
CANADA / JUDGMENT

Charlton v. Abbott Laboratories, Ltd.

2013 BCSC 21

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2013 BCSC 21 Charlton v. Abbott Laboratories, Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Charlton v. Abbott Laboratories, Ltd.,

2013 BCSC 21

Date: 20130109

Docket: 11-0721

Registry: Victoria

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Between:

Terry Charlton, Mayra Charlton, Angela Leone,

Paula Smith-Turner, Carl Turner and Mark Mandell

Plaintiffs

And:

Abbott Laboratories, Ltd., Abbott Laboratories,

and Apotex Inc.

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

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Place and Dates of Trial/Hearing:

Victoria, B.C.

November 2 and 9, 2012

Place and Date of Judgment:

Victoria, B.C.

January 9, 2013

- [1] This action is brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50, by four plaintiffs -- Mr. Charlton, Mr. Mandell, Ms. Leone, and Ms. Smith-Turner -- who allege that drugs manufactured and marketed by the defendants caused them injury. Two other plaintiffs, Ms. Charlton and Mr. Turner, allege that they suffered loss and damage flowing from the injuries to their spouses. The plaintiffs advance their claims under consumer protection, competition and trade legislation, as well as in strict liability, negligence and negligent misrepresentation, breach of warranty, and waiver of tort.
- [2] The Abbott defendants, supported by Apotex, apply for an order that the four plaintiffs who allege they were injured by the defendants' products produce the following medical and pharmaceutical records:
- (a) all records of any physician who treated them for obesity or prescribed Sibutramine to them, relating to such treatment or prescription;
 - (b) all records of heart-related incidents occurring prior to their use of Sibutramine;
 - (c) all records of any physicians and hospitals showing the treatment they received for any heart-related events occurring after their first use of Sibutramine; and

- (d) all PharmaNet and Medical Services Plan records showing when and in what amounts they received Sibutramine and any other medications received contemporaneously.
- [3] In its Notice of Application, Abbott argues that the records it seeks should be produced because they will be relevant to these certification issues:
 - (a) whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, having regard in particular to the relative importance of the proposed common issues and the remaining individual issues;
 - (b) whether there is sufficient evidence for the existence of common issues; and
 - (c) whether the representative plaintiffs can fairly and adequately represent the interests of the proposed class.
- [4] Counsel for Abbott argued that the records are necessary to enable it to argue at the certification hearing that the claim, as set out in the Notice of Civil Claim, is not suitable for class proceedings because there is no basis in fact establishing a real issue between the plaintiffs and the Abbott defendants, and if there is, that individual issues overwhelm any common issues between plaintiffs and defendants.
- [5] Abbott further argued that the records sought are relevant to the suitability of the plaintiffs as representatives of the classes on behalf of which they seek certification.
- [6] That the records sought in this application will eventually have to be disclosed is understood: the question is whether disclosure should be ordered now, before the certification hearing, or later, when their relevance to the merits of the plaintiffs' claims will make them compellable.
- [7] From the evidence provided on the application, it appears that the drug Sibutramine was originally intended to treat depression, and while it was undergoing clinical trials, weight loss was noted in those taking it.
- [8] Drugs containing Sibutramine were approved by Health Canada for appetite suppression in or around 2000, and the defendants distributed compounds containing Sibutramine under different brand names for about 10 years. Health Canada also approved a product monograph that listed a number of suggested precautions, as well as setting out a list of health conditions which, if present, contraindicated use of the drug.
- [9] Some of those contraindicating conditions included history of coronary artery disease, congestive heart disease, arrhythmia or cerebrovascular disease, inadequately controlled or unstable hypertension. Sibutramine was also contraindicated if other drugs, set out in the monograph, were being taken.

- [10] The plaintiff Mr. Charlton pleads that he had no heart problems that he knew of when he started taking Sibutramine, but that he started experiencing shortness of breath within a month or two of starting the drug, and chest pains around four months after starting the drug. He says he now has heart damage as a result of taking Sibutramine.
- [11] The plaintiff Mr. Mandell pleads that he had his first heart attack about three months after he started taking Sibutramine, and that has affected his employment and his lifestyle.
- [12] The plaintiff Ms. Leone pleads that she had her first heart attack about four months after she started taking Sibutramine, and that has affected her business and lifestyle.
- [13] The plaintiff Ms. Smith-Turner alleges she had a stroke about a month after she started taking Sibutramine, which affected her employment, and continues to affect her physically.
- [14] None of these four plaintiffs have purported to rely on medical or pharmacy records, although Mr. Charlton has sworn to what he has been told by doctors who have investigated his post-Sibutramine chest pains and shortness of breath.
- [15] The plaintiffs Ms. Charlton and Mr. Turner plead that they suffered losses as a result of the effects of Sibutramine on their spouses.
- [16] The plaintiffs propose the following as common issues:
1. Does Sibutramine cause or contribute to adverse cardiovascular events, such as non-fatal heart attacks, non-fatal strokes, and other heart-related events?
 2. Was Sibutramine fit for its intended purpose?
 3. Did the defendants breach a duty of care owed to the class in manufacturing, testing, marketing, selling or distributing Sibutramine in Canada?
 4. Did the defendants knowingly, recklessly or negligently breach a duty to warn class members or their physicians of the risks of harm from the use of Sibutramine?
 5. Did the defendants knowingly, recklessly or negligently misrepresent to class members or their physicians the risks and benefits from the use of Sibutramine?
 6. Did the defendants engage in unfair or deceptive trade practices?
 7. If any of questions 1 to 6 are answered in the affirmative, does the defendants' conduct warrant an award of punitive damages?
 8. If any of questions 1 to 6 are answered in the affirmative, should the defendants be ordered to disgorge any or all of the profits they received from the sale of Sibutramine?
- [17] Abbott points to the plaintiffs' pleadings, and the reference there to a study conducted by Abbott called the Sibutramine Cardiovascular Outcome Trial ("SCOUT study"). Abbott says that by pleading that the study results indicated that Sibutramine increased the risk for cardiovascular disease, the plaintiffs have raised issues of fact that include whether those

who took Sibutramine had a history of cardiovascular disease, whether they took the drug as directed or recommended, for the time recommended, as well as the temporal relationship between taking Sibutramine and the first occurrence of certain cardiovascular events.

Abbott argued that the SCOUT study showed that many or most of those who took Sibutramine either should not have been taking it, or took it incorrectly, and that the records it seeks will complete the evidentiary record on the certification hearing.

[18] Abbott relies on the affidavit of Dr. Myers, a cardiologist where, at para. 5, Dr. Myers swears:

In my opinion, for reasons set out herein, in order to determine the cause of any cardiovascular injuries, an examination of each person's personal and family medical histories and a review of the following factors for each individual would be required.

[19] Dr. Myers then lists 19 factors, including patient age, sex, medical history of cardiovascular disease or hypertension, any patient diabetes, cholesterol levels, smoking history, nutrition, alcohol consumption, stress levels, and more.

[20] Dr. Fitchett is the expert cardiologist consulted by the plaintiffs: his affidavit does not refer to the plaintiffs' medical or pharmaceutical records as information on which he relied.

[21] This action has not yet been certified; that hearing is set for early April 2013.

LEGAL FRAMEWORK

[22] The Class Proceedings Act provides:

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
 - (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
 - (d) whether other means of resolving the claims are less practical or less efficient;
 - (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
- [23] In *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 25, the Supreme Court of Canada held that in a class action certification hearing "the class representative must show some basis in fact for each of the certification requirements ... other than the requirement that the pleadings disclose a cause of action."
- [24] In its Notice of Application, Abbott argues that "this Court has held that it is appropriate in certain cases to order the applicant to produce further evidence in advance of the hearing of the motion, where such evidence would assist in resolving the issues arising on the motion." It cites several decisions in support of this assertion. However, I note that most of the cited cases from this jurisdiction did not ultimately order disclosure.
- [25] One is *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663. In that case, the plaintiff sought production of documents it said were relevant to the certification process, including documents produced by the defendant in class proceedings in the United States, which documents had been made the subject of a confidentiality order by the court there. Justice Myers dismissed the application, saying in part:
- [25] It appears to me that at the certification stage of a class proceeding, a party must justify the need for document disclosure. It must show that the sought-after documents would inform the certification process. I do not say the onus is a high one: that is not an issue I need address because I do not think the plaintiffs have even met a low threshold here.
- [26] Justice Meyers relied on two of the other authorities cited by Abbott in this application: *Mathews v. Servier Canada Inc.* (1999), 65 B.C.L.R. (3d) 348, 86 A.C.W.S. (3d) 486 (S.C.), where the application was for an extension of the time to apply for certification and the court's comments on document disclosure appear to be obiter, and *Samos Investments Inc. v. Pattison*, 2001 BCSC 440, where an application for document disclosure was adjourned to after the certification application was heard, and those apparently obiter comments in *Mathews* were cited with approval.

- [27] In Samos there was evidence that the disclosure sought would require a great deal of time and effort. Similar considerations applied in Matthews, where the court described the effort required as "an enormous task" (para. 5). In both cases, as in Pro-Sys, it was the plaintiffs seeking access to defendants' records before the certification hearing.
- [28] Whereas in Pro-Sys, Matthews, and Samos, the proposed plaintiffs were seeking disclosure of a large number of documents from defendants before certification, it is not obvious in the case before me that the disclosure sought would be as onerous. In cases where document discovery can be expected to be onerous, pre-certification production might be less readily ordered than where the cost and effort of production are more manageable.
- [29] Abbott also relies on Stanway v. Wyeth, 2010 BCSC 1497, which raised issues similar to those in this application. The action there sought certification of common issues that included whether there was a causal connection between the use of certain drugs and certain adverse medical conditions. Prior to the certification hearing, the defendant sought medical and prescription records of the representative plaintiff. The court canvassed authorities from other Canadian jurisdictions, and at para. 21 summarized:

The principles thus derived are:

1. Precertification disclosure is ordered in the exceptional case where the defendant demonstrates that the record before the court for the certification hearing will be inadequate for consideration of the issues at that stage of the proceedings.
2. In considering whether an order for disclosure ought to be made the court must address the goals of judicial economy, access to justice, and behaviour modification.
3. It can be assumed that each individual's medical record will be unique. However, the medical evidence suggesting the significance of the individual factors of those who may have been prescribed and ingested the prescription drug may be necessary to furnish the evidentiary record;

and specifically in British Columbia,

5. There is no right to examine the representative plaintiff or other affiants in British Columbia; an order of the court is required.
6. In British Columbia, in accordance with the Act, the court must consider whether the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members, and whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

[30] The court in *Stanway* concluded at para. 22 that the case before it was "the exceptional case where precertification disclosure of medical records must be made", because the information in the records was necessary for "my determination of the predominance of common issues and whether this class proceeding ought to be certified."

[31] It appears that the court assumed that the records sought would contain information about: The individual risk factors identified in those records, and notes of the prescribing physician of the discussion he or she had with the patient concerning the benefits and risks of HRT and of Premarin and Premplus specifically, and the records of the examinations undertaken, test ordered and the results

And the court considered the information necessary for the certification process.

[32] It does not appear from the reasons in *Stanway* that Mathews, Samos, or Pro-Sys were brought to the court's attention.

[33] This court came to a different result than in *Stanway* in *Jones v. Zimmer GMBH*, 2010 BCSC 1504, and in *Bartram (Litigation guardian of) v. Glaxosmithkline Inc.*, 2011 BCSC 1174, leave to appeal ref'd 2011 BCCA 539.

[34] In *Jones*, decided the day before *Stanway* was argued, Loo J. reviewed the authorities, and said at para. 28:

From my review of authorities, I accept that generally the courts in Canada have refused to order that medical records be produced prior to certification, except in exceptional circumstances, including where the record on the certification issue may be inadequate. The party requesting production has the onus of demonstrating that the documents are necessary for the certification application.

[35] This passage establishes that the applicant for document disclosure bears the onus of establishing the case for such disclosure, and that the standard required of the applicant is proof that the documents sought are necessary for the certification application.

[36] One of the authorities relied on in *Jones* was *Pearson v. Inco Ltd.*, 22 C.P.C. (5th) 167, [2002] O.J. No. 1842, where the court said at para. 12:

In the end result, there are likely to be two results if the medical records are produced. One is that they will reveal nothing more than the defendants already know and will be of no use on the certification motion at all. The other is that they will reveal information which might cast doubt on the merits of the plaintiff's claim but that is an impermissible use of the records at this stage of the proceeding.

[37] In *Bartram*, N. Smith J. distinguished *Stanway* on the basis that in the case before it, the issues and class were more narrowly defined, as was the temporal connection between drug use and time of injury. It also noted the different results in *Stanway* and *Jones*. Justice Smith then quoted from an authority relied upon in both *Stanway* and *Jones*, *Pardy v. Bayer Inc.*,

2003 NLSCTD 130, and added this emphasis to the final sentence in the quote: "Indeed the Court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim" (Bartram para. 16).

[38] More recently, Punnett J. of this court made the same point in *Miller v. Merck Frosst Canada Ltd.*, 2011 BCSC 1759, when he said at para. 4:

Applications for disclosure before certification often raise subtle distinctions between evidence relevant to the certification process and evidence which goes to the merits of the claim. The former evidence is permissible, the latter is not.

[39] He elaborated on the difference in para. 40:

The Supreme Court of Canada in *Hollick* did not state "some basis in evidence." It stated "some basis in fact." The difference is important. One goes to the merits of the claim, the other to whether the assertions made are sufficient to allow the court to determine if the proceeding is of the type that is suitable for certification.

And further, "the assertion of facts is still restricted to facts and not the evidence needed to prove them" (para. 39).

[40] Abbott also relies on the reasoning in *MacMillan v. Abbott Laboratories Laboratoires Abbott Limitée Apotex Inc.*, 2011 QCCS 3749, while acknowledging that it is not directly applicable because of differences between class proceeding legislation in Quebec and British Columbia. That case was an attempt to obtain authorization in Quebec to commence a class action related to Sibutramine. The plaintiff there agreed that his pharmacy records should be disclosed, but objected to disclosure of his medical records. The court ordered production of the medical records, in part, it appears, on the assumption that an expert medical opinion the plaintiff indicated his intention to rely on at the certification hearing would probably be based on his medical records (para. 9). It is not clear on what this assumption was based. Mr. MacMillan's application for certification was later denied, partly on the information in his medical record: see *MacMillan v. Abbott Laboratories Laboratoires Abbott Limitée Apotex Inc.*, 2012 QCCS 1684.

[41] In part, authorization to proceed as a class action was refused in that case because: the plaintiff's medical records did not support his claim to have suffered a myocardial condition; the records indicated that the plaintiff was prescribed another drug that was contraindicated while taking Sibutramine; they did not show that his blood pressure was checked regularly as recommended for Sibutramine users; and the records indicated that he took Sibutramine for longer than the year recommended.

[42] Two principles emerge from the British Columbia authorities: first, that the burden of showing that records should be disclosed before the certification hearing is on the party applying for it; second, the standard to be met on such an application is to show that the records sought are necessary to inform the certification process.

- [43] In *Pro-Sys*, Myers J. left open the question of where to set the threshold that must be met to warrant pre-certification document disclosure.
- [44] I conclude that necessity under the second principle must mean more than merely helpful or informative. I say that because of the clear separation between the procedural aspects of class proceedings, and the certification application is purely procedural, and the consideration of the merits of the claims, which comes after certification, if it is granted. So wherever the threshold is set, it must be high enough to protect the procedural certification process from becoming bogged down by evidence that goes to the merits.

ANALYSIS

- [45] As to what information is necessary for the certification hearing, and whether the defendants have made out a case that the records sought will contain it, a starting point is the Notice of Application by which the plaintiffs seek certification.
- [46] Section 4(1)(b) of the Act requires that there be an identifiable class of two or more persons. In its Notice of Application, the plaintiffs propose that the classes be defined as:
- (a) All persons resident or situated in British Columbia who have used or purchased Sibutramine ("Resident Primary Subclass");
 - (b) All persons resident or situated in British Columbia who assert a derivative claim on account of a family relationship with a Primary Subclass member ("Resident Family Subclass");
 - (c) All persons resident or situated in a Canadian province or territory other than British Columbia who have used or purchased Sibutramin ("Non-resident Primary Subclass"); and
 - (d) All persons resident or situated in a Canadian province or territory other than British Columbia who assert a derivative claim on account of a family relationship with a Primary Subclass member ("Non-resident Family Subclass").
- [47] Whether these proposed classes are sufficiently well defined, or whether someone can be identified as being in or outside the class by objective criteria, will be determined at the certification hearing. For present purposes, I have not been persuaded that medical or pharmacy records would assist in that determination.
- [48] The defendants' primary argument is that the records are necessary to enable the court to determine whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, in accordance with s. 4(1)(d), having regard in particular to the relative importance of the proposed common issues and the remaining individual issues. Here the defendants' argument focuses on whether common issues predominate over individual questions, a requirement of s. 4(2)(a) of the Act, which reads:

- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- [49] Section 4(2) of the Act lists considerations relevant to whether "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues."
- [50] Predominance is but one of a number of factors to be considered in the analysis of preferable procedure, which in turn is just one of five preconditions to certification, all of which must be met, under s. 4(1). Its relative importance among the s. 4(2) considerations might be affected by the provisions of s. 4(1)(c), which reads:
4. (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

[emphasis added]

- [51] An applicant for certification must show "some basis in fact to support the certification order": Hollick at para. 25. In saying this, the Supreme Court of Canada agreed with the court appealed from that the Ontario Class Proceedings Act, S.O. 1992, c. 6, "requires the representative plaintiff to provide a certain minimum evidentiary basis for a certification order" (para. 24, emphasis in original).
- [52] Reading ss. 4(1)(c) and (d) together with s. 4(2) of the Act demonstrates that an applicant must show some basis in fact to support the conclusion that claims of class members raise common issues, without those common issues having to predominate over individual issues (s. 4(1)(c)), as well as some basis in fact to support the conclusion that a class proceeding would be the preferable procedure to fairly and efficiently resolve the common issues (s. 4(1)(d)). To assist in the determination of the latter requirement, the Act sets out a non-exhaustive list of factors to be considered under s. 4(2).
- [53] Hollick must be viewed with some caution where it deals with the preferability inquiry, which is phrased in the Ontario statute in terms identical to s. 4(1)(d) of the British Columbia Act because, as the court points out in Hollick, the Ontario statute did not provide any legislative guidance to the preferability inquiry, whereas the British Columbia Act provides guidance in s. 4(2).

[54] Whether the plaintiffs can show "some basis in fact", or on a "minimum evidentiary basis", that the claims of class members raise common issues is a question for the certification hearing. The defendants have not shown that the records they seek are necessary at this stage for the determination of that question. Instead, the Abbott defendants focus their arguments on whether the records sought are needed to determine at the certification hearing whether common or individual issues predominate.

[55] The defendants argue at para. 37 of their Notice of Application:

If the cause of the Plaintiffs' injuries can be attributed to multiple factors -- such as lifestyle choices, medical background, degree of adherence to doctors' recommendations, and consumption of the drug without adherence to labeled guidelines -- then confining the inquiry to the question of "general" causation (as the Plaintiffs propose) may be of limited assistance in resolving the claims of the proposed class. The medical records of the proposed representatives will allow Abbott to advance that argument with concrete examples, rather than in the abstract.

[56] This argument is based upon a prediction -- perhaps hope is a better word -- as to what the records sought will contain. It seems to me to be an invitation to the sort of fishing expedition to which Prowse J.A. referred when she refused leave to appeal in *Bartram v. Glaxosmithkline*, 2011 BCCA 539 at para. 10. The affidavit of Dr. Myers, the cardiologist advising the defendants, who swears that the medical records are necessary "in order to determine the cause of any cardiovascular injuries," illustrates the point.

[57] The defendants argue that its application does not cross the line into consideration of the merits, but in doing so, says that with the records in hand, the court at the certification hearing can look at any conflicts or inconsistencies between what the plaintiffs assert and what the records show and, without going into the merits of the claims, weigh the evidence to determine whether there is some basis in fact on each of the considerations required for certification.

[58] Recognizing that this argument is based on what the defendants hope will be revealed in the records sought, it seems to me that they are caught in the kind of analytical difficulty described by Nordheimer J. in *Pearson* at para. 12:

In the end result, there are likely to be two results if the medical records are produced. One is that they will reveal nothing more than the defendants already know and will be of no use on the certification motion at all. The other is that they will reveal information which might cast doubt on the merits of the plaintiff's claim but that is an impermissible use of the records at this state of the proceeding. Either way, the medical records will not advance the consideration of the issues which are relevant to the certification motion, in that they will not assist in determining whether there are common issues nor will they assist in determining whether a class action is the preferable procedure for the resolution of any common issues.

- [59] It seems to me, with respect, that the Abbott defendants attempt to draw too fine a line between considering whether some basis in fact has been established for the requirements of ss. 4(1)(b) through (e), on the one hand, and a consideration of the merits of the plaintiffs' claims, particularly as to causation, on the other.
- [60] At the certification hearing, the plaintiffs will have to produce sufficient evidence to show that there is some basis in fact satisfying the requirements of s. 4(1)(b) through (e) of the Class Proceedings Act. The requirement of s. 4(1)(a) -- that the pleadings disclose a cause of action -- is based on a review of the pleadings and requires no evidence.
- [61] The plaintiffs will not be required at the certification hearing to establish some basis in fact establishing a real issue as between the plaintiffs and defendants, as argued by the Abbott defendants.
- [62] The difference is important: the requirements of ss. (b) through (e) of s. 4(1) are focused more on the procedural validity of the claims advanced by the plaintiffs if the action is to be certified, and not on the factual underpinnings of the claims against the defendants. By procedural validity I mean whether the claims as advanced satisfy the requirements of the subsection, and that is to be distinguished from whether the claims advanced can succeed. The former aspect is procedural, the latter goes to the merits of the claim. The former aspect is the proper subject of a certification hearing, the merits are not.
- [63] It therefore follows that evidence that might tend to shake the evidentiary foundation of the claims against the defendants by showing whether there is some basis in fact for the claims pleaded is not necessarily relevant to the certification process, and ought not to be ordered produced on that basis.
- [64] The Ontario Superior Court of Justice has said "It is not always easy to separate, prior to the certification hearing, where an examination of the 'basis in fact' ends and an impermissible excursion into the merits begins": *Roveredo v. Bard Canada Inc.*, 2010 ONSC 5240 at para. 9.
- [65] Two reasons for ordering production of documents before certification are to enable the defendant to properly respond to the plaintiff's evidence and to ensure that there is an adequate evidentiary record. See *Roveredo* at para. 8.
- [66] Here, the Abbott defendants say the records sought are needed for the second purpose, to ensure an adequate evidentiary record. It seems to me that if the plaintiffs proceed to a certification hearing on an inadequate evidentiary record, risking denial of their application to certify because of the inadequacy, that is their risk to run, and it is not an argument strong enough to overcome the disinclination of the courts to order pre-certification production of records such as those sought here.

[67] There is an anomaly in some of the cases cited. In *Schroeder v. DJO Canada Ltd.*, 2009 SKQB 169, at para. 60, the court says: "I note that pre-certification disclosure of documents, such as medical records, was ordered in a number of cases." The court then cites several such cases, including this court's decision in *Pro-Sys Consultants*. As I read *Pro-Sys Consultants*, however, the reverse appears to be true. At para. 25, Myers J. says:

It appears to me that at the certification stage of a class proceeding, a party must justify the need for document disclosure. It must show that the sought-after documents would inform the certification process. I do not say the onus is a high one: that is not an issue I need address because I do not think the plaintiffs have even met a low threshold here.

And at para. 33:

Accordingly, except to the extent of the documents which have been referred to by Microsoft in its reply materials, the plaintiffs' motion is denied.

[68] I note that Roveredo has relied upon the statement in *Schroeder*, including the apparent misreading of *Pro-Sys Consultants*.

[69] I am not persuaded that the records sought are necessary at the certification hearing to enable determination of whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, having regard in particular to the relative importance of the proposed common issues and the remaining individual issues.

[70] The same reasoning leads me to conclude that the Abbott defendants have not met the burden of showing that the records are necessary to enable the court to determine whether there is sufficient evidence for the existence of common issues or that the records are necessary to enable the court to determine whether the representative plaintiffs can fairly and adequately represent the interests of the proposed class.

[71] The application is dismissed.

[72] Unless either party wishes to argue otherwise, costs are in the cause.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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