

CANADA / JUDGMENT

Forster v. Monsanto Company

2020 BCSC 1376

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1376 Forster v. Monsanto Company

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Forster v. Monsanto Company,

2020 BCSC 1376

Date: 20200918

Docket: S198790

Registry: Vancouver

Between:

Raymond Forster

Plaintiff

And

Monsanto Company, Monsanto Canada ULC, Bayer Inc., and

Bayer Aktiengesellschaft

Defendants

Corrected Judgment: The text of this judgment was corrected at paragraphs 15, 27, 50, and 95 on September 25, 2020. Paragraphs 10 and 86 were corrected on

October 6, 2020.

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

July 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

Friday, September 18, 2020

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I. introduction

A. The applications

- [1] The plaintiff in this proposed class proceeding brings this sequencing motion for an order that the certification hearing occur at the same time as the defendants' applications to strike and stay the claim.
- [2] The defendants argue that their applications to strike and stay the claim ought to be heard before certification, as resolution of those motions could avoid duplicative class proceedings in multiple jurisdictions. Their proposed applications seek to:
 - (a) stay the British Columbia proceeding as an unnecessary and duplicative abuse of process, in favour of having the matter heard within a parallel Ontario class proceeding; that brought by the proposed representative plaintiff Mr DeBlock;
 - (b) strike the claim as disclosing no reasonable cause of action; and
 - (c) dismiss the claim against the German corporate defendant on the basis that this Court has no jurisdiction over that party.

- [3] The defendants also seek an order pursuant to the July 1, 2019 British Columbia Supreme Court Practice Direction (PD-55), which adopts the Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice (the "Protocol"), that I as case management judge communicate with the judges in the DeBlock and other parallel proposed class proceedings for the purpose of determining the most efficient process for considering the stay and other motions in this proceeding and in the parallel proceedings. I am advised that the present case will be the first case to consider the new Protocol, which has also been adopted in Ontario and other provinces, and will likely be further adopted.
- [4] The plaintiff also seeks an order that the defendants provide their response to civil claim in advance of the certification hearing, and 45 days from the date of this order. The defendants in turn seek an order deferring delivery of their response until 90 days after determination of the strike application.

B. The proposed class proceeding

- [5] The proposed class proceeding alleges that the defendants' herbicide Roundup (glyphosate) caused the members of the plaintiff class to contract non-Hodgkin's lymphoma.
- [6] The Monsanto defendants are part of the Bayer corporate structure. Bayer Inc. and the German Bayer corporate parent are named as co-defendants.
- [7] The proposed British Columbia class proceeding is limited to those persons who were exposed to Roundup in British Columbia from 1976 to the date of the certification order. In contrast to the parallel Ontario and Nova Scotia proceedings, it does not seek to serve as a national class action. It has some national dimensions insofar as some of those then-British Columbia residents and visitors may have since moved to other provinces.
- [8] The proposed class proceeding is based not only upon common law principles of negligence and duty to warn, but also the British Columbia Business Practices and Consumer Protection Act, SBC 2004, c 2 (the "BC Consumer Protection Act"). The proposed class proceeding relies not only upon the substantive provisions of the BC Consumer Protection Act, but also upon its remedial provisions, specifically s. 172.
- [9] The plaintiff argues that his claim's limitation of scope to exposure within British Columbia and its reliance on the British Columbia legislation distinguishes it from the proposed DeBlock proceeding, and makes it more suitably determined here.
- [10] The defendants counter by noting that the central question in each of the proposed class proceedings across the country is whether the herbicide Roundup is a carcinogen, and, if so, whether the defendants negligently failed to disclose that risk. They argue that the proposed British Columbia plaintiffs would be included in the national class proposed in DeBlock, and that the claims of the British Columbia plaintiffs could be adjudicated by the Ontario court. This adjudication could include, if necessary, the interpretation and application of the BC

Consumer Protection Act by the Ontario courts: see, for example, the discussion of *Gomel v. Ticketmaster Canada LLP*, 2019 BCSC 2178 at para. 60.

C. Parallel proceedings in other provinces

- [11] The DeBlock action is one of three (and, until recently, four) other active Roundup class proceedings across Canada. Some ten other proposed proceedings have been filed across Canada (including two others in British Columbia), but have not proceeded extensively or at all beyond the filing stage. The present proceeding was the eleventh proposed Roundup class proceeding filed.
- [12] The three other active Roundup proceedings are:
- (a) Ontario: DeBlock, case managed by the Honourable Mr Justice Grace, as a consolidation of three Ontario proposed Roundup class proceedings. Proposed plaintiffs are nation-wide.
 - (b) Québec: Paquette, case managed by the Honourable Mr Justice Hardy. Proposed plaintiffs are limited to Québec residents.
 - (c) Nova Scotia: Mitchell, case managed by the Honourable Madam Justice Boudreau. Proposed plaintiffs are nation-wide.
- [13] Counsel for the defendants in this proceeding represent the Monsanto and Bayer defendants in the three (and, until recently, four) active parallel proceedings. Plaintiffs' counsel are different in each proceeding. There is no evidence of coordination between the present plaintiff firm and those in the parallel proceedings.
- [14] A proposed class proceeding in Saskatchewan advanced swiftly, but subsided just as swiftly: *Gadd v Bayer Inc. et al.* On February 20, 2020, the Honourable Mr Justice Mitchell of the Saskatchewan Court of Queen's Bench rejected, via judicial fiat, the defendants' application to strike, which was brought on the same grounds as the proposed application in this proceeding.[1] Mitchell J agreed that a stay application based on abuse of process due to a multiplicity of actions could be considered before a certification hearing, and, indeed, heard that application in advance. Ultimately, the Court concluded (at para. 14):

However, I am not satisfied that at the very early stages which these various actions currently find themselves, permitting Gadd to continue would serve "no legitimate purpose". Indeed, the same could be said for the Ontario action were "the shoe on the other foot", so to speak. The representative plaintiff in Gadd resides in Saskatchewan and wishes to have the action proceed in this jurisdiction. Staying his proposed class action because it is an abuse of process is no small matter. In the context of proposed class actions, it appears more leeway is given to allowing duplicate to actions to continue than would be the case in regular civil proceedings. Consequently, I do not think it can be said that Gadd serves no legitimate purpose, at least at this stage of the litigation process.

- [15] Despite this success in responding to the proposed stay application, plaintiff's counsel for the proposed Saskatchewan action soon advised that the Saskatchewan action was content to "park" itself with the Ontario DeBlock action, thus effectively staying the Saskatchewan proceedings by consent.[2] A consent order staying the Gadd proceeding, pending the certification decision in DeBlock, was entered on May 25, 2020.
- [16] All of the active proceedings have proceeded further than the present proceeding, but not considerably so. It is likely that none of them will be in position to issue a certification judgement until well into 2021.
- [17] In the Ontario DeBlock proceeding, in February 2020, the Court ordered that the certification motion be heard by February 2021. On June 12, 2020, the plaintiff served an 862-page certification motion record. According to the current schedule, the defendants' responding record is due on December 9, 2020. Defendants' counsel in DeBlock (and in the present action) indicates that he intends to bring a stay application in DeBlock in advance of the certification hearing, although it is not clear if that would be permitted on the present schedule as directed.
- [18] In the Québec Paquette proceeding, counsel are apparently deliberating whether to continue or to fold their action in with the Ontario DeBlock proceeding.
- [19] In the Nova Scotia Mitchell proceeding, on May 20, 2020 the Court issued reasons in the sequencing application. It declined the defendants' invitation to hear the strike and stay applications in advance of the certification hearing: 2020 NSSC 172. At paras. 44-46, the Court concluded that the best use of time and resources would have the certification and stay motions heard at the same time, with the benefit of a complete evidentiary record. The Court also directed the plaintiff to deliver his certification motion record by November 20, 2020. The defendants have sought leave to appeal the certification judgement: the motion for leave to appeal is scheduled to be heard on December 3, 2020.

D. Positions of the parties

- [20] In support of their positions, each side points to recent developments in the statute and practice direction governing class proceedings in British Columbia.
- [21] The plaintiff argues that certification is typically the first hearing in a class proceeding. The certification hearing is the appropriate time to consider the preferability of the proposed class proceeding as both a class proceeding, and as a class proceeding in the province, in contrast to the preferability of an ongoing class proceeding in another province. The plaintiff points to the Class Proceedings Act, RSBC 1996, c 50 ("CPA"), s.4(3) (under the heading of "Class certification") as expressly sanctioning this approach:

- (3) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada and involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced elsewhere.

[emphasis added]

[22] On October 1, 2018, the CPA was amended to add that section, as well as ss. 4(4) and 4.1 ("Orders in multi-jurisdictional certification"), governing multijurisdictional class proceedings:

4(4) When making a determination under subsection (3), the court must

(a) be guided by the following objectives:

(i) to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;

(ii) to ensure that the ends of justice are served;

(iii) to avoid irreconcilable judgments, if possible;

(iv) to promote judicial economy, and

(b) consider relevant factors, including the following:

(i) the alleged basis of liability, including the applicable laws;

(ii) the stage that each of the proceedings has reached;

(iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;

(iv) the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative plaintiffs to participate in the proceedings and to represent the interests of class members;

(v) the location of evidence and witnesses.

Orders in multi-jurisdictional certification

4.1 (1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order

(a) certifying the proceeding as a multi-jurisdictional class proceeding, if

(i) the requirements in section 4 (1) are met, and

- (ii) the court determines, having regard to section 4 (2) and (3), that British Columbia is the appropriate venue for the multi-jurisdictional class proceeding,
- (b) refusing to certify the proceeding, if the court determines that it should proceed as a multi-jurisdictional class proceeding in another jurisdiction, or
 - (c) refusing to certify a portion of a proposed class, if that portion of the class contains members who may be included within a proposed class proceeding in another jurisdiction.
- (2) If the court certifies a multi-jurisdictional class proceeding, it may
- (a) divide the class into resident and non-resident subclasses,
 - (b) appoint a separate representative plaintiff for each subclass, and
 - (c) specify the manner in which and the time within which members of each subclass may opt out of the proceeding.
- [23] The defendants state that ultimately they are indifferent as to which jurisdiction will hear the various Roundup class proceedings. They object to the time and expense of defending essentially the same claim in multiple jurisdictions. They argue that the Protocol mandates early determination of which among several parallel claims in different jurisdictions should serve as a national class action, in the interests of judicial economy.
- [24] The next section of these reasons will review and quote the key aspects of the Protocol.
- [25] The Protocol finds its origin in a Canadian Bar Association (the "CBA") initiative to set forth the best practices for courts and judges managing class proceedings in which related class actions are filed in more than one Canadian province. On February 15, 2018, the CBA adopted the Protocol, and urged Canadian courts to implement it:

This protocol establishes recommended "best practices" by which multijurisdictional class actions may be coordinated. However, adoption of this protocol by any court remains the decision of that court, absent legislative or regulatory direction.

As noted, and as integrated herein, the CBA had already adopted a protocol to facilitate the management of the approval of multijurisdictional settlements. The CBA had also adopted a protocol on best practices for the issuance of notice in class proceedings, which has also been integrated herein. This updated protocol takes the next step to minimize the confusion, and maximize the communication, in cases where no settlement is proposed, while accepting that such a protocol does not have the power to amend the substantive or procedural laws of any province or territory.[3]

- [26] On April 5, 2018, the Canadian Judicial Council adopted the Protocol. The Protocol has also been officially adopted by Ontario by its Consolidated Provincial Practice Direction (May 17, 2019).[4] The Protocol has not yet been officially adopted in, inter alia, Québec or Nova Scotia, the locations of the other active proceedings parallel to this matter.[5]

- [27] To complete this overview of the relevant procedural and legislative landscape, on July 8, 2020, the Ontario Bill 161, amending the Class Proceedings Act, 1992, SO 1992, c 6, received Royal Assent; they will go into effect and apply to cases commenced on or after October 1, 2020. The amendments include several new sections addressing multi-jurisdictional class proceedings, including sections largely identical to their new British Columbia CPA counterparts. But other Ontario amendments go beyond the 2018 British Columbia amendments, as set out below.
- [28] The new Ontario s. 5(6) largely tracks the British Columbia s.4(3):

Existence of other class proceeding

- (6) If a class proceeding or proposed class proceeding, including a multi-jurisdictional class proceeding or proposed multi-jurisdictional class proceeding, has been commenced in a Canadian jurisdiction other than Ontario involving the same or similar subject matter and some or all of the same class members as in a proceeding under this Act, the court shall determine whether it would be preferable for some or all of the claims of some or all of the class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced in the other jurisdiction instead of in the proceeding under this Act.
- [29] The new Ontario s. 5(7) also tracks the British Columbia CPA, s. 4(4), quoted above, in setting out considerations for the court in making that determination.
- [30] The Ontario amendments contain an additional section that does not exist in the British Columbia legislation. Specifically, the new s.5(8) of the Ontario Act expressly contemplates that an application under s.5(6), to determine whether a proceeding in another jurisdiction may be preferable, may be brought before the certification application (notwithstanding the fact that s.5 governs and is indeed entitled "Certification"):

Motion for determination under subs. (6)

- (8) The court, on the motion of a party or class member made before the hearing of the motion for certification, may make a determination under subsection (6) with respect to a proceeding under this Act, and, in doing so, may make any orders it considers appropriate respecting the proceeding, including,
- (a) staying the proceeding; and
- (b) imposing such terms on the parties as the court considers appropriate.

[emphasis added]

- [31] Parenthetically, the Ontario amendments also encourage greater judicial stringency with respect to dormant class proceedings. The new s.29.1(a) not only enables but requires the court, on application, to dismiss for delay a proposed class proceeding that has not, within a year of filing, filed a "final and complete motion record in the motion for certification," as

well as other steps. These reforms appear to address a scenario seen in the present situation, where only a few of the 14 proposed Roundup class proceedings have progressed beyond mere filing.

II. ISSUE 1: should certification be heard before the defendants' motions?

A. General principle: certification first

- [32] It is well established that as a general rule, the certification motion is the first procedural motion heard in class action proceedings: *Gill v. Yahoo Canada Co.*, 2018 BCSC 290 at para. 13; *Kett v. Mitsubishi Materials Corporation*, 2019 BCSC 2373 at para. 11. The case management judge has the discretion to depart from this principle, based on the particular circumstances. The court's discretion is to be exercised in a manner that facilitates and achieves a judicial economy and the timely resolution of legal disputes: *Gill* at paras. 14-16; CPA, s.12.
- [33] That said, the defendant must provide a "compelling reason" or demonstrate "exceptional circumstances" to receive an exemption from the general rule that the certification motion be heard first: *Kett* at para. 16. At para. 12, *Kett* gave as an example of such an exceptional circumstance: *Li v. British Columbia*, 2017 BCSC 1616 where the determination of the constitutional validity of the foreign transferee provisions of the Property Transfer Tax Act, RSBC 1996 c 378 -- predominantly a question a pure law -- would likely dispose of the entire proceeding, and could be determined without extensive evidence about individual plaintiffs.

B. Effect of the Protocol and the CPA amendments

- [34] The defendants argue that British Columbia's adoption of the Protocol significantly changes the process for determining the preferable proceeding amongst proposed class proceedings in different jurisdictions, and consequently the consideration of sequencing applications, at least insofar as the applications concern the preferable venue. They argue that the present application is a case of first impression since the adoption of the Protocol, and thus distinguishable from earlier cases deferring stay motions until the certification hearing.
- [35] Put broadly, the underlying policy objective of the Protocol is judicial economy and avoidance of superfluous duplication. As stated in *Varnai c. Janssen Inc.*, 2019 QCCS 5090 at para. 44, the "Protocol aims to prevent and deal with the challenges caused by multiple overlapping class action filings in different jurisdictions " As stated in *Wong v. Marriott International Inc.*, 2020 BCSC 55 at para. 21, "Along with the 2018 Judicial Protocol, it encourages coordination and uniformity in multijurisdictional class actions, while respecting the independence of judges and courts."

- [36] The defendants accordingly argue that it would be appropriate to determine their applications first: if the Court determines that the British Columbia proceeding be stayed as an abuse of process as duplicative of the more advanced Ontario and Nova Scotia claims, there is no need for the Court and the parties to be put to the time and expense of the certification hearing.
- [37] The concern over class proceedings that are duplicative, or abusive, or both, is not a new one. As stated fifteen years ago in the Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations (March 9, 2005):
- [17] Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial class actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact-finding, judicial analysis and pretrial procedures and eliminates the risk of inconsistent findings. It increases access to justice by spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.
- [18] By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are thirteen overlapping actions with thirteen different counsel. The uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members.
- [38] The Protocol takes several steps to minimize confusion and duplication between parallel class proceedings in different jurisdictions. Plaintiffs' counsel are to post the pleadings in their action on the CBA Class Action Database (para. 2). Parties must advise the court of the status of each parallel class proceeding (paras. 3-6).
- [39] The Protocol also sets out a means to enable courts and counsel to communicate over jurisdictional lines with respect to the progress and appropriate disposition of multi-jurisdictional class proceedings:

7. Prior to or at the first case management conference set in any Action, and at any other time, the Parties may advise the Judge that the Parties agree that the Judge may:
 - a. speak with the Judges in any other Action (and under what terms if any, subject to the Judge's concurrence), provided that all decisions of each Judge shall be made independently, and based on the evidence and argument presented to the Judge making the decision;
 - b. direct that a joint case management hearing be held with a Judge in any other Action, if the other Judge agrees.

If the Parties do not so agree, but the Judge wishes to communicate with a Judge or Judges in any other Action, a hearing will be convened to consider the issue, and the Judge will make a decision after receiving submissions from the Parties.

9. Any Party to a Motion, or Parties to the other Actions who have received notice pursuant to paragraph 8, may move for an order that Counsel, or the Judge in other Actions, should the Judge in the other Actions agree, be allowed to participate in the Motion to the extent permitted by and in accordance with the rules of each Court. The means and nature of the proposed participation shall be as directed by the Judge in each Action.
10. The Judges may communicate for the purpose of determining the most efficient process for the consideration of any Motions, after receiving any input the Parties may provide, and making any necessary decision as to the appropriateness of any communication as set out in paragraph 7. The Judges shall advise Counsel when and if such communication has occurred, and may advise of the nature of such discussions.
11. Each decision on any Motion, or any direction made at any case management conference, shall remain that of the individual Judge.

[emphasis added]

[40] The defendants argue that the Protocol, if read plainly and purposively, contemplates that stay applications on abuse of process grounds should presumptively be heard before the certification hearing, to sweep away duplication and multiplicity at the earliest possible moment.

[41] The plaintiff argues that the Protocol is not the proverbial game-changer urged by the defendants. The Protocol is administrative, not legislative. The plaintiff notes that the preamble to the Protocol expressively accepts "that such a protocol does not have the power to amend the substantive or procedural laws of any province or territory."

[42] The plaintiff observes that general concern over abusive duplicative proceedings is not new, as set out above, and that repeated and recent jurisprudence has confirmed that parallel proceedings in themselves are not inherently offensive. Last year, and after the enactment of the Protocol, our Court of Appeal said in *Fantov v. Canada Bread Company*, 2019 BCCA 447, at para. 71:

A proposed class action is not abusive simply because there is another class action ongoing in another jurisdiction dealing with the same subject matter. A parallel class proceeding will not be an abuse of process unless it can be shown that the impugned parallel action is a duplicative action that was filed for no legitimate purpose: DALI [DALI 675 Pension Fund v. SNC Lavalin, 2019 ONSC 6512] at para. 19. In this case, the case management judge found that the Asquith Action was not an abuse of process. She found that the regional market differences and the umbrella purchaser claims advanced in the Asquith Action were legitimate reasons for a parallel class action in B.C. She awarded CFMM carriage of the Bread Claims in B.C. I find no error in the case management judge's analysis. Her findings are entitled to deference. I would dismiss the appeals of the award of carriage of the Bread Claims in B.C. to CFMM.

[emphasis added]

[43] In the result, the Fantov Court stayed one of the proceedings before it: that action had been filed by the identical firm who had earlier been granted carriage in their parallel Ontario proceeding. As that firm had earlier argued that the Ontario proceeding was the preferable vehicle, their placeholder British Columbia action became an abuse of process. In contrast, the Court rejected a stay application against another British Columbia parallel proceeding, filed by a separate law firm. The new multi-jurisdictional provisions in the amended CPA would enable the Court to determine whether the British Columbia action should appropriately be certified and continue, or appropriately be stayed in favour of the Ontario proceeding.

[44] Ontario courts have reached similar conclusions. Last year, and after the enactment of the Protocol in Ontario, in DALI 675 Pension Fund v. SNC Lavalin, 2019 ONSC 6512, Belobaba J summarized the law with respect to abuse of process in the context of multi-jurisdictional class proceedings:

[12] Parallel proceedings per se are not an abuse of process. It is beyond dispute that, as far as possible, multiplicity of legal proceedings should be avoided. However, in the class action context, proposed class actions which arise from the same occurrence and proceed in two or more provinces in parallel are not unusual. As this court noted in *Silver v. Imax*:

It is not unusual for class proceedings to be commenced contemporaneously in different jurisdictions. Even where a class proceeding has been certified elsewhere, parallel proceedings may be permitted to continue.

[13] The reality in most cases is that competing class counsel eventually agree to co-operate. Parallel securities class actions that continue beyond leave and certification soon become a single proceeding for purposes of the common issues trial or settlement. My experience as a class action judge supports this observation of the Divisional Court:

Generally, to date in class action proceedings, through the co-operation of counsel and guidance from the court, issues of potentially overlapping jurisdiction have been worked out on a practical basis in the interests of litigants.

[14] The question here, of course, given the absence to date of any such co-operation, is whether the Ontario action should be stayed at the pre-certification stage as an abuse of process.

[15] Abuse of process in the class action context. The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. In the class action context, some of our courts have found that multi-jurisdictional class actions may be an abuse of process where they are duplicative and serve no legitimate purpose.

[16] The Manitoba Court of Appeal said this in *Hafichuk-Walkin v BCE*:

In our federation, parallel multi-jurisdictional class actions are permissible. However, multi-jurisdictional class actions are abusive when they are duplicative and no legitimate purpose would be served by allowing more than one class action to proceed on behalf of overlapping class members from one or more provinces.

[17] Canadian courts have found an abuse of process when the same plaintiff or the same law firm files identical or almost identical actions in several provinces for no good reason. Filing duplicative actions in multiple jurisdictions for example, "as a form of insurance policy" to hedge class counsel's bets, is not a sufficiently good reason.

[18] PO argues that the "duplicative and no legitimate purpose" test has only been applied in cases (and should be so limited) where the same plaintiffs or the same lawyers file identical or almost identical class actions in multiple jurisdictions against the same defendant. Here, of course, different law firms filed in Quebec and Ontario on behalf of different plaintiffs.

[19] I know that some judges have found the same plaintiff/same counsel feature to be an important determinant in deciding duplication. However, as I advised PO during the hearing, the fact that different plaintiffs or different counsel filed the parallel proceedings cannot be determinative. It would not make good legal sense to allow multi-jurisdiction filings to escape scrutiny for abuse of process simply because class counsel was able to persuade another class member to be the representative plaintiff in its parallel action, or worse, another law firm to act as a "beard." In my view, it is more sensible and certainly more principled to approach every parallel class proceeding that generates an abuse of process challenge with the same core question: can it be shown that the impugned parallel action is a duplicative action that was filed for no legitimate purpose.

[45] See also the useful analysis of *Morgan J* in *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499 at paras. 121-127.

[46] Each of *Fantov*, *DALI*, and *Kirsch* concluded that in general, a stay application should be heard with the certification hearing, and not in advance. As summarized in *Fantov*:

- [64] The timing of a stay application under the amended legislation was directly raised in *Brooks v. Canada (Attorney General)*, 2009 SKQB 54 [Brooks]. In *Brooks*, the Merchant Law Group had commenced class actions in several jurisdictions. The defendants sought to stay the Saskatchewan proceedings. After reviewing the amendments to the Saskatchewan legislation, which amendments mirror those found in the CPAA, Mr. Justice Zarzeczny concluded that the issues raised in support of stay should be addressed at the certification hearing. In that regard he reasoned:
- [21] The court has concluded that virtually all, if not all of the concerns raised by the applicants in support of their stay applications are intended to be, and for that matter, mandated to be considered by the court during the certification application of this class action. "Traffic control" as between the nine or ten existing class actions commenced in the other provincial jurisdictions previously noted is the responsibility of this court upon certification as now required by subsections 6(2) and (3) of the Act. The "objectives" and "relevant factors" by which the court is to be guided and which it must consider involve the very considerations upon which the applicants base their stay applications. They include avoiding, where possible, the risk of irreconcilable judgments, the promotion of judicial economy, the consideration of the laws applicable, the stage each action has reached, the plan for the proposed multi-jurisdictional class action and the location of the representative plaintiffs, class members, evidence and witnesses.
- [22] The discretion granted by the legislature to the court with respect to any certification orders it may issue as outlined in s. 6.1 of the Act is very broad. That discretion must be exercised having regard to the criterion set out in subsection 6(2) of the Act. That may prompt a conclusion that deference should be given to an existing class action commenced in another jurisdiction. The discretion of the court is further circumscribed by the objectives and relevant factors set out in subsection s. 6(3).
- [23] The court has concluded that when this new multi-jurisdictional class action framework, especially s. 6, is considered as a whole, it is clear that the concerns raised by the applicants in support of their stay application (being some of the same concerns as were addressed by the Court of Appeal in *Englund*), have been eclipsed. They are now specifically and legislatively required to be addressed by the court at the certification stage and after a certification hearing has been conducted. It is at that time when the full and further information which the court may require and which it is mandated to consider by s. 6 of the Act will be fully before the court and the court can consider the imposition of any conditions, limitations or otherwise to any certification order which it may consider to be appropriate in the whole of the circumstances. Inviting the court, as the applicants in the present case have done, to consider these issues in a preliminary application is premature and an unnecessary duplication of resources and expense.

[24] That is not to say that there might not arise some circumstances where an application to stay a multi-jurisdictional class action for abuse of the court's process might be appropriate, however, the court has concluded that this is not one of them. [Emphasis added.]

[65] In *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512 [DALI], an Ontario case not governed by the new amendments, Justice Belobaba reached a similar conclusion holding at para. 8:

where parallel proceedings are not an abuse of process but nonetheless raise questions of preferability, these questions are best addressed at certification under the preferability criterion.

[66] I agree with and adopt the reasons of Justice Zarzeczny. They are consistent with the language of the amendments and the reasons behind them. Of particular import are ss. 2(b) and 3.1 of the CPA, which require notice of the application for certification to be served on the representative plaintiff of existing or proposed multi-jurisdictional class proceedings. The party who receives notice is given the opportunity to make submissions at the certification hearing. Further, the legislation sets out in detail that when multi-jurisdictional class proceedings have been commenced elsewhere in Canada, the court at the certification hearing must determine whether it would be preferable for some or all of those claims to be resolved in the other proceedings. The legislation sets out the criteria that must be taken into account in reaching those decisions. The court must decide whether to certify the local action or alternatively stay the local action and send it elsewhere. Such a determination cannot be made in an evidentiary vacuum. The evidentiary foundation to decide the issues comes from the materials filed by the parties seeking certification and those who may oppose it.

[67] It is important to recall the comments of the case management judge that before her was an application for carriage and she found that it was in the best interest of the B.C. class to allow a B.C. action to proceed. She recognized that the proceeding was at a preliminary stage and she must be cautious not to preclude the development of the action as on the application for certification, the plaintiff would have to meet different criteria.

[68] This conclusion is also consistent with the Consortium's alternative submission that the case management judge's decision on their stay application was premature.

[69] For the above reasons I find that the applications of the Consortium and the Bread Defendants to stay the Asquith Action in favour of the David Action on grounds other than an abuse of process are premature. I would dismiss those appeals without prejudice to the right of the Consortium and the Bread Defendants to raise those same issues at the certification hearing.

[47] The Fantov Court directed that the stay application be heard at the same time as the certification hearing:

FUTURE PROCEEDINGS

- [73] Going forward, the question for determination will be whether the Asquith Action should be certified or alternatively should be stayed in whole or in part in favour of the David Action. The judge on that application will have to weigh the factors set out in the new legislation. While many of the submissions for and against a separate B.C. action that were made in this Court and on the application below will undoubtedly be repeated, in light of the Supreme Court of Canada's comments in *Godfrey* concerning the complexity of marshalling and presenting evidence in an umbrella purchaser claim, I would expect there will be additional evidence and submissions to consider. The judge hearing the certification application will have to weigh those submissions and determine, given the legislative criteria and the evidence lead on the certification hearing, whether the Asquith Action should be certified and/or whether some or all of the claim should be heard in another jurisdiction.
- [48] I also take guidance from and endorse the reasons of Boudreau J in the parallel Nova Scotia Mitchell sequencing decision. As noted above, Boudreau J held that the stay application would be best determined on a full evidentiary record, which will be provided in the certification application: paras. 44-46.
- [49] Finally, in *Gomel v. Ticketmaster*, the Court declined to stay the British Columbia proceeding before the certification hearing in this province, and before the certification of any other parallel class proceeding action in another jurisdiction:
- [67] I also note what was said by the Manitoba Court of Appeal in *Hafichuk-Walkin v. BCE Inc.*, 2016 MBCA 32, at para. 57:
- [57] Subject to resolving choice of law issues, we see little in the way of a legitimate reason for what are, in substance, "carbon copy" class actions involving the same plaintiffs, defendants, lawyers and allegations being allowed to proceed in two different jurisdictions once a final certification of a class action has occurred in one jurisdiction and all appeals of the certification are exhausted, as is the case here.
- [Emphasis added.]
- [68] At present, none of the actions has been certified. There is a great deal of uncertainty about the outcome of the scheduled hearing in Saskatchewan. The Ontario Action may proceed more quickly than the Saskatchewan Action. Presumably by the time of a certification hearing in this province, much more will be known and I will be in a far better position to decide what is mandated by the interests of justice than I am at present.
- [69] For all of those reasons, I decline to stay the B.C. Action in favour of the Saskatchewan Action at this time.
- [50] None of *Fantov*, *Gomel*, or *DALI* referred to the Protocol. Those actions were not subject to the Protocol as they were commenced before its effective dates in British Columbia and Ontario. That said, those decisions were issued after the formal adoption of the Protocol in

those jurisdictions, and its policy objectives were on those legal landscapes. Further, counsel advises that while Nova Scotia has not adopted the Protocol, the Court in Mitchell was encouraged to some extent to follow the Protocol, and its provisions were before the Court; indeed, one of the defendants' grounds of appeal is that the trial court did not give sufficient weight to the Protocol. The silence of these judgments with respect to the Protocol serves as a further indication that the Protocol is primarily a procedural facilitator, rather than a substantive change to the law.

- [51] Further, I agree with the plaintiff's submission that the Protocol must be read in conjunction with the amendments to the CPA concerning multi-jurisdictional class proceedings, and that those amendments also indicate that a stay application will generally be heard with the certification hearing. In most cases, there will considerable overlap in those enquiries, and the evidence on which they are based, in determining not only the preferability of a class proceeding as a litigation vehicle, but also the preferable venue.
- [52] Specifically, the new CPA multi-jurisdictional provisions are found under the heading of "class certification, in s. 4(3), quoted above. That section immediately follows the statutory list of considerations in s.4(2) guiding the court's determination of whether a class proceeding would be the "preferable procedure for the fair and efficient resolution of the common issues." In other words, the reference in (3) to "the court must determine whether it would be preferable for some or all of the claims of the proposed class members" contemplates that consideration generally occurring during the certification hearing.
- [53] Finally, I reiterate the observation above: that in contrast to the recently-amended Ontario Act ((s.5(8)), the British Columbia CPA has no provision expressly authorizing the court, before the certification hearing, to stay a proposed British Columbia proceeding on the basis that a parallel proceeding in another jurisdiction would be the preferable vehicle.
- [54] I would not go so far as to say that s. 4(3) precludes a pre-certification stay application: that option always remains at the discretion of the court, in any proceeding. As recognized in *Brooks v. Canada (Attorney General)*, 2009 SKQB 54 at para. 24 (as endorsed in *Fantov* at para. 64), an application to stay a multi-jurisdictional class action for abuse of the court's process may be appropriate in certain cases. Such a preemptory application may be appropriate where the proposed British Columbia class proceeding is a manifestly less preferable vehicle for a national claim. For example, the proposed British Columbia proceeding could be potentially statute-barred, or present an obviously unfit representative plaintiff, or have a smaller class of potential plaintiffs, or have a less substantial connection to the subject matter of the litigation, or suffer from a manifestly defective pleading. The legislative or common law framework may be less favourable to the proposed class members. While there should be no advantage to being first to file (DALI at paras 21-24),[6] the relative advancement of competing parallel proceedings will generally weigh in favour of early determination of preliminary motions: it may be appropriate to consider a strike or stay or carriage application before the certification hearing where the horse in another jurisdiction is much faster out of the gate, and under the control of a skilled and steady

rider.

- [55] That said, the wording of the statute, and the jurisprudence above, indicate that it would be a rare circumstance where jurisdictional preferability would be assessed under s. 4(3) before the certification hearing absent the presence of the factors set out above, and other relevant factors.

C. The Cannon/Branch factors

- [56] The parties provided many cases to the Court setting out judicial contemplations of whether certain proposed applications, such a strike, stay, or carriage applications, should occur before, with, or after the certification hearing. I agree with Branch J in Kett at para.13 that "I confess that the facts driving the variety of results is not always clear." The parties also recognize that there is no one case that perfectly aligns with the circumstances of the present case: the effect of the Protocol on a multi-jurisdictional class proceeding with competing proposed class proceedings in other jurisdictions. That said, I have found three cases to be of particular assistance. The first is Kett, which did not have other parallel proposed class proceedings in other provinces. The second is the 2019 decision in Gomel v. Ticketmaster, where the defendants applied before the certification hearing to stay the British Columbia action, and have the British Columbia claims heard in a parallel, slightly more advanced, Saskatchewan proceeding. The third is particularly germane: the decision from three months ago of Boudreau J in the Nova Scotia Roundup case: Mitchell.
- [57] The factors guiding the court's discretion in determining whether applications, particularly stay or strike application such as those before the Court, ought to be heard before certification are commonly referred to as the "Cannon Factors" (after Cannon v. Funds for Canada Foundation, 2010 ONSC 146) or the "Branch Factors" from their expanded listing in Branch J's seminal text, Class Actions in Canada, 2nd ed. (Toronto: Thomson Reuters, 2020) at 5.200. In Kett at paras. 11-12, Branch J lists those factors (although he is too modest to refer to them as such) in two tranches, which I consolidate as follows:
- (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
 - (b) the likelihood of delays and costs associated with the motion;
 - (c) whether the outcome of the motion will promote settlement;
 - (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
 - (e) the interests of economy and judicial efficiency; and
 - (f) generally, whether scheduling the motion in advance of certification would promote the "fair and expeditious determination" of the proceeding (s. 12).

- (g) the strength of the defendant's arguments: *Li v. British Columbia*, 2017 BCSC 1616 at para. 32;
 - (h) any delay by the plaintiff in advancing certification: *Strohmaier v. British Columbia (Attorney General)*, 2017 BCSC 2079 at para. 38;
 - (i) whether the defendant agrees not to pursue costs or otherwise agrees to facilitate the timely pursuit of the action, *Li* at para. 27;
 - (j) whether the defendant agrees to treat the motion as determinative of the s. 4(1)(a) aspect of the certification motion, *Lui v. Transportation Investment Corporation*, 2016 BCSC 827 at para.19;
 - (k) whether there is likely to be an overlap in the issues raised on certification and the issues the court will consider on the motion to strike: *Thomson v. Bryce*, 2016 BCSC 687 at para. 19.
- [58] If the factors indicate an equal advantage to hearing certification first or the other applications first, "the tie goes to the plaintiff," and certification will be heard first or concurrently: *Kett* at para. 16.
- [59] I will consider these factors in turn, each with an eye to the objectives and procedures of the new Protocol and CPA provisions. While I have generally agreed with the plaintiff's argument that the Protocol, as set down in the Practice Direction, does not uproot legislation or past jurisprudence, I agree with the defendants that the Protocol and CPA provisions do reiterate the desirability of avoiding inefficiency and multiplicity of actions. While this policy objective predates the Protocol and CPA provisions, their issuance places greater weight on these policy objectives in considering the Branch factors, and will prompt a court to view a moribund domestic proposed class proceeding more skeptically than before.
- (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined
- [60] The defendants' strike application on jurisdictional grounds would not dispose of the entire action: two domestic defendants would remain.
- [61] If the defendants are successful in their application to stay the proceeding based on abuse of process, it would dispose of the entire proceeding. But, as noted in *Mitchell* at para. 35, that is only one of two possible outcomes.
- [62] In the end, I agree with the plaintiff that there is considerable overlap between the preferability inquiry with respect to the certification application and the preferability inquiry with respect to the stay application. If that argument is to be made once, as urged by the defendants, it is better made that solitary time on a full evidentiary record.
- (b) the likelihood of delays and costs associated with the motion

- [63] If the defendants are unsuccessful in their stay application, it will not only be a wasted step, but it will likely prolong this litigation by at least one-half year.
- [64] Further, the defendants, represented by the same counsel, will have to prepare for at least one certification hearing in any case, in Ontario. They may have to prepare materials for other certification hearings in Nova Scotia and Québec. Preparation for a certification hearing in British Columbia will pose only modest additional effort, given the significant overlap in issues amongst the parallel proceedings, which overlap was the dominant theme of the defendants' own submissions.
- (c) whether the outcome of the motion will promote settlement
- [65] This factor is unknown in this case, and thus neutral.
- (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification
- [66] The defendants have committed not to appeal the Court's decision on whether or not to grant to stay, if the Court rules against them on that application. This undertaking weighs in their favour.
- [67] Of course, there is a real possibility that the plaintiff would appeal a decision by this Court to stay his proceeding. In this, through no fault of their own, the defendants' undertaking is of limited reassurance with respect to staunching appeals and proceeding efficiently towards adjudication of the substantive claim.
- [68] Further, of course, the defendants' commitment is predicated on the Court ruling in their favour on this application. The defendants have made no commitments with respect to appealing the results of this hearing. As set out above, the defendants have appealed the Mitchell decision declining to hear the stay application before the certification hearing. This stands in contrast to Kett, where the defendants agreed to forgo any right to launch any interlocutory appeal: a factor weighing in their favour towards hearing the stay application first.
- [69] I am also mindful of the general admonition against litigating in slices, and the preferability of determining matters together, to avoid multiple appeals of discrete subjects that would be better considered in the context of the whole: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138 at para. 7. Class proceedings are especially vulnerable to a multiplicity of discrete appeals, with significant attendant cost and delay. In this, I agree with the observation of Brundrett J in *British Columbia v. Apotex Inc.*, 2020 BCSC 412:
- [59] If successful, the defendants' jurisdictional arguments have the potential to reduce the scope of the hearing by removing the main jurisdictional objection by a large number of out-of-province defendants. Yet, several of the Cannon/Li factors favour awaiting the certification hearing to deal with the jurisdictional arguments. For instance, the jurisdictional

applications will not dispose of the entire proceeding, the outcome is unlikely to promote settlement, there is a likelihood of delays and increased costs associated with hearing early argument on jurisdiction, and there is a high likelihood of appeals regardless of the outcome. I assess that there is value in a class action in having interrelated issues heard together and in limiting the potential for multiple appeals against isolated aspects of a proceeding rather than providing a basis for all appeals to be heard together on a more complete record.[7]

(e) the interests of economy and judicial efficiency

[70] The defendants complain that multiple proposed class proceedings in multiple jurisdictions impose an unfair economic and logistic burden on them. That may be the case in some circumstances, but, again, this is not a compelling argument in the present case. The defendants are represented by the same law firm in the four active class proceedings. While there may be subtle differences in the pleadings, they will largely be identical. Further, most class proceedings in Canada do not arise as a matter of first instance, but have considerable evidentiary and pleadings precedents based upon earlier litigation in the United States and elsewhere. Ultimately, the defendants have accepted that they will be put to the time and expense of preparing response material to the certification application in DeBlock: it is anticipated that those materials will in substance closely resemble the British Columbia response materials.

[71] The defendants also point to hypothetical confusion sown by the continued existence of parallel proceedings in multiple jurisdictions. These concerns are, at least at this pre-evidentiary stage, more hypothetical than real. As the parallel proceedings proceed toward certification, and as the hypothetical becomes more focused, it may well be an appropriate time for the courts and counsel to employ the cross-jurisdictional communication set out in the Protocol. This communication could avoid inconsistent findings and, indeed, could perhaps avoid the issuance of reasons. The courts could identify, with the aid of the parties, whether a certified action is not only the preferable vehicle for that province, but also the preferable vehicle for a national class proceeding.

[72] Finally, the defendants argue that the class members themselves will be prejudiced by not staying this action at an early stage. Additional time will be required as the overlapping proceedings work their way through certification, thus delaying any recovery, and diluting the funds available for recovery due to duplicative fees and wasted resources.

[73] As a primary observation, as in most class proceedings, plaintiffs' counsel are acting on contingency, this factor is unlikely to have a material effect on net class recovery.

[74] Further, while the defendants' expressed concern for the plaintiffs is laudable, the greater concern for potential class claimants, and a key consideration under this heading, is that there is no guarantee that the DeBlock class proceeding will be certified. The defendants are not agreeing to certification of the DeBlock class proceeding. They will presumably contest that application with vigour, and have applied to stay that proceeding, as set out below. If

DeBlock is not certified, and the other proceedings must be reactivated, the delay will be significantly compounded. Further, with its certification hearing scheduled for early 2021, that Ontario determination may occur after the British Columbia determination.

- (f) generally, whether scheduling the motion in advance of certification would promote the "fair and expeditious determination" of the proceeding (s. 12)

[75] This factor will be determined by the collective weight of the remaining factors. As set out in this discussion, it will be more fair and expeditious to hold one hearing, considering both the stay and the certification at the same time.

- (g) the strength of the defendant's arguments

[76] A successful stay application based on abuse of process would dispose of the entire proceeding. But that application will be challenging on the present record (or, more accurately, lack of an evidentiary record) in light of the Fantov and DALI passages quoted above. Those passages also indicate, without deciding the issue that will be decided at the stay application, that an abuse of process is more likely to be found, and a stay granted, where the parallel proceedings have been filed by the same national law firm, a situation different from the present.[8] At the same time, the Court acknowledges the observation in DALI at para. 19, quoted above, that the mere fact that counsel or representative plaintiffs are different is not a determinative factor shielding from a stay application an otherwise duplicative action that was filed for no legitimate purpose.

[77] Again, while it is not determinative, the present application is not wholly duplicative with the other proposed class proceedings. In contrast to both Mitchell and DeBlock, it does not purport to be a national class action, but is limited to those persons exposed to the product in British Columbia.

[78] To change the focus to the proposed national class proceeding, while an argument could be made that courts of other provinces could apply the BC Consumer Protection Act, and that they may exercise their discretion to do so, the application of a foreign statute is a rarity. Further, the DeBlock action does not presently plead the British Columbia statute, although it is conceded that such an amendment would likely be readily granted.

[79] Finally, the defendants are likely to have a greater odds of success at controlling the multiplicity of proceedings at the certification stage, in contrast to a preemptory stay application. The certification test does not require any determination of abusive conduct on the part of the plaintiffs or their counsel, as would a stay application based on abuse of process. The certification enquiry, in contrast, will focus on whether it is just and convenient to decline domestic certification, in favour of a more appropriate parallel proceeding, under CPA s.4(3).

- (h) any delay by the plaintiff in advancing certification

- [80] The plaintiff has advised the Court that it is in a position to swiftly prepare and deliver the certification motion. I infer from the correspondence that the main reason the certification motion is not already before the Court was the defendants' early-expressed position that the stay motion should be heard first.
- [81] As it is the plaintiff's presumptive right not to deliver its certification motion before receipt of the defendants' response, the lack of certification materials at this stage cannot in itself be a factor in favour of hearing the strike application first. Pre-Protocol, that would probably be an entire response to an accusation of delay in advancing certification. But post-Protocol, as set out below, a plaintiff may be wise not only to show lack of delay, but to show proactive diligence, by delivering certification materials as soon as reasonably possible.
- (i) whether the defendant agrees not to pursue costs or otherwise agrees to facilitate the timely pursuit of the action
- [82] In *Kett*, the defendants agreed to forgo costs and agreed to promptly schedule the motion to strike hearing: all factors weighing in their favour towards hearing the stay application first (albeit not sufficiently in their favour to carry the day). The present defendants have not made such offers.
- (j) whether the defendant agrees to treat the motion as determinative of the s. 4(1)(a) aspect of the certification motion
- [83] The defendants have declined to treat their stay application as determinative of the s.4(1)(a) aspect of the certification motion. This stands in contrast to the defendants in *Kett*, where it weighed in the defendants' favour towards hearing the stay application first.
- (k) whether there is likely to be an overlap in the issues raised on certification and the issues the court will consider on the motion to strike
- [84] The plaintiffs, directly, and the defendants, indirectly, agree that there will be considerable and meaningful overlap between the issues to be decided on certification and the issues to be decided on the stay application. The central issue in each application is whether a British Columbia class proceeding would be the "preferable procedure for the fair and efficient resolution of the common issues": the issues statutorily set out in ss. 4(1)(d) and (3). The other considerations set out for the certification issue under s. 4(1) and (2) will inform both the issue of whether a class proceeding is the preferable vehicle, as well as whether a British Columbia class proceeding, in contradistinction to an Ontario or a Nova Scotia class proceeding, is the preferable vehicle to pursue these claims. This overlap weighs considerably towards having that matter argued and determined once, based on a full evidentiary record.

D. Discussion and decision

- [85] For the reasons above, the Court will hear the stay and strike applications at the same time as the certification applications.

- [86] Without a more substantial evidentiary record, it is premature to decide whether the British Columbia proceeding should be stayed, and whether the Ontario proceeding would be the preferable litigation vehicle for British Columbian plaintiffs to pursue their Roundup claims.
- [87] As earlier observed, even if this Court were to stay the proposed class proceeding in favour of that in Ontario, there is no guarantee that the DeBlock action will in the end be certified. The defendants have not consented to its certification. Indeed, the opposite is true: they have a pending application in Ontario for a stay application in advance of the certification application. That June 12, 2020 application seeks an order staying the claims of those potential claimants resident in British Columbia, Nova Scotia, and Québec, in favour of the existing proposed class proceedings in those jurisdictions, if the courts in those jurisdictions do not agree to stay those proceedings. Alternatively, the defendants seek an order staying the Ontario proceeding in its entirety pending the outcome of the certification hearings in the Forster, Mitchell, and Paquette actions.
- [88] A defendant facing multiple class proceedings in multiple jurisdictions could always agree that one proceeding be certified. Such a step would provide strong reassurances to a court in this present position, everything else being equal, that potential claimants would have their claims adjudicated in a judicially efficient manner. It would better persuade the court that the defendants recognize that the claim should be adjudicated substantively, and that their sole objection is the cost and time of defending multiple proceedings.
- [89] Similarly, were the certification hearing in DeBlock scheduled at an earlier date, a court in the present position would likely be more inclined to at least wait and see the outcome of that certification application, possibly relieving a defendant of an active defence of a proposed class proceeding in the interim through an interim stay or other means.
- [90] Both of these hypothetical scenarios would have been especially germane to the present circumstances, where the plaintiff has not yet provided his certification motion. While presumptively the plaintiff can wait for the defendants' response to civil claim before doing so, it is not necessary for him to do so; in many other class proceedings, the plaintiffs served the certification motion materials before receipt of the response. Doing so would signal to the court hearing a sequencing motion that the plaintiff is genuinely proffering his proposed class proceeding as a viable vehicle to advance the claim, rather than for some other strategic purpose.
- [91] I raise these points not to be critical of counsel in the present case, but to reiterate the policy thrust of the Protocol, the CPA amendments, and the Supreme Court Civil Rules generally: determination of a proposed class proceeding on its merits, as swiftly and efficiently as reasonably possible. That policy will expect and reward actions by plaintiff and defence counsel that move the litigation towards this objective. Conversely, the Court will more readily sweep away filed proceedings that appear disinclined to push the litigation forward towards substantive adjudication, but which may have been filed partly or wholly in order to favourably negotiate a lucrative carriage agreement amongst plaintiff counsel.

III. ISSUE 2: SHOULD THIS COURT COMMUNICATE WITH THE COURTS IN THE PARALLEL PROCEEDINGS?

- [92] The defendants apply an order permitting this Court to enter into the inter-jurisdictional judicial communications set out in paras. 7-9 of the Protocol, quoted above.
- [93] The plaintiff provided no specific response to the application. They declined to consent to the communications, but did not strenuously oppose the application. Their primary input was providing *Kibalian v. Allergan PLC*, 2020 ONSC 2417 to the attention of the Court after the hearing.
- [94] I grant the order, and confirm that this Court may communicate with other Courts pursuant to the Protocol, and that the proverbial lines are open.
- [95] That said, based on the ruling above, I do not contemplate initiating those communications, or holding a judicial teleconference at this stage. Without a more clear evidentiary record, that judicial conversation would likely be limited. While the Ontario case management judge would have the benefit of at least half a certification record before him, his judicial colleagues in Nova Scotia, Québec, and here would not be able to comment on the preferable jurisdiction, except to recognize the obvious fact that the Ontario case is one half-step ahead of those of the other provinces. The judicial conversationalists may be able to speculate on whether the pleaded allegations could likely be supported by facts. But in this case, as in most cases, that conversation is likely premature at this stage. Such a conversation will in most cases most appropriately occur after at least one complete set of certification materials has been finalized and delivered to the Court and, in most cases, after that certification application has been heard, in at least one jurisdiction.
- [96] In this, I am presently of the view of Morgan J in *Kibalian*, who addressed these issues while declining to accede to the defendants' suggestion to hold a multi-jurisdictional case conference, with all of the counsel and all of the judges managing the five cases in four provinces participating:
- [5] While I do not dismiss the possibility of a multi-jurisdictional case conference, my inclination is that now is not the time. Each of the judges in each of the provinces is responsible for the action in their own jurisdiction and has no authority over the actions in the other provinces. Without agreement from the parties - in particular among the plaintiffs in each jurisdiction - there is not much the judges can do amongst themselves about overlapping claims. Any one judge could entertain a motion for a stay in their jurisdiction or could schedule their court's case to proceed. But I certainly could not order the B.C. claim to wait until the Ontario claim catches up, or vice versa. The duplication of claims is sometimes something we just have to live with in a federal state.

- [6] On the other hand, plaintiffs' counsel in each of the jurisdictions could come to an arrangement among themselves to resolve the duplication. They could, for example, include each other in a consortium, or have some provincial actions stand down awaiting a result in one or more that are proceeding ahead, or fashion some creative mix of those possibilities. A meeting of the minds among plaintiffs' counsel holds out a greater prospect for resolving the overlap among jurisdiction than does a meeting of all judges and counsel at this stage.
- [97] I recognize that the proceeding before Morgan J was at an earlier stage than the present - just after the first case conference - and that the Court contemplated "possibly re-visit[ing] the question of holding a multi-jurisdictional case conference" at a later case management conference: para. 10. But the stay and strike application materials in the present case do not provide much more guidance on the appropriate vehicle or venue than did the information before the Kibalian Court, and the comments above apply equally to the present case, measured against the state of the parallel proceedings. That said, like Morgan J, I remain open to revisiting the issue of immediate judicial communications, or a more extensive conference involving judges and counsel, if and when circumstances significantly change in this or any parallel proceeding.
- [98] Parenthetically, and in response to the defendants' suggestion, I do not read the Protocol to contemplate that the British Columbia judge unilaterally open communications with judges in other provinces without the condition precedent of a determination after a hearing on the specific issue. The defendants point to para. 10, which states that "[t]he Judges may communicate for the purpose of determining the most efficient process for the consideration of any Motions, after receiving any input the Parties may provide, and making any necessary decision as to the appropriateness of any communication as set out in paragraph 7." Paragraph 7 contemplates parties agreeing that judges may confer with other judges on the appropriate disposition of parallel proceedings. But "[i]f the Parties do not so agree, but the Judge wishes to communicate with a Judge or Judges in any other Action, a hearing will be convened to consider the issue, and the Judge will make a decision after receiving submissions from the Parties" [emphasis added].
- [99] Finally, my comments on this issue are limited to an analysis of the requirements and expectations of the Protocol. They do not purport to comment on a judge's general ability to confer with judges outside the jurisdiction about an ongoing case.[9] But the Protocol contemplates doing so only after consent, or determination after a hearing.

IV. ISSUE 3: should the defendants be required to provide a response before the certification hearing?

- [100] In *Gomel*, Tamm J built upon the analyses of Myers J in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74 and Griffin J (as she then was) in *Shaver v. British Columbia*, 2017 BCSC 108, as to whether the Court should permit the defendant in a proposed class proceeding to delay delivery of a response to civil claim:

- [78] The law is clear that a judge has discretion to permit the defendant in a class proceeding to delay filing a statement of defence until after the certification hearing. Equally, a judge may exercise her or his discretion by requiring that the defence be filed prior to such a hearing, in compliance with the British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [79] It appears that as class action litigation has developed in different provinces, there may be "local customs" emerging. It may at one time have been routine for a statement of defence to be filed post-certification, and that may still be the norm in parts of the country.
- [81] In my view, if it ever was the normal practice to delay filing of a defence until after certification, such is no longer the case, at least in British Columbia. I adopt the comments of Mr. Justice Myers in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74 at paras. 31 to 34:
- [31] I will conclude with a comment regarding the practice of deferring the filing of a statement of defence until after the action has been certified. This case is an illustration of the difficulties that can create. It is a practice that ought to be revisited. I am not the first judge to make that comment: in *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257 and *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924, Mr. Justice Perell made the same observation.
- [32] There is nothing in the Class Proceedings Act mandating the delay, nor is there anything in the Supreme Court Civil Rules. The courts have come to allow the deferral as a matter of course, often simply based on an agreed schedule between the parties who adopt the ingrained practice. Given the financial stakes of class actions and the consequences of a certification ruling, it cannot be justified on the basis of potential cost savings. As Perell J. noted, defence counsel will have to investigate the case and ascertain the facts in order to argue certification. The actual drafting of a defence after that work has been done is a minimal incremental effort and expense in the larger picture.
- [33] It is hard to see what legitimate purpose is served by deferring the statement of defence when it, and the plaintiff's reply, if any, crystallise the issues, something that the certification process is supposed to accomplish. This case - commenced 10 years ago - has gone to the Supreme Court of Canada and back down, and we are still dealing with pleadings and class period issues, with a trial date some 10 months away.
- [34] I do not say that deferring the statement of defence should never be allowed; rather, that there ought to be good reason to do so.
- [83] I also note that Myers J. in *Pro-Sys Consultants Ltd.* referred to comments made by [Perell] J. of the Ontario Superior Court of Justice in a 2012 decision. More recently, in *Winder v. Marriott International Inc.*, 2019 ONSC 5766 at para. 113, [Perell] J. stated:

- [113] I have opined on the matter of the close of pleadings in class actions, as have some other courts, but there is a strong case to be made that a certification motion should follow the close of pleadings because this facilitates the analysis of whether the certification criteria are satisfied.
- [84] Similarly, in *Shaver v. British Columbia*, 2017 BCSC 108, Madam Justice Griffin, now of our Court of Appeal, denied an application to delay filing a defence until after certification. She stated:
- [80] It is true that in proposed class actions the court has discretion to waive the requirement for a defendant to file a defence until after the certification hearing: see *MacLean v. Telus Corp.*, 2005 BCCA 338 at para. 10. This discretion was sometimes exercised where it was thought to be more efficient and would avoid the necessity of reformulating a defence in response to a claim that would likely change after the certification hearing, as in *Mangan v. Inco Ltd.* (1996), O.J. No. 2655 (Gen. Div.) at para. 13.
- [81] After years of experience in managing class actions, case law has evolved away from this stated concern, realizing that delay in filing of a defence is often simply a tactical manoeuvre, as noted by Perell J. in *Smith v. Sino-Forest Corp.*, 2012 ONSC 1924 at paras. 50-54.
- [82] Hindsight has shown us that delaying the filing of a defence is not always ideal, as the filing of a defence can reveal common issues that are relevant to the certification application and closes the pleadings in a timely way, focusing the issues before the certification decision is subject to appeals and associated delay, as was noted by Myers J. in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2015 BCSC 74 at para. 32.
- [83] The plaintiff is entitled to know the case it has to meet. The plaintiff's claim and certification application will likely be better informed, including incorporation of amendments, once the plaintiff knows the Province's Response.
- [84] Further the Court will be better informed as to the true issues between the parties, once a Response is filed. This is especially so in Charter litigation which makes relevant contextual factors: see *Murray v. Alberta (Minister of Health)*, 2007 ABQB 231.
- [emphasis added]
- [101] Our Court of Appeal recently endorsed this analysis in *Service v. University of Victoria*, 2019 BCCA 474:
- [116] By agreement of the parties, the University has not yet filed a Response to Civil Claim. It will be easier to identify and define additional common issues along these lines once the University's position is stated clearly in a defence pleading.
- [117] I have reservations as to whether it was wise in this case for the parties to proceed to a certification application without the University's Response to Civil Claim in hand. The availability of a defence pleading assists in crystallizing the issues for purposes of analyzing

the certification criteria. While it is not an uncommon practice for parties to agree that a Response to Civil Claim need not be filed pending the hearing of a certification application, this practice has been subject to valid criticism. I agree with the comments of Myers J. in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2015 BCSC 74 at paras. 31-34 that deferring the filing of a defence should only be allowed where there is good reason; see also *Gomel v. Ticketmaster Canada LLP*, 2019 BCSC 3178 at paras. 78-86.

[102] In *Apotex* at paras. 82-90, Brundrett J reviewed the above authorities and ordered that the defendants not delay in providing their responses despite a pending jurisdictional challenge:

[90] I am not convinced that there exists good reason to delay the filing of Responses by the defendants who have not filed jurisdictional objections. Instead, the filing of Responses will clarify and focus the issues in dispute between the parties, reduce the possibility of surprise submissions at the certification hearing, and assist in moving the proceeding forward with the benefit of all pleadings being filed. Any issues with regards to the specificity of the pleadings may be dealt with on the certification motion itself rather than by delaying the filing of Responses.

[103] The defendants do not advance any arguments specifically responsive to the plaintiff's application to compel provision of a response. Instead, their arguments flow from their overarching position that the preliminary consideration of the stay application may avoid unnecessary duplication of steps in this proceeding, including the superfluous drafting and provision of a response.

[104] I adopt and endorse the statements of Tammen, Myers, Griffin, and Brundrett JJ, above, in their entirety. The defendants have provided no extraordinary reasons why the response should not be provided as a matter of course. The provision of a response will better inform both of the upcoming applications: whether a class proceeding, and whether a British Columbia class proceeding, is the preferable vehicle. Finally, while the response responsive to the British Columbia pleading will require some bespoke pleading drafting, it will largely track pre-existing pleadings in responses filed in other jurisdictions.

V. CONCLUSION

[105] Accordingly, the Court makes the following orders and directions:

- (a) the defendants will file and serve a response to civil claim within 45 days of the date of this order;
- (b) the plaintiff will provide his certification materials within 30 days of receipt of the defendants' response;[10]
- (c) the defendants will provide their certification response materials within 60 days of receipt of the plaintiff's certification materials;[11]

- (d) the parties have leave to seek a five-day certification, stay, and strike hearing at the first available date before me provided by the Registry, after the end of the schedule of steps above. The parties have leave to and should secure this date immediately, rather than waiting for the end of that period;
- (e) the parties have leave to refer to the certification materials with respect to the strike and stay applications, and vice versa;
- (f) counsel in the Mitchell and DeBlock and Paquette action are granted leave to participate with brief written, and, if they wish, oral submissions, at the certification and stay hearing;
- (g) pursuant to para.10 of the Protocol, each party may provide any input with respect to this Court communicating with the Mitchell and DeBlock and Paquette Courts with respect to the stay and certification applications and other aspects of the cases, within 30 days of the defendants' delivery of response materials, by way of letter not exceeding 10 pages;
- (h) at least two weeks before the letter deadline above, the parties are to confer and reach agreement on as many aspects of the Protocol communications as possible;
- (i) as always, the schedule is subject to adjustment;
- (j) the Court will remain available for any case planning conferences required by the parties to discuss proposed adjustments to the schedule, or to discuss additional steps not currently contemplated by the plaintiff's proposed schedule or this schedule.

"Crerar J"

- [1] A form of abbreviated reasons for judgement, focused on procedural directives, and generally impervious to appellate review. This creature appears to be only native to Saskatchewan and Alberta.
- [2] The Merchant Law Group, also counsel in one of the Ontario actions subsumed in the DeBlock proceeding.
- [3] Canadian Bar Association, "Resolution 18-03-A" (15 February 2018).
- [4] Ontario Superior Court of Justice, "Consolidated Provincial Practice Direction" (17 May 2019), Part II.
- [5] In addition to B.C. and Ontario, the Protocol has been adopted in Alberta (Court of Queen's Bench of Alberta, "Civil Practice Note No. 6" (21 June 2018)) and Manitoba (Court of Queen's Bench of Manitoba, "Practice Direction Re: Class Action Judicial Protocol" (4 September 2019)).

Saskatchewan (Court of Queen's Bench for Saskatchewan, "Civil Practice Directive #3" (3 December 2011)) and Nunavut (Nunavut Superior Court, "Practice Directive #42" (1 February 2012)) have adopted an earlier iteration of the Protocol.

- [6] Indeed, the three leading Roundup actions were relative latecomers to the registries: of the 14 filings, Mitchell was #8; this action, Forster, was #11; and DeBlock was last: #14. The fact that many of the other 10 filings (apart from Gadd) were not advanced beyond the filing stage may itself suggest that their existence is an abuse of process, designed to extract a participation fee in exchange for an agreement to join with a consortium led by a firm with a bona fides intention to prosecute the claim.
- [7] Apotex is a proposed class proceeding against pharmaceutical companies manufacturing opioid products. In the sequencing application leading to this decision, the defendant manufacturers sought to have their motions to strike and for summary judgement heard in advance of the certification hearing.
- [8] See also *Hafichuk-Walkin v BCE Inc.*, 2016 MBCA 32 at para. 10
- [9] On the issue of inter-jurisdictional judicial communications in the specific and special and very different circumstance of cross-border child abduction, for example, see *Hoole v Hoole*, 2008 BCSC 1248 at paras. 21-25.
- [10] Counsel for the plaintiff advised the Court that they would be in a position to deliver their certification application swiftly. The Court encourages and expects the plaintiff to make good on this representation, and to deliver the certification materials before the 30 days have expired.
- [11] This deadline will likely fall after the defendant's deadline for providing responsive certification materials in *DeBlock*. Again, it is encouraged and expected that the materials will be provided as soon as reasonably possible.

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