

CANADA / JUDGMENT

Gionet v. Syngenta

2024 BCSC 1440

COURT

Supreme Court of British Columbia

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2024 BCSC 1440 Gionet v. Syngenta

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gionet v. Syngenta,

2024 BCSC 1440

Date: 20240809

Docket: S217598

Registry: Vancouver

Between:

Wayne Gionet

Plaintiff

And

Syngenta AG, Syngenta Crop Protection LLC, Syngenta Canada Inc.,

and Syngenta Crop Protection AG

Defendants

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

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

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Introduction

- [1] The plaintiffs seek certification of their proposed class proceeding under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] pursuant to a proposed second amended notice of civil claim. The proposed second amended claim was further amended during submissions at the hearing before me. This amended claim would amend the amended notice of civil claim dated August 31, 2022 ("ANOC").
- [2] The claim is brought on behalf of individuals in Canada, excluding Québec, who, pursuant to the latest proposed amendment:
- a) have been diagnosed with Parkinson's disease after using (i.e. applying, mixing, loading, and/or flagging) Gramoxone Products during any time after July 1, 1963 (the "Class" or "Class Members");
 - b) are the living spouse, child, grandchild, parent, grandparent or sibling of a Class Member (the "Family Class").
- [3] "Gramoxone Products" is defined in the proposed amendment as:
- a) #8661 - Gramoxone Liquid Herbicide with Wetting Agent;
 - b) #25448 - Gramoxone PDQ Liquid non-selective herbicide;
 - c) #15843 - Sweep No-Till Herbicide;
 - d) #33125 - Gramoxone 200 SL;
 - e) #21247 - Paraquat Technical; and
 - f) #21273 - Paraquat Dichloride Manufacturing Concentrate.
- [4] The work of Wayne Gionet, one of the proposed representative plaintiffs, involved using Gramoxone Products for decades during his tenure at Agriculture Canada in Saanich, BC. Mr. Gionet was diagnosed with Parkinson's disease. He passed away on August 2, 2023. This litigation is continuing on behalf of his estate. Johannes Van Wijngaarden also seeks to act as representative plaintiff. He deposed that he used Gramoxone Products for decades. He was diagnosed with Parkinson's disease in 2015.
- [5] For the reasons below, I grant the plaintiffs' application for certification.

Background of the claims

The defendants

- [6] The defendants are in the business of agricultural technology, particularly seeds and pesticides.
- [7] Imperial Chemical Industries Inc. ("ICI") originally developed paraquat and trademarked Gramoxone in Canada in 1963. As part of a later spin-off of ICI's chemical business, ICI changed its name to Zeneca Corp. In 2001, Zeneca Corp. amalgamated with Novartis Crop Protection Canada Inc. ("Novartis") to form Syngenta Crop Protection Canada Inc. Novartis also had a seed business under Novartis Seeds Canada Inc. that became Syngenta Seeds Canada Inc. in 2001.
- [8] In 2012, Syngenta Crop Protection Canada Inc. amalgamated with Syngenta Seeds Canada Inc. to become Syngenta Canada Inc. ("Syngenta Canada").
- [9] Syngenta Canada, including its corporate predecessors, is the only entity that is and was responsible for registering and distributing Syngenta's products in Canada containing the active ingredient paraquat, for use as herbicides.

Paraquat and Gramoxone

- [10] Paraquat dichloride is an active chemical that is a non-volatile (meaning it does not vaporize), fast-acting herbicide. It is used by farmers, or other commercial and domestic users, to control and eliminate a variety of weeds in crops and land used for agriculture.
- [11] As a product that is designed to control for, mitigate, and eliminate plant "pests" (i.e. weeds), paraquat, and any product containing paraquat, has always come within the scope of the federal regulatory system governing "pest control products" ("PCPs"). Paraquat is referred to as an "active ingredient" or "active substance" within this framework.
- [12] Every PCP that is manufactured, used, or sold in Canada, both historically and currently, must be approved and registered under federal law. The relevant legal framework has varied over time, including throughout the proposed "Relevant Period", from July 1, 1963 to present.
- [13] Legislative regulation of PCPs dates back to at least 1927 with the Act to Regulate the Sale and Inspection of Agricultural Economic Poisons, known as the Agricultural Pests Control Act (the "ACPA"). The legislation imposed registration requirements, including labelling requirements. Administrative oversight of this system was granted to the Minister of Agriculture. The Minister could deny registration if the PCP was unsuited to the purpose for which it was to be sold, or if it was "generally detrimental or seriously injurious" to vegetation, animals, or public health when used in accordance with the product's directions.

- [14] The ACPA was replaced in 1939 by the Pest Control Products Act (the "PCPA 1939"). This marked an expansion of the regulation of products beyond those for agricultural purposes to also include household and industrial purposes. The PCPA 1939 required more detailed disclosure of information about the composition, purposes, and uses of PCPs, as well as guarantees regarding their qualities, such as strength and effectiveness. The Minister of Agriculture continued to be responsible for the administration of the PCPA 1939.
- [15] Expanded regulations to the PCPA 1939 were introduced in 1955, which further specified requirements for registrants regarding registration, testing, labelling, and packaging of PCPs. The PCPA 1939 was again revised in 1969, which specifically included reference to the fact that the Act applied to the "use" of products, which correspondingly expanded the penalties to include offences for using products in an unsafe way. There were additional amendments in 1985, and the legislation did not significantly change the regime with respect to registration, use, or labelling.
- [16] In 1995, the Pest Management Regulatory Agency (the "PMRA") was created under the Minister of Health, which took over administrative oversight from the Minister of Agriculture. The PMRA remains the federal body responsible for administering the PCPA today. In 2002, the legislation was largely rewritten, resulting in the Pest Control Products Act, S.C. 2002, c. 28 (the "PCPA 2002"), which came into force in 2006. The PCPA 2002 was accompanied by further detailed regulations.
- [17] All of Syngenta Canada's Gramoxone Products containing paraquat which were sold in Canada between 1963 and 2017 were registered and approved for use under the relevant PCPA.
- [18] Throughout the 60-year Relevant Period, there were nine distinct Syngenta Canada paraquat PCPs registered for sale and use. Some, but not all, of these products were sold under the name Gramoxone. All nine Syngenta Canada paraquat PCPs included paraquat as one active ingredient, with differing formulations and concentrations. This depended upon whether it was in a ready-to-use form or intended for dilution. The plaintiffs' claim covers six of these PCPs as included in its definition of Gramoxone Products.
- [19] Some of the Gramoxone Products contained active ingredients other than paraquat.
- [20] Gramoxone Products had a variety of application methods including: (i) domestic use spray for use on small areas of lawns and gardens; (ii) non-domestic hand-held spray containers or backpacks to target localized areas; (iii) commercial large-scale agricultural spray using larger equipment for entire fields; and (iv) manufacturing uses.

- [21] During some of the Relevant Period, each Gramoxone Product was required to be registered for specific "use-site categories", or "USCs". These included registration for specific uses relating to particular crops (e.g., for potato or vegetable fields), or particular areas (e.g., for use on grasses, around trees and shrubs, or other non-crop land use). During certain portions of the Relevant Period, each of the Gramoxone Products was approved for a variety of USCs.
- [22] The Gramoxone Products included instructions depending on the use and application methods, including where it could be used, in what circumstances it could be used, how it was to be mixed, how it was to be applied--including during what weather conditions and using what equipment--what measures were required to be taken to protect the individual applying the product, and so on.
- [23] All labels at all times contained warnings that the Gramoxone Products were acutely toxic or hazardous and must be used strictly in accordance with the instructions.
- [24] In addition to product labels, at and after certain points in time, each of the Gramoxone Products also included Material Safety Data Sheets ("MSDS"). The MSDS provided information about the health and safety risks of the product, preventative measures to be taken when using it, and first aid recommendations for various types of workers using the products.
- [25] Like the product labels, the MSDS provided different guidelines depending on the product and varied over time.

Parkinson's disease

- [26] Parkinson's disease is a chronic neurodegenerative disease associated with both motor problems--such as tremor, rigidity, and slowed movement--and non-motor problems, which range from a loss of sensation to dementia and psychosis. It has no cure, nor is there any treatment that can slow or reverse its progression. While Parkinson's disease affects many parts of the nervous system, the brain is particularly vulnerable. The pathological hallmarks of Parkinson's disease are:
- a) the degeneration of critical cells--dopaminergic neurons--deep in an area of the brain called the substantia nigra pars compacta ("SNpc"). These are the cells which create dopamine, which the brain uses to control movement. As dopaminergic neurons degenerate, the brain creates less dopamine, and the symptoms of Parkinson's disease appear.
 - b) the accumulation of abnormal clumps of alpha-synuclein, a protein, called "Lewy bodies", which spread throughout the body. In addition to degeneration of dopaminergic neurons in the brain, this process results in cell death in the nervous system, leading to many of the non-motor symptoms of Parkinson's.

- [27] The damage is permanent. Once dopaminergic neurons die, they are not replaced. By the time the classic motor symptoms become apparent and Parkinson's disease is diagnosed, significant and irreversible damage has already occurred.
- [28] Parkinson's disease is predominately an idiopathic illness, meaning it arises spontaneously without an identifiable cause. There is a subset of cases (less than 10%) where risk of Parkinson's disease is related to certain genetic mutations.
- [29] Parkinson's disease is clinically diagnosed and does not currently have a specific diagnostic test. In other words, Parkinson's is not "pathologically defined", meaning that there is no particular cell, bacteria, or virus that causes or definitively demonstrates the existence of Parkinson's disease.

The claims

- [30] The plaintiffs assert the following causes of action on their own behalf and on behalf of the Class Members:
- a) Battery;
 - b) Negligence:
 - i. Negligent design; and
 - ii. Failure to warn; and
 - c) Unjust enrichment.
- [31] They seek damages, punitive damages, disgorgement as well as recovery of health care costs incurred in British Columbia pursuant to the Health Care Cost Recovery Act, S.B.C. 2008, c. 27.

Certification under the CPA

- [32] Section 4(1) of the CPA establishes the requirements for the certification of class proceedings. The court must certify the proceeding if the plaintiff establishes that:
- (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
 - (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[33] The provisions of the CPA are to be construed generously in order to achieve its well-settled objectives of judicial economy, access to justice, and behaviour modification. As summarized by the Court of Appeal for British Columbia in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd, [2010] S.C.C.A. No. 32:

[64] The provisions of the CPA should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behavior modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].

[34] Certification is a procedural step that "is decidedly not meant to be a test of the merits of the action": *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16. The certification stage focuses on the form of the action; the question "is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick* at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys*]; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19-20.

[35] The evidentiary burden on a certification motion is low. The first requirement, that the pleadings disclose a cause of action, is decided solely on the pleadings. For the remaining requirements, in ss. 4(1)(b)-(e), the plaintiffs need only show "some basis in fact" that the requirements are met. There no assessment of the merits of the action at the certification application stage. Evidence is required to establish a minimum factual basis for the certification criteria only: *Hollick* at para. 25; *Pro-Sys* at paras. 99-100; *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at paras. 33-34 [*Mentor*].

[36] The certification judge takes on the role of gatekeeper, screening out claims that are not appropriate for resolution as class proceedings. The goal of the CPA is to be fair to both plaintiffs and defendants, and "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency": *Thorburn v. British Columbia (Public Safety and Attorney General)*, 2012 BCSC 1585 at para. 117, *aff'd* 2013 BCCA 480. See also 676083 B.C. Ltd. v. Revolution Resource Recovery Inc., 2021 BCCA 85 at para. 31; *Pro-Sys* at para. 103.

Causes of action - s. 4(1)(a)

- [37] The first requirement for certification under s. 4(1) is that the pleadings disclose a cause of action. This is assessed on the same standard that applies to an application to strike pleadings under R. 9-5(1)(a) of the Supreme Court Civil Rules--that is, "whether, assuming the pleaded facts are true, it is plain and obvious the action cannot succeed": Finkel at para. 16. The court can only refuse to certify an action on the basis of failing to meet the requirement of s. 4(1)(a) if, based solely on the pleadings, the claim has no reasonable prospect of success: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 54, citing *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198.
- [38] In assessing the pleadings, the court must read the claim "generously, and accommodate inadequacies that are merely the result of drafting deficiencies": *Situmorang* at para. 55, citing *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22 [FORCOMP], leave to appeal to SCC ref'd, 40051 (30 June 2022). The fact that a claim is novel or unsettled at law is not a bar to certification, nor is the court obligated to permit such claims to proceed. The court must determine whether, assuming the facts pleaded are true, it would recognize the cause of action. If not, the claim is bound to fail and certification must be denied: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 18-19 [Atlantic Lottery]; *Pearce* at para. 56.

Negligence

- [39] The Supreme Court of Canada set out the elements of the tort of negligence in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. A plaintiff alleging negligence must plead:
- a) that the defendant owes the plaintiff a duty of care;
 - b) that the defendant's conduct breached the standard of care;
 - c) that the plaintiff sustained damage; and
 - d) that the damage was caused, in fact and in law, by the defendant's breach.
- [40] There is no dispute that the defendants owed a duty of care to the plaintiffs related to the design and need to warn regarding the Gramoxone Products, or with respect to the pleadings to that effect.
- [41] The plaintiffs specifically assert two established genres of product liability causes of action: negligent design and failure to warn.

Negligent design

- [42] Justice Armstrong in *Williamson v. Johnson & Johnson*, 2020 BCSC 1746 at para. 149, citing *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 and *Player v. Janssen-Ortho Inc.*, 2014 BCSC 1122 at para. 211, confirmed that for a claim for negligent design to be viable, the plaintiff must plead:
- a) a design defect;
 - b) that substantial likelihood of harm was created by the defect; and
 - c) that it was feasible to design the product in a safer manner.
- [43] Recently, the Court of Appeal for Ontario held in *Fernandez Leon v. Bayer Inc.*, 2023 ONCA 629 that at an early stage of the proceeding, the plaintiff need not plead the specific defect that caused the injury:
- [12] We do not agree with Bayer that in every case where a plaintiff alleges negligence in the design and manufacture of a product, the statement of claim must be struck unless it identifies the specific defect in the product that caused the injury. The particulars of a specific defect are not in our view elements of the tort that are always required to be pleaded before the claim discloses a cause of action. To identify a specific manufacturing or design defect in every case would place too onerous a burden on a plaintiff at the stage of initiating a proceeding in a product liability action. In this case, involving a medical device that is alleged to have caused injury after it was implanted for its intended use, the appellants meet the requirement to plead a cause of action in negligence, even if they cannot at this time identify a specific defect in the product's manufacture or design.
- [13] Bayer's reliance on two decisions of the Superior Court, *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487, rev'd in part on other grounds, 2020 ONSC 128, 149 O.R. (3d) 521 (Div. Ct.) and *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744, is misplaced. Both decisions involved certification motions in proposed class proceedings, where the test for certification includes the identification of proposed common issues and requires the proposed representative plaintiff to meet the evidentiary threshold of showing "some basis in fact" to show a defect in the product or products at issue that is common across the proposed class. In *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950, by contrast, the proposed representative plaintiff was found to have pleaded a cause of action in negligent design notwithstanding a failure to identify a specific design defect, but her failure to identify a common defect across the various products at issue was fatal to the certification of the action as a class proceeding: at paras. 100-103, 116-126.

- [44] The plaintiffs have specified material facts pertaining to the design defect of the Gramoxone Products. They allege that a safer product could have been produced, of which they provide specific examples. Unlike Williamson, the plaintiffs also plead facts regarding the negligent testing and particularizes the defendants' role in the design and testing of the Gramoxone Products.
- [45] The pleading of a claim in negligent design is not bound to fail.

Failure to warn

- [46] In a failure to warn claim, the plaintiff must plead that an adequate warning would have resulted in a different outcome. In other words, the plaintiff must plead that the failure to warn caused or materially contributed to the plaintiff's injury, and that an adequate warning would have averted the injury: *James v. Johnson & Johnson Inc.*, 2021 BCSC 488 at para. 103, *aff'd* 2022 BCCA 111.
- [47] Manufacturers owe a specific duty to warn users of the dangers inherent in the use of their products of which they have (or ought to have) knowledge. The defendants' duty to take reasonable care in the circumstances required them to warn users of the danger or risk of injury inherent in a product or attendant upon its use: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, 1995 CanLII 55 at paras. 20, 23, 29; *James* at para. 101; *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286 at para. 201.
- [48] In pleading a failure to warn, sufficient particulars should be provided as to what warnings were given and how they were inadequate (e.g., a demonstration that the defendants failed to provide the appropriate level of specificity in a monograph of a drug product). The plaintiff must also plead that the failure to warn caused or materially contributed to the plaintiff's injuries (e.g., that an adequate warning would have influenced the plaintiff not to use the product or otherwise averted the injuries): *James* at para. 103; *Cantlie* at paras. 203-210.
- [49] The plaintiffs plead that the defendants knew or should have known of the risks associated with the use of and/or exposure to Gramoxone Products given studies providing clear evidence of a link between the use of and/or exposure to Gramoxone Products and Parkinson's disease (known to the defendants but unknown to the public-at-large and the Class Members). They further plead the defendants failed to adequately investigate through post-marketing studies, tests, and trials or to warn users of the significant and irreversible risks.

- [50] Here, the plaintiffs plead that the defendants owed a duty of care to adequately warn, provide instructions, and inform individuals using Gramoxone Products of the risk of Parkinson's disease. Syngenta's labels make no mention of any implications of chronic exposure, nor do they make any reference to Parkinson's disease. The plaintiffs allege the warnings were therefore inadequate to permit Class Members to understand the risks and avert their injuries.
- [51] The pleadings claim that the damages and losses suffered by the plaintiffs and the Class Members were the result of the defendants' negligence in labelling Gramoxone Products and were reasonably foreseeable consequences of the defendants' failure to warn.
- [52] In the proposed amendments, the plaintiffs restricts the class members to users and plead that they would not have used Gramoxone Products had they been provided with accurate information and/or warnings by the defendants.
- [53] I find that as pleaded, the cause of action in negligent failure to warn is not bound to fail.

Battery

- [54] Battery is the intentional infliction of harmful or offensive contact with another person, beyond the trivial contact that is expected in the course of ordinary life: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 246, 1992 CanLII 65; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at para. 16 [Scalera]. Consent to the contact at issue is a defence to battery--not an essential element of the tort: *Norberg* at 246; *Scalera* at paras. 18-20. In *Scalera*, McLachlin J. (as she then was) set out the purpose and principles of the tort of battery:
- [15] The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy, not fault. When a person interferes with the body of another, a prima facie case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, if he can. If he can show that he acted with consent, the prima facie violation is negated and the plaintiff's claim will fail. But it is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault.
- [55] *Scalera* further sets out that beyond the prima facie harmful or offensive contact, the tort of battery does not require further proof of injury:
- [22] The assertion in some of the authorities that the contact must be harmful or offensive to constitute battery (see, e.g., *La Forest J. in M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 25), reflects the need to exclude from battery the casual contacts inevitable in ordinary life. It does not, however, require the conclusion that to make out a case of battery, a plaintiff must prove that the contact was physically or psychologically injurious or morally offensive. The

law of battery protects the inviolability of the person. It starts from the presumption that apart from the usual and inevitable contacts of ordinary life, each person is entitled not to be touched, and not to have her person violated. Liability is not confined to foreseeable consequences.

- [56] The plaintiffs plead that the defendants engaged in harmful and offensive contact by causing the Class Members to be exposed to paraquat, which they say is an offensive contaminant with a propensity to cause injury, beyond that which would be ordinarily expected in day-to-day life. The toxic contact is with a manmade substance that accumulates in the body and whose chemical properties render it abnormal compared to substances to which individuals are regularly exposed. Prodromal symptoms resulting from the destruction of dopaminergic neurons are apparent and indicative of the imminent and irreversible dangers of Gramoxone exposure.
- [57] Further, they allege that individuals who used and were exposed to Gramoxone did not meaningfully consent to the increased risks of Parkinson's disease associated with it, as the defendants did not warn of this risk.
- [58] They also plead that the defendants were recklessly indifferent, in that for decades they knew that persons applying Gramoxone would absorb paraquat into their bodies and that neuronal damage was likely to occur, but they hid the science and worked to influence public opinion and delay awareness of the risks.
- [59] In sum, the plaintiffs allege that the defendants destroyed critical neurons in the Class Members' brains without consent.
- [60] The defendants argue that the plaintiffs' battery claim is a transparent attempt to convert a negligence-based claim into an intentional tort.
- [61] Battery is an intentional tort and requires only the intent to cause the physical consequences at issue, namely, the harmful or offensive contact: *Scalera* at paras. 98-99.
- [62] The plaintiffs do not plead that Syngenta intended to cause any physical consequences for the plaintiffs or any Class Member. However, they do plead that the defendants have been willfully blind or recklessly indifferent to whether the Gramoxone products cause Parkinson's disease. This is different from other "toxic battery" pleadings rejected by courts as poorly disguised unintentional negligence claims. Unlike the allegations in *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 at paras. 219-222, which alleged inadvertent acts, the plaintiffs here specifically plead wilful blindness and reckless indifference.
- [63] I cannot say that the plaintiffs claim in battery is bound to fail for failing to plead the requisite elements of the tort. Specifically, in addition to the other elements adequately plead, there are allegations which impute intent to cause harmful or offensive contact on the part of the defendants.

Unjust enrichment

- [64] A claim for unjust enrichment requires three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Moore v. Sweet*, 2018 SCC 52 at paras. 41-43.
- [65] The plaintiffs allege that some Class Members purchased Gramoxone products, suffered a corresponding deprivation in the amount of the difference between the amount paid for the products and what they would have paid in the absence of the defendants' tortious acts.
- [66] However, any contract of purchase and sale is a juristic reason for the transfer of value. As the Supreme Court of Canada held in *Atlantic Lottery* at para. 71, a valid contract is a juristic reason justifying retaining any benefit. No vitiation of the contract of purchase of sale between the defendants and that group of Class Members has been alleged.
- [67] This cause of action is bound to fail.

Admissibility of evidence

- [68] Evidence tendered on an application for certification must meet the usual criteria for admissibility: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 31, leave to appeal to SCC ref'd, 31218 (23 March 2006); *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2008 BCSC 1263 at para. 25; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 1, 23-24. The plaintiffs must satisfy the lower evidentiary burden of there being "some basis in fact" for the final four certification requirements on the basis of properly admissible evidence: *Williamson* at paras. 61-66; *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 at paras. 124-127.

The Dimson Affidavits

- [69] The defendants object to the admission of a number of affidavits provided by Alex Dimson in support of the plaintiffs' application (the "Dimson Affidavits"). Mr. Dimson is a lawyer with the plaintiffs' counsel's law firm.
- [70] The objections are that there is some content in the affidavits where Mr. Dimson opines on the legal criteria and provides argument in support of the plaintiffs' application. This content is clear inadmissible evidence. Also inadmissible is any of his commentary and opinion regarding the exhibits attached to his affidavits.
- [71] The defendants also object to the admission of many exhibits to the Dimson Affidavits on the basis that they contain inadmissible hearsay, including articles and documents which allegedly are records which were referred to during depositions, the transcripts of which are also attached as exhibits, which I will discuss below.

The Botham Transcripts

- [72] The plaintiffs have appended hundreds of pages of deposition transcripts and related exhibits from U.S. litigation to Mr. Dimson's affidavits (the "Botham Transcripts"). The plaintiffs submit the Botham Transcripts are party admissions admissible for the truth of their contents. The Supreme Court has held that the rationale for admitting admissions differs from other exceptions to the hearsay rule, and that it is open to dispute whether the evidence is hearsay at all. The admissibility rests on the theory that "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath": *R. v. Evans*, [1993] 3 S.C.R. 653 at 664, 1993 CanLII 86. Such admissions are admitted without any necessity or reliability analysis: *R. v. Schneider*, 2022 SCC 34 at para. 55.
- [73] In *Schneider*, Justice Rowe, writing for the majority, was clear that party admissions are "acts or words of a party offered as evidence against that party" (underline in original) and "fall within a well-recognized exception to the hearsay rule": at para. 52. They are admissible for the truth of their contents because "a party cannot 'complain of the unreliability of his or her own statements' . Unlike many other exceptions, justification for allowing party admissions does not relate to necessity or reliability": *Schneider* at para. 53. This principle applies to transcripts of testimony of employees of a party: *Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662 at para. 91.
- [74] Dr. Botham was deposed as Syngenta's corporate representative. He was examined in proceedings in the United States' federal and state courts. His deposition was made under oath. There is no question as to the authenticity of the transcripts.
- [75] The defendants submit that use of this evidence would be overly prejudicial to the defendants because they have not been afforded an opportunity to respond to inconsistencies by way of them being put to the witnesses under cross-examination. While the defendants characterise this as "case-splitting" by the plaintiffs, they also raise a concern over violation of the rule in *Browne v. Dunn*.
- [76] This material was filed and delivered with the plaintiffs' application materials. The defendants had the opportunity to have their witnesses address any inconsistencies in their application response materials. As to prejudice generally, the material complained of was all readily available and known to the defendants, as it comprises testimony and documents referred to in testimony which have been filed within related litigation against Syngenta in the United States. There is no prejudice in admitting such evidence. This is not a matter of case-splitting or a violation of the rule in *Browne v. Dunn*.

- [77] If there are missing facts material to the application as a result of admitting the Botham Transcripts, the defendants have had the opportunity to provide an explanation. Dr. Shulkin, on behalf of the defendants, deposes in the responsive materials of the defendants that there is nothing "that any of the Syngenta defendants are aware of that is relevant to these certification proceedings" that was not disclosed in her affidavits. Impeachment is not the goal in this application.
- [78] Further, the rule in *Browne v. Dunn* does not apply to circumstances like an application where evidence is proffered by way of affidavit. In *Nagy v. BCAA Insurance Corporation*, 2020 BCCA 270, the Court of Appeal dealt with the (non) application of the rule in a summary trial. The Court concluded that where, as is the case here, facts are clearly in issue, there can be no surprise and so the rule does not apply: at paras. 91-96. As in *Nagy*, it was "surely a given" that the plaintiff would rely on the material in the Dimson Affidavits, and there is no realistic probability that the defendants would have been caught by surprise by publicly accessible documents that were part of the record in litigation against Syngenta about paraquat: *Nagy* at para. 96. As well, the defendants had the last word: Dr. Shulkin swears that she "reviewed the Plaintiff's Written Submissions". If there was some inaccuracy or some matter that surprised her, she would have responded.
- [79] Deposition transcripts from United States proceedings have been admitted on certification applications in this Court. This issue was recently considered in *Mann-Campbell v. JUUL Labs Canada Ltd.*, 2023 BCSC 2153:
- [22] The only case authorities on this issue to which I have been referred that address the admissibility of transcripts from other court proceedings are:
- a) *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286, where depositions made in a US proceeding and attached to an affidavit were admitted into evidence on the certification hearing on the basis of necessity and reliability (see paras. 58, 156, and 158); and
 - b) *Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662, where Justice Brundrett at paras. 90-91 refused to strike affidavits that attached transcripts and trial exhibits from a foreign proceeding. In doing so, he noted that the rules allowed evidence on information and belief.
- [23] It is to be observed that s. 26 of the Evidence Act was not addressed in either case. I have been provided no other authorities that address the meaning and effect of s. 26 of the Evidence Act, or how it interacts with Rule 22-1(4) of the Supreme Court Civil Rules, which requires that evidence in a chambers proceeding must be given by affidavit.
- [24] Bearing in mind (1) that the transcripts are proffered for a certification hearing and not for a trial, and (2), that the authenticity of the transcripts is not in serious issue, I am of the opinion that any non-compliance with s. 26 of the Evidence Act is not fatal.

- [80] The transcripts indicate some of the evidence that will be available to the plaintiffs (and the defendants) at trial. They contain relevant information. They are reliable: they were obtained from United States court dockets. At this early stage in the proceedings, the plaintiffs are not able to compel disclosure or evidence from the defendants. Dr. Botham resides in the United Kingdom. His cooperation with the plaintiffs is presumably not forthcoming.
- [81] Hearsay evidence by way of affidavits sworn on information and belief is appropriate at class certification pursuant to R. 22-2(13)(b)(i). Certification is interlocutory and does not result in a final order, nor does it allow a determination on the merits. Instead, the plaintiffs are seeking to establish "some basis in fact" for certification issues. In these circumstances, the potential prejudice associated with relying on hearsay evidence is minimal. Where there is content which would be characterised as hearsay, I find that it is admissible as necessary for the purpose of indicating relevant evidence which would likely be available to the plaintiffs at trial: *Cantlie* at paras. 157-158.
- [82] Any admission against interest made in the Botham Transcripts is admissible and is not hearsay.

Non-transcript exhibits to the Dimson Affidavits

- [83] The plaintiffs submit that the other exhibits to the Dimson Affidavits are not tendered for the truth of their contents.
- [84] Many of these other exhibits corroborate and situate the plaintiffs' expert evidence and respond to the defendants' challenges on whether the plaintiffs have met the "some basis in fact" standard.
- [85] For example, the defendants take issue with a PMRA review decision to situate the present-day regulation of Gramoxone Products in Canada. They also take issue with the plaintiffs offering examples of other regulatory reports in response to the defendants' reliance on a U.S. government report. These are what the Supreme Court of Canada has called "social facts" rather than "adjudicative facts"--facts used to construct a frame of reference for placing otherwise asserted facts in context: *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at paras. 169-172, *aff'd* 2017 BCCA 401 at para. 101, citing *R. v. Spence*, 2005 SCC 71 at para. 58.
- [86] This Court endorsed this approach in the class proceedings context in *McEwan v. Canadian Hockey League*, 2022 BCSC 1104, where it found similar evidence may be admissible to demonstrate a person's state of mind, further a narrative, or explain events that follow: at para. 36.
- [87] The defendants submit that the plaintiffs ought to have adduced report evidence though expert opinion. Some of it was, as it was referred to by the plaintiffs' experts. The report evidence is also admissible under the exception for public documents. In *Sharp v. Royal Mutual Funds Inc.*, 2019 BCSC 2357 [Sharp BCSC], two affidavits consisting entirely of

appended exhibits of publicly accessible online documents were admitted as public documents: at paras. 26, 36-39, aff'd 2021 BCCA 307 [Sharp BCCA], leave to appeal to SCC ref'd, 39882 (15 March 2022). Likewise, in Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts, 2021 BCSC 837 at paras. 187-189 and in Williamson at para. 100, affidavits appending reports from government health authorities were admitted under the public document exception. Since Ernewein, this Court has repeatedly admitted similar exhibits for similar purposes. There is no reason to depart from that reasoning here.

- [88] The plaintiffs have provided expert reports that they rely on for certification purposes in addition to the Dimson Affidavits, which contain, largely, sworn testimony and exhibits from Syngenta representatives (not non-party U.S. government officials).
- [89] Each of the Botham Transcripts were produced by the plaintiffs when they became publicly available. Some became available later in these proceedings, but prior to the responsive materials being produced by the defendants. Despite its availability, experts for the defendants were not provided that material. These materials were subsequently referenced in responsive expert evidence of the plaintiffs. The later transcripts are admissible as proper responsive material.

Dr. Shulkin's affidavit evidence

- [90] As noted above, the defendants rely on affidavit evidence from Dr. Shulkin, a member of Syngenta Canada's regulatory team. Dr. Shulkin specifically states that she has overseen the regulatory portfolio for Syngenta Canada's products containing paraquat since April 2017.
- [91] The plaintiffs argue that Dr. Shulkin's affidavit evidence is deficient because it does not fulfill the obligation imposed by s. 5(5) of the CPA. Section 5(4) of the CPA states that a person to whom a notice of application for certification is served must file an affidavit. Section 5(5)(b) requires that such an affidavit sets out the material facts on which the person intends to rely at the certification hearing and swears that the person knows of no fact material to the application that has not been disclosed in their affidavit or in any affidavits previously filed in the proceeding. An individual swearing an affidavit on behalf of a corporate entity that is a party of record has an obligation to do their due diligence to ensure that the entity knows of no other material facts: Cantlie at para. 168.
- [92] While Dr. Shulkin's affidavits contain sworn statements that mirror the language of s. 5(5)(b), the plaintiffs argue that her affidavit is deficient because she deposed only to what she personally knows, rather than to what Syngenta Canada knows. They specifically claim that Dr. Shulkin's affidavit evidence omits (i) information on the sale of paraquat products in Ontario and (ii) information from U.S. proceedings involving paraquat and Parkinson's disease. As a result of these omissions, the plaintiffs urge the court to give Dr. Shulkin's affidavit evidence less weight.

- [93] The defendants say that the allegedly omitted information falls outside of the scope of the obligation under s. 5(5)(b), which requires attestation to facts that are "material" to certification, and not the broader threshold of "relevance" to certification: Mentor at para. 75; Lee v. Ocean Pacific Hotels Ltd., 2023 BCSC 1650 at para. 109. They further argue that even if Dr. Shulkin had given evidence on her own behalf or had otherwise failed to attest to all material facts, the appropriate remedy would not be to give her affidavit less weight; rather, it would be for the defendants to file a supplementary affidavit to confirm that Dr. Shulkin was speaking on behalf of all named defendants, which they in fact did "out of an abundance of caution."
- [94] I agree with the defendants that the plaintiffs' reading of Dr. Shulkin's first affidavit is, in certain respects, overly literal. Dr. Shulkin does not say that she cannot estimate class size because she failed to consider records available in Ontario. Rather, she notes that Syngenta does not and has never sold directly to end-users; she has no knowledge of the sales of other manufacturers' PCPs; she could not estimate "exposure"; and she does not know how common Parkinson's disease is in Canada. Reviewing the records available in Ontario would not have impacted Dr. Shulkin's ability to attest to these points. Her, and Syngenta's, lack of knowledge on each of these points is not an indication of a lack of diligence.
- [95] However, Dr. Shulkin's omission of certain information contained in filed materials from U.S. proceedings, including the exhibits to the Botham Transcripts, does amount to a failure to comply with s. 5(5) of the CPA. For example, Dr. Kirsch (one of the defendants' experts) stated that one study showing a link between paraquat and Parkinson's disease ("Tanner 2011") was flawed due to potential bias arising from the method of calculation of the underlying data in the study. In part on this basis, Dr. Kirsch opined that "there is no evidence to support an associative or causal relationship between paraquat exposure and [Parkinson's disease]." However, as revealed in the exhibits to the Botham Transcripts, Syngenta had received the underlying data in the Tanner 2011 study by October 2012, performed the alternative method of calculation proposed by Dr. Kirsch, and still concluded that "the odds ratio was c.2.5". Dr. Botham, under oath, admits that Syngenta's calculations "confirmed Tanner's findings": a "250 percent increase" in Parkinson's disease.
- [96] Syngenta instructed Dr. Kirsch to opine on the validity of the Tanner 2011 study. Dr. Kirsch then made specific critiques of the causal link between paraquat and Parkinson's suggested by the Tanner 2011 study. Despite the fact that Syngenta knew of information contained in the Botham Transcripts and the exhibits that undercut Dr. Kirsch's critiques, it nevertheless relied on Dr. Kirsch's opinions on this issue at the certification hearing.

- [97] Syngenta's omission of this information in Dr. Shulkin's affidavits represents a failure to swear information that was material to the certification application. I do not agree with the defendants' argument that the omission was a result of differing views about what was "material" to the certification application. In my view, this evidence is material to whether the plaintiffs have established some basis in fact that the proposed common issue of general causation has met the certification requirement in s. 4(1)(c), which I will discuss below.
- [98] As a result of this omission, I find that the remedy imposed in *Cantlie* for a failure to comply with s. 5 of the CPA is equally appropriate in this case:
- [171] where the defendants rely on their own affidavits to attempt to rebut the plaintiffs' established basis in fact, I must give the defendants' evidence less weight as it is now unclear if there are other materials in the defendants' knowledge that were not included in the affidavits.
- [99] To be clear, the onus remains on the plaintiffs to establish "some basis in fact" for the certification criteria in ss. 4(1)(b)-(e) of the CPA, and it remains impermissible for the court to engage in a detailed weighing of conflicting evidence at certification: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.

Evidence

- [100] For each of the remaining certification requirements, the plaintiffs must show "some basis in fact": *Hollick* at para. 25; *Mentor* at paras. 33-34. This is a low burden. This evidentiary standard does not require the court to resolve conflicting facts or evidence. It is not a requirement to show that the action will succeed, that a *prima facie* case has been made, or that there is a genuine issue for trial: *Miller v. Merck Frosst Canada Ltd.*, 2011 BCSC 1759 at paras. 37-40, leave to appeal to BCCA ref'd, 2012 BCCA 137. It does not require that all material facts required for the resolution of the action be identified, much less proven: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 99.
- [101] The test reflects that, at certification, the court is ill-equipped to resolve conflicts in the evidence or engage in finely calibrated assessments of evidentiary weight: *Pro-Sys* at paras. 99-100; *Hollick* at paras. 24-25.
- [102] In assessing whether the procedural requirements of the certification test are met, "the certification judge is not to be drawn into a battle of the experts or a consideration of the merits of the claim": *Ewert* at para. 7. Where expert evidence conflicts as to matters that may affect whether a proposed common issue can be resolved on a class-wide basis, "the plaintiff's evidence need not prove its case nor be preferred over the conflicting evidence": *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 at para. 74. This Court has held that this threshold is "deliberately low because the evidence has not been through the trial laboratory" and "anticipates that the evidence will be more developed at trial and the findings of fact may well be different": *Bowman* at para. 74.

[103] Additionally, as noted above, this Court has found that where defendants rely on their own affidavits to attempt to rebut the plaintiff's established basis in fact, it "must give the defendants' evidence less weight" if it becomes "unclear if there are other materials in the defendants' knowledge that were not included in the affidavits": Cantlie at para. 171.

[104] The plaintiffs' application is supported by affidavits from the proposed representative plaintiffs and a collection of internal corporate documents dating back decades. The plaintiffs submit these documents indicate that Syngenta's public statements about Parkinson's risk conflicted with its internal research.

[105] The plaintiffs provided two expert reports, which I describe below.

Dr. J. Timothy Greenamyre

[106] Dr. Greenamyre is a professor and Vice-Chair of Neurology at the University of Pittsburgh. He directs the Pittsburgh Institute for Neurodegenerative Diseases and the American Parkinson Association Center for Advanced Research.

[107] In his report, Dr. Greenamyre analyzes paraquat's chemistry, how it operates in the brain, and extensive animal modeling. Paraquat enters the bloodstream after it is breathed in, swallowed, or touches skin. He concludes that exposure to paraquat can cause or substantially contribute to the development of Parkinson's disease.

[108] He also describes the methodology widely used by movement disorder specialists to determine the cause of a person's disease.

Dr. Myles Cockburn

[109] Dr. Cockburn is an epidemiologist and professor of population and public health sciences at the University of Southern California's Keck School of Medicine. He has 25 years of experience evaluating causation in epidemiologic studies, the majority of that work focusing on environmental exposures and chronic disease outcomes. He has published widely on the role of pesticide exposure in health outcomes.

[110] Dr. Cockburn opines on the epidemiological methodology that can be used to assess whether paraquat causes Parkinson's disease and concludes that the available epidemiological evidence is robust and supports the causal role of paraquat in developing Parkinson's disease.

[111] Dr. Cockburn's evidence is that there is a quantifiable association between paraquat exposure and Parkinson's disease. Dr. Cockburn opines that the highest quality studies, taken as a whole, show "somewhere in the order of 2- to 3-fold increased risk with any exposure to paraquat".

Syngenta internal documents

- [112] The internal documents come from two sources. First, the plaintiffs obtained non-public internal Syngenta studies from the U.S. Environmental Protection Agency ("EPA"). These studies, by Dr. Louise Marks, were conducted between 2003 and 2005 and confirmed that rats exposed to paraquat develop the "hallmarks" of Parkinson's disease. Syngenta provided them to the EPA in December 2019.
- [113] Second are deposition transcripts and exhibits, including the testimony of Dr. Botham. Dr. Botham is the principal science advisor for Syngenta's product safety group and one of the company's deposition witnesses in the U.S. litigation. The deposition of Dr. Botham was seven days long and covered what Syngenta knew about paraquat and Parkinson's disease, and when it knew it. Internal documents and studies were put to him for comment. Dr. Botham deposed that:
- a) Syngenta was aware that it was likely small amounts of paraquat could get into the brains of paraquat users when applying the chemical during their work;
 - b) Syngenta's internal studies in primates showed paraquat concentrations in their brains after paraquat exposure;
 - c) by October 1958, it would have been reasonable for Syngenta to assume that it was possible for paraquat to damage or kill brain cells;
 - d) animal studies are "capable of predicting human toxicity";
 - e) Syngenta knew paraquat has a very high reactivity and is not metabolized, such that it persists for a long time and accumulates in the brain;
 - f) by 1969, Syngenta was aware that paraquat is a "hit-and-run" compound, meaning that the more time that passes after exposure, the more effects will be seen; and
 - g) paraquat can cross the blood-brain barrier.
- [114] As early as October 1958--prior to seeking regulatory approval for Gramoxone--Syngenta's predecessor appears to have questioned paraquat's potential for toxicity of the central nervous system. By the early 1960s, its laboratory had exposed animals to paraquat and then (i) recorded the clinical signs of neurotoxicity; and (ii) detected paraquat in the animals' brains.
- [115] They also found paraquat in human brains. Syngenta's predecessor detected paraquat in the brain during autopsies of humans who died from acute paraquat poisoning. Unfortunately, paraquat became a poison of choice for some people who committed suicide.
- [116] In 1975, more autopsies showed injuries to the central nervous system and brain-lesions on the motor neurons, sufficient to cause "debilitation". Chevron, which sold paraquat in the U.S. at that time (Dr. Botham describes the relationship as a "joint venture"), was concerned about potential chronic effects on paraquat sprayers and requested "positive data to use in

litigation cases". Chevron's concerns compounded as more data became available; in 1985, the link between paraquat and Parkinson's disease was described in a Québec study. Chevron enclosed the study in a letter to Syngenta, which read:

The attached outlines an aspect of the problem which differs from the normal dangers in dealing with poisons--namely, long-term effects that might not become apparent except after many years.

Since we don't want to take any chance of facing an asbestos situation down the road, I am sure your people are following this aspect of the matter most closely. However, I thought I would pass this on to you as I cannot think of anything more horrible for us to bequeath to our successors than an asbestos problem.

[117] Less than a year later, in 1986, Chevron exited the U.S. paraquat market. Syngenta remained.

[118] Syngenta undertook confidential testing in its laboratory between 2003 and 2005 by Dr. Louise Marks, a research scientist at Syngenta. Those studies measured neurodegeneration in the SNpc following paraquat administration in animal models and found that the neurodegeneration was (i) specific to paraquat; and (ii) specific to cells considered hallmarks of Parkinson's disease. Syngenta replicated the results of a vast number of independent studies.

[119] Between 2009 and 2011, Syngenta was presented with lab results that showed primates, genetically more relevant to humans than rodents, were more sensitive to the toxic effects of paraquat than rodents were, and similarly showed what the plaintiffs' expert calls "hallmarks" of Parkinson's in these primates. These results were not shared with the U.S., EPA or any other regulatory body or Drs. Jog and Kirsh.

[120] An internal Syngenta policy mandated that paraquat not be measured in the brains of study animals because "detection of any [paraquat] in the brain (no matter how small) will not be perceived externally in a positive light." In 2021, Syngenta published a primate study that measured the rate of elimination of paraquat in the urine of monkeys. They did not, however, measure the amount of paraquat in the brain or paraquat's effects on the brain, though Dr. Botham and the defendants' expert Dr. Jog agree that it would have been possible.

[121] In an internal presentation titled "What can Syngenta say about the issue?", Syngenta privately acknowledged it could not say that:

- a) paraquat does not enter the brain;
- b) paraquat does not cause any changes in the brain;
- c) paraquat only causes effects in the mouse;
- d) the mouse data on paraquat are not relevant to humans;

- e) people are not exposed to paraquat;
- f) there are no data reporting that paraquat may be associated with Parkinson's disease in humans; and
- g) the data show that paraquat does not cause Parkinson's disease in humans.

[122] The defendants provided expert opinion evidence from two experts.

Dr. Mandar Jog

- [123] Dr. Jog is a neurologist with decades of research and clinical experience relating to Parkinson's disease and other movement disorders. Currently, he is the Director of the Parkinson's Disease and Movement Disorders Program at the London Health Sciences Centre and a Professor of Neurology at Western University. He also manages a large clinical practice involving the diagnosis and management of patients with movement disorders, including Parkinson's disease.
- [124] Dr. Jog was asked to respond to Dr. Greenamyre's report.
- [125] In Dr. Jog's opinion, there is no evidence that paraquat exposure causes, or causes an increased risk of, Parkinson's disease. His view is that despite decades of research, neurologists do not know what causes Parkinson's disease.
- [126] Given that there is no known cause of Parkinson's disease, there is not a closed or definitive list of potential causes or risk factors for Parkinson's disease. Therefore, using differential etiology to rule factors in or out, as Dr. Greenamyre suggests, is not a credible methodology to make a causative diagnosis, whether on a balance of probabilities or to any degree of scientific certainty in any individual patient.
- [127] Dr. Jog explains that animal modelling does not demonstrate the biological plausibility of paraquat causing Parkinson's. This is because animals cannot develop Parkinson's, which is a clinically diagnosed disease that is unique to humans. As well, he opines, the animal modelling studies that exist have involved extremely high exposure to paraquat through methods like direct injection, which are far from any plausible scenario of human exposure. The animal studies are also "acute models" that do not test low-dose or chronic exposures, as would be the case in any occupational exposure.
- [128] When asked in cross-examination whether he agreed with the suggestion that paraquat is neurotoxic in humans, Dr. Jog categorically answered, "no". He does state that extremely low amounts of any absorbed dose of paraquat may potentially end up in the human brain.
- [129] Dr. Jog opines that there is no credible or reliable methodology to determine the cause of Parkinson's disease, whether in general or relating to paraquat exposure specifically.

Dr. Victoria Kirsh

- [130] Dr. Kirsh is an epidemiologist with expertise in chronic diseases, including neurodegenerative diseases and Parkinson's disease. She is currently an epidemiologist for the Ontario Health Study, a longitudinal population-based cohort study designed to assess a wide range of health outcomes and risk factors over a long period of time.
- [131] Dr. Kirsh responded to both Dr. Greenamyre's and Dr. Cockburn's reports.
- [132] Dr. Kirsh opines that the totality of the valid epidemiological studies have found no association between paraquat and Parkinson's disease. As Dr. Kirsh explains, when there is a consistent lack of association, epidemiological studies can show that there is no causal relationship. In Dr. Kirsh's view, there must first be evidence of a strong and consistent statistically significant association, otherwise any further discussion or analysis of causation is moot. Dr. Cockburn agrees with Dr. Kirsh that association is not causation.
- [133] Dr. Kirsh observes that despite extensive ongoing epidemiological studies, research has not yielded any associative link between paraquat exposure and Parkinson's disease. Specifically, the latest Agricultural Health Study data (after now following the cohort for nearly 30 years) and most recent 2020 study by Shrestha et al., which are the best and most recent data available to date, find no evidence of an association.
- [134] Dr. Kirsh opines that the three studies cited by the plaintiffs' experts that do show an association all suffer from methodological flaws, including recall bias.

Identifiable class - s. 4(1)(b)

- [135] The second requirement for certification as a class proceeding is that there be an identifiable class of two or more persons: CPA, s. 4(1)(b). Our Court of Appeal summarized the principles governing this requirement in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82, leave to appeal to SCC ref'd, 38738 (14 November 2019):
- the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
 - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
 - the class definition must bear a rational relationship to the common issues -- it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
 - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[Emphasis in original.]

[136] The proposed representative plaintiffs used Gramoxone Products and were diagnosed with Parkinson's; they seek to certify a class proceeding for others in the same position. In response to arguments made by the defendants at the certification application, as noted above, the plaintiffs amended their class definition to (i) incorporate specific products named by Syngenta Canada's affiant; and (ii) more explicitly focus on individuals who used these products. The class definition now reads:

any individual in Canada (excluding Québec) who has been diagnosed with Parkinson's disease after using (i.e., applying, mixing, loading, and/or flagging) Gramoxone Products any time during the Relevant Period.

[137] In supplemental submissions, the defendants' key remaining objection is that the proposed class members are not able to self-identify as users of Gramoxone Products. I agree with the plaintiffs that there is no reason to think that this would be the case. As the defendants made clear at the hearing, the products contained prominent labels, there were detailed regulations governing the labelling of the relevant products, and at least some users would have been subject to licensing and training requirements. As well, the proposed representative plaintiff Mr. Van Wijngaarden provided a second affidavit identifying the products he used: Gramoxone PDQ Herbicide Non-selective liquid and Gramoxone Liquid Herbicide with Wetting Agent.

[138] The defendants' other submissions ask me to wade into the merits of the claims.

[139] The proposed class definition is rationally connected to the common issues: all contemplated Class Members share an interest in the determination of whether Gramoxone Products can cause Parkinson's disease in humans. If the answer to the first general causation common issue is negative, the answer applies to all of the Class Members regardless of these postulated differences. If affirmative, Class Members generally benefit, even if more nuanced answers may be required.

[140] I therefore accept there is some basis in fact that the plaintiffs' new proposed amended definition of Class Members meets the requirements of s. 4(1)(b) of the CPA.

Common issues - s. 4(1)(c)

[141] The third requirement for certification is that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members": CPA, s. 4(1)(c). The CPA defines "common issues" in s. 1 as "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

- [142] As stated in Finkel, "[t]he commonality threshold is low; a triable factual or legal issue which advances the litigation when determined will be sufficient": at para. 22. The central question is "whether allowing the [class proceeding] will avoid duplication of fact-finding or legal analysis": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39 [Dutton].
- [143] Issues can be common even when they address only "a very limited aspect of the liability question": Finkel at para. 23. Common issues need merely to advance or terminate the claims of the class members, not necessarily determine the liability of a defendant to every, or even any, class member. This is succinctly stated in *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, 1997 CanLII 4111 (C.A.), leave to appeal to SCC ref'd, [1998] S.C.C.A. No. 13:
- [53] ... the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief.
- [144] In *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, the Court of Appeal confirmed that the test for commonality in British Columbia only requires demonstrating that an issue can be resolved in common:
- [57] The certification judge is not to conduct an adjudication on the merits. There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis . The evidence at this stage "goes only to establishing whether these questions are common to all the class members" . Said another way: "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis"
- [145] In *Mentor*, the Court noted that "regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred": at para. 33.
- [146] When assessing the proposed common issues, the following principles apply:
- a) Commonality should be approached purposively and "must not be applied inflexibly": *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45.
 - b) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues: *Dutton* at para. 39.
 - c) It is not essential that class members be identically situated vis-à-vis the opposing party, and wide differences are tolerated. It may be that a particular claim will be sustainable for only a portion of the class, due to differences in their relative positioning vis-à-vis the defendants, but particularly since these differences may not be apparent until the common issues trial,

the court always has the capacity and option to provide "nuanced" answers to the common questions: Dutton at paras. 39-40; Stanway v. Wyeth Canada Inc., 2012 BCCA 260 at para. 61 [Stanway BCCA].

- d) Success for one class member on a common issue need not necessarily mean success for all, but it must not mean failure for another. A common question can exist even if the answer "might vary from one member of the class to another": Vivendi at para. 45.
- e) It is not necessary "that a plaintiff's expert's methodology establish that each and every class member suffered a loss" or be able to identify "those class members who suffered no loss so as to distinguish them from those who did": Pioneer Corp v. Godfrey, 2019 SCC 42 at para. 102.

General causation issues

[147] Common issues 1, 2(f), and 2(g) address questions of "general causation" and are factual, entirely focused on whether Gramoxone Products cause or contribute to Parkinson's disease:

1. Can exposure to Gramoxone Products cause or contribute to Parkinson's disease?

2(f) Does the risk described in (1) make Gramoxone Products make them unfit for their intended use?

2(g) If the answer to 2(f) is yes, does this constitute a design defect?

[148] It is clear that a determination of these questions in favour of the Class will significantly advance the litigation for members of the proposed Class, as they are a substantial element of each Class Member's claim. Alternatively, if the court determines that paraquat cannot cause Parkinson's disease, then there will be a common answer that will be dispositive of all the Class Members' claims.

[149] A plaintiff seeking certification for a general causation common issue must show that some methodology exists to test the common issues--that is, "whether there is any plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim": Miller v. Merck Frosst Canada Ltd., 2015 BCCA 353 at paras. 31-33 [Miller BCCA]. The plaintiff is not required to show proof of harm: Kirk v. Executive Flight Centre Fuel Services Ltd., 2019 BCCA 111 at para. 103, leave to appeal to SCC ref'd, 38678 (17 October 2019).

[150] Proposed methodologies are not to be held to a "robust or rigorous standard", and the court should not attempt to assess competing expert evidence: Pro-Sys at paras. 117-119.

[151] Plaintiffs in similar product liability cases before this Court have satisfied the methodology requirement in various ways, including with proposed prospective studies by relevant experts, evidence of robust epidemiological evidence, and expert opinions on biological plausibility of causation: MacKinnon v. Pfizer Canada Inc., 2021 BCSC 1093 at paras.

125-137, rev'd in part on other grounds 2022 BCCA 151; Miller BCCA at paras. 54-66; Stanway BCCA at paras. 40-47; Felker v. Teva Branded Pharmaceutical Products R, 2022 BCSC 1813 at paras. 213-219; Bartram v. GlaxoSmithKline Inc., 2013 BCCA 462 at para. 18.

The evidentiary record and "some basis in fact"

- [152] The "general" causation question is concerned with whether a particular substance is capable of causing a particular harm.
- [153] Dr. Greenamyre presents evidence from animal studies, including those done by the defendants, and studies on paraquat applicators, which show paraquat can enter the bloodstream, and discusses the biological mechanism of action by which paraquat causes Parkinson's disease.
- [154] Dr. Greenamyre opines that the paraquat-Parkinson's disease link is biologically plausible. In Felker, this Court accepted that conducting animal and cell model system studies, paired with human epidemiological studies, would be sufficient meet the "some basis in fact" standard for causative toxicity to the general population. This was despite the fact that the relevant data did not yet exist, and therefore did not permit the court to readily draw conclusions on causality at certification--but to do so would be an "impermissible intrusion into the merits": Felker at paras. 182, 214-219.
- [155] Syngenta's own representative, Dr. Botham, subscribes to many of the same opinions.
- [156] However, there are differing expert opinions presented by the defendants based on many of the same studies and data. Though, to enter into an exercise of weighing the opinions provided by experts whose qualifications I accept would go beyond the scope of the certification application procedure and tests.
- [157] Dr. Cockburn provides epidemiological evidence which can be assessed through the Bradford-Hill factors and used to infer general causation. Dr. Greenamyre provides biological plausibility evidence--the "how" and "where" of paraquat's attack on the SNpc deep in the brain--that shows paraquat is capable of causing Parkinson's disease. This meets the methodology requirement for general causation: Miller BCCA at paras. 44, 55-59, 66.
- [158] Dr. Greenamyre provides evidence of a "differential etiology" methodology that can be used to streamline specific causation. While the defendants criticize this methodology, it is a tool to assess specific causation, which is not a common issue.
- [159] The first two are the methodology by which general causation can be answered. This type of evidence has been repeatedly accepted in this Province.
- [160] In a "toxic substance" case like this, "to meet the methodology requirement, the plaintiff must, at a minimum, identify the mechanism by which the impugned substance causes disease and therefore harm": Miller BCCA at para. 44.
- [161] As set out above, Dr. Greenamyre's opinion evidence meets that test.

[162] I accept that the evidence meets the "some basis in fact" standard for these common issues.

Conduct-related common issues

[163] The plaintiffs allege the defendants' alleged misconduct was systemic. There are proposed common issues which address the conduct, behaviour, and knowledge of the defendants and can be determined without reference to any of the circumstances of individual class members.

[164] The courts have previously found that class members have a common interest in proving the facts and circumstances pertaining to a defendant's wrongful or tortious conduct: *Rumley v. British Columbia*, 2001 SCC 69 at paras. 30-33; *Williamson* at para. 289, citing *Miller v. Merk Frosst Canada Ltd.*, 2013 BCSC 544 at para. 187 [Miller BCSC], *aff'd* 2015 BCCA 353, leave to appeal to SCC *ref'd*, 36668 (14 April 2016). These types of common issues are central or overriding issues for all members of a class.

Duty of care

2(b) Did the Defendants have a duty to warn the Class Members of the risks of Parkinson's disease associated with Gramoxone Products?

2(h) Do the Defendants owe a duty of care to the Class Members with respect to the research, investigation, and testing of Gramoxone Products?

[165] The question of whether a manufacturer owes a duty of care to users of its products is a common legal question that forms a significant part of any product liability claim in negligence. The focus is on the defendants' conduct and knowledge and does not depend on the individual circumstances of any class member. Standard of care common issues are usually certified, especially in product liability cases: *Miller BCSC* at para. 187; *Felker* at para. 226; *Cantlie* at para. 301; *Bowman* at paras. 175-176.

[166] There is some basis in fact that each defendant, as a critical component of putting Gramoxone Products into the stream of commerce, owes a duty of care to the members of the Class, the users of the products: *Lambert v. Lastoplex Chemicals* (1971), [1972] S.C.R. 569, 1971 CanLII 27 at 574-575; *Hollis* at paras. 20-23. Dr. Cockburn provides evidence of an association, and a causal link, between paraquat and Parkinson's disease.

[167] As well, determination of these issues is common to the Class as a whole and can be answered across the Class.

Knowledge and breaches of duty

2(a) When did the Defendants know, or when ought the Defendants have known, of this causal relationship or association?

2(c) Did the Defendants breach their duty to warn the Class Members of risk described in (1) associated with Gramoxone Products?

2(d) If the answer to question 2(c) is yes, when did the breach of duty occur?

2(e) Were the Defendants negligent in failing to conduct reasonable research, investigation and testing of Gramoxone Products in relation to the risk described in common issue 1?

2(i) Did the Defendants breach the standard of care with respect to the design, development and/or testing of the Gramoxone Products?

3. Are the Defendants vicariously liable for the acts and omissions of their officers, director, agents, employees, and representatives?

[168] Whether any defendant had knowledge of the risk and breached a duty of care or duty to warn is common in that it focuses exclusively on the defendants' conduct: Williamson at para. 289, citing Miller BCSC at para. 187. For example, for the negligent design claim, a court can analyse whether a defendant exercised reasonable care by exclusively looking to the conduct of the manufacturer through a balancing of the risk inherent in the product as designed, considering its utility and cost, against a safer, alternate design: Player at para. 210.

[169] The expert opinions of Dr. Greenamyre and Dr. Cockburn provide some basis in fact for the risks that ought to have been known to the defendants, along with examples in the evidentiary record that show the defendants did have knowledge and did not disclose results of internal studies, described above.

[170] At no point prior to pulling Gramoxone off the market did the product labels describe the non-acute toxicity of paraquat. There was never any specific warning of a potential to cause Parkinson's disease. If there is a causal relationship, the defendants effectively denied the Class the ability to make informed choices as to how best to protect themselves from exposure or whether to use the defendants' products at all. The evidence establishes "some basis in fact" that there was a breach of the defendants' duty "to provide clear, complete and current information regarding the dangers inherent in the ordinary use of their product": James at para. 102, citing Hollis at para. 23.

[171] Like the existence of a duty, its breach can also be determined in common, as can purely legal questions like vicarious liability. These issues are necessary to the resolution of the claims of Class Members and are best addressed in common. They are properly certifiable.

[172] To the extent variation exists in warning labels or minor adjustments in product formulations, it is not fatal to certification as "even a significant level of difference among the class members does not preclude a finding of commonality": Pro-Sys at para. 112. Addressing the alleged breaches of duties in common avoids duplication of factual and legal analysis.

Unjust enrichment

4(b) Were the Defendants unjustly enriched? if so, is disgorgement an appropriate remedy?

- [173] If I am in error in not allowing the claim in unjust enrichment, I provide the following analysis on the related common issue.
- [174] The issue of unjust enrichment can be determined in common without reference to the individual Class Members' circumstances. Like the other conduct-related common issues, the questions regarding unjust enrichment focus on the defendants' actions: whether the defendants tangibly benefited when they profited from their deceptive acts and whether the Class Members suffered a corresponding deprivation. As long as the loss and gain are causally connected, the "nature of the correspondence between such gain and loss may vary from case to case": Moore at para. 43; Pro-Sys at para. 87.
- [175] The absence of juristic reason can also be determined in common. The question of legality of the contracts "should not be resolved at this stage of the proceeding", and these questions must be left to the trial judge: Pro-Sys at para. 88.

Battery

2(j) Did the Defendants commit battery against the Class Members, or any of them?

- [176] The court must determine the offensiveness of the contact complained of by determining whether, in general, the contact is usual or inevitable in the course of ordinary life: Scalera at para. 22.
- [177] Here, there is some basis in fact to support the conclusion that exposure to Gramoxone Products caused lasting and permanent harm. Dr. Greenamyre opines that the neurodegenerative effects of paraquat are irreversible.
- [178] There is therefore some basis in fact that the proposed common issue concerning battery can be answered on a common basis. Its resolution would avoid the duplication of the legal analysis concerning whether exposure to paraquat constitutes harmful or offensive contact.

Damages-related common issues

General damages

4(a) Is an award of damages appropriate?

- [179] In *Good v. Toronto (Police Services Board)*, 2016 ONCA 250 at para. 73, leave to appeal to SCC ref'd, 37050 (10 November 2016), the Court of Appeal for Ontario certified issues assessing a base amount of non-pecuniary general damages, based on a sampling of the harm experienced by individual class members.
- [180] I see no reason why that would not be available or applicable here.

Punitive damages

4(d) Would the Defendants' conduct justify an award of punitive, aggravated, or exemplary damages?

- [181] Punitive damages are a certifiable common issue: there is some basis in fact of systemic wrongdoing--that is, behaviour towards the Class, as a group, that is a marked departure from ordinary standards of decent behaviour: *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 at paras. 58-60 [*Stanway BCSC*]; *Sherry v. CIBC Mortgage Inc.*, 2015 BCSC 490 at para. 28, rev'd in part on other grounds 2016 BCCA 240, citing *Rumley* at para. 34.
- [182] There is a body of cases in which a bifurcated approach to "punitive damages" common issues has allowed our courts to certify those common issues: *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 31; *Sherry* at para. 21; *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699 at paras. 165-167, rev'd in part on other grounds 2023 BCCA 274, leave to appeal to SCC ref'd, 40930 (4 April 2024). Where the question of whether "conduct warrants an award of punitive damages" is split from issues of whether "an award of punitive damages should be made", this Court has been amenable to certifying those questions as common issues: *Sherry* at paras. 36, 46-47; *Miller BCSC* at paras. 188-193; *Williamson* at paras. 295-299; *MacKinnon* at paras. 144-150.
- [183] There is some basis in fact to support the theory that the defendants knew of many of the facts underpinning the link between paraquat and Parkinson's disease, and once published scientific studies were available drawing a connection between paraquat and Parkinson's disease, the defendants took steps to develop and implemented a corporate "influencing" campaign to counter those studies, with a view to countervailing those studies while concealing their internal studies.
- [184] Here, as in *Williamson*, "[t]he allegations describe deliberate efforts alleged to have been committed by the defendants in deceitfully withholding information that could have been important in informing users of the risks inherent in using the products": at para. 298.
- [185] Common issues focusing on the appropriate distribution of a punitive damages award, costs owed by defendants in regard to that distribution, and interest on any award are pure questions of law that relate to the defendants' conduct and are suitable for determination as common issues: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2019 BCSC 2007 at para. 150, rev'd in part on other grounds 2021 BCCA 85.

Restitution

4(c) is restitution an appropriate remedy?

- [186] The plaintiffs also seek disgorgement as an alternative to compensatory damages. In *Atlantic Lottery*, the majority of the Supreme Court of Canada held that disgorgement remedies were available for "deceit": at para. 36.

[187] While the Gramoxone Products worked well as herbicides, the purpose for which they were purchased and utilized, the claim in this case pleads deceptive conduct by the defendants. The Court in Atlantic Lottery clarified that disgorgement "refers to awards that are calculated exclusively by reference to the defendant's wrongful gain": Atlantic Lottery at para. 23.

[188] There is some basis in fact that the proposed issue can be answered on a class-wide basis. It is concerned with the restitution of money unjustly received by the defendants from the sale of Gramoxone Products to the Class by way of deceit, rather than the Class Members' individual damages or losses.

PHI Recovery

4(e) Are the Defendants liable to pay subrogated health care costs to provincial health care insurers?

[189] There is some basis in fact that the common issues pertaining to the recovery of Provincial Health Insurers can be answered on a class-wide basis. The Province of British Columbia has retained the plaintiffs' law firm in this case for the purposes of recovering healthcare costs relating to persons who used Gramoxone Products and developed Parkinson's disease during the Relevant Period.

Preferable procedure - s. 4(1)(d)

[190] The next step requires the court to be satisfied that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues: CPA, s. 4(1)(d).

[191] Section 4(2) of the CPA provides a non-exhaustive list of considerations that must inform the preferability analysis:

- a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- d) whether other means of resolving the claims are less practical or less efficient; and
- e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[192] The overarching concern for the preferability analysis is "the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice": Fischer at para. 22, citing Hollick at para. 27.

Do the common issues predominate?

- [193] The determination of common issues in this case will significantly advance the litigation for all Class Members. Resolution of the common issues here is essential to the recovery of each Class Member with regard to the defendants, and thus "a resolution of the common issues would significantly advance the action": Pro-Sys at para. 140.
- [194] There is significant complexity in resolving the common issues. A trial of the common issues will determine liability and remedies. The remaining individual issues to be determined will be narrowly focused, and the litigation plan provides examples of how such issues may be dealt with efficiently, if required. There is some basis in fact that many of the individual issues will not arise. If, as Dr. Cockburn opines, the common issues trial determines that the risk ratio is in the order of 2- to 3-fold increased risk, specific causation will be rebuttably presumed: *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras. 556-560; *Williamson* at para. 277.
- [195] Even if some individual issues remain (such as issues pertaining to individual damages or specific causation), s. 7(a) of the CPA provides that "[t]he court must not refuse to certify a proceeding as a class proceeding merely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues".
- [196] Further, existence of individual "specific causation" issues have not been a bar to similar actions. For example, in *Williamson*, where the relative risk of ovarian cancer due to talc use was in the order of 1.22-1.36, the Court found that the common issues would still materially advance individual class members claims: at paras. 275-283. Similarly, in *Stanway*, where the increased risk was estimated to range from 1.24-2.19 depending on the level of exposure, the Court found that "in spite of the significant individual issues which arise, a class proceeding is a preferable procedure to resolve the common issues": *Stanway* BCSC at para. 72.
- [197] The following excerpt from *MacKinnon* applies equally to the present case, in which the question of general causation is both a common issue and a fundamental controversy between the parties:
- [160] While there are individual issues that will have to be determined in order for any class member to succeed in their claims, those issues do not predominate. A common issue trial will resolve a fundamental controversy between the parties, which is the question of general causation. The complexity of that issue is apparent from the material filed on this certification application, and that complexity would act as a barrier to any class member attempting to individually litigate their claims. If general causation is established on a common issues trial, this would advance the claims of all class members. If it is not established, all class members would benefit by the result, which is to the defendants' advantage.

- [198] Dr. Greenamyre sets out how the fact that paraquat can cause Parkinson's disease, if proven at the common issue trial, can be applied to each class member. Dr. Greenamyre explains how a "differential etiology" can be used to do so in his report: by excluding the other known causes of Parkinson's, one is left with the causative agent, here paraquat. Dr. Jog does not agree this is sufficient, however it is the same technique that Dr. Jog advised be used in a peer-reviewed article published in 2022, in the context of mercury exposure and parkinsonism (which is related to, but not the same as, Parkinson's disease). I must view Dr. Jog's report in light of the inconsistent positions he has taken in the academic literature.
- [199] In Stanway BCCA at para. 13, the Court of Appeal referenced the reasons of Huddart J.A. in Harrington v. Dow Corning, 2000 BCCA 605 when describing the significance of the common issues in relation to individual issues:
- [65] Individual issues of proximate causation, date of discoverability, allocation of fault, and damages are important, but they are consequential to a finding of the risks inherent in breast implants . Their resolution will be made easier by the resolution of the common issue.
- [200] It is clear to me that the common issues are also a necessary first step in the resolution of the Class Members' claims.

No interest in individual control and no competing proceedings

- [201] This class proceeding involves claims of a national class (excluding Québec), whose claims are not the subject of any other actively litigated proceedings in Canada. Authorization of a parallel class action in Québec exclusively for Québec residents involving similar claims was granted on July 27, 2022, and there are no other actively litigated proceedings related to this matter in Canada.
- [202] There is no evidence that any Class Members wish to pursue these claims on an individual basis. Considering the quantum of damages for each Class Member, which could be dwarfed by the costs associated with bringing a claim, there is no apparent interest for any reasonable Class Member to control the prosecution of separate actions at significant time and expense.

Alternative means

- [203] Individual litigation of product liability cases is expensive, which creates significant barriers to individual litigants. This matter will involve "complex scientific and expert evidence likely beyond the means of individual plaintiffs against a well funded adversary": Miller BCSC at para. 231.

- [204] Here, as in Pro-Sys, "if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure, but the only procedure available to serve these objectives": Pro-Sys at para. 141.
- [205] As well, litigating this case as a class action is less burdensome to judicial resources than individual proceedings. Judicial economy is maximized through the resolution of common issues because it will avoid duplication of fact-finding and legal analysis. On the evidence before me, Class Members number in the hundreds.
- [206] The significant health concerns that underlie the issues in this litigation also militate in favour of certification. To require, as individual actions would, that each plaintiff be fully and personally involved in the litigation is a significant barrier that is particularly onerous where, as here, the Class Members have a neurodegenerative disease.
- [207] Certification will also promote behaviour modification, which is a general deterrent to large-scale wrongdoing. The defendants allegedly concealed the paraquat-Parkinson's disease link for decades. If they are found liable and their concealment is proven, it will create incentives for all industry participants to avoid similar conduct.
- [208] I agree that a class proceeding as proposed provides a fair and efficient procedure for advancing the Class Members' claims, and there is no other realistically available alternate procedure for resolving the claims. Certification will advance the policy objectives of the CPA by promoting access to justice, judicial economy, and behavioural modification.

Suitable representative plaintiff - s. 4(1)(e)

- [209] Finally, certification as a class proceeding requires the presence of a suitable representative plaintiff. Section 4(1)(e) of the CPA provides:
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
- [210] A proposed representative plaintiff need not have a claim "typical" of the class or be the "best" possible representative: Kirk at para. 154; Miller BCCA at para. 75. The test for the "adequacy" of a representative plaintiff is whether they have a common interest with other class members and will "vigorously prosecute" the action: Campbell at paras. 75-76.

- [211] The representative plaintiffs share a common interest with other Class Members. All were exposed to paraquat and have been diagnosed with Parkinson's disease. Both Ms. Gionet and Mr. Van Wijngaarden are not aware of any conflicts with other Class Members with respect to the proposed common issues. Ms. Gionet, in her capacity as Mr. Gionet's personal representative, confirms that the estate is willing to act as the representative plaintiff and continue this litigation.
- [212] Both proposed representative plaintiffs understand the major steps in a class action and the responsibilities of a representative plaintiff. To date, the plaintiffs have been diligently prosecuting this claim. They have sworn to do their best to represent the interests of Class Members fairly and adequately.
- [213] With regard to a workable litigation plan, the purpose of the litigation plan at the certification stage is to aid the court by providing a framework for advancing the litigation and to demonstrate that the plaintiffs and class counsel have a clear grasp of the complexities involved in the case. Courts do not scrutinize the plan to ensure that it will be capable of carrying the case through to trial and generally anticipate that plans will require amendments as the case proceeds: *Fakhri et al. v. Alfalfa's Canada Inc. (cob Capers Community Market)*, 2003 BCSC 1717 at para 77, *aff'd* 2004 BCCA 549.
- [214] The proposed litigation plan addresses the requisite issues and nuances in this litigation, outlining each step following certification through to a final distribution report. It provides a roadmap for: (i) a notice plan providing a reasonable method of notifying the Class Members of certification and of opt-out opportunities; (ii) a litigation schedule; (iii) a procedure for discovery; (iv) the exchange of expert reports; (v) a procedure for the common issues trial; and (vi) a procedure for the determination of individual issues, among other things.
- [215] I find that the plaintiffs have put forward a detailed and comprehensive litigation and notice plan that provides a workable method for advancing the litigation.
- [216] The plaintiffs are suitable for the purposes of s. 4(1)(e) of the CPA.

Conclusion

- [217] This action is certified as a class proceeding as proposed but excluding the claim in unjust enrichment.
- [218] The class definition as proposed and set out in paras. 2 and 3 above is approved.
- [219] The other proposed amendments to the ANOCC as set out at appendix "A" to the plaintiffs' reply written submissions dated November 14, 2023 are permitted.
- [220] The proposed common issue 4(b) with regard to unjust enrichment is not approved. The remaining proposed common issues are approved.

[221] The representative plaintiffs are approved.

[222] The litigation plan is approved.

"Wilkinson J."

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