

CANADA / JUDGMENT

Cline v. Gymnastics Canada

2025 BCSC 146

COURT

Supreme Court of British Columbia

DECIDED

30 January 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 146 Cline v. Gymnastics Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cline v. Gymnastics Canada,

2025 BCSC 146

Date: 20250130

Docket: S223818

Registry: Vancouver

Between:

Amelia Cline

Plaintiff

And:

Gymnastics Canada, Alberta Gymnastics Federation, Gymnastics B.C., Manitoba Gymnastics Association Inc., The Ontario Gymnastic Federation, Fédération de Gymnastique du Québec, Gymnastics Saskatchewan Inc., Gymnastics Nova Scotia, New Brunswick Gymnastics Association Inc., Gymnastics Newfoundland & Labrador Inc.,

Northwest Territories Gymnastics Association, Gymnastics Prince Edward Island Inc., Yukon Gymnastics Association

Defendants

And:

Vladimir Lashin, Svetlana Lashin also known as Svetlana Lashina,

Omega Gymnastics Academy Society, John Doe #1-1,000,000, Jane Doe #1-1,000,000, ABC Company #1-1,000,000 and ABC Society #1-1,000,000

Third Parties

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

J. Winstanley

C. Hermanson

R. Bailey

Counsel for the Defendant Gymnastics Canada:

N. Shirazian

Counsel for the Defendant Fédération de Gymnastique du Québec:

N. Trevethan

D. Liu

N. Cooke

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.

June 19 and 20, 2024

Written Submissions of the Plaintiff Received:

December 18, 2024

Written Submissions of the Defendant Fédération de Gymnastique du Québec Received:

December 18, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 30, 2025

Table of Contents

Introduction.. 5

Background Facts. 7

The Fédération. 7

Gymnastics Canada. 8

Allegations Advanced in the Pleadings. 10

Issues. 12

Issue 1: Can this application proceed prior to the certification hearing?. 13

Position of the Parties. 13

Position of the Fédération. 13

Position of the Plaintiff 13

Legal Principles. 14

Analysis. 14

Issue 2: Does the Court have territorial competence over the Fédération Ex Juris Gymnasts?. 21

Legal Principles. 21

Position of the Parties. 26

Position of the Fédération. 26

Position of the Plaintiff 27

Analysis. 28

No Jurisdiction in This Case but for a Class Action. 28

Real and Substantial Connection. 30

Moran v. Pyle National (Canada) Ltd. 30

Harrington v. Dow Corning Corp. (BCCA) 31

British Columbia v. Imperial Tobacco Canada Ltd. 33

Stanway v. Wyeth Pharmaceuticals Inc. 33

Chalmers v. AMO Canada Company. 35

Ward v. Canada (Attorney General) 36

Silver v. Imax Corporation. 36

Meeking v. Cash Store Inc. 36

Tataskweyak Cree Nation et al v. Canada (A.G.) 38

Nelson v. Teva Canada Limited. 39

Microcell Communications Inc. v. Frey. 39

Airia Brands v. Air Canada. 42

Issue 3: What impact does the Supreme Court of Canada's decision in Sanis Health Inc. v. British Columbia have on this application?. 44

Background Facts. 44

Procedural History. 44

The Supreme Court of Canada. 47

Positions of the Parties. 48

Discussion. 50

Conclusion.. 52

Introduction

- [1] This is a pre-certification application regarding territorial competence. The Fédération de Gymnastique du Québec (the "Fédération") seeks a determination as to whether the Court has territorial jurisdiction over the Fédération in respect of the claims of its member gymnasts who have not undertaken gymnastics in British Columbia (the "Ex Juris Fédération Gymnasts").
- [2] The plaintiff has filed an action under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]. She seeks to certify a class action on behalf of all gymnasts resident in Canada who were sexually, physically, and/or psychologically abused while participating in Gymnastics Canada, its provincial member organization, or member club programs, activities, or events between 1978 to the present (the "Class Period").
- [3] I have been assigned as the case management and trial judge in this action. The timing of this application was discussed at the judicial management conference ("JMC") on July 26, 2023. At that time, the plaintiff did not contest to having the application heard prior to the certification hearing. However, at the JMC on May 16, 2024, the plaintiff raised the issue again. She agreed that the application could be heard prior to the certification application so as to avoid any further delays, but advised that she would object to the appropriateness of it being heard at that time.
- [4] For the purposes of this application, the plaintiff and the Fédération agreed to the following:
- The plaintiff and the Fédération are in agreement that the Fédération had some gymnasts that attended British Columbia for national gymnastics competitions.

· The plaintiff is not arguing that jurisdiction over the claims of the Ex Juris Fédération Gymnasts against the Fédération is established:

o via a tort committed in British Columbia; or

o [because the] common design creates a real and substantial connection between the claims of [a] non-resident plaintiff and this pleading.

Plaintiff's Written Submissions at para. 8

· Rather, the plaintiff argues that this Court has territorial competence over those claims based on the common issues among all of the plaintiffs, which the plaintiff argues establishes the real and substantial connection necessary for jurisdiction.

Plaintiff's Written Submissions at para. 7

· For the purposes of this application only, the Fédération submits that the Court can assume that:

o this Court has jurisdiction over the Fédération for the claim of Amelia Cline against the Fédération; and

o on a certification application, there would be common issues on issues of duty of care and standard of care.

This is not a general concession for other purposes.

[5] The Fédération seeks a declaration that the Court does not have territorial competence over the claims of the Ex Juris Fédération Gymnasts who were not abused by British Columbia residents on the grounds that their claims lack a real and substantial connection to British Columbia.

[6] The second amended notice of civil claim was filed on August 22, 2023. The plaintiff anticipates no further amendments to it.

[7] Gymnastics Canada is the only other party to this proceeding that filed an application response, attended the hearing, and made a short submission. The remaining defendants either took no position or consented to the orders being sought. Gymnastics Canada took no position on the granting of the orders sought but disputed certain facts in the notice of application and a supporting affidavit. It argued that:

To the extent that any findings are made, they should be for the limited purpose of determining the issues on the motion and not the ultimate findings that would be made after trial.

- [8] With respect only to the arguments made on June 19 and 20, 2024, I agree with the Fédération. However, I decline to rule definitively on the issue of territorial competence. I anticipate that, depending on my ultimate jurisdiction ruling in this application, other defendants will make similar applications alleging lack of territorial competence. To ensure consistency, I have decided to adjourn the Fédération's application, in part, to the certification hearing only in respect of the following outstanding issues:
- a) the substance of the meetings the Fédération attended in British Columbia and any impact those meetings had on the Fédération's policies; and
 - b) whether there is a real and substantial connection on the basis of a joint tort committed in British Columbia through common design.

Background Facts

- [9] For the purposes of this application, I will not make any findings of fact on any disputed evidence. Not only am I not permitted to do so, but the objective of territorial competence applications is only to determine whether there are facts alleged, which if true, would found territorial jurisdiction: *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, citing *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34.

The Fédération

- [10] The Fédération was constituted in 1971 as a non-profit legal person pursuant to the laws of the province of Québec. It was registered in the Registraire des entreprises Québec on March 3, 1995. Its registered home address is and has always been in Québec. During the Class Period, it has never had an address or agent in British Columbia or engaged in any business in British Columbia. None of its current directors are resident in British Columbia.
- [11] The Fédération is the provincial organization responsible for the development, management, and promotion of gymnastics activities in Québec. It sets up and offers various programs within different gymnastics disciplines. It publishes and implements its own bylaws, policies, procedures, and standards with respect to the sport of gymnastics in Québec. It only accepts as members gymnasts training in Québec.
- [12] The Fédération does not have any agreements with its member clubs or registered individual members (the "Members") which designate British Columbia courts as having jurisdiction over the relationship between the Fédération and its Members.

Gymnastics Canada

- [13] Gymnastics Canada is the national sport organization responsible for gymnastics in Canada. It operates under the auspices of the federal government and Sport Canada and is a separate legal entity from the Fédération. The Fédération is an affiliated member, not a subsidiary, of Gymnastics Canada. It pays \$8 per Member to Gymnastics Canada on an annual basis for that affiliation.
- [14] The Fédération is a voting member of Gymnastics Canada. From time to time, it puts forward candidates to join the Gymnastics Canada board, but these candidates run in their individual capacity. The Fédération is not otherwise involved in the governance of, and does not have any form of control over, Gymnastics Canada.
- [15] There is no requirement for a representative from Québec or from the Fédération to be on the board of Gymnastics Canada. Gymnastics Canada is not involved in, and has no control over, the Fédération's operations and activities.
- [16] Each provincial governing body of gymnastics in a province is considered a "Member" of Gymnastics Canada. These governing bodies, as well as "clubs" who have met the requisite membership requirements, are its "Provincial Member Organizations" or "PMOs". Except for Gymnastics Canada itself, all the defendants in this action are PMOs.
- [17] Gymnastics Canada creates athletic programs (the "Programs") which are distributed to its PMOs. Although the PMOs may be consulted for input by Gymnastics Canada, they do not have control over what programs are distributed by Gymnastics Canada. Both the PMOs and the member clubs in each PMO's jurisdiction may decide whether to implement the Programs. However, if the PMOs or member clubs want their gymnasts to participate on a national level, they are required to follow the Programs.
- [18] Gymnastics Canada sets, implements, and enforces certain policies, practices, and standards in respect of the sport of gymnastics in Canada and national gymnastics events. Although the PMOs may be consulted for input by Gymnastics Canada, they do not have control over the policies, practices, and standards it issues. While the Fédération abides by Gymnastics Canada's policies, practices, and standards, it also has its own bylaws, policies, practices, and standards which Gymnastics Canada has no control or input over.
- [19] Gymnastics Canada is also responsible for the coaches' certification course, required of all gymnastics coaches.
- [20] Gymnastics Canada organizes two events per year: the Canadian National Gymnastics Championships (the "Championships") and Elite Canada. Each event is held in a different location each year. When the events occur in Québec, the Fédération assists Gymnastics Canada in organizing them, but the Fédération is not involved in governing them. When the events are held outside of Québec, the Fédération does not have any form of control over them.

- [21] The Fédération has a provincial gymnastics team. Gymnasts on that team may attend the Championships and/or Elite Canada events, as well as other extra-provincial events outside of Québec. The latter events are not organized by Gymnastics Canada. Fédération gymnasts who are not on its provincial team only compete in competitions outside of Québec if their club is invited to compete by another extra-provincial club. This is uncommon.
- [22] The gymnasts on the Fédération's provincial team who participated in the Championships or Elite Canada during the Class Period would have attended those events in British Columbia when it hosted them. As previously stated, these events are organized by Gymnastics Canada. The Fédération does not have any form of control over provincial gymnastics competitions or events that occur outside of Québec.
- [23] The Fédération does not contest that a small number of its gymnasts--namely, those on its provincial team--have participated in various national gymnastics events, including ones held in British Columbia. However, during the Class Period, all the gymnasts who are or have been a member of the Fédération trained in Québec. The regular and ordinary place of practice and competition of gymnastics by these gymnasts during the Class Period was in Québec, not British Columbia. The overwhelming majority of Fédération member gymnasts have not undertaken gymnastics in British Columbia.
- [24] From time to time, some Fédération gymnast members will qualify for the Canadian national gymnastics team, for which Gymnastics Canada is responsible. That team occasionally practices at national camps hosted across Canada and competes in international competitions around the world. The Fédération is not involved in the governance of, and does not have any form of control over, any international gymnastics competitions or events organized by or through Gymnastics Canada or any foreign gymnastics organizations.
- [25] During the Class Period, the Championships were hosted in British Columbia 13 times. On these occasions, the Fédération attended only to accompany its members and to represent itself. It did not coach, interact with, or manage any gymnasts from British Columbia.
- [26] From time to time and out of convenience, the Gymnastics Canada Board might host meetings during the Championships to be attended by PMOs or technical directors of PMOs.

Allegations Advanced in the Pleadings

- [27] The plaintiff is a resident of British Columbia. She brings this proceeding on behalf of all gymnasts resident in Canada who were physically, sexually, and/or psychologically abused while participating in Gymnastics Canada, PMO, or member club programs, activities, or events between 1978 and the present.

- [28] The second amended notice of civil claim alleges that the defendants "caused or contributed to the abuse of gymnasts by creating a culture and an environment where the abuse could occur, and [by] failing to take appropriate steps to protect the athletes in their care and control, many of whom were children when the abuse took place": at para. 4.
- [29] The claim pleads the following causes of action against all of the defendants:
- a) systemic negligence;
 - b) breach of fiduciary duty;
 - c) vicarious liability; and
 - d) common design.
- [30] With regards to class members resident in Québec, the claim also pleads a breach of article 1457 of the Civil Code of Québec, C.Q.L.R. c. C.C.Q.-1991, which provides a basis for extracontractual fault.
- [31] As noted above, the plaintiff pleads common design as a path to joint liability, saying:
111. At all material times, the Defendants acted pursuant to a common design to supervise, monitor, oversee and control gymnastics programs, coaching, activities, and/or events in Canada. Each of the Defendants has assisted the other Defendants in their breaches of duties owed to the plaintiff and the Class Members
- [32] The particulars of the defendants' acts or omissions in furtherance of the common design include that they:
- a) implicitly or explicitly agreed to prioritize performance over the health and well-being of athletes;
 - b) when abuse was reported, prioritized the reputation and career prospects of coaches and other adults over the safety and well-being of the gymnasts under their care and supervision; and
 - c) refused to implement a comprehensive independent review of abuse in the sport of gymnastics.
- [33] The abuse suffered by the Class Members is alleged to have occurred "at gymnastics clubs, programs, activities and events throughout Canada".
- [34] The same acts and omissions are alleged against each of the PMOs, including that they:
- a) tolerated and condoned the abuse perpetrated against the Class Members; and
 - b) created a culture and environment that discouraged athletes from reporting abuse and, when abuse was reported, failed to take any or adequate steps to protect the Class Members, adequately investigate the abuse, or appropriately sanction perpetrators of the abuse.

- [35] Each of the PMOs is alleged to be liable to the Class Members on the basis of their "role as the provincial governing bodies, with responsibility for business, activities, and events including, but not limited to, competitions, practices, tryouts, training camps, and travel associated with activities": second amended notice of civil claim at para. 88.

Issues

1. Can this application proceed prior to the certification hearing?
2. Does the Court have territorial competence over the Ex Juris Fédération Gymnasts?
3. What impact does the Supreme Court of Canada's decision in *Sanis Health Inc. v. British Columbia* have on this application?

Issue 1: Can this application proceed prior to the certification hearing?

Position of the Parties

Position of the Fédération

- [36] The Fédération points out that the plaintiff did not contest the scheduling of the application prior to the certification application. It appears that the plaintiff is now objecting to the timing of this application on the grounds that, even if the Fédération is successful, the plaintiff's proposed class action against the Fédération would not be stayed or dismissed.
- [37] The Fédération argues that, in the circumstances of this case, the bifurcation of this jurisdictional challenge is suitable for pre-certification adjudication because it is a narrow point of law that requires very little in the way of facts. If successful on this application, the Fédération will significantly narrow the issues to be put before this Court at the certification hearing, both for itself and likely for the other PMOs. Bifurcation also avoids the costs of a more prolonged certification hearing and significantly narrows what is currently an "enormous" class size.

Position of the Plaintiff

- [38] The plaintiff argues that the Fédération's application is premature. The issue of jurisdiction over non-resident class members is one that cannot be decided prior to certification because it is intertwined with the certification analysis. The plaintiff says that the Fédération's application cannot succeed because:
- a) The Ex Juris Fédération Gymnasts' claims are not before the court. It is not until the certification application that the plaintiff is asking the court to certify a class that includes claims of non-residents.
 - b) Jurisdiction over 12 of 13 defendants is challenged and has not been resolved, and the caselaw is clear that this issue must be resolved before jurisdiction over non-resident class members can be addressed.

- c) The common issues have not been resolved and will not be addressed until the certification application. Determination of the common issues is necessary as the common issues may ground [a] real and substantial connection between the claims of the non-residents and this jurisdiction.
- [39] The plaintiff further argues that there are no cases identified where jurisdiction over non-resident class members has been decided in advance of certification. However, the plaintiff provided a long list of cases in which courts have certified a class that included non-resident class members in the context of a challenge to the court's jurisdiction. In those cases, the jurisdictional challenge has been addressed as part of the certification analysis.

Legal Principles

- [40] There is no presumption that the certification motion ought to be the first procedural matter to be heard, or that all applications be heard in conjunction with it: *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 at paras. 37, 86 [Jean Coutu]. Since there is no absolute rule, each proposal for a pre-certification motion must be looked at in the specific context of the case: *Shaver v. Mallinckrodt Canada ULC*, 2021 BCSC 455 at para. 10, citing *Lieberman et al. v. Business Development Bank of Canada*, 2005 BCSC 389 at para. 16. The likelihood of interlocutory appeals is a neutral factor in jurisdiction applications: *Jean Coutu* at para. 87. The argument that the nature of the cause of action is a relevant consideration for determining jurisdiction can be advanced before, or at the same time as, the certification application: *Jean Coutu* at para. 91.

Analysis

- [41] In this proceeding, no sequencing application was made. That issue was addressed at the JMC on May 16, 2024, when the Fédération advised that it would bring a sequencing application, if needed. The plaintiff advised that she would not object to having the Fédération's application heard prior to certification. However, she would still be raising issues relating to the appropriateness of proceeding in that fashion.
- [42] I am not persuaded that an application of this nature needs to take place at the same time as the certification application. There is no reasoned basis to deprive a defendant from advancing a jurisdictional challenge even if they would remain, to some extent, involved in the proceeding if the application was successful.
- [43] As part of the case management of this proceeding, it was clear from the first JMC on July 26, 2023 that the Fédération intended to bring a jurisdictional challenge. After hearing all of the submissions, reviewing the evidentiary record, and considering the relevant cases, in the context of this particular case, there is no valid reason to preclude this application from proceeding pre-certification.

- [44] The plaintiff provided a long list of cases in which the challenge to the Court's jurisdiction over non-resident claimants have been addressed as part of the certification process. The mere fact that this was the approach taken in those cases, does not, itself, mean that it is the approach that must be taken in this case. As stated above, there is no prescribed order for procedural matters in a class action: Jean Coutu at paras. 37, 86. Rather, "each application must be determined in the context of the particular case before the court" and the court must exercise its discretion "in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute": Jean Coutu at para. 37.
- [45] This case is factually distinct because it involves the issue of territorial competence over a subclass of non-resident plaintiffs with no connection to British Columbia, in the context of facts involving at least one defendant with no connection to British Columbia. With one exception, none of the cases the plaintiff cited involved this issue or these circumstances.
- [46] The only case that did address this territorial competence issue involved a products liability claim, where a product had been placed into the national chain of commerce. In such cases, the manufacturer can be assumed to know that the product may find itself anywhere in Canada if it is capable of being moved: see *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, leave to appeal denied, [2001] S.C.C.A. No. 21 [*Harrington BCCA*]. This is distinct from the nature of the underlying claims in this class action. First, abuse is not a product. Abuse is a form of violent or coercive human action or inaction that causes harm to another person. It can be a single incident or a pattern of behaviour, and its forms include physical abuse, sexual abuse, psychological abuse, financial abuse, and neglect. It is not a manufactured item or a service, and it is not sold or marketed to consumers in legal economic markets.
- [47] Second, a product is, via mass production, identical copies of itself. A consumer who uses the product in Ontario will receive an identical product to a consumer in British Columbia. Abuse, however, is never committed the same way twice. It is a wrong that can be perpetrated in a plethora of different ways and circumstances across time and location. The unique and individual nature of each iteration of abuse is therefore so different from a product liability claim that I am not persuaded that I must address the issue of territorial competence at the time the court did in those cases.
- [48] My review of each case cited by the plaintiff is set out below.
- [49] In *Chalmers v. AMO Canada Company*, 2009 BCSC 689 [*Chalmers BCSC*], aff'd 2010 BCCA 560, the plaintiff contracted a rare but serious eye infection from her use of a contact lens solution. She sought to certify a class proceeding on behalf of all persons resident in Canada who contracted the infection after purchasing or using the solution. Two other subclasses were proposed but were not dealt with.
- [50] The Court held that it had territorial competence over the claims of non-British Columbia resident class members against each of the two defendants, AMO Canada Company ("AMO") and its US parent, Advanced Medical Optics, Inc.: para 82. It had jurisdiction over the claims

against AMO under s. 3(d) of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA] because its extra-provincial registration in British Columbia meant that it was ordinarily resident in British Columbia: at para. 68. The Court relied on the decision in Harrington BCCA to conclude there was a real and substantial connection between British Columbia and the non-residents' claims against the parent company. The connection was the existence of the common issues relating to claims of British Columbia residents against the defendants and the claims of the non-residents against AMO: paras. 70-76.

- [51] In *Hoy v. Medtronic*, 2001 BCSC 1343, aff'd 2003 BCCA 316, the plaintiff proposed to certify a class of all Canadian residents implanted with pacemakers distributed in Canada, a component of which was allegedly defective. The defendant, Medtronic Inc., was the US parent company of Medtronic of Canada Ltd., which had a head office in British Columbia: at para. 34. The Court relied on *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.) [Harrington BCSC] and *Harrington BCCA*, to find that it was appropriate to certify a non-resident subclass.
- [52] In *Bergen v. WestJet Airlines Ltd.*, 2021 BCSC 12, aff'd 2022 BCCA 22, the plaintiff sought to certify an action against the defendant WestJet companies, alleging that they had represented in their published tariffs that a first checked bag would be free but charged passengers anyway. The plaintiff proposed to certify the action on behalf of individuals residing anywhere in the world who had travelled on a fare-paying itinerary on a WestJet-operated flight and paid a fee for their first checked bag during the relevant periods: para. 12. The Court's jurisdiction over WestJet was not challenged, likely because there was no question that WestJet did business in British Columbia.
- [53] The defendants did not raise a jurisdictional challenge regarding the worldwide scope of the proposed class, but merely argued that a worldwide action would be "unwieldy and difficult to manage": para. 59. The Court concluded that there was no reasonable basis upon which to exclude from the class passengers resident outside of Canada. There was no distinction in the contractual obligations the defendants had to Canadian and foreign claimants. Any practical challenges resulting from the broad scope of the class could be dealt with by procedural safeguards: at paras. 57-60. This is not the issue before me.
- [54] In *McCorquodale v. RBC Global Asset Management Inc.*, 2021 BCSC 144, the plaintiff sought to certify a class action on behalf of all persons, "wherever they reside", who hold or held at any time during the class period, one or more units in two investment funds: para. 83. Both of the defendants were companies amalgamated under the laws of Canada. While not expressly stated, both companies operated in British Columbia. The Court found it had jurisdiction over the absent foreign claimants pursuant to the CJPTA and the framework in *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, leave to appeal ref'd, [2017] S.C.C.A. 476: para. 175 [Airia Brands].

- [55] In *Bleuler v. RateMDs Inc.*, 2024 BCSC 755, the plaintiff physician alleged that the defendants breached provincial privacy legislation by posting profiles of health professionals on their website without consent and then rating them. She proposed to certify a class of all living, current or former health professionals in British Columbia, Saskatchewan, Manitoba, Quebec, and Newfoundland and Labrador who, at the relevant times, has or had a profile on the website: at para. 97. While the defendants argued that including claims brought in different provinces was inappropriate, it did not challenge the Court's jurisdiction over those proposed class members.
- [56] In *Abdula v. Canadian Solar Inc.*, 2015 ONSC 53, the plaintiff sought to certify a class action on behalf of "all persons, wherever they may reside or be domiciled" who had acquired securities of the defendant corporation during the class period. The defendant company had its registered office and principal executive office in Ontario and conducted business in the province: paras. 48, 60. For this and other reasons, the company had a real and substantial connection to Ontario and the Court's jurisdiction to deal with it was not in issue: para. 59. The Court noted that this was not a case where the defendant was being forced to defend a lawsuit in a jurisdiction to which it had no connection: at para. 60. On this point alone, this case is distinct from the one before me because the Fédération has no connection to British Columbia.
- [57] In *Silver v. Imax Corporation*, [2009] O.J. No. 5585, 2009 CanLII 72334 (S.C.), the plaintiffs brought an action for misrepresentation on behalf of all persons who acquired IMAX Corporation ("IMAX") securities during the class period on the TSX and NASDAQ and held some or all of them at the close of trading: at para. 98. The defendant, IMAX, was a corporation registered under the Canadian Business Corporations Act, R.S.C. 1985, c. C-44, with its head office in Ontario. In addition, the financial statements at issue were prepared and audited in Ontario, and the alleged representation was made in Ontario: at paras. 109, 129-130. On this basis, the Court held that there was a real and substantial connection between the claims of the non-resident class members and Ontario: at para. 129.
- [58] In *McCutcheon v. The Cash Store Inc.*, (2006) 80 O.R. (3d) 644, 2006 CanLII 15754 (S.C.), the plaintiff sought to certify a class action, alleging that the defendant companies had imposed a criminal interest rate. The proposed class was national but excluded persons resident in British Columbia. The defendant, The Cash Store Inc., was a corporation incorporated under the laws of Alberta and carried on business in nine provinces, including Ontario, and two territories. Its parent company, Rentcash Inc., was incorporated in Ontario: at para. 2.
- [59] The defendants objected to the Court's jurisdiction over non-resident class members on the ground that it could not bind persons who obtained loans in other provinces or territories: at paras. 30, 53. The Court relied on *Harrington BCSC* for the proposition that a common issue can establish the real and substantial connection necessary for jurisdiction: paras. 40, 50.

- [60] The Court noted that all the claims of the non-resident class members were based on material facts that occurred outside of Ontario: at para. 37. This is the situation of the Fédération Ex Juris Gymnasts. However, unlike The Cash Store Inc. and its parent company, the Fédération has no connection to British Columbia. In addition, the nature of the tort claims in this case are distinct from those before me. On this basis, I conclude that McCutcheon is sufficiently distinct such that I am not bound to follow its analytical sequencing.
- [61] In *Wilson v. Servier Canada Inc.*, (2000) 50 O.R. (3d) 219, 2000 CanLII 22407 (S.C.) [Wilson No. 1], the plaintiff sued in tort for harm caused by a drug marketed, purchased, and ingested in Canada. The proposed class included residents of every Canadian province except Québec. One of the defendants was a Canadian company. The other, a French company called Biofarma S.A., was the Canadian company's parent. The Court found that there was a real and substantial connection between the subject matter of the action, founded in tort, and Ontario: at para. 21. The Court concluded that Biofarma S.A. had attorned to Ontario jurisdiction via its "unconditional appearance" following its filing of a Notice of Intent to Defend: at para. 17. As the Fédération has not attorned, this case is distinguishable.
- [62] In *Nantais v. Teletronics Proprietary (Canada) Ltd. et al.*, (1995) 25 O.R. (3d) 331, 1995 CanLII 7113 (S.C.), leave to appeal ref'd, [1995] O.J. No. 3069, 25 O.R. (3d) 347, the plaintiff sought to certify a class action for defective pacemakers. The pacemaker leads were marketed and implanted in Canada by the defendants, who were members of an international family of associated corporations with an Australian parent: at para. 4. The Court dismissed the defendants' jurisdictional concerns regarding the non-Ontario resident class members on the grounds that any double jeopardy issues were unlikely to be prejudicial to the defendants: at paras. 76-79. As a product liability case, *Nantais* is distinguishable.
- [63] In *Anderson v. Bell Mobility Inc.*, 2010 NWTSC 65, no territorial jurisdictional issues arose because the defendant provided telephone services in the North West Territories and had entered into a service agreement with the plaintiff in that jurisdiction: at paras. 6, 19.
- [64] The plaintiff argues that these cases support that, where there is a challenge to the court's jurisdiction, that challenge ought to be addressed as part of the certification analysis. Based on my review, none of the non-products liability cases cited by the plaintiff involve a defendant who was not incorporated in, and had no office or place of business in, the relevant province. I am not persuaded that, on these authorities, there is a requirement that the territorial jurisdictional issue be addressed as part of the certification hearing.
- [65] I am of the view that this application can be heard prior to certification and it is appropriate to consider the merits of the application.

Issue 2: Does the Court have territorial competence over the Fédération Ex Juris Gymnasts?

Legal Principles

- [66] Pursuant to R. 21-8 of the Supreme Court Civil Rules [Rules], a defendant may apply to stay or dismiss claims against it for lack of territorial competence.
- [67] The CJPTA provides a complete code for determining the territorial competence of this Court: CJPTA, s. 2(2); *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 at para. 22; see also *Cockerham v. Hanc*, 2014 BCSC 2432 at para. 45. It is a procedural statute that confers no substantive rights: *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 22; *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 at para. 25; *Harrington BCCA* at para. 85.
- [68] The CJPTA sets out five circumstances in which the court will have territorial competence in a proceeding:

Proceedings against a person

3 A court has territorial competence in a proceeding that is brought against a person only if

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court's jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[69] It is useful to point out that ss. 3(b), (c), and (d) together codify the two traditional bases upon which jurisdiction could be asserted over an *ex juris* defendant: presence-based and consent-based jurisdiction. These bases were explained by the Court in *Muscutt v. Courcelles*, (2002) 60 O.R. (3d) 20, 2002 CanLII 44957 (C.A.) as follows:

[19] There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, [page29] or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

- [20] This appeal raises the issue of assumed jurisdiction. Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to Morguard and Hunt, assumed jurisdiction did not provide a basis for recognition and enforcement.
- [70] These traditional bases for jurisdiction were preserved by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 [Van Breda]: see *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at para. 81 [Chevron].
- [71] To establish presence-based jurisdiction over an out-of-province defendant, the plaintiff must establish that the defendant was carrying on business in the forum at the time of the action: *Chevron* at para. 85. This is a question of fact and requires some form of actual presence in British Columbia, such as maintaining an office there: *Van Breda* at para. 87.
- [72] In this case, ss. 3(a) to (d) of the CJPTA--and thus the traditional presence- and consent-based grounds for jurisdiction--do not apply. This Court will only have territorial competence in this application if the plaintiff can establish that there is a real and substantial connection between British Columbia and the facts on which the proceeding against the Fédération is based: CJPTA, s. 3(e). This has been referred to as the "assumed" basis for jurisdiction: *Chevron* at para. 82.
- [73] Section 10 of the CJPTA provides a list of presumptive circumstances that will support a real and substantive connection:

Real and substantial connection

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
- (b) concerns the administration of the estate of a deceased person in relation to
 - (i) immovable property in British Columbia of the deceased person, or
 - (ii) movable property anywhere of the deceased person if at the time of death the person was ordinarily resident in British Columbia,
- (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
 - (i) property in British Columbia that is immovable or movable property, or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in British Columbia;

(iii) the administration of the trust is principally carried on in British Columbia;

(iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,

(ii) by its express terms, the contract is governed by the law of British Columbia, or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,

(g) concerns a tort committed in British Columbia,

(h) concerns a business carried on in British Columbia,

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in British Columbia, or

(ii) in relation to property in British Columbia that is immovable or movable property,

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia,

(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or

(l) is for the recovery of taxes or other indebtedness and is brought by the government of British Columbia or by a local authority in British Columbia.

- [74] If any one of the listed circumstances is established, a real and substantial connection is presumed to exist: Van Breda at para. 41.
- [75] The only listed circumstance which could apply in this case is s. 10(g). However, by agreement, the plaintiff does not rely on s. 10(g) in this application. Instead, the plaintiff thus relies on the opening words of s. 10 of the CJPTA, which expressly preserves its right to prove other circumstances that constitute a real and substantial connection. These circumstances or "connecting factors" must be "objective factors that connect the legal situation or subject matter of the litigation with the forum": Van Breda at para. 82.
- [76] The standard of proof is low. The basic jurisdictional facts the plaintiff relies on are taken to be true: Ewert v. Höegh Autoliners AS, 2020 BCCA 181 at para. 16. This is often referred to as the presumption that the pleaded facts are true. The defendant may contest these facts with evidence. If it chooses to do so, then the plaintiff is only required to show that there is a good arguable case that the pleaded facts can be proven: Ewert at para. 16.
- [77] In Van Breda, the Supreme Court of Canada clarified the real and substantial connection test as it relates to claims in tort: at para. 85. It noted that the presence of the plaintiff in the jurisdiction is not, itself, a sufficient connecting factor: at para. 86. The Court then set out a non-exhaustive list of presumptive connecting factors sufficient to establish a real and substantial connection (and thus, territorial competence):
- [90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute:
- (a) the defendant is domiciled or resident in the province;
 - (b) the defendant carries on business in the province;
 - (c) the tort was committed in the province; and
 - (d) a contract connected with the dispute was made in the province.
- [78] All of these factors are codified in the CJPTA: ss. 3, 10.
- [79] The Court went on to set out the relevant considerations pursuant to which courts may identify new presumptive factors:
- [91] As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:
- (a) Similarity of the connecting factor with the recognized presumptive connecting factors;
 - (b) Treatment of the connecting factor in the case law;

- (c) Treatment of the connecting factor in statute law; and
 - (d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.
- [92] When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.
- [80] If there are no connecting factors, whether under the CJPTA or as recognized at common law, then there is no real and substantial connection and the court does not have territorial competence: *Van Breda* at para. 93.

Position of the Parties

Position of the Fédération

- [81] The Fédération says that the Court has no territorial competence over the *Ex Juris Fédération Gymnasts* under the CJPTA, and thus their claims should not be included in this proceeding.
- [82] The Fédération has not attorned to, and does not submit to, the jurisdiction of this Court. It does not concede that this Court has jurisdiction over it for any purpose. In this application, the Fédération is only challenging the territorial jurisdiction of the Court over itself with respect to the *Ex Juris Fédération Gymnasts*.
- [83] The Fédération argues there is no real and substantial connection between British Columbia and the claims of the *Ex Juris Fédération Gymnasts* for the following reasons:
- a) There is no tort committed in British Columbia concerning the *Ex Juris Fédération Gymnasts*, whose claims arose outside of British Columbia;
 - b) A class action is a procedural vehicle and does not extend jurisdiction just because the claim is a class action;
 - c) The allegation of "common design" does not create a real and substantial connection between the claims of the *Ex Juris Fédération Gymnasts*, whose claims did not give rise to harm, injury, or expense in British Columbia;

- d) The existence of "common issues" with the claims of British Columbian gymnasts arising from torts committed in British Columbia does not create a real and substantial connection between the claims of the Ex Juris Fédération Gymnasts and British Columbia;
 - e) Product liability cases are factually distinct from abuse cases; and
 - f) The disorderliness of a Québec court refusing to enforce a British Columbia judgment in circumstances where the British Columbia Court exercised jurisdiction over claims arising outside of British Columbia points to a lack of territorial competence.
- [84] The Fédération argues territorial jurisdiction requires something more than a common design and/or common issues. In support, the plaintiff relies on *Bisaillon and Seidel v. TELUS Communications Inc.*, 2011 SCC 15.

Position of the Plaintiff

- [85] In her application response, the plaintiff argued that the Court has territorial competence over the Fédération because there is a real and substantial connection between it and British Columbia pursuant to s. 10(g) of the CJPTA. However, at the hearing of this application, the parties handed up a copy of a joint agreement, pursuant to which they agreed that the plaintiff "was not arguing that jurisdiction over the claims of the Ex Juris Fédération Gymnasts is established via a tort committed in British Columbia": see para. 4 of these reasons. I understood this to mean that the plaintiff had abandoned her s. 10(g) argument for the purposes of this application.
- [86] Instead, the plaintiff relies on common issues as a presumptive connecting factor. She argues that "[t]he basis on which the jurisdiction 'encompasses, or extends' to jurisdiction over non-resident class members is that the common issues among all of the plaintiffs establishes the real and substantial connection necessary for jurisdiction".
- [87] The plaintiff asserts that the evidence on this application establishes that the Fédération's conduct relevant to this claim occurred in Canada, including in British Columbia. The evidence in support is as follows:
- (a) The Canadian National Gymnastics Championships were held in British Columbia 13 times between 1985 and 2023.
 - (b) When in attendance at the Canadian National Gymnastics Championship hosted outside of Quebec, the Fédération was in attendance to accompany members and to represent the Fédération.
 - (c) From time to time, the Gymnastics Canada board hosted meetings to be attended by PMOs at the time and place of the Canadian National Gymnastics Championships.

- (d) From time to time, the technical directors of the PMOs had discussions during the Canadian National Gymnastics Championships in which they shared information relating to their provincial programs.
- (e) From time to time, Gymnastics Canada held their general assembly annual general meeting in British Columbia, which was attended by the president of the Board of Directors of the Fédération.

Analysis

No Jurisdiction in This Case but for a Class Action

- [88] The fact that this action is a proposed class proceeding does not negate the requirement that the Court have territorial jurisdiction over the defendants. The only ground on which the Court can assert territorial competence in this proceeding in respect to the Fédération is that there is a real and substantial connection between British Columbia and the facts on which the proceeding against it is based.
- [89] The parties agree that for the purposes of this application none of the enumerated presumptive categories set out in s. 10 of the CJPTA apply in this case. In particular, with respect to s. 10(g), the parties agree that the pleadings do not allege that a tort was committed in British Columbia, or by British Columbia residents, against the Ex Juris Fédération Gymnasts. I will not consider this issue further.
- [90] There is no doubt that, but for this action being brought under the CPA, this Court would not have jurisdiction to consider the allegations advanced against the Fédération with respect to the Ex Juris Fédération Gymnasts. Instead, they would have been required to advance their claims in Québec because the situs of the injury occurred in Québec: *T.C. v. A.M.*, 2011 BCSC 1002 at para. 12. This is a key distinguishing factor of this case.
- [91] In *T.C.*, the plaintiff sought to certify an action (not a class action) she commenced against her former father-in-law for damages for sexual assault. The assault was alleged to have occurred in Québec. The father-in-law was and always had been a resident of Québec. The plaintiff had moved to British Columbia 10 years prior and had resided there ever since.
- [92] The Court held that it did not have territorial competence. Since ss. 3(a) to (d) of the CJPTA did not apply, the only basis on which territorial competence could be established was a real and substantial connection: at para. 7. Like in this case, none of the factors in s. 10 of the CJPTA applied. The Court held that the mere residence of the plaintiff in British Columbia was insufficient to establish a real and substantial connection: at para. 10. This point was later affirmed by Justice LeBel in *Van Breda*: at para. 86.

- [93] Similarly, the fact that she suffered harm in British Columbia was due entirely to her residence there: at para. 12. The Court relied on the decision in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, 1973 CanLII 192, for the proposition that "if the essence of a tort is injury, 'a paramount factor in determining situs must be the place of the invasion of one's right to bodily security': at para. 12. That location was Québec.
- [94] I find this case analogous in several respects. First, it involves a claim of sexual assault, which is one of the particulars of abuse advanced in this proceeding. Second, the father-in-law, like the Fédération, was resident in another province and had no ties to British Columbia. Third, the alleged injury, as in this case, occurred in another province. The only distinction is that, unlike the *Ex Juris Fédération Gymnasts*, the plaintiff was resident in British Columbia. This is something more than what is present on the facts here, and still it was insufficient to establish territorial competence. This highlights the strength of the connecting factor required to satisfy the test. As Justice Loo stated in *Josephson v. Balfour Recreation Commission*, 2010 BCSC 603:
- [77] While the real and substantial connection test has been described as "flexible" -- which suggests an ability to bend without breaking, or adaptability -- there is still a requirement to prevent overreaching. Flexibility does not equate to reaching to find a real and substantial connection where none exists.
- [79] The real and substantial connection test requires that there be a significant or substantial connection: *Beals v. Saldanha*, [2003] 3 S.C.R. 416; and *UniNet Technologies Inc. v. Communication Services Inc.*, 2005 BCCA 114.
- [95] Pursuant to the joint agreement, the plaintiff is not arguing that the common design pleading creates a real and substantial connection between the *Ex Juris Fédération Gymnasts* and this proceeding. As such, I will not address this issue.

Real and Substantial Connection

- [96] The issue here is jurisdiction territorial competence. Specifically, does the existence of a common issue among the plaintiffs establish the real and substantial connection necessary for jurisdiction? The plaintiff says it does. In support, she relies on *Harrington BCCA*, *Chalmers BCCA*, *Sandoz Canada Inc. v. British Columbia*, 2023 BCCA 306, the Supreme Court of Canada in *Sanis Health Inc. v. British Columbia*, 2024 SCC 40 [Sanis] and cases in three other jurisdictions that were consistent with the principles set out in *Harrington BCCA*.
- [97] I now turn to the cases provided by the parties considering when there is a real and substantial connection arising from a common issue.

Moran v. Pyle National (Canada) Ltd.

- [98] In *Moran*, an electrician was fatally injured in Saskatchewan while removing a defective light bulb. The defendant Ontario manufacturer did not carry on business in Saskatchewan and had no property, assets, or agents in that province. The electrician's family brought an action in negligence pursuant to The Fatal Accidents Act, R.S.S. 1965, c. 109.
- [99] The Supreme Court of Canada held that the Saskatchewan Court had jurisdiction over the defendant company because, by placing a defective product "in the interprovincial flow of commerce", it was selling defective light bulbs into Saskatchewan and the plaintiff was actually injured there: at 409. Justice Dickson found a real and substantial connection in the injury caused by the defendant by a flexible application of the test for a location of a tort. He formulated the rule appropriate to a case of careless manufacture as follows, at 409:

where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant . By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

Harrington v. Dow Corning Corp. (BCCA)

- [100] In *Harrington BCCA*, the plaintiff launched a negligence claim against the manufacturers of silicone breast implants and a supplier of silicone. The resident and non-resident subclass were comprised of women who had been implanted with silicone gel breast implants and suffered an injury caused by the implant. The issue was whether a British Columbia court could adjudicate a British Columbia class action in which some victims had been implanted with the faulty product outside British Columbia but had subsequently moved to that province.
- [101] On the issue of jurisdiction, the Court noted that "jurisdiction involves two concepts: jurisdiction simpliciter and forum (non) conveniens. The first is a question of law, the second involves an exercise of discretion": para 69. The test for jurisdiction simpliciter requires a real and substantial connection between British Columbia and either the defendant or the subject-matter of the litigation: at para. 69.
- [102] After considering the court's jurisdiction over British Columbia residents, the Court turned to the issue of its jurisdiction over non-residents without a direct connection to British Columbia: at para. 72. It held that jurisdiction simpliciter is not a rigid concept only capable of determination by strict application of the rules: para 86. It explained:

- [90] The jurisdictional rules being functional, the values protected by the real and substantial connection test dictate the factors relevant to its application. The fundamental values are fairness to the parties and orderly decision-making. As Mr. Justice La Forest noted in *Hunt v. T & N PLC*, supra, at 325, "the connections relied on under the traditional rules are a good place to start." However, broad principles of order and fairness must prevail. A decision whether a court has jurisdiction must not depend on a mechanical application of a rigid test.
- [91] Some cases will not require a court to move beyond the traditional rules. If a defendant is within the jurisdiction or has submitted to judgment by agreement or attornment or if a wrong has been committed within the jurisdiction, the test will normally be satisfied .
- [92] Where the traditional rules are not adequate to ensure fairness and order then other considerations will become relevant. One such consideration will be the nature of the subject matter of the action. In this case, the alleged wrongful acts are defective manufacture or failure to warn. When a manufacturer puts a product into the marketplace in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada if it is capable of being moved. As I suggested earlier in these reasons, it is reasonable to infer that a manufacturer of a breast implant knows that every purchaser will wear that implant wherever she resides, and that if the implant causes injury then the suffering will occur wherever she resides, and require treatment in that location. By the action of sale, the manufacturer risks an action in any province. In these circumstances, there can be no injustice in requiring a manufacturer to submit to judgment in any Canadian province. The concept of *forum non conveniens* is available to deal with any individual case where a different forum is established as more appropriate. As Mr. Justice La Forest remarked in the passage I quoted from *Tolofson*, supra, in some circumstances individuals need not be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience.

[Emphasis added, bolding of case names removed.]

- [103] I agree with the *Fédération* that *Harrington BCCA* does not stand for the general proposition that common issues create a real and substantial connection sufficient for territorial competence. As noted above, *Harrington BCCA* concerned the alleged wrongful acts of a manufacturer putting into the marketplace a product capable of being moved anywhere in Canada. The nature of the action as a product liability case was critical and the existence of common issues itself was not sufficient to found territorial competence. The analysis in this case therefore does not apply to the types of claims in this proceeding. In the alternative, if I am wrong, *Harrington BCCA* is distinguishable because the non-resident subclass had moved to British Columbia following implantation. In the case before me, there is no allegation or pleading that the *Ex Juris Fédération Gymnasts* have such a connection to British Columbia.

British Columbia v. Imperial Tobacco Canada Ltd.

[104] In *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 [Imperial Tobacco], the Court of Appeal held that jurisdiction over the ex juris defendants was derived directly from the analysis in *Moran*: at para. 33. The Court then referred *Harrington BCCA*:

[33] In finding that the court could take jurisdiction, Huddart J.A. [in *Harrington BCCA*] reviewed the history of the real and substantial connection test and then said, at para. 84:

In my view, this rule is sufficient to justify the inclusion in the resident class of all women resident in British Columbia who allege they are suffering harm from the use of silicone breast implants manufactured and put into the flow of commerce negligently by an appellant. Any manufacturer of breast implants would understand that any injury would follow the user in whom they were implanted into whatever jurisdiction the user might reside from time to time.

[Emphasis in original.]

[105] The Court concluded that there was no basis upon which to interfere with the trial judge's conclusion that the British Columbia court had jurisdiction over the ex juris defendants who sold cigarettes in British Columbia: *Imperial Tobacco* at para. 35. With respect to the defendants who did not manufacture cigarettes sold in British Columbia, the Court found it had jurisdiction over them on the basis that they were alleged to be parties to a conspiracy: at para. 41. There is no conspiracy alleged in the second amended notice of civil claim.

Stanway v. Wyeth Pharmaceuticals Inc.

[106] In *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592, the plaintiffs brought a class action alleging that they had suffered harm as a result of taking hormone therapy drugs manufactured by the six named defendants. The first defendant, Wyeth, was a US company incorporated in Delaware. The remaining five defendants were its wholly owned subsidiaries. Two of the five subsidiaries were Canada Business Corporations Act, R.S.C. 1985, c. C-44 corporations with registered offices in British Columbia who carried on business in Canada via a third subsidiary, a Canadian general partnership. The two remaining subsidiaries were US companies: paras. 28, 36. Wyeth and the two US subsidiaries (the "US Appellants") did not maintain an office in British Columbia and were not registered or licensed to carry on business in British Columbia: para. 37. They appealed the lower court's decision that it had territorial competence over them.

[107] The Court of Appeal held that while the chambers judge's analysis was flawed, her conclusion was correct. The British Columbia court had territorial competence over the US Appellants because, through other defendants, they had placed the drugs in the stream of commerce in British Columbia. This was sufficient to establish a real and substantial connection:

[78] As I have explained, the connections between British Columbia and the subject matter of the proceeding against the US defendants as pleaded and as shown on the evidence are real and substantial. The pleading alleges the US defendants jointly with the Canadian defendants placed the products into the stream of commerce in British Columbia and failed to warn the

plaintiff of the risks of using the products when they knew or ought to have known that they were unsafe for use and that they jointly carried on the business of promoting and selling the products in British Columbia. Under the "personal subjection" approach, it was therefore reasonable for them to contemplate they might be sued in British Columbia. Thus, their conduct amounts to personal subjection to the jurisdiction and the requirements of comity and its underlying principles of order and fairness are satisfied.

[108] This is distinguishable from the facts underlying the proceeding before me.

[109] I agree with the comments in *Dembroski v. Rhinds*, 2011 BCCA 185, by the Court of Appeal regarding *Moran and Stanway*:

[42] *Moran and Stanway* were both product liability cases in which it was held that the tort occurred in that jurisdiction in which harm accrued to a plaintiff via contact with a defective product. The harm in each case was caused by an item that harmed the particular plaintiff in the place where that injured party resided. That sufficed to found jurisdiction over a defendant who did not have any physical presence in such location.

[43] As can be seen from those cases, the place where the damage occurred via contact with the item was the crucial factor that underpinned the assumption of jurisdiction. It seems to me that it was this type of situation that Cumming J.A. had in mind when he observed in *Jordan*, "Clear examples of connecting factors include the residency of the defendant in the jurisdiction or the fact that the tortious act was committed or damages suffered here" (para. 23).

Chalmers v. AMO Canada Company

[110] In *Chalmers BCSC*, the plaintiff alleged the defendants were negligent in the research, development, testing, manufacture, distribution and sale of contact lens solution: at para. 6. The Court of Appeal found that *Harrington BCCA* was binding and thus the chambers judge did not err by relying on it in his determination that the British Columbia Court had territorial competence over the claims of the non-British Columbia resident class members: at para. 44.

[111] The Court noted at para. 76:

The alleged wrongful act is the defective design and manufacture of the Solution. AMO placed the Solution in the marketplace throughout Canada. In doing so, it knew that it risked action being taken against it in any province. There is no injustice in requiring AMO to submit to the jurisdiction of the courts of British Columbia.

- [112] With respect to Harrington BCCA, the Court stated at para. 40 that, in that case "[t]he majority of the Court agreed with the chambers judge that the existence of a common issue of fact constituted [a] sufficient connection to found jurisdiction". The plaintiff argues that this supports its argument that a common issue of fact is all that is required to establish territorial competence. I disagree.
- [113] It is essential that this statement be contextualized within the entirety of the facts in Chalmers BCCA and Chalmers BCSC. It was made in the context of a products liability case in which the defendants were alleged to have placed a defective product into the Canadian marketplace, akin to the allegations in Harrington BCCA. In that context, and in light of the binding precedent in Harrington BCCA, the defendants could not avoid answering for their actions in British Columbia.
- [114] I agree with the submissions of the Fédération that the unique characteristic of Harrington and Chalmers is that the defendants had placed into the flow or commerce, or the marketplace in Canada, an allegedly defective product. It was on this basis that the BC courts had jurisdiction over the claims of the non-resident users of the product.

Ward v. Canada (Attorney General)

- [115] The plaintiff notes that Harrington BCCA has been followed in Ward v. Canada (Attorney General) et al., 2007 MBCA 123. In Ward, the plaintiff, a Manitoba resident, proposed a class action against the Ministers of the Federal Crown (the "Crown") for harm sustained in Manitoba allegedly caused by the spraying of herbicides in New Brunswick. The Court acknowledged that the Crown is a resident in every province and territory in Canada: para 2. Per the traditional presence-based approach, jurisdiction "normally depends on the presence of the defendant within the territorial limits of the Court or upon the voluntary submission of the defendant to the authority of the Court": Ward at para. 35, citing Moran at 397. Since (a) both the plaintiff and the defendant were resident in the province, (b) there was "a connection such as the sustaining of damage within the province", and (c) the Court would have had jurisdiction but for the proceeding being a class action, the Court accepted that the traditional approach should be applied: at para. 41.
- [116] I am not persuaded that the decision in Ward is of any relevance to the decision in this proceeding. Neither party argues that the Fédération is a resident of British Columbia. In addition, absent a class action, this Court would have no jurisdiction over the claims of the Ex Juris Fédération Gymnasts.

Silver v. Imax Corporation

- [117] The plaintiff also relies on Silver, which I have already commented on. The factual findings in Silver cannot be made in this case because the Fédération does not carry on business in British Columbia and the alleged wrongful actions against the Ex Juris Fédération Gymnasts occurred in British Columbia, not in Québec.

Meeking v. Cash Store Inc.

- [118] I turn now to the Manitoba Court of Appeal decision in *Meeking v. Cash Store Inc. et al.*, 2013 MBCA 81. This case concerned an Ontario court's jurisdiction to certify a class action and approve a corresponding settlement that purported to be binding on Manitoba residents where the transactions giving rise to the claim occurred wholly in Manitoba: para. 1. The Ontario action on appeal was the *McCutcheon* proceeding, which I have summarized above. Only the Court's analysis regarding jurisdiction over non-resident Manitobans is relevant.
- [119] The defendant carried on business in Manitoba and the transactions giving rise to the plaintiff's claim all occurred in Manitoba: at paras. 76-77. The Court found the jurisprudence allowing for common issues to be a presumptive connecting factor in the real and substantial connection test persuasive: at para. 93. The plaintiff argues that I should reach the same conclusion in this application. I disagree. The Court expressly stated that common issues are a presumptive connecting factor sufficient to give the court jurisdiction over non-resident plaintiffs in circumstances where the court has territorial jurisdiction over both the defendant and the representative plaintiff: at para. 97. These are not the circumstances before me.
- [120] In *Meeking*, the Court relied on a number of cases including: *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165, 2005 CanLII 18717; *Bisaillon; Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 [Dell]; *Parsons v. The Canadian Red Cross Society*, 2013 ONSC 3053; and *Thorpe v. Honda Canada, Inc.*, 2011 SKQB 72.
- [121] The Court in *Meeking* noted that both *Bisaillon* and *Dell* dealt with subject matter jurisdiction and not the broader questions of the real and substantial connection test and constitutional territorial jurisdiction. I find both cases distinguishable.
- [122] *Parsons* addressed the issue of whether a judge of the Superior Court of Ontario has jurisdiction to sit in another province to hear a motion concerning a pan-Canadian settlement agreement of related class actions certified in Ontario. It is of no assistance because it concerns a completely different issue than the one before me.
- [123] *Baxter* concerned a sequencing application and not the issue of territorial competence which is the issue before me. I decline to consider it.
- [124] In *Thorpe*, the plaintiff proposed a multi-jurisdictional product liability class action against the defendant, *Honda Canada Inc.*, alleging that its 2006 and 2007 model year Honda Civic vehicles were manufactured with a defect that caused premature tire wear. The defendant challenged the constitutionality of the "opt-out" model of multi-jurisdictional class action legislation. The legislation was upheld as it was procedural only and did not confer judicial jurisdiction over class actions: paras. 119, 127. Notwithstanding this finding, the Court went on to consider jurisdiction simpliciter. Following *Wilson No.1*, the Court held that it had "unquestionable jurisdiction" to adjudicate the plaintiff's claims because she resided in the

province and her cause of action arose there: paras. 135-138. On this basis, and as a product liability case, Thorpe is distinguishable.

Tataskweyak Cree Nation et al v. Canada (A.G.)

- [125] The plaintiff cites *Tataskweyak Cree Nation et al v. Canada (A.G.)*, 2021 MBQB 153 [Tataskweyak], as further support for Meeking. The plaintiff relies on the following phrase from para. 26: "[t]he Manitoba courts can assume jurisdiction over the claims of class members resident in other provinces when they are represented by a Manitoba plaintiff with whom they share common issues".
- [126] The plaintiffs in *Tataskweyak* sought to certify a class action against the Attorney General of Canada which would address First Nations' entitlement to clean drinking water on Indigenous reserves: at para. 1. The decision concerned the intervenor's objection to certification on the grounds that the proposed representative plaintiffs had a conflict of interest that prevented them from representing both First Nations and their members: at paras. 6, 11. This case is of little assistance because it does not deal with the issue before me. Alternatively, it is distinguishable on two grounds. First, the defendant consented to the certification of the class proceeding: para. 2. Second, there was no challenge to the Court's jurisdiction over the defendant.

Nelson v. Teva Canada Limited

- [127] In further support of *Harrington BCCA*, the plaintiff directed me to *Nelson v. Teva Canada Limited*, 2020 SKQB 159, rev'd 2021 SKCA 171. Since this case was overturned on appeal, I find its comments regarding *Harrington BCCA* unpersuasive. I decline to deal with it further.

Microcell Communications Inc. v. Frey

- [128] The plaintiff cites *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 [Microcell], as authority for the proposition that common issues can provide a real and substantial connection to ground this Court's jurisdiction over the *Fédération*. The *Fédération* submits that Microcell was wrongly decided or, alternatively, that it is distinguishable.
- [129] In *Microcell*, six corporate defendants who provided cellular or wireless voice services and operate across Canada appealed the lower court's decision to certify a class action against them in unjust enrichment for recovery of improper fees. Three of the defendants raised jurisdictional issues. One of the three, Bell Alliant, appealed the lower court's decision that the Saskatchewan Court had territorial competence over it: paras. 6, 9. Bell Alliant's position was unique because it was the only one of the six appellants who was not registered to carry on business in Saskatchewan and therefore was not ordinarily resident in that province: para. 79.

- [130] The Court dismissed Bell Alliant's appeal: para. 95. It began its analysis by highlighting the unique difficulties the facts posed to the issue of territorial competence:
- [85] Bell Aliant's situation in this appeal offers rare facts. The jurisprudence and academic writing, presented to the Court, centers on the position of non-resident plaintiffs in a national class action where there are resident plaintiffs who assert a cause of action against a resident defendant. In this case, all of the plaintiffs who might have a cause of action against the defendant and the defendant [itself] are non-resident, for the purposes of this analysis. The difficulty is thus brought into stark relief by these factors: (i) Bell Alliant was not ordinarily resident when the action was commenced -- which means that s. 4(a) through (d) of the CJPTA do not apply; (ii) the Court must consider s. 4(e) "real and substantial connection", but none of the presumptions in s. 9 of the CJPTA apply. The Court is driven to a consideration of the meaning of the opening words of s. 9 and a host of other sub-issues relating to the determination of territorial competence over *ex juris* plaintiffs and an *ex juris* defendant in a national class action proceeding.
- [Emphasis in original.]
- [131] Note that s. 9 of the Saskatchewan CJPTA is identical to s. 10 of the British Columbia CJPTA. The "opening words" to which the Court is referring are the words preserving the plaintiff's right to "prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based": CJPTA, s. 10. The Court concluded that these words permitted it to consider the approach to real and substantial connection set out by the Supreme Court of Canada in *Morguard and Hunt*: paras. 86, 90. It then turned to what factors could be considered:
- [92] That leaves the much more difficult question of what factors may be considered to ground territorial competence when the plaintiff is unable to prove the existence of one or more of the presumptions in s. 9 of the CJPTA and none of the plaintiffs, who are linked to the defendant, or the defendant, who is sought to be joined to other defendants, are resident in the province. In my view, the answer to the question must be informed by the principles taken from *Morguard and Hunt*...
- [93] According to those authorities, each jurisdiction in Canada is encouraged to give full faith and credit to the judgments of other Canadian jurisdictions and to move beyond the strict notion of territorial competence that had governed issues of service. In this jurisdiction, the CJPTA is the culmination of the work begun by the Supreme Court of Canada in *Morguard and Hunt*. The following factors point to the courts in this jurisdiction having territorial competence over Bell Aliant: (i) a common regulatory scheme gives rise to the authority to charge customers for cellular service; (ii) the five other Appellants are ordinarily resident here; (iii) the allegation is made, supported by the evidence, that all of the Appellants charged similar fees in a similar manner; (iv) evidence of commonality of approach is relevant to the allegation that, as a matter of contract interpretation, the Appellants were not entitled to retain the "system access fees" collected; and (v) the resolution of the common

issues applies equally to Bell Aliant as it does to the other Appellants. The recognition of these factors as influencing the determination of territorial competence is consistent with Morguard and Hunt.

- [94] If there were any doubt that the courts in this Province have jurisdiction over Bell Aliant, this Court could consider the fact that Bell Aliant is now registered to carry on business in this jurisdiction. I do not believe that the subsequent registration of a corporation alone would be sufficient to find a real and substantial connection, as such a conclusion would fly in the face of the express wording of s. 4(d), but it is one factor that may be considered along with the other factors supporting assertion of territorial competence over Bell Aliant in this national class action.

[Emphasis in original]

- [132] As was the case in Microcell at para. 85, on the evidence before me, all of the plaintiffs who may have a claim against the Fédération, as well as the Fédération itself, are not resident in British Columbia. There exist no facts to support that any of the Ex Juris Fédération Gymnasts suffered a wrongful act in British Columbia. They never came to British Columbia and the alleged abuses they suffered all took place in Québec at the hands of Québec coaches. As a result, s. 4(a) to (d) of the CJPTA do not apply. The only way to establish territorial competence over the Fédération is via a real and substantial connection per s. 4(e). However, it is the application of this test that distinguishes this case from Microcell. Specifically:

- a) There is no common regulatory scheme giving the Fédération authority to abuse its gymnasts in the manner alleged in the pleadings. Even if such a scheme existed, it would be void as against public policy.
- b) Based on the pleadings, none of the other defendants are resident in British Columbia with the sole exception of Gymnastics B.C.

- [133] The nature of the allegations in Microcell are also distinguishable. There, the subject matter related to a network the defendant operated across Canada, such that customers' use of the network would extend to Saskatchewan, should customers travel or move there. The subject matter in this case relates to assault and abuse, the situs of which is the location where the invasion or threatened invasion of bodily security occurred: T.C. at para. 12. In this case, there was no reasonable expectation that any of the Ex Juris Fédération Gymnasts would travel to British Columbia. As such, the Fédération had no reasonable expectation that the non-travelling gymnasts would be able to bring claims against it in British Columbia.

- [134] With respect to common issues, there is no evidence of a common set of facts which would lead to a commonality of findings applicable across all of the PMOs. I specifically repeat that for the purposes of this application, the plaintiff did not assert that the common design pleading creates a real and substantial connection that establishes jurisdiction. Given that

the Fédération makes and solely controls its own policies, practices, and standards for gymnastics in Québec--in addition to the Gymnastics Canada policies, practices, and standards it follows--there is no evidence of a commonality of facts or approach with respect to the relationship or conduct of each PMO with their respective gymnasts, on the evidentiary record before me.

[135] The plaintiff says that there are common issues regarding the relationship between class members and the PMOs, such as the duty and standard of care, which would apply equally to the Fédération. I disagree. A real and substantial connection cannot be based on elements of a legal test required to be proven in every case to establish a tort. In any event, should this action proceed, the law of each province would apply to each provincial member organization. The Fédération would thus be subject to the Québec Civil Code, which has different bases for liability than British Columbia common law. On the basis of all of these distinctions, I find that Microcell is distinct and I am not persuaded to follow it.

[136] The Fédération goes on to argue that Microcell was also wrongly decided. I see no need to address this argument.

Airia Brands v. Air Canada

[137] Finally, the plaintiff refers to Airia Brands, a class action involving a claim of global conspiracy to fix prices of air freight shipping services for shipments to and from Canada. There was no issue that the Court had territorial competence over Air Canada because it is domiciled in Canada and its principal hub location for all services, including air freight shipments, is Toronto (Pearson) International Airport: at para. 11. Rather, the question was jurisdiction simpliciter over the absent foreign claimants included in the proposed class.

[138] The Court held that the motion judge erred in concluding that the real and substantial connection test did not apply--or if it did, that it was not satisfied--and that jurisdiction only existed if the absent foreign claimants were present in Ontario or consented to the Ontario Court's jurisdiction: para. 8. There was a real and substantial connection because all three of the respondents carried on business in Ontario and there were common issues of liability for the tort of conspiracy and breaches of the relevant statute: paras. 111, 113. This is distinct from the case before me, because the Fédération does not carry on business in British Columbia and the pleadings do not allege conspiracy.

[139] The question I am faced with is not the same as the one in Airia Brands Inc. In this case, the court does not have territorial jurisdiction over the Fédération, which it did in Airia Brands. The issue here is whether, in such circumstances, the court can found jurisdiction because there is a common interest shared between the non-resident plaintiffs (in this case the Ex Juris Fédération Gymnasts) and the representative plaintiff. In Airia Brands, the Court of Appeal specifically pointed out that this was "not a case of a defendant being forced to defend a lawsuit in a jurisdiction in which it has no connection": para. 117. This is precisely the position of the Fédération.

[140] The plaintiff argues that Harrington has been applied in cases that are not product liability cases, e.g. McCorquodale, Bergen, Abdula, and Silver. I have already addressed each of those cases. None of them assist me in resolving the issue before me.

[141] The plaintiff argues that no case has limited Harrington BCCA to products liability cases and thus it should not be so limited. I disagree. When applying principles from cases, a key consideration is the factual underpinnings of the case. The principle in Harrington BCCA does not operate independent its facts, nor should only portions of the decisions be extracted without a view to the totality of the reasons and the rationale for the finding.

[142] I turn now to address the Supreme Court of Canada's decision in Sanis.

Issue 3: What impact does the Supreme Court of Canada's decision in Sanis Health Inc. v. British Columbia have on this application?

[143] In its oral submissions, the plaintiff relied on the case of Sandoz Canada Inc. v. British Columbia, 2023 BCCA 306, for its comments that Harrington BCCA is good law and remains binding: at para. 20. At that time, Sandoz was on appeal to the Supreme Court of Canada, but the Court's decision had not yet been released. After the hearing of this application but prior to the release of these reasons, the Supreme Court of Canada published its reasons in Sanis, upholding the British Columbia Court of Appeal's decision in Sandoz. I gave the parties leave to provide written submissions on the application of Sanis to the issues before me.

Background Facts

[144] In Sanis, British Columbia commenced a class action by notice of civil claim in August 2018. It sought certification of a class action for recovery of opioid-related costs. It alleged that the manufacturers, markets, and distributors of opioid related products committed common law torts and breached the Competition Act, R.S.C. 1985, c. C-34. British Columbia proposed itself as the representative plaintiff and a class consisting of all federal, provincial, and territorial governments and agencies that paid healthcare, pharmaceutical, and treatment costs related to opioids.

[145] A few months after the proceeding was commenced, the British Columbia legislature passed the Opioid Damages and Health Care Costs Recovery Act, S.B.C. 2018, c. 35 [ORA]. Section 11 of the ORA authorizes British Columbia to bring an action on behalf of the class named in its proceeding on an "opt-out" basis. British Columbia amended its pleadings to include s. 11.

Procedural History

[146] Multiple applications and appeals have been heard in Sanis to date. Only a few are relevant to the issues before me.

- [147] In November and December 2019, the defendants filed various applications relating to the sequencing of proposed jurisdiction and constitutional challenges. In March 2020, Justice Brundrett released reasons substantially requiring all motions to be heard in conjunction with the certification hearing: *British Columbia v. Apotex Inc.*, 2020 BCSC 412 [Sequencing Decision]. Two defendants, Jean Coutu Group (PJC) Inc. ("Jean Coutu") and Pro Doc Limitee ("Pro Doc"), sought and obtained leave to appeal the Sequencing Decision: *British Columbia v. Apotex Inc.*, 2020 BCCA 186. In June 2021, the British Columbia Court of Appeal partially directed that the their jurisdictional challenges be heard in advance of the certification application: *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219.
- [148] In September 2022, this Court heard and dismissed Jean Coutu and Pro Doc's jurisdictional challenges: *British Columbia v. Pro Doc Limitee*, 2023 BCSC 662 [Jurisdiction Application]. They appealed and subsequently applied to stay the proceedings against them until the Court of Appeal decided their appeals. This application was dismissed: *British Columbia v. Apotex Inc.*, 2023 BCSC 1354. The jurisdiction appeals remain outstanding.
- [149] In the Jurisdiction Application, Brundrett J. ruled that the British Columbia court had territorial competence and dismissed the application. His reasons are useful to review, as the Supreme Court of Canada only dealt with the constitutional challenge to s. 11 of the ORA.
- [150] Jean Coutu and Pro Doc argued that there was no real and substantial connection sufficient to ground territorial competence on the following grounds:
- [4] they are not, and never were, residents in British Columbia; the proceeding does not concern a tort committed by them in BC; the claims do not concern restitutionary obligations that, to a substantial extent, arose in BC as a result of their conduct; and it was not reasonably foreseeable that persons in British Columbia would use or be exposed to the Applicants' opioids.
- [151] In the alternative, if one of the presumptive connecting factors in s. 10 of the CJPTA was established, then it was rebutted due to affidavit evidence showing that they never participated in the British Columbia marketplace.
- [152] Justice Brundrett found that s. 10(h) (carrying on business in British Columbia) did not apply because neither defendant had sufficient "actual" presence in the province: see also Van Breda at para. 87. In his analysis of s. 10(f) (restitutionary obligations) and 10(g) (tort committed in British Columbia), Brundrett J. considered Moran. He concluded:
- [102] The Moran analysis recognizes that an action in the jurisdiction lies where the arguably harmful product was used or consumed if it was reasonably foreseeable that it would be used or consumed in that jurisdiction. Here, some Pro Doc drugs (including at least a small amount of opioids) were sold in British Columbia. Pro Doc's submission that it was not foreseeable that its opioids would be distributed in British Columbia struggles for traction when placed against the facts that many different Pro Doc drugs were sold in BC, Pro Doc

websites solicited BC health professionals with information on their products, and some of its opioids made their way (perhaps indirectly) to the BC marketplace.

[103] As well, the subject matter is relevant to the question of whether the Applicants' products could be reasonably anticipated to end up in BC. Here, the claim involves prescription opioid medications that could presumably be kept by and moved with a consumer

[153] He then turned to Harrington BCCA:

[105] the dicta in Harrington above echoes the rationale stated in Moran at 409 that by tendering a consumer good in the marketplace directly or through normal distributive channels, a manufacturer ought to assume the burden of defending that product (particularly if it is dangerously defective) wherever it causes harm, as long as the forum is reasonably contemplated. This proposition was articulated in Moran even though the defendant lightbulb manufacturer did not carry on business in the plaintiff's jurisdiction and had no property or assets in that province.

[106] The present claim deals with arguably highly addictive opioids which could conceivably be distributed indirectly to British Columbia (as in Furlan, where the resin manufactured by the American defendants was then incorporated into various plumbing products purchased by consumers in BC); or, if dispensed in Quebec, could be consumed by an end-user who happened to travel with their opioid-related medication to BC and suffer harm here. Hence, I find the comments above in Harrington and Moran to be of assistance in assessing the foreseeability of harm resulting from health-related consumer products put into the Canadian market.

[107] In this factual and legal context, and at this early stage, I find there is a good arguable case that it was reasonably foreseeable that Pro Doc or Jean Coutu-distributed opioids would indirectly find their way to consumers in BC or be consumed in BC, even if they were only directly distributed to wholesalers or pharmacies in Quebec.

[154] In keeping with my analysis above, I agree with Brundrett J.'s characterization of the principles in Moran and Harrington BCCA.

[155] Justice Brundrett concluded that the plaintiff had established a real and substantial connection under ss. 10(f) and (g) of the CJPTA: at para. 142. I note that Brundrett J. declined to consider the plaintiff's argument that common issues could ground jurisdiction because jurisdiction had already been established on other grounds: at paras. 127-129.

The Supreme Court of Canada

- [156] The defendants applied to strike s. 11 of the ORA as unconstitutional on the grounds that it does not respect the constitutional territorial limits on provincial legislative competence and violates Canada's constitutional structure by undermining the sovereignty of other Canadian governments: at para. 4. Both the British Columbia Supreme Court and the Court of Appeal dismissed the application.
- [157] The majority of the Supreme Court of Canada found that s. 11 was constitutional, affirming the decisions below. The Court applied the two-part test for constitutionality set out in *Imperial Tobacco*. The first prong of the test is to determine the pith and substance of the provision. The Court concluded that the pith and substance of s. 11 is the creation of a procedural mechanism for the application of the ORA to the existing opioid-related proceeding: at para. 75. Section 11 does not create substantive rights for the Crown by enabling it to engage in litigation under the British Columbia Crown Proceeding Act, R.S.B.C. 1996, c. 89, which it could not otherwise do: at para. 60. The procedural mechanism in s. 11 falls within British Columbia's authority to legislate in relation to the "Administration of Justice in the Province", including "Procedure in Civil Matters" in its courts, under s. 92(14) of the Constitution Act, 1867: at para. 79.
- [158] The second prong of the test asks whether the challenged provision respects the territorial limits of provincial power set out in s. 92 of the Constitution Act, 1867: at para. 34. The test for territoriality is whether the legislation has a "meaningful connection" to the enacting territory: at para. 85. Meaningful connection is tested by assessing the law's connection to the enacting territory, the subject matter of the law, and those subject to it: at para. 85.
- [159] The majority concluded that s. 11 maintained a meaningful connection to British Columbia through both "the nature of the class action" and "the choice of the foreign Crowns to participate in the proceeding": at para. 88. It concerns "a single action with commonality of defendants, issues and claims": at para. 88. Further, it respects the sovereignty of other jurisdictions. Pursuant to the substantial connection test, which s. 11 does not modify, British Columbia courts only reach outside the province if there are common issues between British Columbia and the class members, and British Columbia is the proper venue for their resolution: at paras. 89-90. On this basis, the Court concluded that s. 11 was *intra vires* the British Columbia legislature and dismissed the appeal.

Positions of the Parties

- [160] The crux of the parties' submissions come down to what use I should make of the Supreme Court of Canada's comments regarding common issues in its meaningful connection analysis. The majority stated:
- [89] Section 11 is consistent with how courts establish jurisdiction over out-of-province class members. Nothing in s. 11 changes that process. A court must still find a real and substantial connection between B.C. and the class as a whole in order to establish jurisdiction, and

therefore B.C.'s legislature can only impose its procedural rules on foreign Crowns if the court is first satisfied that a real and substantial connection between B.C. and the class is present. In the proceeding that s. 11 empowers, B.C.'s laws and courts do not reach outside the province unless the court is satisfied there are common issues between the government of B.C. and the proposed class members, and deems that B.C. is the proper venue for their resolution (see CPA, ss. 4(1) and 4.1(1)(a); ORA, s. 11(1)(b)).

[90] This Court and many others across Canada have endorsed the idea that the common issues shared between the non-resident class plaintiffs and the resident representative plaintiff suffice to establish a real and substantial connection for adjudicatory jurisdiction over the class (see, e.g., *Dutton*, at paras. 52-54; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at paras. 61-63; *Endean*, at paras. 6, 17 and 58; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, 417 D.L.R. (4th) 467, at para. 107; *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 193 D.L.R. (4th) 67, at para. 96; *Meeking v. Cash Store Inc.*, 2013 MBCA 81, 367 D.L.R. (4th) 684, at para. 97; *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72, [2011] 8 W.W.R. 529, at para. 135; *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.); see also C. Jones, "The Case for the National Class" (2004), 1 C.C.A.R. 29, at pp. 46-47; T. J. Monestier, "Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?" (2010), 45 *Tex. Int'l L.J.* 537, at pp. 546-48; J. Walker, *Canadian Conflict of Laws* (7th ed. (loose-leaf)), at § 4.03). Section 11 of the ORA and the relevant provisions of the CPA do not extend or change the court's jurisdiction over these extraterritorial plaintiffs or issues. This jurisdiction arises from the court's plenary authority, anchored by the real and substantial connection from the plaintiffs' common issues (*Dutton*, at paras. 19-24, 33-34 and 39; *Meeking*, at paras. 92-97; *Thorpe*, at paras. 119 and 135; *Jones*, at pp. 46-47; *Walker*, at § 4.03). Section 11 of the ORA and the relevant provisions of the CPA merely provide the procedural rules for the court once jurisdiction is established. It is a legitimate exercise of power for a province to set the procedural rules for proceedings within its jurisdiction.

[Emphasis added.]

[161] The Fédération argues that *Sanis* is not applicable to this case for three reasons. First, it was not a jurisdictional application pursuant to Rule 21-8 of the Supreme Court Civil Rules, but rather a constitutional challenge to s. 11 of the ORA. Second, the Court addressed the question of jurisdiction over *ex juris* plaintiffs, not jurisdiction over *ex juris* defendants in respect of the claims of *ex juris* plaintiffs. Third, *Sanis* was a product liability case and, as such, is distinguishable from the facts alleged in this proposed class action.

[162] The plaintiff argues that *Sanis* confirms that the plaintiff's interpretation of *Harrington* is correct. In a national class proceeding, common issues are sufficient to form the basis of the real and substantial connection between non-resident class members and British Columbia courts. Something more is not required.

[163] The plaintiff also says that Sanis endorses the benefit of national class actions generally to class members. The plaintiff says that the underlying allegation in this pleading is "that federal and provincial gymnastic bodies acted pursuant to a common design and caused or contributed to the abuse of gymnasts by creating a culture and an environment where the abuse could occur". This allegation is exactly the kind of interjurisdictional problem that class actions were created to address. This seems to be a *forum non conveniens* argument. It is unclear what the plaintiff wishes me to make of this submission in the context of the real and substantial connection analysis.

Discussion

[164] For the reasons that follow, I agree with the Fédération that Sanis is distinguishable. The Fédération rightly points out that jurisdiction and constitutional validity are distinct issues and further, that the Court's comments must be considered in the context of its legal analysis and its factual matrix.

[165] The issue before me is whether the British Columbia superior court has territorial competence over the Fédération for the claims of the Ex Juris Fédération Gymnasts. This is a completely different issue from the constitutional validity of class action legislation in the context of the Sanis case. Different legal principles apply to each issue.

[166] The majority used the real and substantial connection test to establish that, within the Imperial Tobacco framework, there was a meaningful connection between s. 11 of the ORA and British Columbia. It did not deal substantively with the real and substantial connection test itself. As Justice Côté (dissenting) noted, full argument was not made on the question of the Court's jurisdiction in national class actions. She said, and I agree, that:

[173] it would be imprudent to comment on how the real and substantial connection test is to be met in the context of multi-jurisdictional class actions -- a question that has not been raised by the parties in the present appeal. Our Court has never ruled on this question, and there are diverging opinions at the appellate level, as well as considerable academic debate, on whether the certification of common issues is sufficient to ground a superior court's jurisdiction over foreign class members

[167] In light of this statement, and the context in which the majority referenced the real and substantial connection test, I do not take the majority's comments about common issues as a statement meant to clarify the law as to what is sufficient to establish a real and substantial connection for the purpose of territorial competence.

[168] In my view, the Courts' comments have a limited scope of application to cases where there was already "something more" connecting the defendants to the jurisdiction. This conclusion is reinforced by the fact that the cases cited at para. 90--most of which I have addressed individually above--are almost entirely product liability cases and/or cases in which the applicant defendant was resident in or carried on business in the province. Sanis itself is a product liability case in which the defendants put opioid products into the

national stream of commerce. As I have established, neither of these facts exist in the underlying claim.

[169] In the alternative, if I am wrong, I find that Sanis is distinguishable because its comments were made with respect to jurisdiction over ex juris plaintiffs, not ex juris defendants. This is evident in the way that the Court framed its comments;

[90] This Court and many others across Canada have endorsed the idea that the common issues shared between the non-resident class plaintiffs and the resident representative plaintiff suffice to establish a real and substantial connection for adjudicatory jurisdiction over the class. Section 11 of the ORA and the relevant provisions of the CPA do not extend or change the court's jurisdiction over these extraterritorial plaintiffs or issues

[Emphasis added and citations omitted.]

[170] Additionally, the Fédération argues that the majority's focus on jurisdiction over the ex juris plaintiffs was intentional. They point to its citation at para. 90 to T.J. Monestier, "Personal Jurisdiction over Non-Resident class Members: Have We Gone Down the Wrong Road?" (2010), 45 Tex Int'l L.J. 537. In that article, the author specifically recognizes the distinction between jurisdiction over ex juris plaintiffs and jurisdiction over defendants in respect of the claims of ex juris defendants. He notes that the two are similar in that they can both result in a finding that the court lacks jurisdiction. However, the two are conceptually distinct in the sense that the former asks whether the court has the ability to bind the non-resident class members, while the latter addresses whether the court has the power to bind the defendant: Monestier at 544.

[171] On this basis, I find that the majority's comments about common issues do not apply when considering the real and substantial connection necessary to establish jurisdiction over an ex juris defendant in respect of the claims of ex juris plaintiffs.

Conclusion

[172] In the case at bar, the Fédération is not resident in British Columbia, the alleged tortious acts against the Ex Juris Fédération Gymnasts are not alleged to have occurred in British Columbia, and the damages suffered by the Ex Juris Fédération Gymnasts did not occur in British Columbia. As I have already discussed, the Fédération did not put any product into the stream of commerce across British Columbia.

[173] The Fédération argues that something more is needed than common issues with the claim of the representative plaintiff. It says there is a lack of "something more" on the evidentiary record and that this is fatal to the claim of jurisdiction.

- [174] The plaintiff argues that (a) the fact that the Fédération representatives travelled to British Columbia and participated in both gymnastics events and conduct directly relevant to this claim, and (b) the fact that some Fédération gymnasts travelled to British Columbia is sufficient to found jurisdiction. I note that it is unclear what "conduct" the plaintiff refers to.
- [175] I am not persuaded that the fact that some Fédération gymnasts travelled to British Columbia to compete is enough to ground the Court's jurisdiction of the Fédération. At this point, the Fédération is not seeking to have the claims of those gymnasts excluded from the class, nor is it arguing that this Court has no jurisdiction over it with respect to the claims of those gymnasts. I am more concerned by the allegations by the plaintiff, as set out at paragraph 49 of the plaintiff's written submissions, that:
- (c) From time to time, the Gymnastics Canada board hosted meetings to be attended by the PMOs at the time and place of the Canadian National Gymnastics Championships.
 - (d) From time to time, the technical directors of the PMOs had discussions during the Canadian National Gymnastics Championships in which they shared information relating to their provincial programs.
 - (e) From time to time, Gymnastics Canada held their general assembly annual general meeting in British Columbia, which was attended by the president of the Board of Directors of the Federation.
- [176] The evidentiary record before me appears to support that the Fédération representatives attended meetings in British Columbia, just as they did in the other provinces when the meetings were held in those provinces. What is lacking in the evidentiary record is whether any decisions took place at those meetings that could form any part of the claims being advanced in this action. As I have already noted, unlike the Airia Brands and Imperial Tobacco cases, there is no allegation of conspiracy in the pleadings here which, if it existed, could form a basis for establishing jurisdiction if some of the conspiracy took place in British Columbia.
- [177] Among other things, the plaintiff advances a systemic negligence claim. She alleges that, as a result of the Fédération's implementation of Gymnastics Canada policies, standards, and procedures for the sport of gymnastics in Québec, it failed to create and maintain an environment free from physical, sexual, and psychological abuse. The plaintiff further argues that all of the relevant and necessary evidence is not before the Court. It is this aspect of the plaintiff's submissions that concern me.
- [178] At this stage of the proceeding, I agree that there is only a limited record before me. There is evidence that the Fédération attended meetings in British Columbia, but I have no evidence as to the substance of those meetings. Specifically, whether the issue of the abuse of gymnasts was discussed, whether any type of policy was formed to address it, and whether the Fédération implemented any such policies.

[179] This proposed class action involves a non-resident defendant, who does not carry on business in British Columbia, and non-resident plaintiffs who allegedly suffered abuse in another province. In these circumstances, I am not persuaded that a British Columbia court should take territorial jurisdiction. However, there remains the outstanding issue of evidence as to the subject-matter of the Gymnastics Canada meetings held in British Columbia and what potential impact any decisions at those meetings had on the Ex Juris Fédération Gymnasts.

[180] On this basis, I decline to definitively rule on the issue of territorial competence. These reasons are a final decision with respect to the jurisdiction arguments advanced at the hearing on June 19 and 20, 2024. However, I grant the plaintiff and the Fédération limited leave to make submissions regarding territorial competence only in respect of the following issues:

- a) the substance of the meetings the Fédération attended in British Columbia and any impact those meetings had on the Fédération's policies; and
- b) whether there is a real and substantial connection on the basis of a joint tort committed in British Columbia through common design.

(the "Outstanding Issues").

[181] I recognize that the Fédération and plaintiff expressly agreed not to argue common design. However, it strikes me as a potential avenue for territorial competence. I anticipate that the other PMOs will bring jurisdiction applications depending on the outcome of this application. While the plaintiff and the Fédération agreed not to advance common design, it is possible that such an agreement may not be reached as between the plaintiff and other defendants. For the sake of consistency, I wish to deal with the issue of common design at one hearing so as to avoid any potentially contradictory rulings as to territorial competence over defendants in analogous circumstances.

[182] On this basis, the Fédération's application respecting the Ex Juris Fédération Gymnasts is adjourned to the certification hearing with respect to the Outstanding Issues.

[183] Any prejudice to the Fédération resulting from its participating at the certification hearing is minimal. This is because, even if I had decided this issue in favour of the Fédération, it would still remain a defendant and thus have had to prepare for and attend the certification hearing.

[184] The costs of this application will be decided as part of the certification hearing. I point out that the Fédération was predominantly successful on the appropriate interpretation of the case authorities.

[185] I request that the parties schedule a further judicial management conference before me to discuss the next steps in this proceeding. The judicial management conference should be scheduled to be heard within three months from the pronouncement of these reasons.

"Forth J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/01/2025BCSC0146.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/cline-v-gymnastics-canada-2025>

Prepared on 25 October 2026 · Esheria