various motions are heard before the certification hearing. The plaintiff cautions against litigation in slices.

The Defendants

[15] The defendants argue that their motions ought to be scheduled in advance of the certification hearing. They argued, inter alia, that the plaintiff's pleadings are highly deficient, the plaintiff has failed to move their action forward, some of the smaller defendants have been caught up in a larger war, and the defendants deserve the chance to extricate themselves from these proceedings at an early stage. None of the defendants oppose the desire of co-defendants to have their issues heard before certification.

Applicable Legal Principles

[16] I would begin the discussion of legal principles impacting my discretion as to sequencing by referring to the overarching object of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] which is set out in R. 1-3:

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
 - (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.

[17] This object is incorporated into class proceedings by virtue of s. 40 of the CPA, which states that the Rules apply to class proceedings to the extent that those rules are not in conflict with the CPA.

[18] The timing for the determination of issues in class proceedings is a recurring subject that has attracted repeated judicial commentary.

[19] Under s. 12 of the CPA, the Court has the discretion to hear a pre-certification application. Section 12 provides as follows:

12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[20] Generally, the certification hearing is the first application heard in a class action case: *Strohmaier v. British Columbia (Attorney General)*, 2014 BCSC 2078 at para. 17; *Li v. British Columbia*, 2017 BCSC 1616 at para. 17; *071604 BC Ltd. v. Alio Gold Inc.*, 2019 BCSC 1829 at para. 12. The rationale for the general rule is premised in part on the brief 90-day period for bringing a certification application being indicative of a legislative intent that certification should precede other preliminary motions: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v.*

British Columbia (Agriculture and Lands), 2009 BCSC 1593 at para. 59 [Kwicksutaineuk].

- [21] In *Gill v. Yahoo! Canada Co.*, 2018 BCSC 290, Justice Morellato further explained the rationale behind the general rule, and its discretionary nature, as follows:
- [14] This general rule flows in part from the relatively tight timeframe for bringing a certification application following the commencement of such an action: see *Attis v. Canada (Minister of Health)* (2005), 2005 CanLII 10884 (ON SC), 75 O.R. (3d) 302 (Ont. S.C.J.). There is, however, no absolute rule. The question of whether a stay, or other application, ought to be heard prior to a certification application is a discretionary one to be determined on a case by case basis in light of the particular circumstances before the court: *Consumers' Association et al. v. Coca-Cola Bottling Company et al.*, 2005 BCSC 1042; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263 at para. 15; and *Moyes v. Fortune Financial Corp.* (2001), 109 A.C.W.S. (3d) 556 (Ont. S.C.J.).
- [22] Justice Morellato noted the Supreme Court's caution against "litigation by installments" (*Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 90) and further commented on the sequencing discretion as follows:
- [16] Nonetheless, it is clear that the discretion of the court in such cases ought to be exercised in a manner that facilitates and achieves judicial efficiency and the timely resolution of legal disputes. Indeed, the policy underlying the general rule that the certification application should be the first application in a class proceeding is consistent with the Supreme Court of Canada's caution against "litigation by installments," in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 90. Madame Justice Griffin's reasons in *Douez v. Facebook Inc.*, 2012 BCSC 2097 [Douez BCSC], at paras. 12-13, are particularly salient in this regard:
- [12] The *Garland* case was an example of what can happen when separate procedural motions are heard. That case involved two trips to the Supreme Court of Canada and 10 years before it concluded.
- [13] As pointed out by the plaintiff, similar problems have been encountered in other cases where pre-certification motions have resulted in multiple appeals and years of litigation before any certification hearing, such as in *Seidel v. Telus Communications Inc.*, 2008 BCSC 933, reversed 2009 BCCA 104, reversed 2011 SCC 15.
- [23] As to the factors impacting the exercise of a court's discretion as to sequencing, Justice Davies stated as follows in *Lieberman et al. v. Business Development Bank of Canada*, 2005 BCSC 389:
- [16] My review of all of the authorities upon which counsel have relied leads me to conclude that the timing of the hearing of jurisdictional issues in proceedings for which certification is sought under the Class Proceedings Act is a matter requiring the exercise of discretion determined by the circumstances of each case.

- [17] A non-exhaustive list of the factors that will likely have to be considered in exercising that discretion will include: the cost to the parties of participation in Class Proceedings Act pre-certification procedures; the strength of a defendant's jurisdictional arguments and the extent to which a preliminary application may dispose of the whole of the proceeding; the potential for delay arising from interlocutory appeals; the complexity of the evidentiary and legal issues that may arise in both the jurisdictional and certification applications; and, the interplay between the issues on both applications.
- [24] In *Kwicksutaineuk*, at para. 62, Justice Slade held that no absolute rule could be laid down for when the Court will entertain and decide pre-certification motions. This view is shared widely in the jurisprudence: *Gill* at para. 14; *Alio Gold Inc.* at para. 12. Rather, each pre-certification motion must be looked at in the specific context of the case before the Court. Where the preliminary motion is time-sensitive, would benefit all parties, further the objective of judicial efficiency, or have the potential to dispose of the litigation or more efficiently address the general policy objectives of class proceedings, it may be appropriately heard before the certification motion.
- [25] In addition, all parties have directed me to the non-exhaustive list of factors from *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146, which have been adopted in *British Columbia: Watson v. Bank of America Corporation*, 2012 BCSC 146 at paras. 22-24; *John Doe 1 v. The University of British Columbia*, 2019 BCSC 673 at para. 47.
- [26] The *Cannon* factors were also adopted in *Li*, in which Justice Bowden offered the following general comment as to the exercise of the court's discretion in departing from the general rule:
- [17] While the certification hearing is usually the first step in a class proceeding, the court may exercise its discretion to hear an application before certification where it goes to the merits of the case, narrows or defines the nature and scope of the case for certification or otherwise moves the litigation forward. There is no absolute rule in this regard and each application must be looked at individually in the context of the particular case before the court. (*Consumers' Association et al. v. Coca Cola Bottling Company et al.*, 2005 BCSC 1042).
- [18] The relevant factors that a court may consider when determining whether to proceed with a motion or an application such as this, before a certification hearing, as described in *Cannon*, are as follows:
1. Will the application dispose of the entire proceeding or substantially narrow the issues to be determined?
 2. What is the likelihood of delays and increased costs associated with the application?
 3. Will the outcome of the motion promote settlement?
 4. Will the outcome of the motion give rise to interlocutory appeals and delays that will affect certification?

5. The interests of economy and judicial efficiency; and
 6. Generally, will scheduling the application in advance of certification promote the fair and efficient determination of the proceeding?
- [27] In accordance with these authorities, I find that the non-exhaustive Cannon/Li factors ought to guide my discretion on this sequencing application, with other factors mentioned in Lieberman at para. 19, such as the strength and complexity of proposed arguments, and interplay with certification, supplementing the analysis.

Applications to Strike and Summary Judgment Applications

General

- [28] Over 40 of the defendants have expressed an intention to file applications to strike the Amended Claim under R. 9-5 of the Rules. The applications to strike differ to some extent. Many allege the pleading fails to disclose a reasonable claim, is not capable of succeeding, or that the plaintiff's claim against the defendants is unnecessary, scandalous, frivolous, vexatious, or embarrassing.
- [29] In addition, a minority of the defendants wish to raise their right to bring a motion for summary judgment under R. 9-6. Some of those defendants are smaller entities who want to reserve their right to remove themselves from these proceedings by arguing that there is no evidence to support the plaintiff's claims concerning their clients.
- [30] Mr. McKee made submissions on behalf of Janssen Inc. and Johnson & Johnson, which were generally adopted by the other defendants, in favour of the pre-certification hearing of these motions. To summarize the defendants' position, they generally submit that the defendants are entitled to procedures for just, fair, and efficient determination of their applications and motions. They argue that the Amended Claim does not particularize different claims of law even as against groups of defendants, the motions will assist in providing disclosure of material facts against each defendant, lumping all the motions into a certification hearing is not efficient, a motion to strike is not the same as assessing the requirements in s. 4(1)(a) of the CPA at the certification hearing, and it is better to use the available mechanisms to refine the pleadings prior to certification.
- [31] The defendants also point out that the plaintiff chose to join 48 defendants on the same claim with respect to actions occurring over a period of 20 years. The defendants submit that the plaintiff's decision to prosecute such a complex claim ought not to afford the plaintiff a basis to argue that procedural and substantive mechanisms in the Rules should be bypassed. The defendants say that the plaintiff is causing delay by not filing its certification record.
- [32] The defendants further submit that separating their applications to strike will have several benefits:

- 1) It will narrow and focus the issues rather than intertwining those issues with others at certification;
 - 2) It will potentially reduce the number of parties if applications to strike are successful or even partially successful;
 - 3) It will help reduce the scope of evidence at the certification hearing; and
 - 4) It will help the court develop a firm grasp on the allegations.
- [33] Generally, the defendants submit that pre-certification hearing of these motions will make for a more fair and expeditious determination of the proceeding.
- [34] I accept, as the defendants submit, that they have a right to bring applications to strike or summary judgment applications at the appropriate time. The defendants point out that in some cases, applications to strike have been permitted to proceed prior to certification: *Strohmaier* at para. 22. However, in other cases, the courts have rejected the hearing of applications to strike prior to certification: *Attis v. Canada (Minister of Health)* (2005), 75 O.R. (3d) 302 (S.C.J.); *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (S.C.J.); *Douez v. Facebook, Inc.*, 2012 BCSC 2097; *Kwicksutaineuk*; *Tucci v. Peoples Trust Company*, 2015 BCSC 987; and *Watson*.

Applications to Strike

- [35] Applying the Cannon/Li factors in this context, I find that the applications to strike under R. 9-5 ought not to pre-date the certification hearing. In my view, any benefits to hearing the motions to strike before certification in terms of narrowing the issues, promoting settlement, or facilitating judicial economy and efficiency are outweighed by the potential for significant delays and further costs that the hearing of the motions to strike, and any associated appeals, would bring: *Merlo v. Canada (Attorney General)*, 2013 BCSC 1136 at paras. 7-13.
- [36] Hearing the motions to strike before certification may have some benefits in terms of narrowing the issues, but they would not dispose of the entire proceeding. This point is not fatal because the courts have taken into account whether the resolution of a proposed issue will bring finality to some of the issues in the action: *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263 at para. 29; *aff'd* 2006 BCCA 369 at para. 37.
- [37] I am not convinced in this context that pre-certification hearing of numerous motions to strike would promote settlement.
- [38] In my view, the defendants' applications to strike would very likely give rise to interlocutory appeals, quite possibly with multiple appeal paths, that would delay the certification hearing. I note that there has been no concession by the defendants to defer any appeal on such a motion until after the certification hearing, a factor the court found significant in *Strohmaier*, at para. 25, in allowing an application to strike to precede a certification

hearing.

- [39] I am not satisfied that hearing these motions would promote economy and efficiency, or the fair and efficient determination of the proceeding. Having tentatively examined the proposed arguments on the proposed motions to strike, I would not characterize them as involving a discrete question the outcome of which may determine the entire action. In my view, allowing these motions to go forward would likely add an unnecessary layer of procedural complication and lead to costs and delays that would undermine timeliness as an object of the Rules and the CPA.
- [40] Moreover, the basis of the motions to strike overlap with and are related to the factual issues which the Court has to determine in any event on the certification hearing in assessing the "cause of action" argument under s. 4(1)(a) of the CPA: Watson at paras. 30 and 33; John Doe 1 at paras. 52 and 62. The connectivity between the proposed motions to strike and the expected issues on a certification hearing is an important consideration here.
- [41] Having regard to the totality of the Cannon/Li factors, I would not permit the motions to strike to proceed prior to the certification hearing.

Applications for Summary Judgment

- [42] Turning to the issue of potential motions for summary judgment, a small number of defendants have requested that their right to bring a motion for summary judgment before certification be preserved. I would again assess the timing for hearing of these motions in light of the Cannon/Li factors.
- [43] If successful, the summary judgment motions could potentially dispose of a party's proceeding, though they would not dispose of the entire proceeding against all parties. Again, I view this as a mixed factor.
- [44] Some defendants urge me not to foreclose the possibility of a summary judgment application prior to certification on the basis that they stand in a different position. For non-resident defendants, there may be overlap in their potential motions for summary judgment with the jurisdictional applications based upon jurisdiction simpliciter, which I deal with below.
- [45] Short of arguments going to the territorial competence of the Court, early hearing of individual defendants alleging that they played a peripheral role or that there is no evidence to support any claims against them is likely to add an extra obstacle to the timely journey of this already bulky proceeding toward a certification hearing. I find that there is a likelihood of significant delay and increased costs associated with the advance hearing of the summary judgment motions. Regardless of the outcome, the hearing of motions for summary judgment are likely to lead to delays and interlocutory appeals that will postpone the certification hearing. These delays could be significant.

- [46] The hearing of the summary judgment motions could promote settlement, but only in the sense that they would remove certain defendants if they are successful. I am mindful of the defendants' submissions as to the benefits of potential focusing and elimination of unnecessary parties, but in my estimation, scheduling these motions in advance of certification will not, on balance, promote the fair and efficient determination of these proceedings.
- [47] In addition, it appears to me that the summary judgment motions would benefit from a more fulsome consideration of the evidence. This factor militates in favour of their moving forward with certification.
- [48] In all of the circumstances, I find that any motions for summary judgment ought not to proceed before the certification hearing.

Jurisdictional Challenges

- [49] Many of the defendants have indicated their intention to challenge this Court's jurisdiction in respect of the claims made against them.
- [50] The nature of the vast majority of the jurisdictional challenges is a jurisdiction simpliciter argument. Numerous defendants submit that, contrary to the plaintiff's assertions, there is no real and substantial connection between British Columbia and the facts on which the proceeding against those defendants is based under s. 3 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA]; *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 12. The defendants focus on s. 3(e) of the CJPTA, which provides that "[a] court has territorial competence in a proceeding that is brought against a person only if (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based." Section 10 of the CJPTA outlines certain specific circumstances in which the court will presume that a real and substantial connection exists.
- [51] Ms. Sheriff, on behalf of Pro Doc Limitee, provided arguments in support of the jurisdictional challenges proceeding before certification. Those arguments were supported by the other out-of-province defendants objecting to the Court's jurisdiction. The defendants submit that the Cannon/Li factors the defendants relied upon in relation to hearing the motions to strike and summary judgment applications before certification also apply to the prioritizing the jurisdictional challenges. The defendants submit that the cases that hold otherwise, such as *Lieberman* and *Douez*, deal solely with a forum non conveniens issue.
- [52] Sections 2 and 3(1)(c) of the ORA provide for a cause of action in relation to an opioid-related wrong "committed in British Columbia" or "in respect of a duty or obligation owed to persons in British Columbia." In submitting that they lack a real and substantial connection, these defendants argue that they are not resident in British Columbia, this proceeding does not concern a tort committed in British Columbia, and it is not reasonably foreseeable that persons in British Columbia would use or be exposed to opioids manufactured or distributed

by the objecting defendants. These defendants thus challenge the territorial competence of the court.

- [53] The defendants further submit, based in part upon *Marren v. Echo Bay Mines Ltd.*, 2002 BCSC 1168, rev'd on other grounds, 2003 BCCA 298, that I must decide the jurisdiction issue before proceeding with the certification hearing. The defendants also rely upon the decision in *Ezer v. Yorkton Securities Inc.*, 2005 BCCA 22, a decision involving a forum selection clause in an account agreement, in which the Court dismissed the appellant's argument that the chambers judge should have heard the application for certification of the class proceeding before deciding the stay applications. Neither decision is a sequencing decision, though both provide examples of situations where jurisdictional challenges were heard prior to the certification hearing.
- [54] The Quebec-based defendants additionally submit that their home jurisdictions offer a more appropriate forum and that this Court ought to decline to exercise its territorial competence under s. 11 of the CJPTA.
- [55] The plaintiff, on the other hand, relies on the decision in *Lieberman* where Davies J. held at para. 16 that the decision to allow motions to proceed before certification is a matter of discretion. That statement remains apt. In *Lieberman*, Davies J. decided that a jurisdictional application in the form of a *forum non conveniens* argument would be determined at the certification hearing.
- [56] Similarly, in *Douez*, Griffin J. (then sitting for this Court) found that a jurisdictional challenge on a *forum non conveniens* basis ought not to proceed before the certification application. In so finding, the Court stated as follows:
- [47] Here, the fact that the plaintiff relies on the court's jurisdiction as conferred by statute and the fact that the issue before me will be one of *forum non conveniens* rather than jurisdiction simpliciter distinguishes it from some other cases where the jurisdiction issue was argued in advance of the certification hearing, such as *Ezer* or *Marren v. Echo Bay Mines Ltd.*, 2002 BCSC 1168, rev'd 2003 BCCA 298.
- [57] In *Douez*, the territorial competence of the court was conceded. That is not the case here.
- [58] The plaintiff submits that the defendants' arguments neglect to give any consideration to the effect that the existence of common issues has in relation to jurisdiction: *Harrington v. Dow Corning*, 2000 BCCA 605, at paras. 84; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 at para. 113. It says that the jurisdictional issues raised here are part of the inquiry the court must perform in any case under s. 4(1)(a) of the CPA at certification to determine whether the pleadings disclose a cause of action. As such, it argues, hearing of these arguments in advance of certification would be premature and would frustrate the legislative intent underpinning s. 4(1)(a).

- [59] If successful, the defendants' jurisdictional arguments have the potential to reduce the scope of the hearing by removing the main jurisdictional objection by a large number of out-of-province defendants. Yet, several of the Cannon/Li factors favour awaiting the certification hearing to deal with the jurisdictional arguments. For instance, the jurisdictional applications will not dispose of the entire proceeding, the outcome is unlikely to promote settlement, there is a likelihood of delays and increased costs associated with hearing early argument on jurisdiction, and there is a high likelihood of appeals regardless of the outcome. I assess that there is value in a class action in having interrelated issues heard together and in limiting the potential for multiple appeals against isolated aspects of a proceeding rather than providing a basis for all appeals to be heard together on a more complete record.
- [60] To be sure, the jurisdictional arguments the objecting defendants have outlined are foundational in that they raise the issue of whether the defendants are properly before the Court. As opposed to *forum non conveniens*, which involves an exercise in discretion, territorial competence is a precondition to the exercise of the court's authority. The objecting out-of-province defendants seek to raise the issue of whether this Court has jurisdiction at all over the claims in respect of the objecting defendants, rather than whether this Court ought to assume jurisdiction. For that reason, I agree with the defendants that it will often be preferable to resolve discrete issues of territorial competence at an early stage.
- [61] Here, it appears that the real and substantial connection issue on territorial competence will overlap with the issues to be decided at the certification hearing including the determination of common issues, the scope of the class, and the constitutionality of s. 11(1) (b) of the ORA. As stated in *Harrington* at paras. 86-96 and *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 43, jurisdiction simpliciter is not a rigid concept, and the nature of a cause of action and the certified common issues may be a relevant consideration to whether a real and substantial connection exists with British Columbia.
- [62] As well, the decision in *Club Resorts v. Van Breda*, 2012 SCC 17 at paras. 31-34, supports a relationship between the constitutional limits of jurisdiction simpliciter and s. 92 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. In suggesting that the jurisdictional objections could be heard prior to certification along with the constitutional issue, some of the defendants acknowledged that the jurisdictional arguments are rooted in constitutional principles and have some relationship to the proposed constitutional issue with respect to the extra-territoriality of provincial legislation.
- [63] On the whole, in this particular context, and particularly given the overlap between the jurisdictional arguments and the other issues, I agree with the plaintiff that the application of the Cannon/Li factors does not favour hearing the jurisdictional challenges prior to the certification hearing.

[64] Additionally, I find that the forum non conveniens challenges should be dealt with at the certification hearing. There is no choice of forum clause at issue in this case in issue here, as in *Ezer*. I see some overlap between this issue and others to be argued at certification, and I am not convinced that the Quebec defendants will suffer sufficient prejudice in Quebec proceedings to justify the early hearing of this issue. I am prepared to direct, as in *Lieberman*, that any steps the Quebec defendants take in compliance with the pre-certification application procedures under the CPA will be without prejudice to their forum non conveniens submissions. They may maintain their position at the certification hearing that Quebec is the more appropriate forum. If successful, they will be freed from further participation in this proceeding. As in *Douez and Lieberman*, a consideration of the Cannon/Li factors does not favour early hearing of the forum non conveniens issue in this case.

Constitutional Challenge

[65] Several of the defendants intend to bring a constitutional challenge to the ORA.

[66] Ms. Glendinning, on behalf of the defendants, Shoppers Drug Mart Inc., Loblaw Companies Limited, and Sanis Health Inc., proposed that the constitutional issue be decided before certification. While no Constitutional Question Act, R.S.B.C. 1996, c. 68 notice has yet been filed, these defendants have provided a draft of their argument which they suggest may proceed by petition or summary trial. Their submission was supported by several of the other defendants.

[67] The nature of the challenge impugns s. 11(1)(b) of the ORA. That provision allows the plaintiff to bring claims on behalf of other jurisdictions for opioid-related wrongs. It provides as follows:

11 (1) If the government has commenced a proceeding in relation to an opioid-related wrong and the proceeding is ongoing as of the date this section comes into force,

(b) for the purposes of section 4 of the Class Proceedings Act, the government may bring an action on behalf of a class consisting of

i. one or more of the government of Canada and the government of a jurisdiction within Canada, and

ii. a federal or provincial government payment agency that makes reimbursement for the cost of services that are in the nature of health care benefits within the meaning of this Act,

[68] The defendants submit that s. 11(1)(b) is ultra vires of the B.C. Legislature, violates s. 92 of the Constitution Act, 1867, and is of no force and effect pursuant to s. 52 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[69] The defendants say they intend to act expeditiously to bring forward motions challenging what they characterize as an unprecedented provision in s. 11 of the ORA giving the plaintiff the right to bring claims on behalf of the federal government and other provinces. The defendants submit that if s. 11(1)(b) is struck down, the plaintiff can still potentially recover

its costs under the ORA, but a certification motion will not be necessary. This will streamline the case, and there will be a saving of time. The defendants submit that this is the most efficient manner of proceeding, perhaps in conjunction with the jurisdictional motions since those motions overlap with the arguments the defendants will make on the constitutional issue.

- [70] Among their many arguments, the defendants submit that the intervening time before the certification can be used expeditiously now. According to this argument, it may be years before we get to certification, and that time could be best used by litigating the constitutional issue in the interim. As well, the defendants say that dealing with the constitutional issues now would avoid the certification hearing from becoming unduly protracted by lumping multiple issues into one unwieldy hearing.
- [71] The defendants further submit that it is not altogether uncommon for a court to determine that constitutional issues can be heard in advance of a certification motion, pointing to the examples of *Li and Unlu v. Air Canada*, 2012 BCSC 60.
- [72] Finally, in addition to the weighing of the Cannon/Li factors, the defendants submit that the fact that the Ontario order staying proceedings concerning Canadian Purdue-related entities should be taken into account. I am not convinced that this development adds a complicating factor, or that the situation with the Canadian Purdue-related entities will result in delay. The existing stay only applies as against the Canadian Purdue-related entities and does not inhibit this matter from moving forward to certification. Indeed, as the plaintiff points out, the risk of bankruptcy of some of the defendants motivates the plaintiff to proceed expeditiously toward certification so that it can crystalize its right to claim against such defendants.
- [73] The plaintiff submits that the constitutional issue ought to be deferred until the certification hearing. It submits that the constitutional question is not a simple question of law alone and requires a proper evidentiary record. The plaintiff points out that national classes have been upheld as constitutional despite federalism challenges: *Meeking v. Cash Store Inc. et al.*, 2013 MBCA 81 at paras. 79-97, leave to appeal to SCC granted, [2013] S.C.C.A. No. 443, subsequently abandoned July 28, 2015. It also points to the potential involvement of other interested parties, such as the Attorney General of Canada and the Attorney General of Ontario. Finally, the plaintiff argues that resolution of the constitutional issue will not bring an end to the action, even if the defendants are successful, since the Court could certify a multi-jurisdictional class proceeding and include other governments as class members under s. 4.1 of the CPA.
- [74] In assessing the Cannon/Li factors, the first factor is whether the advance determination of the constitutional issue will dispose of the entire proceeding or substantially narrow the issues that must be determined at the certification hearing. The plaintiff points out that the defendants' constitutional challenge is not aimed at the ability of the plaintiff to provide recovery of health care costs, or at the constitutionality of national classes pursuant to the

provisions of class proceedings legislation, but against the plaintiff's ability to act as the representative plaintiff for other jurisdictions. It argues the constitutional challenge is squarely within the consideration of whether the plaintiff satisfied the representative plaintiff criteria of the CPA, and s. 2(4) of the CPA expressly allows for certification of a class proceeding with a non-class member serving as the representative plaintiff, though only if it is necessary to avoid substantial injustice to the class.

- [75] As the plaintiff notes, unlike the situation in *Unlu*, the constitutional challenge to s. 11(1)(b) of the ORA may not dispose of the entire proceeding against the out-of-province defendants because the plaintiff could pursue a multi-jurisdictional class proceeding under ss. 2 and 4.1 of the CPA to recover health care costs which would still take up other governments as non-resident class members. The fact that the 2018 amendments in the CPA moved to B.C. to an opt-out regime for resident and non-resident class members alike lends weight to this argument. The defendants respond that s. 4.1 of the CPA providing for multi-jurisdictional class proceedings would stand or fall with the constitutional challenge to s. 11(1)(b) of the ORA, and that the issue ought to be determined now.
- [76] Regardless of the merits of these positions, it appears overall that on the second and fourth Cannon/Li factors, hearing the constitutional challenge before certification carries a high likelihood of delay and costs. The outcome of the constitutional challenge will almost certainly give rise to interlocutory appeals and added delays that will further interrupt the expeditious movement of this proceeding toward a certification hearing.
- [77] On the third factor, I assess that hearing the constitutional challenge prior to certification is unlikely to have a significant impact on settlement due to the multiplicity of unresolved issues that would remain in this proceeding.
- [78] As for the fifth Cannon/Li factor, I find that hearing the constitutional challenge prior to certification will not promote the interests of economy and efficiency. Instead, the constitutional challenge addresses whether the plaintiff can act as a representative in a class action on behalf of other governments, which is interconnected with the issues to be decided at the certification hearing such as the proper scope of the class. Moreover, while there could be some benefit in reducing the number of issues at certification, I see no urgency in resolving the constitutional question at an early stage, and I see value in having all issues heard together at the certification hearing.
- [79] In assessing the timing of the constitutional challenge, I am mindful that there is some overlap between with the jurisdictional issue as both deal with the Court's extra-provincial authority over non-residents. Some of the defendants suggested that both issues be heard in tandem at an early stage.

- [80] It does not appear to me that the interests of fairness and efficiency on the sixth factor require an early decision on the constitutional issue. Rather, there are valid concerns concerning delay, and the constitutional issue appears better suited for hearing after a more complete record on all issues is placed before the Court at an admittedly more comprehensive certification hearing.
- [81] On balance, weighing of the various Cannon/Li factors and other considerations, I find that the constitutional issue ought not to be decided prior to the certification hearing.

Timing of Responses

- [82] As noted, the parties are divided as to the timing of the filing of Responses. Rule 3-3(3) of the Rules directs that a Response is to be filed within 21 days after service of a notice of civil claim upon a person in Canada, within 35 days of service upon a person in the United States, and within 49 days of service upon a person anywhere else. In this proceeding, service of the notice of civil claim was effected on all but one foreign defendant by the end of 2018.
- [83] Despite R. 3-3, this Court has the discretion to direct the timing of the filing of Responses: *Maclean v. Telus Corp.*, 2005 BCCA 338; *Gomel v. Ticketmaster Canada LLP*, 2019 BCSC 2178 at para. 78. A practice had heretofore developed of permitting the late filing of Responses in class actions. More recently, however, the practice of allowing the belated filing of Responses has fallen out of favour in British Columbia absent good reason. In *Gomel* at para. 81, Mr. Justice Myers commented as follows in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74 [Microsoft] held as follows:
- [31] I will conclude with a comment regarding the practice of deferring the filing of a statement of defence until after the action has been certified. This case is an illustration of the difficulties that can create. It is a practice that ought to be revisited. I am not the first judge to make that comment: in *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257 and *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924, Mr. Justice Perell made the same observation.
- [32] There is nothing in the Class Proceedings Act mandating the delay, nor is there anything in the Supreme Court Civil Rules. The courts have come to allow the deferral as a matter of course, often simply based on an agreed schedule between the parties who adopt the ingrained practice. Given the financial stakes of class actions and the consequences of a certification ruling, it cannot be justified on the basis of potential cost savings. As Perell J. noted, defence counsel will have to investigate the case and ascertain the facts in order to argue certification. The actual drafting of a defence after that work has been done is a minimal incremental effort and expense in the larger picture.

- [33] It is hard to see what legitimate purpose is served by deferring the statement of defence when it, and the plaintiff's reply, if any, crystallise the issues, something that the certification process is supposed to accomplish. This case - commenced 10 years ago - has gone to the Supreme Court of Canada and back down, and we are still dealing with pleadings and class period issues, with a trial date some 10 months away.
- [34] I do not say that deferring the statement of defence should never be allowed; rather, that there ought to be good reason to do so.
- [84] At a case management conference on July 29, 2019, I ordered that the timing of filing of Responses was to be taken up by the case management process.
- [85] The defendants generally submit that Responses ought to be deferred, at least until after the preliminary applications have been resolved, or later in the proceedings. They point out that in many past cases, and in some other jurisdictions, Responses have not been required until after the certification hearing.
- [86] The defendants suggest that those defendants contemplating summary judgment applications may wish to provide Responses at an earlier time if they decide to bring those applications. The defendants point to the comments of Myers J. in *Microsoft* as allowing for the deferred filing of Responses where there is good reason to do so. The defendants suggest that good reason to defer Responses exists here, particularly where there are serious issues with the Amended Claim. Mr. McKee stated that he was not aware of any case where a court has required a defendant to file a Response while simultaneously attacking a notice of civil claim. The defendants submit that the Amended Claim is so vague and deficient that the filing of Responses will not assist the Court. Some of the defendants suggest that I ought to hear the applications to strike first, and the filing of Responses can take place afterward.
- [87] In addition, the defendants point to the shifting nature of the plaintiff's claims. They point out that it is not unusual for notices of civil claim to go through several iterations, even at the certification hearing itself: *Simsek v. United Airlines*, 2017 BCCA 316 at para. 27. The motions to strike could result in further amendments, and there is no reason to file Responses while there remains a likelihood of further amendments. This is particularly so here where there are 48 defendants.
- [88] In reply, the plaintiff submits that the filing of Responses is mandatory. It acknowledges that in proposed class actions, there has been a practice of delaying or deferring delivery of Responses until after certification. However, it says that this practice is outdated: *Microsoft; Shaver v. British Columbia*, 2017 BCSC 108.
- [89] In *Shaver*, Griffin J., held as follows:

- [80] It is true that in proposed class actions the court has discretion to waive the requirement for a defendant to file a defence until after the certification hearing: see *MacLean v. Telus Corp.*, 2005 BCCA 338 at para. 10. This discretion was sometimes exercised where it was thought to be more efficient and would avoid the necessity of reformulating a defence in response to a claim that would likely change after the certification hearing, as in *Mangan v. Inco Ltd.* (1996), O.J. No. 2655 (Gen. Div.) at para. 13.
- [81] After years of experience in managing class actions, case law has evolved away from this stated concern, realizing that delay in filing of a defence is often simply a tactical manoeuvre, as noted by Perell J. in *Smith v. Sino-Forest Corp.*, 2012 ONSC 1924 at paras. 50-54.
- [82] Hindsight has shown us that delaying the filing of a defence is not always ideal, as the filing of a defence can reveal common issues that are relevant to the certification application and closes the pleadings in a timely way, focusing the issues before the certification decision is subject to appeals and associated delay, as was noted by Myers J. in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2015 BCSC 74 at para. 32.
- [83] The plaintiff is entitled to know the case it has to meet. The plaintiff's claim and certification application will likely be better informed, including incorporation of amendments, once the plaintiff knows the Province's Response.
- [84] Further the Court will be better informed as to the true issues between the parties, once a Response is filed. This is especially so in Charter litigation which makes relevant contextual factors: see *Murray v. Alberta (Minister of Health)*, 2007 ABQB 231.
- [85] I am of the view that the certification application will be much better informed if the Province files its Response, and there is no good reason not to require it to do so. Given the Province's application to strike the claim, the Province must already be quite familiar with the issues it needs to understand in order to plead. I therefore decline to exercise my jurisdiction to grant the Province an order postponing the filing of a Response.
- [90] I agree with these comments and those of Myers J. in *Microsoft*. I am not convinced that there exists good reason to delay the filing of Responses by the defendants who have not filed jurisdictional objections. Instead, the filing of Responses will clarify and focus the issues in dispute between the parties, reduce the possibility of surprise submissions at the certification hearing, and assist in moving the proceeding forward with the benefit of all pleadings being filed. Any issues with regards to the specificity of the pleadings may be dealt with on the certification motion itself rather than by delaying the filing of Responses.
- [91] I will allow the defendants 45 days from the date of this judgment to file a Response, or such additional time as may be agreed to by counsel, subject to the defendants having liberty to apply for an extension if necessary. The issue of Responses for defendants who have filed jurisdictional objections will be dealt with after the ruling on that issue.

the Impact of Covid-19

- [92] The spread of the Coronavirus disease (COVID-19) escalated just prior to the release of this judgment and has resulted in modifications to the normal operations of the Court and interruption of the timely hearing of non-urgent civil chambers matters. At the time counsel provided arguments as to sequencing, the pandemic was not foreseeable. As I did not have the benefit of submissions from counsel, and the duration and extent of the disruption to the normal scheduling of motions are still unknown, I have not taken this development into account as a factor relevant to the proper sequencing of issues.
- [93] Counsel are asked to have regard to announcements from the Court respecting modified proceedings, and to coordinate the timing and manner of future appearances with trial scheduling. All counsel have leave to appear by telephone at future case management conferences and uncontested chambers matters for the duration of the impact of the virus on the normal operations of the Court.

Conclusion

- [94] In summary, subject to further order of the Court, I order the following:
- a) The jurisdictional challenges based upon territorial competence and forum non conveniens will proceed in conjunction with the certification hearing. Any steps the defendants take in compliance with the pre-certification application procedures under the CPA are without prejudice to their submissions on jurisdictional objections including forum non conveniens;
 - b) The motions to strike and motions for summary judgment will proceed in conjunction with the certification hearing;
 - c) The constitutional challenge will proceed in conjunction with the certification hearing;
 - d) The defendants who have not filed jurisdictional objections are to file their Responses within 45 days from the date of this judgment, or such additional time as may be agreed to by counsel, subject to the defendants having liberty to apply for an extension if necessary; and
 - e) The Responses of the defendants who have filed jurisdictional objections are deferred until the outcome of the hearing of the jurisdictional arguments.
- [95] All other orders sought by the defendants as to the early hearing of pre-certification motions are dismissed.
- [96] Counsel are directed to engage in case planning on the basis of the hearing of the above-mentioned motions to coincide with the certification hearing. It is understood that there are sub-groups among the defendants with shared common interests, and the hearing itself will necessarily require division into separate issues and commonly affected parties.
- [97] I wish to express my appreciation to counsel for their helpful submissions.

"Brundrett J."

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