

CANADA / JUDGMENT

Hosington v. Johnson & Johnson Inc.

2020 BCSC 431

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 431 Hoisington v. Johnson & Johnson Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hoisington v. Johnson & Johnson Inc.,

2020 BCSC 431

Date: 20200324

Docket: S088553

Registry: Vancouver

Between:

Deborah Hoisington and

Stefanie Puls

Plaintiffs

And

Johnson & Johnson Inc., Janssen-Ortho Inc.,

now named Janssen Inc., Canderm Pharma Inc.,

Colbar Lifescience Ltd., ABC2 Company, ABC3 Company,

Anna Maria Duchon John Doe1, John Doe2, Jane Doe

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiffs:

E. Stanger

Counsel for the Defendants,

Canderm Pharma Inc., Colbar Lifescience Ltd. and Anna Maria Duchon:

M. Sharp

Place and Dates of Hearing:

Vancouver, B.C.

October 17, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2020

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- [1] The proposed representative plaintiffs, Ms. Hoisington and Ms. Puls (collectively the "Plaintiffs"), seek an order for certification of this class proceeding against Canderm Pharma Inc. ("Canderm") and Anna Maria Duchon (collectively the "Canderm Defendants"). They also seek approval of a notice to class members of: (a) the details of certification; and (b) a hearing to seek a discontinuance of the claim against the Canderm Defendants.
- [2] The following distinct issues arise from the Plaintiffs' application:
 - i) Whether the Plaintiffs' intended application should proceed, as the Plaintiffs propose, in two distinct stages. The first such stage would be for certification of the proceeding and would give class members notice of an intention to discontinue. The second step, assuming no class members objected or sought to opt out, would be for the order of discontinuance itself. It would also be at this second stage that the parties would argue about whether the Plaintiffs would have to pay the costs of the discontinuance. Conversely, the Canderm Defendants argue that, for various reasons, these steps should be merged into a single process with a single set of notices going to class members and with costs of the discontinuance being addressed at this application. Which option is more appropriate necessarily gives rise to differences in the form and language of the order the Court would make as well as in the notices that would be sent to class members;
 - ii) Whether, in the circumstances of this case, the interaction of s. 37 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the "CPA") and R. 9-8(4) of the British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009 either insulates the Plaintiffs from the need to pay the costs of the discontinuance they seek or, alternatively, mandates that the Plaintiffs pay such costs; and
 - iii) If the Plaintiffs are required to pay the costs of the intended discontinuance, whether this Court can, or should, fix those costs, and other costs the Canderm Defendants are entitled to, on a lump-sum basis.
- [3] Both the general history of this action as well as the genesis of this particular application are relevant to the first two of these questions. The Canderm Defendants also raise a fourth and distinct issue. They seek to settle the terms of the cost order I made in an earlier judgment. That judgment, dated October 27, 2016, is indexed at 2016 BCSC 1973 (the "Costs Judgment"). No formal order has yet been entered in respect of the Costs Judgment.

I. Background and History

A. The Basis for this Action

- [4] In or about December 2006, the Plaintiffs were injected in the lips with a product known as Evolence. As a result of those injections they allege that they experienced permanent lip disfigurement in the form of, inter alia, nodules, lip colour changes, unusual swelling, chafing and chapping in the lips, and increased sensitivity to cosmetics causing redness and inflammation. This Court has previously been provided with evidence of other potential class members who suffered similar difficulties following injections with Evolence.
- [5] The Plaintiffs made, inter alia, the following allegations in the Notice of Civil Claim that was filed on their behalf:
- a) The product Evolence was developed by the Defendant Colbar LifeScience Ltd. ("Colbar") as a cosmetic filler for use in cosmetic surgery.
 - b) Prior to the year 2000, the United States company Johnson & Johnson Inc. ("J&J US") purchased Colbar to obtain access to various cosmetic filler products that had been developed by Colbar.
 - c) J&J US then began to market and sell the Evolence products to plastic surgeons in the United States as a cosmetic filler for repair of deep facial lines.
 - d) The Defendant Johnson & Johnson Inc. in Canada ("J&J Inc.") is a wholly-owned subsidiary of J&J US. J&J Inc. applied for and received authorization from Health Canada to use the product Evolence as a cosmetic filler for repair of deep facial lines.
 - e) J&J Inc. and its subsidiaries, the Defendant Janssen Inc. and Colbar (collectively the "J&J Defendants") then began to market, sell and/or license Evolence for use as a cosmetic filler.
 - f) The J&J Defendants entered into a contractual relationship with Canderm to allow Canderm to be the exclusive marketer and sales organization for the sale of the product Evolence as a cosmetic filler.
 - g) Canderm used its contacts in the cosmetic and cosmeceutical industry to market and obtain orders from cosmetic surgeons for Evolence. The Defendant, Ms. Duchon, was an employee of Canderm and its Western Canada Representative for sales and distribution of Canderm products.
 - h) In or around 2004, the Canderm Defendants began to advise physicians and other users that Evolence could be injected and used to augment lips.
 - i) The J&J Defendants and Canderm, either together or individually, knew or ought to have known that the product Evolence had not been tested for use as an injected lip augmentation filler. Furthermore, the J&J Defendants and Canderm, either together or individually, knew or ought to have known that, for various reasons, the use of Evolence for purposes other than the filling of deep lines, and in particular in the lips, could cause disfigurement, pain, irritation, and swelling.

- j) Notwithstanding that knowledge, the J&J Defendants and the Canderm Defendants, either together or individually, advised cosmetic surgeons throughout Canada that Evolence could be used safely for lip augmentation by injection. As a result of that advice cosmetic surgeons in Canada began to order Evolence from the Canderm Defendants for the purposes of injection and lip augmentation.
- [6] The Plaintiffs' claim is advanced in negligence, as a breach of contract, in unjust enrichment, and as a breach of each of the Sale of Goods Act, R.S.B.C. 1996, c. 410 and the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2. A separate plaintiff began a separate companion action in the Ontario courts in *Micevic v. Johnson & Johnson et al* under file no. CV-09-390846-00 (the "Ontario Action"). Counsel in both jurisdictions formed a consortium after issuance of the claims and agreed that the Ontario Action would be stayed and that the proposed class action would be pursued in British Columbia rather than in both jurisdictions.

B. The History of this Action

- [7] A Writ of Summons was filed in this action in December 2008. The original Notice of Civil Claim was filed in December 2010. The original Statement of Claim in the Ontario Action was filed in November 2009.
- [8] The Plaintiffs served their materials for a certification application in December 2012. I was appointed to case manage the action in February 2013. Prior to a contested certification hearing, the Plaintiffs reached a class wide settlement, in principle, with both the J&J Defendants and the Canderm Defendants. Over the ensuing months, however, the parties continued to be at odds over various procedural issues that pertained primarily to the implementation of the settlement.
- [9] In July 2015, the Plaintiffs brought an unsuccessful application to enforce what they believed was a settlement agreement they had made with the Canderm Defendants. The reasons for judgment arising from that application are indexed at 2015 BCSC 1582 (the "Settlement Agreement Reasons"). The following parts of the Settlement Agreement Reasons are relevant:
- [5] It is common ground that the size of the proposed class is expected to be limited, possibly to no more than 50 individuals, and that the global amounts involved in the action are likely to be correspondingly modest. It is also clear that all parties have worked diligently to settle the action. The central impediment to any such settlement has been the procedure by which the action would be certified, members of the class would be given notice of the settlement, and the settlement would then be approved.

- [63] Counsel for the plaintiffs' written submissions assert that at the March 31, 2015, hearing I "admonished" counsel to resolve the procedural issues associated with the action. Though the word "encouraged" rather than "admonished" might be preferable, this is generally accurate.
- [64] This is an action involving relatively modest sums, involving able and knowledgeable counsel, where the only apparent matter in dispute is the best means by which to bring about the certification/notice/settlement/dismissal of the action before the British Columbia and Ontario courts. Nevertheless, it is not for this Court, in the absence of any formal application, to impose a particular procedure or regime on the parties.
- [10] An application for certification of the class proceeding, for the purposes of effecting a settlement agreement with the J&J Defendants (the "J&J Settlement"), was brought in a hearing dated January 22 and 29, 2016. The Canderm Defendants opposed aspects of the proposed certification order and notice plan. Once again, the primary issues that they raised were procedural in nature. I delivered reasons for judgment, indexed at 2016 BCSC 807, in respect of that application (the "Certification Reasons"). In the Certification Reasons I repeated what I had earlier said at para. 64 from the Settlement Agreement Reasons and I then continued:
- [59] These comments continue to be relevant. Though various issues of procedure continue to be a source of disagreement between the parties, no application has been or is advanced by the Canderm Defendants to resolve these issues. There is then, at this point, nothing before me to address, or consider, or determine.
- [60] This action is now eight years old. Its progress to the courts has been glacial. It is said to involve a very small class and modest sums of money. As K. Smith J.A. said: "simplicity and expedition have been elusive goals in the management of this case"; Halvorson at para. 1.
- [73] Often the objects of timeliness, consistency, and efficiency do not align perfectly. In this case, the procedures that have been proposed reasonably reflect the needs of the present litigation and reasonably advance the objects of consistency and timeliness. To the extent there is a suggestion that there may be more efficient procedures available, and I do not say that that is so, such suggestions ring hollow after several years in which the same issue has been raised repeatedly in multiple hearings and in multiple conferences without the matter being advanced in any meaningful, or substantive or formal way. Furthermore that finite object is necessarily overtaken at a certain point when other objects, such as timeliness and the fair resolution of the dispute, are being held hostage to questions of process.
- [11] The Canderm Defendants then applied for various cost orders in a hearing dated July 7 and September 16, 2016. It was that application that gave rise to the Costs Judgment. In the Costs Judgment, at paras. 102 and 103, I once again referenced the concern that "this is a comparatively modest class action involving perhaps 30 - 50 plaintiffs", that the issues being argued about were overwhelmingly procedural in nature and that based on what I had been told I expected that the parties had "cumulatively, if not individually, spent more than is

being claimed in the action".

- [12] The foregoing chronology does not address the myriad other conferences or applications, including applications that were brought and then adjourned. It also does not address the myriad applications that were brought in Ontario, primarily in connection with the J&J Settlement.
- [13] Ultimately, during the J&J Settlement notification process, 13 plaintiffs, nationwide, advanced claims. There were no opt outs but there was one objection that was subsequently addressed.
- [14] At present, this action is more than a decade old. The likely class has been fixed with reasonable precision. The Canderm Defendants have filed materials, which I will return to in a different context, indicating that they have incurred in excess of \$800,000 in legal fees, costs and taxes. This is multiples of what the class received from the J&J Settlement. The inclusion of the likely legal fees of the Plaintiffs and of the J&J Defendants would dwarf the benefits achieved by the class.
- a) The Procedural History of this Application
- [15] The Plaintiffs filed an application on September 25, 2019 seeking the relief that I described at the outset of these Reasons. The draft order they filed included, inter alia, the following terms:
2. The BC Action is certified as a class proceeding as against the Canderm Defendants for the purpose of providing notice to the class of the intention to seek approval of this court of the discontinuance of proceedings against the defendants Canderm Pharma Inc. and Anna Maria Duchon.
 7. The hearing of the Notice of Application for Approval of the Discontinuance of the action against the defendants Canderm Pharma Inc. and Anna Maria Duchon in this Action will be held at 10 AM on at the Courthouse, 800 Smithe St., Vancouver, BC ("the Approval Hearing"). At the Approval Hearing the Representative Plaintiff will seek the following Order:
 - a. Approval of a Discontinuance of the Class Proceeding against Canderm Pharma Inc. and Anna Maria Duchon without cost to any party in the form attached at schedule (A),
- [16] The Plaintiffs also included a second draft order which was described as an "Order Made After Application for Approval of Discontinuance of Action Against Canderm Pharma Inc. and Anna Maria Duchon". Paragraph 1 of that draft order states: "This class proceeding is hereby discontinued against the defendants Canderm Pharma Inc. and Anna Maria Duchon."
- [17] The Canderm Defendants, "out of an abundance of caution" filed a separate cross application seeking, inter alia, an "Order for joint Certification and Approval of a with costs/with prejudice discontinuance, on the terms set out in the attached Order".

[18] The Canderm Defendants' attached draft order, at para. 2, states:

Subject to paragraph 16 of this Order, the BC Action is certified as a class proceeding as against the Canderm Defendants for the purposes of a discontinuance of the within action.

[19] Paragraph 16, in turn, states that if no opt outs or objections are received, the Order is to become effective on a specific date.

C. Should the Certification and Discontinuance that the Plaintiffs Seek be Achieved in Two Stages or in a Single Stage?

[20] The Plaintiffs propose that the certification and discontinuance be achieved in two stages, while the Canderm Defendants argue it should be achieved in a single stage. Counsel for the Plaintiffs advance various reasons for why the intended certification and discontinuance of this action should be achieved in two distinct stages. Most of these reasons have a common thread. It is argued that it remains important, even at this stage, to preserve the rights of class members. It would be "fake" to give effect to the certification and discontinuance in a single stage in that this would signal to the class the discontinuance was already a "done deal". It would be wrong to run "rough shod" over the rights of potential class members without first giving them the opportunity to express their views.

[21] In addition, it is argued that it is important to maintain consistency between the two-stage certification and settlement process that was undertaken in the J&J Settlement and the certification and discontinuance that is contemplated in this application. One further aspect of this last proposition is that in the J&J Settlement the notices that went to class members as well as the orders that gave effect to that settlement all suggested that the action would be continued, rather than discontinued, against the Canderm Defendants.

[22] I do not agree, either individually or in combination, with these various submissions.

[23] There is nothing "fake" about an intended single-stage process, by which certification and discontinuance would, absent objection and opt outs, take place concurrently.

[24] The form of order that the Canderm Defendants propose could not be clearer. The certification for the purposes of the discontinuance is expressly made subject to para. 16 of the order. Paragraph 16 states that if no opt outs or objections are received, the order will become effective on a given date. Paragraphs 12 - 15 carefully explain the mechanism by which persons in the class may either opt out or object. Both the short form and long form of the proposed notices to class members similarly explain both that the intended certification and discontinuance is subject to the right to opt out or object and explain how class members can go about expressing their objection or intention to opt out.

[25] In addition, I do not consider that there is a sound basis to assert that the certification for the purposes of the J&J Settlement and the present certification for the purposes of the discontinuance should be undertaken in a consistent manner. These two processes are inherently different.

- [26] For example, the J&J Settlement required approval in both the Ontario and British Columbia courts. The approval in the Ontario courts governed all residents of Canada except those who resided in British Columbia. The approval in the British Columbia courts pertained to only British Columbia residents. The present application is brought on a multijurisdictional basis and it is intended to govern all class members in Canada.
- [27] By way of further example, the J&J Settlement process, because it was giving effect to a settlement, had a different object and it contemplated a very different set of procedures. For example, class members were required to submit claims and medical evidence in support of their claims.
- [28] While I accept that it is always important to be principled, and to ensure that class members are treated fairly, it is also important to be pragmatic. This case was, but for certain procedural issues, settled nearly five years ago. For all practical purposes, no substantive steps, that I am aware of, have been brought by the Plaintiffs to advance their claim against the Canderm Defendants. The class we are dealing with likely consists of 13 members. Both proposed representative plaintiffs in this proceeding have, in their affidavit materials, indicated that this process has taken far longer than they originally expected and that they wish matters to be brought to an end.
- [29] The J&J Settlement, which did have a two-step process, was originally expected to require two applications in each of the Ontario and British Columbia courts. The application materials that have been filed by the Canderm Defendants indicate that there were ultimately nine separate applications or court attendances required.
- [30] Furthermore, Rule 1-3 of the Rules provides:

Object

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
- (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.
- [31] A court is required to ensure, to the extent reasonably possible and having regard to the nature of the action, that each of these objects is advanced. Still further, R. 1-3 requires some consideration of judicial economy; *Tri-City Capital Corp. v. 0942317 B.C. Ltd.*, 2017

BCCA 179 at para. 24. There has been nothing "speedy" or "inexpensive" about this action. Indeed it is hard to imagine a case, including a class proceeding, with less at issue, that has taken longer, that has used more judicial resources and that has cost the parties more in terms of their legal fees.

[32] I am therefore satisfied that the single-step process being proposed by the Canderm Defendants is appropriate. Under that single-step process, both certification and discontinuance of the action, subject to the rights of class members to object or opt out, would be achieved by virtue of a single set of notices and a single order. I will return to the actual terms of the order I am making after I have addressed each of the three issues I raised at the outset.

D. What Cost Consequence Results from the Interaction of s. 37(1) of the CPA and Rule 9-8(4) of the Rules?

[33] Section 37(1) of the CPA insulates "any party to an application for certification" from the cost consequences of that application. Rule 9-8(4) of the Rules requires that a person who discontinues an action against a party "must pay the costs of that party to the date of service of the notice of discontinuance". The parties do not agree on the result that follows from the intersection of these two provisions. I am told that this issue has not, to date, been considered by any court in this province. It is also clear that provisions in other class proceeding legislation of other provinces use language that is sufficiently different from the CPA as to be of no assistance in the present case.

[34] Counsel for the Plaintiffs has indicated that the certification and discontinuance he seeks is not contingent on the outcome of this second issue. Still further, the Plaintiffs' application materials, as well as the Notices that will go to class members, confirm that class members will not, in any circumstance, be responsible for any cost order that may be made.

a) The Relevant Provisions of the CPA and of Rule 9-8

[35] The following provisions of the CPA are relevant:

35 (1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

37 (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

- (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
 - (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
 - (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
 - (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
- (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.
- (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

40 The Supreme Court Civil Rules apply to class proceedings to the extent that those rules are not in conflict with this Act.

[36] The relevant parts of R. 9-8 provide:

- (1) At any time before a notice of trial is filed in an action, a plaintiff may discontinue it in whole or in part against a defendant by filing a notice of discontinuance in Form 36 and serving a filed copy of the notice of discontinuance on all parties of record.
- (2) After a notice of trial is filed in an action, a plaintiff may discontinue the action in whole or in part against a defendant with the consent of all parties of record or by leave of the court.
- (4) Subject to subrule (2), a person wholly discontinuing an action against a party or wholly withdrawing his or her response to civil claim filed in response to a notice of civil claim of a party must pay the costs of that party to the date of service of the notice of discontinuance or the notice of withdrawal, as the case may be, and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.
- (8) Unless the court otherwise orders, the discontinuance of an action in whole or in part is not a defence to a subsequent proceeding for the same or substantially the same cause of action.

b) The Legal Authorities that Pertain to each of s. 37(1) of the CPA and Rule 9-8(4)

i. Section 37(1)

[37] A number of cases, that are consistent in result, have considered s. 37(1) of the CPA. Prior to certification of a class action, the ordinary costs under the Rules apply. In *The Consumers' Association of Canada et al v. Coca-Cola Bottling Company et al*, 2006 BCSC 1233, aff'd on appeal 2007 BCCA 356 and leave to appeal dismissed [2007] S.C.C.A. No. 464 Justice Russell, at trial, said:

[16] Samos Investments decided only the very narrow issue of whether s. 37(1) extends to appeals from orders refusing to certify a class proceeding (it does). Can it be extended to pre-certification motions, the bulk of which are brought by defendants seeking to have the action dismissed entirely, or the scope of the action substantially curtailed, prior to certification? The section appears to me to be quite plainly limited to certification applications, to class proceedings once certified, and to appeals arising from either. There is ample authority for the proposition that pre-certification motions are subject to the ordinary costs rules rather than the "no costs" provision in the Act, the most widely cited of which is the conclusion of Brenner J. (as he then was) in *Edmonds v. Acton Super-Save Gas Stations Ltd.* (1996), 5 C.P.C. (4th) 105, [1996] B.C.J. No. 2051 (S.C.) (QL) at para. 4:

With respect to the contention that the court ought to be mindful of s. 37 of the Class Proceedings Act, it is clear in my view that that provision only applies and becomes operative once the court embarks upon an application for certification under the statute. Until such time as a certification hearing commences, the litigation is ordinary litigation and it is governed by the Rules of Court.

[17] *Edmonds* was not appealed, and while the Court of Appeal has not commented directly on its ratio, I am mindful of the opinion of Saunders J.A. in *MacKinnon v. National Money Mart Co.* (2004), 19 C.P.C. (6th) 96, 2004 BCCA 472 at para. 33:

It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the Class Proceedings Act expressly provides that the Rules of Court apply. It does so, however, with the caveat "to the extent those rules are not in conflict with this Act". I think it is also clear that an action commenced under the Class Proceedings Act is, even before the certification application, more than just "any old action": it is an action with ambition.

[18] A court may in future be asked to determine whether s. 37(1) commences operation at the moment the plaintiff files a certification application, or not until the certification hearing commences, as *Edmonds* implies. Such an interesting question of policy and statutory interpretation aside, however, I conclude that the practice in B.C. is to apply the usual costs rules to pre-certification motions and I have been provided with no cogent reason for departing from it.

[Emphasis in the original.]

[38] On appeal, Justice Low, for the Court, said:

[12] The Class Proceedings Act provides protection to plaintiffs with respect to costs orders, but not prior to the certification application. The statute gives no direction to the Court as to the awarding of costs if the proceedings are dismissed prior to the application for certification. It follows that when the action is dismissed prior to the application for certification the ordinary rule applies, namely, that costs follow the event. Of course, this is subject to the proper exercise of judicial discretion to bring about a different result. In the present case, the trial judge exercised her discretion by applying the ordinary rule with variation as to the scale of costs recoverable by some of the groups of defendants.

[39] To similar effect, see *Drover v. BCE Inc.*, 2013 BCSC 50 at paras. 57 and 58; and *Nickel v. Weyerhaeuser Company Limited*, 2018 BCSC 570 at paras. 4-6.

ii. Rule 9-8(4)

[40] The case law that is relevant to R. 9-8(4) is similarly consistent.

[41] In *British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corporation*, 2014 BCCA 207, the Court explained the object of R. 9-8 and said:

[17] Rule 6-2(7)(a), although of general application, requires that the person sought to be removed is not a proper or necessary party. In contrast, Rule 9-8, a rule of specific application, allows a plaintiff wide latitude to discontinue an action against a defendant, effectively dropping the claim against the defendant (provided the application is timely). The only tie on the plaintiff is the requirement to pay costs. That condition reflects the position of the plaintiff as *dominus litus*, able to commence litigation and to choose the parties by defining the scope of the allegations and relief sought.

[18] In summary, there are two differences between Rule 6-2(7)(a) and Rule 9-8: first, Rule 6-2(7)(a) establishes firm criteria for the order sought, being that the person sought to be removed is not a proper or necessary party to the litigation, whereas Rule 9-8 is openly available to a plaintiff; and second, Rule 9-8 imposes cost consequences upon the plaintiff for having commenced an action against the defendant that is not pursued to judgment, whereas Rule 6-2(7) is silent on costs. This costs obligation found in Rule 9-8 may seem to make the Rule 9-8 route disadvantageous to a plaintiff. In my view, however, that is not the case and the defendant is entitled, even under Rule 6-2(7)(a), to the protection of costs provided by Rule 9-8. Costs are the safeguard provided by the Rules to balance the plaintiff's ability to draw a person into litigation by commencing an action against them, and the defendant's burden of defending him or herself at the plaintiff's fiat. In other words, the specific rule has effect in the plaintiff's application to disengage from the defendant even where the application is ostensibly under the general rule. To conclude otherwise is to allow a plaintiff to end-run the consequences of what is, plainly, discontinuance of the action against a particular defendant.

[42] In *Scuccato v. Almazan*, 2007 BCSC 1314, the Court expressly addressed the question of whether it had any ability to relieve against the mandatory cost provisions of what was formerly R. 36(4) and what is now R. 9-8(4). After addressing a number of authorities, the Court succinctly said:

[37] I conclude the court has no power to relieve against the mandatory provision as to costs of Rule 36(4).

[43] Recently, in *Lim v. Zhu*, 2019 BCSC 88 Justice Adair, at para. 158, concluded that, notwithstanding some slight differences in wording between the former Rule and the current Rule, she was bound to follow *Scuccato* and she said "the court has no power to relieve against the mandatory provision as to costs in Rule 9-8(4)".

c) Relevant Interpretive Principles

i. A General Framework

[44] The starting point for analyzing the meaning of a statutory provision is found in Dreidger's modern principle:

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at p. 7; *Rizzo & Rizzo Shoes Ltd. (re)*, [1998] 1 S.C.R. 27 at para. 21; and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.

ii. Clear Language

[45] The interplay between clear language, language that is capable of more than one meaning, and legislative object or purpose was addressed in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1:

[21] The parties both relied on the approach used in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10, which confirmed that statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found:

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning,

the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.

iii. The Policy Objectives of Class Action Legislation

[46] In *Hollick v. Toronto (City)*, 2001 SCC 68, McLachlin C.J. considered the underlying policy reasons for Ontario's class action legislation and, in language that is relevant to the CPA, said:

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982) vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

iv. The Policy Objectives of the "No Costs" Rule

[47] Ward Branch, now Justice Branch, in *Class Actions in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2019), at 20.330-20.350, has said:

British Columbia's legislation adopts a "no costs" approach. The basis for such a rule in the class action context is the concern that potential representatives may be deterred from bringing a class action if they face liability for costs if unsuccessful.

The protection from an adverse cost award does not apply unless the action is formally certified as a class action. If the action is dismissed prior to the certification hearing, the normal rules will generally apply, although in the exercise of its usual discretion, the court may still take into account that the action is a proposed class proceeding.

[48] These various themes were developed by the Court of Appeal in *Samos Investments Inc. v. Pattison*, 2002 BCCA 442:

[24] There is little doubt that one of the main objects of the Act is to improve access to the courts for litigants who could not otherwise afford to exercise such access. Costs are an integral aspect of that overall scheme. In that regard, the Ontario Law Reform Commission identified the question of costs as "the single most important issue" that the Commission considered in designing an expanded class action procedure. In the Commission's view, the matter of costs affected not simply the efficacy of class actions, but the more fundamental question of whether class actions should be utilized at all. (Report, p. 647).

[25] As earlier stated, the B.C. Act is based on the recommendations contained in the Ontario Law Reform Commission Report, *supra*. That report recommended a "no way" costs rule, whereby:

... the ordinary party and party costs rule should be abrogated and replaced by a general rule that, at the certification hearing and the common questions stage of a class action, no party and party costs may be awarded to either party.

The Commission, however, also recommended modifications to the "no way" costs rule at the certification stage by building in two exceptions to that rule: (1) where plaintiffs' claims were found to be entirely lacking in merit, and (2) where the court found "vexatious, frivolous, or abusive conduct on the part of any party." These considerations, which were designed to provide some protection to respondents, are reflected in the wording of s. 37(2) of the B.C. Act.

[26] While the Ontario Legislature did not adopt the "no way" costs rule recommended by the Commission, it is apparent that the B.C. Legislature did. It is apparent from the legislative debates at the time that this was a deliberate choice, as evidenced by the following extract from Hansard, in relation to s. 37, at the time of second reading of Bill 16 (the precursor to the Act):

Hon. C. Gabelmann [then Attorney General]: I have no way of knowing why the Ontario Legislature did not follow the recommendations of the Ontario Law Reform Commission. We felt that the Ontario Law Reform Commission recommendation that there be a no-way costs rule - in other words, that each party pay their own expenses, except under exceptional circumstances - was the appropriate way to go. Why the Ontario House did something else, I don't know.

...

Hon. C. Gabelmann: We think as the Ontario Law Reform Commission thinks: that this cost rule is the best way to ensure fairest access to the justice system. Plaintiffs banding together know that with the exception of the exceptional circumstance provision [s. 37(2)] they are not going to have to bear the costs of the defendant if they are unsuccessful. They are each going to bear their own costs. That's an access-to-justice question that I think is straightforward. (B.C. Debates, June 13, 1995)

(For authority justifying the reference to legislative history, including *Hansard*, to determine the purpose of legislation, see *Rizzo*, *supra*, at para. 35 and *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at para. 28.)

d) Analysis

- [49] The central argument advanced by the Canderm Defendants is that isolating the fact that the Plaintiffs are seeking to certify the proceeding would give effect to "form over substance". Instead, they argue that the Court should recognize the reality that the Plaintiffs seek to discontinue the present action and that that discontinuance is the dominant focus of the present application.
- [50] There is an aspect of this submission that I agree with. In particular, it is clear that the Plaintiffs are not applying to certify the proceeding so as to advance a claim. Instead their specific and central object is to discontinue the proceeding they have filed. The form of order they seek states that the proceeding is to be certified "for the purpose of providing notice to the class of the intention to seek ... the discontinuance of proceedings".
- [51] And yet this reality, without more, does not assist the Canderm Defendants. The starting point is the clear language of s. 37(1) of the CPA. As a result of that provision, no costs are payable: (a) to any party to an application for certification under s. 2; (b) to any party to a class proceeding or (c) to any party to an appeal from any class proceeding "at any stage of the application, proceeding or appeal".
- [52] In this case it is the first of these alternatives that is relevant. The second and third alternatives assume the existence of a "class proceeding". A "class proceeding", in turn, is defined in s. 1 of the CPA as "a proceeding that is certified as a class proceeding under Part 2".
- [53] Thus, had this proceeding been certified as against the Canderm Defendants at an earlier time, s. 35, whose language I quoted earlier, would pertain. Though a court could, under s. 35, on a subsequent discontinuance application impose such other terms that it considered appropriate it could not, as a result of s. 37(1) and absent the application of s. 37(2), impose a cost award. I do not understand the Canderm Defendants to question these propositions.
- [54] In this case it is useful to return to what the Plaintiffs initially sought to achieve. They proposed, in the first instance, to certify the proceeding albeit for the purposes of later obtaining a discontinuance. Nevertheless the first order they sought was for certification of the proceeding.
- [55] They thereafter proposed to bring a separate application and to obtain a separate order to achieve a discontinuance of the proceeding. It was in the context of that second application that they also proposed to deal with the cost issue that is now raised by the Canderm Defendants.

- [56] In this context it is also relevant that the members of a class who seek to certify a proceeding can do so to advance a claim or they can do so to give effect to a settlement as was the case in the J&J Settlement, or they can do so, as in this case, to obtain a discontinuance, or they can, potentially, do so for other purposes.
- [57] Section 37(1) does not distinguish between such purposes. Its focus is not on the underlying object of a certification application. Instead the focus of s. 37(1) is temporal. Applications brought prior to an application for certification are subject to the usual cost regime in the Rules. Applications that are brought "for certification under section 2" as well as subsequent steps in a class proceeding are, subject to s. 37(2), immune from such cost awards. This is the central proposition that emerges from Edmonds, from The Consumers' Association of Canada and from the other authorities I have referred to.
- [58] The fact that the Canderm Defendants sought, and I agreed, to merge the Plaintiffs' intended certification and discontinuance into a single step does not alter this analysis or its result. The considerations that supported the conclusion that a single-stage certification and discontinuance, subject to objections and opt outs, was appropriate, were primarily related to the history of this action, the amounts involved, the size of the class and the other factors I referred to. They are not considerations that change the underlying determination of when or how s. 37(1) is engaged.
- [59] These propositions are also consistent with aspects of R. 9-8(1) and 9-8(2). A discontinuance issued before a trial date is effective when a filed Form 36 is delivered to all parties of record. A discontinuance issued after a notice of trial is filed requires leave of the Court and is effective when that order is made: *Allard v. Manahan* (1974), 54 D.L.R. (3d) 443 (B.C.C.A.) at 449. In this case, no Form 36 has been filed nor could it be filed until class members are given an opportunity to object or opt out. Furthermore, the discontinuance will not be effective until the order from this application is made, at which point, the proceeding will also have been certified.
- [60] I observe that the Canderm Defendants, in their submissions, stated that the Plaintiffs had given "formal notice of discontinuance". In saying this, they were referring to the application and other materials that were filed in support of this application. Under R. 9-8(1) and (2), however, the filing of application materials in support of a discontinuance has no particular legal significance.
- [61] The foregoing analysis, based on the language of s. 37(1), is also reasonably consistent with the policies I have referred to and that underlie both class-action legislation and the "no costs" Rule in s. 37(1). These policies are intended to facilitate advancing class actions and to dim the chilling effect that cost awards might have on representative plaintiffs.
- [62] I recognize that the conclusions I have expressed leave little or no room for the operation of the mandatory cost provisions of R. 9-8(4) in the class action context. To be clear, plaintiffs who seek to discontinue a class proceeding will likely do so by first certifying that proceeding. They will thereby engage the protection of s. 37(1). This is not entirely

satisfactory because R. 9-8(4) serves the salutary purpose of deterring unmeritorious claims and of providing some indemnity to defendants for costs they incur in defending an unmeritorious claim.

[63] Nevertheless, there are several answers to this. First, s. 37(2) leaves open the prospect of a court making a cost award, including on a discontinuance, if any of the particular circumstances that are identified in subparagraphs (a) to (c) are relevant. Indeed, the Canderm Defendants argue that s. 37(2)(c) is relevant - an issue that I will return to momentarily.

[64] Second, s. 40 of the CPA confirms that the Rules "apply to class proceedings to the extent that those rules are not in conflict with the Act". Thus, s. 40 foreshadows that the CPA and the Rules may not align or be consistent in all cases. In *Sullivan on the Construction of Statutes*, the author, at p. 344, explains:

When two or more provisions overlap, the courts try to give effect to each. They do not resort to the conflict resolution strategies at their disposal unless there is a genuine conflict. However, determining whether genuine conflict exists in particular circumstances can be challenging.

[65] These principles were further addressed in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 where the Court said:

47 The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818).

[66] I am unaware of any instance where the courts of this Province have determined that a conflict exists between the CPA and the Rules. The existing s. 40 cases generally involve circumstances where a court fills a procedural gap or finds that a particular Rule applies because there is no conflict. See for example *Kimpton v. A.G. of Canada et al.*, 2002 BCSC 67 at para. 16 and *Knight v. Imperial Tobacco Canada Limited*, 2017 BCSC 1487 at paras. 18-20.

- [67] Nevertheless, I consider that in this case, s. 40 is engaged and that there is a conflict between s. 37(1) of the CPA and R. 9-8(4). Rule 9-8(4) directs that a party who wholly discontinues an action "must pay the costs" of the opposing party "to the date of service of the notice of discontinuance". There are no exceptions to this requirement. It does not matter when the discontinuance is filed. Section 37(1) of the CPA, on the other hand, and subject to some exceptions, insulates parties from the cost consequences of a class proceeding after that proceeding has been certified. This includes circumstances, as I have said, where a proceeding is certified and a representative plaintiff chooses, at some later time, to discontinue the proceeding. Thus, R. 9-8(4) and s. 37(1) have different objects and give rise to different results.
- [68] The third answer to there being no cost consequence to a representative plaintiff who brings an unmeritorious action and then seeks to discontinue the proceeding is that it remains open to a defendant, prior to certification, to seek dismissal of that unmeritorious proceeding. This is, in fact, what occurred in Nickel. The defendant, Weyerhaeuser Company, brought an application for summary trial and dismissal of the Plaintiff's claim. At the same time, the plaintiff brought an application for certification of the action as a class proceeding. The Court was informed by the parties that they had agreed it would be efficient to have the two applications heard together with the dismissal application going first.
- [69] The Court decided to dismiss the plaintiff's claim. The Court further determined that "Weyerhaeuser applied to dismiss Mr. Nickel's claim before the action was certified as a class proceeding"; at para. 5. Accordingly s. 37(1) was not engaged and the defendant was awarded costs against the plaintiff for the application to dismiss his claim; at para. 7. I note that Nickel was different from the present case in that what the parties did in Nickel was binary. The Defendants sought a dismissal; the Plaintiff sought certification. Only one result could ensue from their respective applications. Here, the Plaintiffs seek to both certify and to discontinue the proceeding they have commenced.
- e) Is s. 37(2)(c) of the CPA Engaged?
- [70] Though the Canderm Defendants did not develop this submission in any detail, or press the issue with any vigour, they did argue, in the alternative, that they ought to get their costs of the proceeding under s. 37(2)(c). They accept that ss. 37(2)(a) and (b) have no application. Section 37(2)(c) permits a judge to order costs in class proceedings "at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs".
- [71] Section 37(2)(c) has been considered in other circumstances. Most recently, in *N.N. v. Canada (Attorney General)*, 2019 BCCA 286, the Court addressed the proceeding that arose in the context of the Independent Assessment Process within the Indian Residential Schools Settlement Agreement ("IRSSA"). The appellant N.R.'s claim for compensation was dismissed by the Western Administrative Judge. N.R.'s appeal was successful with the Court of Appeal remitting her claim to be reconsidered. N.R. applied for costs of the appeal. Canada opposed

the cost award, arguing that s. 37 of the CPA establishes a "no costs' regime". The Court, in awarding costs to N.R., concluded that the IRSSA proceedings were "far removed from circumstances of typical class proceedings litigation" and constituted "wholly exceptional circumstances": paras. 20-22. The Court further said:

- [33] Nevertheless, it is our view that the circumstances of this case make it unjust to deprive N.R. of her costs. As we have indicated, the key factor in reaching this conclusion is that the case arises in the context of judicial recourse under the IRSSA. This appeal is not in any way a typical proceeding under the CPA. We would, therefore, exercise our discretion to award costs to N.R.
- [72] Conversely, in each of *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 499 at paras. 9 and 10; *Main v. Hershey Company*, 2011 BCCA 128 at paras 5-8; and *Campbell v. Flexwatt Corp.* (1997), 35 B.C.L.R. (3d) 404 (S.C.) at paras. 19-20, the Courts declined to award costs under s. 37(2). Only *Stanway* dealt with s. 37(2)(c). *Main* and *Campbell* dealt with s. 37(2) more broadly. In each case, the applicant sought to obtain costs in different circumstances. Thus, for example, in *Main*, the Court of Appeal had dismissed the appeals from the approval of a settlement agreement. The respondents applied for costs of the appeals relying on the exception to the costs rules in s. 37(2). In *Campbell*, the plaintiff applied for special costs for time wasted reviewing documents due to an inadequate list of documents provided by one of the defendants. The plaintiffs argued that that failure satisfied one or more of each of ss. 37(a), (b) or (c).
- [73] In the present case, the Canderm Defendants argue that the unusual delays that have attended the orderly progress of this proceeding warrant the application of s. 37(2)(c). I accept, and I have said, that this proceeding has taken an unusual amount of time and that it has appeared to languish for extended periods of time. It is not clear, however, that such delays or even most of them can fairly be visited upon the Plaintiffs alone.
- [74] The passages from the various judgments I have referred to indicate that the various parties, including the J&J Defendants and the Canderm Defendants, were unable to agree, at different times, on various issues including numerous procedural matters. Each party must have considered that these procedural issues were sufficiently important that it warranted their refusing to yield and, in some cases, their coming to court for assistance. On some of the applications that I heard, the Canderm Defendants were successful. On others they were not. In some circumstances the assertions by the Canderm Defendants of what would, or would not, be efficient or expeditious were rendered academic by the delays and costs that arose from the need to bring these matters to court. It is also relevant that aspects of this proceeding were delayed, from time to time, by matters that were being addressed in the Ontario Action.
- [75] Ultimately, though I consider that aspects of this proceeding, and in particular the delay that attended its progress, were "exceptional", I do not consider that s. 37(2)(c) assists the Canderm Defendants.

f) Should the Court Make a Lump Sum Cost Award in Favour of the Canderm Defendants?

[76] The Canderm Defendants have asked the Court to fix the costs payable by the Plaintiffs in the global amount of \$40,000. In addition, they seek reimbursement for a particular disbursement in the amount of \$6,031.88. This \$40,000 figure would include the costs that the Canderm Defendants argued they were entitled to under R. 9-8(4), the costs that they incurred as a result of the Plaintiffs withdrawing an earlier application to amend their Notice of Civil Claim, and the costs they were awarded in the Settlement Agreement Reasons.

[77] The \$40,000 amount has no particular foundation. The Canderm Defendants have deposed, as I have said, that they incurred approximately \$800,000 in legal fees, costs and taxes. They argue that they would surely be able to receive 5% of that \$800,000 figure if they went through the process of taxing their costs before the Registrar. They also argue that, because that I am familiar with the proceeding and with the various applications I have referred to, my making a lump sum cost award would be efficient.

[78] Several distinct issues prevent me from making the order that the Canderm Defendants seek.

[79] First, an aspect of the global cost award that the Canderm Defendants seek is, with these reasons for judgment, no longer available to them. Specifically I have concluded that R. 9-8(4) is not engaged in the circumstances of this case and that the Canderm Defendants are not entitled to the costs they would normally receive on a discontinuance. This, without more, likely renders this aspect of the Canderm Defendants' application academic.

[80] Second, the Plaintiffs argued that the Canderm Defendants raised this issue in their own Notice of Application and that they were not in a position to respond to this aspect of the Canderm application. The Canderm Defendants did not seriously contest this position and this too, without more, prevents this aspect of the application from moving forward.

[81] The third difficulty arises from the limitations that exist on the ability of a trial or chambers judge to make global or lump-sum cost awards. One aspect of the Plaintiffs' submission asserts that it is not enough for the Canderm Defendants to point to the global fees they incurred. Instead, it is necessary for them to break down those fees and to ascribe them to the different stages of the litigation and to different applications. At a minimum, some of those legal fees will be on account of applications where the Canderm Defendants were unsuccessful. The Plaintiffs also argued that the Canderm Defendants are required, at a minimum, to prepare bills of costs on account of the costs they seek. The Plaintiffs would then be in a position to file their own materials. Once the Canderm Defendants prepared a proper evidential record the Plaintiffs would then, they argue, be in a position to file their own materials.

- [82] Each aspect of the foregoing submission is supported in the case law. First, the authorities in the Canderm Defendants' written submission, that support the court having jurisdiction to fix costs, were decided before *Gichuru v. Smith*, 2014 BCCA 414. In *Gichuru*, the Court of Appeal said that fixing costs is "a matter of judicial discretion that should be sparingly exercised": para. 154. In saying this, I recognize that there are some post-*Gichuru* decisions where courts have assessed costs: see for example *Popa v. Oland*, 2015 BCSC 919 at para. 23; and *Jensen v. Ross*, 2015 BCSC 2065 at para. 146.
- [83] Furthermore, there is a requirement that a party prepare a bill of costs when it asks the court to fix party and party costs. In *Herbison v. Canada (Attorney General)*, 2014 BCCA 461 the Court said:
- [31] While R. 14-1(15)(a) authorizes the judge to fix the amount of costs, such costs cannot be assessed in a vacuum. A party asking the judge to assess costs summarily must arm the judge with the evidence necessary to make the award. In the case of party and party costs that would normally require an affidavit attaching a draft bill of costs. A party seeking special costs must provide evidence of its actual legal fees.
- [84] Although the Court in *Gichuru* was focused on a special cost award, the principle behind requiring evidence to support an award of costs remains relevant:
- [111] As indicated above, the right of a party to challenge the reasonableness of the opposing party's proposed costs derives from the rules of natural justice. Where a court elects to make a summary assessment of costs, the party facing a costs order must have a meaningful opportunity to challenge the reasonableness of the fees allegedly incurred by the other party; this opportunity is denied where there is insufficient evidence as to the scope and nature of the actual legal fees: *Williston* at para. 53. Assessing special costs on a summary basis absent sufficient evidence of the objective reasonableness of those fees is an error of principle, contrary to both natural justice and to the Rules.
- [85] Accordingly, and based on these various considerations, I do not consider that it would be appropriate to make the lump-sum cost award that the Canderm Defendants seek.
- g) The Draft Orders and Notices that were Submitted
- [86] The Plaintiffs' written submissions set out the various matters a court is required to consider before certifying a proceeding. The Canderm Defendants took no issue with these submissions. I have also said that the present certification is being sought to discontinue the proceeding. In such circumstances, I do not consider that I need to develop these matters further.

[87] Based on the conclusions that I have arrived at in relation to these first three issues, I make the following further specific orders in relation to the draft orders and notices that the parties submitted. Each of the Plaintiffs and the Canderm Defendants provided me with a draft order. The comments that follow refer to those draft orders and to the particular paragraphs within them. I have only addressed those paragraphs within the orders where the parties disagreed or where some amendment to one of those draft orders is required:

- i) The parties agree that para. 2 of the Plaintiffs' draft order should now include the words "multi-jurisdictional";
- ii) The order that the parties prepare should be consistent with para. 2 of the Canderm Defendants' draft order. This paragraph reflects that the certification and discontinuance will, subject to objections and opt outs, be achieved in a single stage with one order and one hearing. Any additional changes in language throughout the balance of the order or in the notices that the parties prepare should reflect this central determination;
- iii) The order that the parties prepare should follow para. 5 of the Canderm Defendants' draft order. That paragraph identifies the common issue that reflects the basis upon which the action is being certified. In this case, the action is being certified not for the purposes of advancing it, but rather so that it can be discontinued;
- iv) The order that the parties prepare should follow para. 6 of the Canderm Defendants' draft order. These proceedings are multi-jurisdictional and it is appropriate to identify the various claims that were brought on behalf of the class in both British Columbia and elsewhere;
- v) The order that the parties prepare should refer to and attach both a short form notice of certification and discontinuance as well as a long form notice of certification and discontinuance. The long form provides additional detail that may be useful to class members; and
- vi) Paragraph 8 of the Canderm Defendants' draft order identifies various "terms" of the discontinuance that are, subject to objections and opt outs, being achieved:
 - Subparagraph (a), which states that the discontinuance binds all members of the class who have not opted out of the action, is appropriate;
 - Subparagraph (b), which states that the discontinuance will be a defence to subsequent proceedings for the same or similar causes of action as are asserted in either this proceeding or the Ontario Action, is appropriate. I have the jurisdiction to make that Order under R. 9-8(8). Both parties agree that the order is appropriate in the circumstances. Based on the extended history of this matter, I too consider that such a term is appropriate;

- Subparagraph (c), which states that the Canderm Defendants are entitled to their costs under R. 9-8(4), is not, for the reasons I have provided, appropriate. There should be no reference to the Canderm Defendants receiving their costs, on account of the discontinuance, in either the Order or the short or long form of notice. Instead, both the Order and the short and long form notices should indicate that the certification and discontinuance is taking place on a without cost basis;
- Subparagraphs (d) and (f), which address the Canderm Defendants receiving their costs of various earlier applications and to the Court fixing those costs in the global amount of \$40,000 is, for the reasons I have provided, inappropriate. Furthermore, though the Canderm Defendants were awarded the costs of some earlier applications, those cost awards stand independently and are not tied to the Plaintiffs' application to certify and discontinue. There is no need to again refer to those earlier cost orders. In this context, I have said that the Canderm Defendants sought the costs of any earlier application brought by the Plaintiffs to amend their pleadings that they withdrew. At the time, I concluded that that application was premature. The Canderm Defendants should receive the costs of their preparing for that application; and
- The parties' respective draft orders include various future dates by which various notices or objections or opt outs must take place and when the certification and discontinuance order would become effective. It appeared during the application that this is an issue counsel can work out on their own.

[88] Both the short form and long form notice that is ultimately prepared should be consistent with the foregoing comments. The parties agree on the Notice Plan that will be attached as a schedule to the Order. I have reviewed that Notice Plan and I am satisfied that its terms are appropriate.

E. What Cost Order Should Be Made in the Costs Judgment?

[89] In the Costs Judgment, the Canderm Defendants sought various cost awards, arising out of various earlier applications, as against the J&J Defendants and the Plaintiffs. The specific issues that were raised in the Costs Judgment are identified in para. 1 of that judgment:

[1] The applicants, Canderm Pharma Inc. and Anna Maria Duchon (the "Canderm Defendants"), seek various cost orders against either or both the plaintiffs and the defendants, Johnson and Johnson Inc. and Jansen-Ortho Inc. (the "J&J Defendants"). Specifically, the applicants seek cost orders in respect of the following distinct matters:

- i) the plaintiffs' application to enforce a settlement agreement. I dismissed that application on September 3, 2015 (the "Settlement Application");
- ii) the plaintiffs' withdrawal of its application to amend its Notice of Civil Claim on October 26, 2015;
- iii) the application for Consent Certification that was determined on May 6, 2016 (the "Consent Certification Application");

iv) the written submissions that were filed by the J&J Defendants on the Consent Certification application. Following the oral hearing, I had asked the parties for further submissions in respect of the interpretation of s. 8(1)(c) of the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the Act); and

v) this application for costs.

[90] My conclusions in respect of each of these five issues are found at paras. 35, 47, 91, 98 and 106 of the Costs Judgment respectively. It will be apparent, in looking at these various aspects of the application, that issues (i) and (ii) only pertained to the Plaintiffs. Issue (iii) pertained to both the Plaintiffs and the J&J Defendants. Issue (iv) only pertained to the J&J Defendants. On each of these first four issues, the Canderm Defendants were, for various reasons, unsuccessful. It is issue (v), the costs of the Costs Judgment itself, that the Canderm Defendants seek to clarify or revisit.

[91] It is also relevant for each of the first four matters, other than the first application, where the Canderm Defendants sought double costs against the Plaintiffs, the Canderm Defendants applied, in the first instance, for special costs. Their submissions in support of these various special cost awards argued that the J&J Defendants, or the Plaintiffs, or both, had in different circumstances, acted either "reprehensibly" or "improperly" or for an "improper purpose".

[92] In the Costs Judgment I said:

[104] One last point is important. This action has been hard-fought. This, in itself, is not unusual. The position of the Canderm Defendants has, however, consistently gone beyond this. It will be apparent that on this application there have been numerous assertions that counsel for the plaintiffs and/or the J&J Defendants have acted "improperly" and that their conduct warrants sanction. Initially, the Canderm Defendants argued that the J&J Defendants had not been forthright on another application, though this assertion was later withdrawn. In the Certification Application, the Canderm Defendants suggested, without bringing a formal application, that the conduct of the plaintiff's and of the J&J Defendants had amounted to an "abuse of process"; see Certification Reasons at paras. 62-66.

[105] There will be limited cases where it is necessary and appropriate to advance such positions. It is self-evident, however, this should not be done lightly or unless the circumstances warrant it. It is also self-evident that such assertions, particularly if they are unsupported, will make the interaction of counsel and the orderly progress of litigation more difficult.

[106] I consider, for obvious reasons, that the Canderm Defendants should bear the costs of this application.

[93] It is relevant that the parties have not entered a filed order in respect of the Costs Judgment. Normally the terms of an order will be settled before the Registrar: R. 13-1(11). The Court, however, retains an inherent jurisdiction to settle the terms of its own orders: *Peirce v. Van Loon*, 2001 BCSC 1096. Furthermore, before an order is entered, the court has the power to reconsider, vary or revoke its judgment: *Chand v. Insurance Corporation of British Columbia*, 2009 BCCA 559 at para. 29 and *Canadian Western Bank v. Trepanier Manor Corp.*,

2013 BCSC 232 at para. 5.

- [94] It is also relevant that the issue of costs for the application itself was not argued at the time. Instead, in accordance with my general practice and the practice of many trial judges, I signalled my intention with respect to the issue of costs so as to assist the parties and to potentially obviate the need for them to return to court for a further application. Nevertheless, in *Loft v. Nat*, 2014 BCCA 108 at para. 52, the Court confirmed that in circumstances where parties have not made any submissions on costs, and the Court has indicated its view on the likely disposition of a cost award, the parties should be provided the opportunity to address the question of costs if they seek a different result.
- [95] Finally, it is relevant that the J&J Defendants support the Plaintiffs in their position that the cost order I made in the Costs Judgment was appropriate.
- [96] The Canderm Defendants argue that because the application they advanced, and that resulted in the Costs Judgment, postdated the J&J Settlement certification, s. 37(1) of the CPA is accordingly engaged. They further argue that s. 37(2) is not relevant and that it was not therefore open to me to make the cost order I did.
- [97] Several specific considerations are relevant. In paras. 104 and 105 of the Costs Judgment, I expressed my concern with the submissions that had been made by the Canderm Defendants. Different jurisdictions have different cost rules and different litigation cultures. In some jurisdictions cost applications are a central component of class action litigation strategy. This reality has given rise to some concern; see for example *Heller v. Uber Technologies Inc.*, 2018 ONSC 1690.
- [98] In this jurisdiction, however, special costs are awarded "exceptionally" and are intended to address wrongful or reprehensible conduct that a court considers worthy of sanction or rebuke: see paras. 11-14 of the Costs Judgment and the authorities that are referred to. At the time I heard the application, I considered that the submissions of the Canderm Defendants, which were hyperbolic and unwarranted, likely fell within the ambit of s. 37(2) of the CPA. The serious and inappropriate nature of aspects of the submissions that they made are addressed throughout the Costs Judgment: see, for example, paras. 44 and 45. The Plaintiffs do not, however, on this application advance that argument and accordingly I have not considered it any further. I also accept, as counsel for the Canderm Defendants observed, that the submissions that have been made on behalf of her clients since she received the Costs Judgment have been much more measured and temperate.
- [99] The Plaintiffs argued that the various cost applications the Canderm Defendants brought were not steps or a "stage of the proceeding" within the language and meaning of s. 37(1). Expressed differently, they argue that s. 37(1) only pertains to steps within the litigation that advance a proceeding and that a cost application does not achieve that end.

- [100] I do not consider that s. 37(1) should necessarily be limited in this way. An application that is brought and a cost order that is made after a proceeding has been certified should fall within the ambit and object of s. 37(1) and should be subject to s. 37(2).
- [101] This conclusion must, however, be refined. In respect of the first two issues in the Costs Judgment that I identified at para. 91 of these reasons, the cost orders that the Canderm Defendants sought pertained to either an application or a matter that predated the certification for the purposes of the J&J Settlement. Is the protection of s. 37(1) engaged when a cost application is brought, in respect of a substantive application that pre-dated certification, after certification? I do not consider that s. 37(1) generally governs such circumstances.
- [102] The "stage" or step in the proceeding, under s. 37(1) is the substantive application. That is the engine that advances, or should advance, the litigation. Ideally parties should endeavour to deal with cost issues at the time a substantive issue or application is addressed. This is particularly the case when the application is interlocutory in nature. This is both efficient and expeditious. Conversely parties should not, as a general rule, await the outcome of an application and then return to court to argue about costs. In this province, the legal regime that governs an award of costs, in particular in relation to interlocutory applications, is straightforward. It is highly unusual for either double costs or special costs to be awarded in respect of such an application. Furthermore, the discretion to award costs other than in accordance with the standard order is to be exercised judicially and sparingly. There is then generally no good reason to deal with an application and the costs of the application separately.
- [103] Furthermore, splitting an application and the costs of the application gives rise to inefficiency. In this jurisdiction, a separate cost application gives that cost application an importance or pre-eminence that is generally not warranted. The applications that resulted in the Costs Judgment occupied two days. In this case, the Canderm Defendants propose to again either file written submissions or to return to court, following the receipt of these reasons, to deal with the costs that arise from this application.
- [104] A related issue arises. I have said that issues (i) and (ii) in the Costs Judgment, identified at para. 89 of these reasons, had nothing to do with the J&J Defendants - they only pertained to the Plaintiffs. Issue (iv) had nothing to do with the Plaintiffs. Instead, the Canderm Defendants sought an award of special costs as against the J&J Defendants alone. There was then only one aspect of the Canderm Defendants' various cost applications, identified in issue (iii), that arose within the context of a certification application and that related to both the Plaintiffs and the J&J Defendants. In such circumstances I do not consider that either the language or the object of s. 37(1) should immunize the Canderm Defendants from the cost consequences of the applications they brought and that resulted in the Costs Judgment. Instead, the usual rule, that costs go to the successful party, pertains: R. 14-1(9).

"Voith J."

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