

CANADA / JUDGMENT

British Columbia v. Apotex Inc.

2023 BCSC 1354

COURT

Supreme Court of British Columbia

DECIDED

2 August 2023

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2023 BCSC 1354 British Columbia v. Apotex Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia v. Apotex Inc.,

2023 BCSC 1354

Date: 20230802

Docket: S189395

Registry: Vancouver

Between:

His Majesty the King in Right of the Province of British Columbia

Plaintiff

And

Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Endo Ventures Ltd., Ethypharm Inc., Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Mylan Pharmaceuticals ULC, Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) LTEE., West-Ward Columbus Inc., Sanis Health Inc., Sandoz Canada Inc., Teva Canada Innovation G.P.-S.E.N.C., 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., Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc.,

McKesson Corporation, McKesson Canada Corporation, Nu-Quest Distribution Inc., United Pharmacists Manitoba Inc., Procuracy Inc., Procuracy Pharmacy Services Inc., Shoppers Drug Mart Inc., Unipharm Wholesale Drugs Ltd., LPG Inventory Solutions, and Noramco Inc.

Defendants

Corrected Judgment: The cover page of the judgment was corrected on September 19, 2023.

Before: The Honourable Mr. Justice Brundrett

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Place and Date of Hearing:

Vancouver, B.C.

July 12, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 02, 2023

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Introduction

- [1] The Jean Coutu Group and Pro Doc Limitee (the "Quebec Defendants") apply for an order staying proceedings against them until the Court of Appeal has decided their appeals from a jurisdiction decision indexed at 2023 BCSC 662 ("Jurisdiction Decision").
- [2] The Quebec Defendants are two of many defendants in a putative class action commenced by the Province of British Columbia (the "Plaintiff") on August 29, 2018 under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]. The Plaintiff's claim was amended on June 20, 2019 after the passage of the Opioid Damages and Health Care Costs Recovery Act, S.B.C. 2018, c. 35 [ORA]. A second and then a third amended notice of civil claim have been filed, with the most recent notice of civil claim having been filed on April 25, 2022, after leave to amend was granted (the "NOCC").
- [3] The proposed class action, brought on behalf of the Canadian provincial, territorial and federal governments, seeks to recover healthcare costs associated with the opioid epidemic, as defined in the ORA. It has proceeded through various procedural steps to date. On March 19, 2020, I ordered that all preliminary applications were to be heard in conjunction with the certification hearing: *British Columbia v. Apotex Inc.*, 2020 BCSC 412 at para. 94 ("Sequencing Decision"). On appeal, the Court of Appeal set aside the sequencing order to the limited extent of allowing the Quebec Defendants' jurisdiction simpliciter challenges to

be heard prior to certification: *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 at para. 95 ("Sequencing Appeal Decision").

- [4] The jurisdictional response of the Quebec Defendants was originally filed on June 6, 2019. On September 26-28, 2022, the Court heard argument from the Quebec Defendants in favour of an order permanently dismissing the claims against them on the basis that the Court did not have territorial competence or jurisdiction over them in respect of the claims made against them in the NOCC. Alternatively, the Quebec Defendants sought a permanent stay of proceedings in the Supreme Court of British Columbia against them on the same grounds.
- [5] On April 25, 2023, the Court dismissed the jurisdictional objections of the Quebec Defendants in the Jurisdiction Decision. The Quebec Defendants both filed notices of appeal on May 24, 2023. The appellants had not yet filed their factums at the time the stay issue was argued.
- [6] The Plaintiff's certification application is currently scheduled to commence for four weeks starting November 27, 2023. The orders the Quebec Defendants presently seek are as follows:
1. An order staying the Order pronounced by Justice Brundrett on April 25, 2023 (the "Jurisdiction Order") until the Court of Appeal has decided the Quebec Defendants' appeals of the Jurisdiction Order (the "Pending Appeal"); and
 2. An order for a partial stay of the proceedings whereby:
 - (a) The Quebec Defendants are not required to file their application response materials to the Plaintiff's application for an order certifying the within action as a class proceeding pursuant to the [CPA] (the "Certification Application") and Notice of Application concerning forum non conveniens (the "FNC Application") until the Court of Appeal has rendered judgment on the Pending Appeal, and only in the event that the Quebec Defendants are unsuccessful in the Pending Appeal;
 - (b) The Quebec Defendants are not required to make their oral submissions at the hearing of the Certification Application currently scheduled to commence November 27th, 2023, but instead the Quebec Defendants are granted leave to make submissions on their own behalf on the Certification Application and FNC Application after judgment is rendered on the Pending Appeal, and only in the event the Quebec Defendants are unsuccessful on the Pending Appeal; and
 - (c) Justice Brundrett will reserve the release of any decision on the Certification Application until after the Court of Appeal renders judgment on the Pending Appeal and the Quebec Defendants have, if necessary, made submissions on their own behalf on the Certification Application and FNC Application in the event the Quebec Defendants are unsuccessful on the Pending Appeal

- [7] The Quebec Defendants submit that this Court has jurisdiction to grant a stay. Further, they argue that there is merit to their appeals, that they will suffer irreparable harm if a stay is refused, and that the balance of convenience favours a stay.
- [8] The Plaintiff opposes the orders sought. It submits that the Quebec Defendants have failed to satisfy all three aspects of the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (S.C.C.) [RJR].
- [9] Several other defendants have filed application responses, including: Janssen Inc. and Johnson & Johnson; LPG Inventory Solutions; Bristol-Myers Squibb Canada and Bristol-Myers Squibb Company; Sandoz Canada Inc.; and Apotex Inc. and Apotex Pharmaceutical Holdings Inc.
- [10] These responding defendants all partially oppose the orders sought to the extent that any stay of proceedings or change to the timetable ought to be limited to the Quebec Defendants only. The responding defendants cite the relatedness of the issues between the parties and oppose a bifurcated certification hearing.

Legal Principles

- [11] The circumstances here involve an application for a stay pending appeal. As noted in *Watt v. Health Sciences Association*, 2015 BCSC 2468 at para. 26, this Court retains the inherent jurisdiction, confirmed by s. 8 of the Law and Equity Act, R.S.B.C. 1996, c. 253, to stay its own proceedings pending an appeal to the Court of Appeal.
- [12] As recently summarized in *0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.*, 2022 BCCA 261 at para. 8 (Chambers) [KBK]:
- [t]he power to grant a stay is discretionary. It is generally exercised "only where necessary to preserve the subject matter of the litigation and pending final decision of the Court or to prevent irreparable damage, or where there are other special circumstances": *Contact Airways Limited v. De Havilland Aircraft of Canada Limited* (1982), 1982 CanLII 521 (BC CA), 42 B.C.L.R. 141 at 143 (C.A. Chambers).
- [13] The onus is on the applicant to establish the entitlement to a stay: *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 at para. 9.
- [14] The test for a stay has three parts, as initially established by the Supreme Court of Canada in *RJR* and more recently restated in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 12 [CBC]:

At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify

the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

- [15] Injunctions are equitable remedies, and the fundamental question in each case is whether granting the injunction is just and equitable in all the circumstances of the case: *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333, 1986 CanLII 171 at 6-7 (C.A.), *aff'd* [1991] 1 S.C.R. 62, 1991 CanLII 109 (S.C.C.).
- [16] The three parts of the test are not intended to be separate watertight compartments but factors that relate to each other, such that strength on one part of the test ought to be permitted to compensate for weakness on another: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19, citing *Wale* at 6-7.
- [17] In *Wale*, the interlocutory injunction test was expressed as comprising two parts: (1) the applicant must establish a serious issue to be tried, and (2) the balance of convenience must favour the granting of the injunction. There is no practical effect to the distinction between the two-part test expressed in *Wale* and the three-part test in *RJR: Coburn v. Nagra*, 2001 BCCA 607 at para. 7.
- [18] The ultimate consideration is whether granting the requested order is in the interests of justice: *Coburn* at para. 9.

Discussion

a) Serious Question to Be Tried

- [19] The first branch of the *RJR* test deals with the existence of a serious question to be tried, in the sense that the application must neither be frivolous nor vexatious: *CBC* at para. 12. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case, but a prolonged examination of the merits is generally neither necessary nor desirable: *RJR* at 337-38. It is generally sufficient to show there is an "arguable case": *KBK* at para. 10.
- [20] The applications here do not engage the heightened threshold applicable to an application for a mandatory interlocutory injunction in the context of restorative relief, referred to in *CBC* at para. 15, where the applicant must show a strong *prima facie* case rather than a serious question to be tried. Rather, the relief sought is in the nature of a prohibitory injunction, to which the general framework applies: *CBC* at para. 16.
- [21] The Quebec Defendants advised during oral argument that on appeal they will submit that, while the Court articulated the correct test in the *Jurisdiction Decision*, it erred in its application of the test by:
 - 1) misapplying the standard of "good arguable case" (once the pleaded facts were refuted by the defendants) by not shifting the burden to the Plaintiff to show a good arguable case. Instead, the Court relied on pleaded facts that amounted to bald allegations, and it speculated as to jurisdictional connections (such as individuals becoming addicted to the Quebec

Defendants' opioids and then travelling to BC, and that there may have been a common design between the Quebec Defendants and a competitor at some point whereby the competitor caused harm in BC); and

- 2) relying on the same pleaded facts at the second stage of the analysis that gave rise to the presumption at the first stage, in order to deny the presumption had been rebutted, instead of considering the evidence provided by the Quebec Defendants to determine whether the presumption had been rebutted. This arguably effectively collapsed the first and second parts of the test into a single step.

[22] The Quebec Defendants submit that the appeal of the jurisdictional issue is based upon a question of law reviewable on a standard of correctness: *Hershey Company v. Leaf*, 2023 BCCA 264 at para. 35. They also point out that the Court of Appeal recognized that jurisdiction is an important foundational issue: *Sequencing Appeal Decision* at para. 93.

[23] I note that in the *Jurisdiction Decision*, the finding of a real and substantial connection with respect to ss. 10(f) and (g) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 was based on either: (i) the decision in *Moran v. Pyle Nat. (Canada) Ltd.*, [1975] 1 S.C.R. 393, 1973 CanLII 192 (S.C.C.) (being jurisdiction over a tort where the damage occurs), and/or (ii) jurisdiction based on a joint tort committed through common design. To be successful, the Quebec Defendants would have to demonstrate that an error occurred that undermined both bases for territorial competence.

[24] I would not, however, find that the appeal is frivolous or vexatious. Counsel offered enough detail during argument to convince me that the appeal raises a "serious question to be tried" that is neither frivolous nor vexatious. I agree with the Quebec Defendants that they have met this branch of the test, given the low threshold at play.

b) Irreparable Harm

[25] The second branch of the test addresses whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application: *RJR* at 341.

[26] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other: *RJR* at 341; *KBK* at para. 11.

[27] In *Wale* at 6, the Court commented that "[i]t is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction." However, in *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 60, the Court further explained that:

there surely must be a foundation, beyond mere speculation, that irreparable harm will result. Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be invoked only when the test in *RJR-MacDonald* is satisfied on a sound evidentiary foundation.

[Bolding added; underlining in original.]

- [28] The Quebec Defendants submit that a refusal to grant a stay would require them to participate in a four-week certification hearing, thereby putting them to considerable expense. They submit that their forced participation in such a hearing would amount to attornment, which would operate to their prejudice since they would lose an enforcement defence they would otherwise be able to advance in Quebec if they were successful on their jurisdiction application. They submit they may find themselves as defendants in a certified class action prior to the determination of the pending appeal, and that if the proceeding is certified against them prior to the determination of the pending appeal, their costs in so participating would not be recoverable under s. 37 of the CPA.
- [29] First, and on this latter point, I note that the position of the Quebec Defendants rests on the assumption that the appeal of this matter will not be decided prior to the certification hearing in December. During argument, counsel advised this Court that while the Plaintiff sought a hearing date for an expedited appeal in September, the Quebec Defendants were seeking an appeal date in October or November because a September date was not "workable" for them.
- [30] I understand that an appeal date has now been set for November 6, 2023. This date puts increased pressure on the Court of Appeal to render a speedy decision and makes it less likely that a decision can be made prior to the commencement of the certification hearing in this Court in December. Certainly, if a decision is reserved, the Quebec Defendants may not receive a decision on their appeal prior to the certification hearing, and I am prepared to consider this prospect.
- [31] Second, as to the expense of participation in the certification hearing, I do not agree that the litigation expenses the Quebec Defendants might incur constitute irreparable harm. The harm referenced in *RJR* at 341 is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other." The incurring of litigation costs as a result of participating in the certification hearing is not in the nature the type of harm contemplated in *RJR* as constituting irreparable harm: *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 347 at para. 15; *RJR* at 341.
- [32] The Quebec Defendants have already served their responding material to the certification application. If their appeals are successful, the cost of their participation in the hearing is the only financial harm they will have suffered. The Quebec Defendants are relatively sophisticated parties, represented by multiple counsel who have attended numerous application hearings (thus far on a "watching brief" basis). It does not appear that the cost of participation is a significant burden on the Quebec Defendants amounting to irreparable harm.

- [33] Moreover, it appears that the expense-related "harm" the Quebec Defendants might suffer from a successful appeal after "forced" participation in a certification hearing is potentially curable. The court retains the discretion to order costs in exceptional circumstances under s. 37(2)(c) of the CPA, and such a scenario may well be the subject of argument over exceptional costs. I therefore do not agree that the litigation expenses the Quebec Defendants might incur amount to irreparable harm.
- [34] Third, the Quebec Defendants argue that they cannot participate in the certification application in a meaningful or substantive way without the risk of submitting to the jurisdiction of this Court, citing *Barer v. Knight Brothers LLC*, 2019 SCC 13 at para. 69. That case assesses the "difficult strategic choice" sometimes faced by Quebec-based defendants sued in a foreign court. They can either defend the foreign lawsuit and try to protect their assets in the foreign jurisdiction, or refrain from doing so in order to challenge the foreign court's jurisdiction in Quebec proceedings. In *Barer* at para. 69, the Court held that by presenting substantive arguments on the merits, a defendant submits to the foreign court's jurisdiction. The Quebec Defendants argue that they will suffer irreparable harm by having to decide to participate in the certification hearing without knowing in advance whether the jurisdiction appeal will be successful.
- [35] Given that the proposed proceeding has not yet been formally certified as a class proceeding and that the nature of the proceedings is procedural, it is not clear whether the principles in *Barer* are engaged by the participation of the Quebec Defendants in a certification hearing, a question left aside in the Sequencing Appeal Decision at para. 71. In any case, the Court of Appeal took a "different view" of the significance of this alleged prejudice and reasoned as follows:
- [73] The appellants argue that hearing the jurisdiction application first will alleviate any prejudice because they will "either be out of the B.C. Action or required to submit to the jurisdiction" of the Court. However, this misstates their position. If they lose on jurisdiction, the appellants are not required to submit to the Court's jurisdiction. They still have the same choice they articulated in the paragraph cited above: (a) contest the proceeding on its merits, and by doing so submit to the Court's jurisdiction, or (b) stop participating and preserve their ability to challenge later enforcement proceedings in Quebec.
- [74] Leaving aside the cost of participation in these proceedings, the actual prejudice the appellants may suffer is not being "forced" to make the difficult choice; rather, it is having to decide to participate in defence motions without knowing in advance whether the jurisdiction application will be successful. In addition, if the appellants decide not to participate and lose on their jurisdiction argument, they will have lost the opportunity to make submissions on other issues that may impact them (i.e., the constitutionality of the ORA or other applications). But again, if the jurisdiction application is instead sequenced first, and they lose, the appellants would still not be able to participate in the other applications if they want to preserve their *Barer* enforcement defence as they say. Contrary to the appellants' argument, the Order does not require the appellants to submit to the

Court's jurisdiction. If the appellants truly wish to choose (b), and preserve their ability to later defend against enforcement in Quebec, they cannot at any point participate in substantive applications -- and they can make that decision now.

- [75] If they do decide to participate in the defence applications, their participation will not prejudice them in British Columbia with respect to their jurisdiction application. Rule 21-8(5) states that if a party files a timely jurisdictional response, the party does not submit to the jurisdiction of the court until the court has decided the application, and until then the party may defend the proceeding on its merits. If the appellants ultimately succeed on jurisdiction, the issue of enforcement in Quebec is moot, and the only prejudice they will have suffered compared to having the jurisdiction application held first would be the costs of preparing for the additional applications.

[Italics in original; underlining added.]

See also paras. 79-82 of the Sequencing Appeal Decision dealing with "Barer and enforcement in Quebec".

- [36] As the Court of Appeal noted, the Quebec Defendants are not "required" to participate in the certification application. Their choice as to whether to defend the lawsuit in BC or defend against enforcement in Quebec remains, regardless of whether the decision on their appeal is rendered before the certification hearing. To adopt the phrase in Barer at para. 69, they cannot have "two kicks at the can".
- [37] If the Quebec Defendants succeed on appeal, "the issue of enforcement in Quebec is moot" (Sequencing Appeal Decision at para. 75), and the only prejudice they will have suffered compared to knowing the result of the jurisdiction appeal first would be the costs of participating in the certification hearing. I note that the Quebec Defendants have already served material responding to the certification application and their past practice indicates they may well conduct a "watching brief" in any case.
- [38] If the Quebec Defendants do not succeed on their jurisdiction appeal, however, this Court's finding of territorial competence over them in respect of the claims made in the NOCC will stand. At that point, the Quebec Defendants would still have the same choice: contest the proceeding on its merits and run the risk of submitting to the Court's jurisdiction, or stop participating and preserve the ability to later challenge enforcement proceedings in Quebec: Sequencing Appeal Decision at para. 73.
- [39] In the Sequencing Appeal Decision, the Court held the following:
- [78] In summary, I do not accept the appellants' characterization of the additional prejudice they face as a result of the Order. I accept that the Order does result in some prejudice by virtue of the appellants' not knowing the outcome of the jurisdiction application, in advance, before making their decision on whether to participate in the other preliminary applications. In addition, their participation in the other defence motions (as distinct from the certification hearing itself) may have an impact on their enforcement defence in Quebec

if their interpretation of Barer is correct. However, I am of the view that the nature of this prejudice is not as significant as the prejudice of not having the foundational issue of jurisdiction heard at an early stage of the proceedings, and would not, on its own, be given significant weight in considering the Shaver factors. It is instead the complex, expensive, and time-consuming nature of the proposed class proceeding that gives rise to the main prejudice faced by the appellants as a result of the Order.

[Emphasis added.]

- [40] Similarly, it may be argued that if a) the Court of Appeal does not render a decision prior to the certification hearing, b) the Quebec Defendants choose not to participate in the certification hearing to preserve their right to defend against enforcement in Quebec, and c) they are not successful on appeal, they might arguably suffer "some prejudice" (i.e., the lost "opportunity to make submissions on other issues that may impact them": Sequencing Appeal Decision at para. 74). However, in that case, they would preserve their Barer enforcement defence in Quebec--they would still get the one "kick at the can" to which they are entitled.
- [41] Moreover, while a stay of proceedings might further extend the timeframe to make their "difficult strategic choice," the Quebec Defendants filed their jurisdictional objection in June 2019. The Jurisdiction Decision was released in late April 2023. They have now had more than sufficient time to seek legal advice and balance the risk-reward equation that must be made before deciding whether to submit to a foreign jurisdiction: Barer at para. 65. The Quebec Defendants cannot reasonably expect this Court and the other parties to exercise indefinite patience for the preservation of their long-unexercised choice. That choice is largely uncoupled from the jurisdiction appeal. Just as the Quebec Defendants may be forced to exercise their choice no matter the sequencing of applications (Sequencing Appeal Decision at para. 72), their choice remains no matter the sequencing of the jurisdiction appeal and the certification hearing. In these particular circumstances, I cannot find that the lack of a stay would cause irreparable harm in the form of the Quebec Defendants being prejudicially forced to participate in the certification hearing as their only plausible tactical decision if their appeal remains outstanding at that time.
- [42] Further, if the Quebec Defendants participate in the certification hearing, their participation will not prejudice them in BC with respect to their jurisdiction application: see R. 21-8(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009; Sequencing Appeal Decision at para. 75. As well, if a certification order is ultimately made, this Court will be empowered under section 12 of the CPA to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination": Sequencing Appeal Decision at paras. 22, 39-40. This provision empowers the court to order that if any certification order is ultimately made (i.e., once the matter falls under the definition of a "class proceeding" applicable to s. 12), it can be ordered without prejudice to the jurisdiction arguments advanced by the Quebec Defendants on the pending appeal (assuming it remained outstanding). As noted in the Sequencing Decision at para. 64, this is an assurance

that I would extend to the Quebec Defendants if necessary.

- [43] Last, the Quebec Defendants argue irreparable harm in the form of inconsistent findings. On this point, I agree with the Plaintiff that there is little such risk of harm if the certification hearing proceeds ahead of the appeal. If the Quebec Defendants are successful on appeal, any certified claims against the Quebec Defendants can be discarded. As well, if a certification order is eventually made, it can be rendered without prejudice to any jurisdiction appeal by the Quebec Defendants to a higher court.
- [44] I would add that if the Court of Appeal does reserve its decision, given the significant complexity of the certification hearing, there is a near-certain likelihood of this Court reserving its decision on certification well beyond the expected release of any decision on the jurisdiction appeal (the relief the Quebec Defendants seek in para. 2(c) of their Notice of Application). Therefore, to the extent any harm arguably arises, it likely arises only in the form of the possibility that the Quebec Defendants will be faced with a choice as to whether to participate in the certification hearing without knowing the final outcome of their jurisdictional appeal.
- [45] In all the circumstances, I find that the Quebec Defendants have not established that they would suffer irreparable harm if a stay is not granted.

c) The Balance of Convenience

- [46] At the third stage, as articulated in RJR at 342, the balance of convenience involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at 129, 1987 CanLII 79 (S.C.C.). In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings are determined at this stage.

See also Charbonneau at para. 69.

- [47] The factors which must be considered in assessing the "balance of convenience" are numerous and vary in each individual case: RJR at 342. In *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, 64 B.C.L.R. (2d) 96 at 102, 1992 CanLII 560 (C.A.), the Court listed a number of factors relevant to assessing the balance of convenience:

[I]n assessing the balance of convenience a judge should consider these points: -- the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

- [48] In assessing the various factors impacting the balance of convenience here, I assess that the balance strongly favours the Plaintiff.
- [49] The Quebec Defendants seek to defer their participation in the certification application until after their appeal is finally resolved and seek an order that the Court withhold reasons for judgment on the certification application until after they have been given the opportunity to make submissions on the certification application. They add that if the hearing is bifurcated, they will not oppose submissions by the other defendants at their hearing.
- [50] The proposal of the Quebec Defendants, which effectively bifurcates the certification hearing, is logistically challenging because:
- (1) it requires the parties to come back to court to hear additional arguments on the certification application from the Quebec Defendants, when a four-week hearing has already been scheduled for this purpose;
 - (2) it contemplates delaying some or all of the proceedings while the jurisdiction appeal is outstanding; and
 - (3) it would extricate the Quebec Defendants from the certification proceedings when the issues between the parties overlap, and the other defendants and the Plaintiff would all benefit from the simultaneous participation of all defendants.
- [51] The responding defendants point out that non-participation by the Quebec Defendants would result in an asymmetrical record in that those responding defendants may not be able to rely on the materials filed by the Quebec Defendants. Moreover, the submissions of the Quebec Defendants would not be heard and responded to by the responding defendants. Of particular concern to the responding defendants is the possibility that their forum non conveniens arguments, which are scheduled to be heard in conjunction with the certification hearing, would not be heard at the same time as the Quebec Defendants. I find some merit in this submission. Given the large number of defendants joined in this proposed class proceeding, I find that a bifurcated hearing is highly problematic.
- [52] By contrast, a single hearing of all issues has advantages, which was part of the motivation behind the Sequencing Decision in the first place. In the context of this complex litigation, the balance of convenience strongly weighs in favour of an omnibus certification hearing with the concurrent participation of all defendants.
- [53] Moreover, the challenge to jurisdiction in the form of territorial competence has been decided in the first instance. The Plaintiff and the other parties are entitled to the benefit of this decision, and to place reliance upon it, subject of course to the possibility of a successful appeal.
- [54] I agree with the Plaintiff that any of the prejudice advanced by the Quebec Defendants is far outweighed by the prejudice to the other parties involved--including the Plaintiff, the putative class members, and the other defendants--not to mention the public interest in

seeing this significant matter proceed in a timely and efficient manner. This prejudice to other parties is heightened because of overlapping issues, including forum non conveniens, and the desire of other parties to rely on the application response materials of the Quebec Defendants.

- [55] I assess that the proposal by the Quebec Defendants for a stay or a partial stay would undermine the judicial economy goals of class proceedings. The Quebec Defendants were not able to offer an example of a situation where a stay was granted in the present context. However, the fact that a trial process will be delayed by the granting of a stay of an interlocutory order has been found to militate against the granting of a stay: *Kasian Estate v. Kasian*, 2021 BCCA 273 (Chambers) at para. 58.
- [56] Commenting on the present case, the Court of Appeal observed, "an action of this breadth and scale stretches the capacity of the legal system to manage the litigation fairly and efficiently": *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at para. 11. The number of parties to the present proceeding, the complexity of the issues, and the need to accommodate the schedules of numerous counsel has already complicated the timely progression of this matter toward a certification hearing, which was scheduled in early 2022. For the reasons above, I am not inclined to grant a stay of proceedings to await the outcome of the jurisdiction appeal, the relief sought in para. 1 of the Notice of Application.
- [57] Moreover, even a partial stay of certification proceedings for the Quebec Defendants, the relief sought in para. 2 of the Notice of Application, represents an undesirable solution from a case management point of view. Twice conducting a certification application of exceptional complexity and magnitude would unduly complicate this case and place significant burdens on the parties and the process. Even on a generous view of the prejudice or harm against them, I find that the Quebec Defendants have failed to make a convincing case that such harm warrants partially or fully staying the question of class certification until the appeal of the Jurisdiction Decision is decided.
- [58] The key question at the third stage is which of the parties will suffer the greater harm from the granting or refusal of a stay, pending a decision on the merits: *RJR* at 342. In all the circumstances of this case, I find that this balance strongly favours the Plaintiff and the responding defendants who oppose a stay.

Conclusion

- [59] The overarching question is whether it is in the interests of justice to grant a stay: *Coburn* at para. 9.
- [60] I find, after weighing all the circumstances, that it is not in the interests of justice to grant a stay of the certification hearing pending the aforementioned appeals.
- [61] The application by the Quebec Defendants is dismissed.

"Brundrett J."

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Prepared on 27 October 2026 · Esheria