
CANADA / JUDGMENT

Shaver v. Mallinckrodt Canada ULC

2021 BCSC 404

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 404 Shaver v. Mallinckrodt Canada ULC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shaver v. Mallinckrodt Canada ULC,

2021 BCSC 404

Date: 20210122

Docket: S205793

Registry: Vancouver

Between:

Laura Shaver

Plaintiff

And

Mallinckrodt Canada ULC, Mallinckrodt PLC,

Her Majesty the Queen in right of the Province of British Columbia

and the College of Pharmacists of British Columbia

Defendants

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

Before: The Honourable Madam Justice Matthews

(appearing by videoconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing by videoconference:

J.B. Gratl

T. Rauch-Davis

Counsel for the Defendant Her Majesty the Queen in right of the Province of British Columbia appearing by videoconference:

T. Callan

A.F. Davies

Counsel for the Defendant the College of Pharmacists of British Columbia appearing by videoconference:

A. Sharon

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

January 18, 2021

Place and Date of Judgment:

Vancouver, B.C.

January 22, 2021

Introduction

[1] These applications relate to procedural steps in this proposed class action pertaining to the manufacture, approval for BC PharmaCare coverage, and pharmacy dispensation of a manufactured liquid form of methadone, called Methadose, in place of pharmacy-compounded methadone. Both Methadose and pharmacy-compounded methadone have been used for the treatment of opioid use disorder. Ms. Shaver argues that Methadose is an inferior treatment. She alleges that Mallinckrodt Canada ULC and Mallinckrodt PLC, to whom I will refer to as the "Mallinckrodt defendants", coordinated with Her Majesty The Queen in Right of the Province of British Columbia and the College of Pharmacists of British Columbia, to eliminate the proposed class members' access to compounded-methadone, exposing them to the inferior efficacy of Methadose and the risk of relapse into illicit drug use.

- [2] Ms. Shaver applies for orders requiring the defendants British Columbia and the College of Pharmacists to file responses to the notice of civil claim within 21 days. Ms. Shaver also seeks an order, referred to colloquially as a "sequencing" order, that any applications filed by British Columbia or the College of Pharmacists to strike the notice of civil claim be heard with the application to certify. Finally, Ms. Shaver seeks an order directing that any application filed by British Columbia or the College of Pharmacists for a stay of proceedings be scheduled or rescheduled to be heard after the application to certify. British Columbia and the College of Pharmacists have also filed applications pertaining to sequencing their applications to strike.
- [3] The main issue is whether British Columbia and the College of Pharmacists must file responses to the amended notice of civil claim before Ms. Shaver delivers her certification materials. That issue must be determined in the context of the other matters extant and pending, including the corporate reorganization proceedings pertaining to the Mallinckrodt defendants, and other procedural British Columbia and the College of Pharmacists seek to take before certification.
- [4] Ms. Shaver amended her notice of civil claim after she filed her applications and after British Columbia and the College of Pharmacists filed their applications for sequencing orders, as a result of which I adjourned the sequencing application so that British Columbia and the College of Pharmacists would have an opportunity to consider their applications to strike in light of the amended notice of civil claim. With regard to Ms. Shaver's application pertaining to the timing of the potential application for a stay, at the case planning conference on December 4, 2020, I directed that if British Columbia and the College of Pharmacists wished to seek a stay, they bring the applications to be heard after the application pertaining to the responses to the notice of civil claim and the sequencing application.
- [5] British Columbia and the College of Pharmacists take the position that they should not be required to file responses to the notice of civil claim until after the certification materials have been delivered. They argue that this application is moot because it seeks responses to a notice of civil claim that was amended after the notice of application was delivered and the time to respond to the amended notice of civil claim has not yet expired. British Columbia and the College of Pharmacists argue that in any event, the appropriate time to file responses to Ms. Shaver's claim is after certification materials have been delivered by Ms. Shaver, so that they have greater particulars and certainty about what they are responding to. They argue that requiring them to file responses before Ms. Shaver delivers certification materials will result in wasted resources. The College of Pharmacists also argue that because this action is stayed against the Mallinckrodt defendants, they do not have access to those co-defendants and cannot properly prepare responsive responses to Ms. Shaver's claim.
- [6] The issues to be addressed on this application are:
- 1) whether the application is moot because of the delivery of the amended notice of civil claim after the filing of the application;

- 2) whether there is a good reason to defer delivering responses until after Ms. Shaver has delivered her certification materials;
 - 3) if there is good reason, whether it outweighs the benefits of having the certification materials and analyses informed by a complete set of pleadings; and
 - 4) taking into account the answers to these questions, when British Columbia and the College of Pharmacists should file their responses.
- [7] These reasons for judgment were delivered orally. I have edited them without changing the substance.

Background to the litigation

- [8] Ms. Shaver brings this proposed class action on her behalf and on behalf of a proposed class of individuals with opioid use disorder for which the treatment is opioid agonist treatment. Opioid agonist treatment is administered in British Columbia through the Methadone Maintenance Treatment Program. For Ms. Shaver and the proposed class, the cost of the treatment is covered by PharmaCare Plan C coverage. Ms. Shaver alleges that prior to March 1, 2014, opioid agonist treatment was a compounded crystalline form of methadone delivered in a liquid, compounded at the pharmacy at the time the prescription was dispensed. Ms. Shaver alleges that on March 1, 2014, British Columbia stopped covering oral compounded methadone under PharmaCare Plan C and replaced it with Methadose, a manufactured form of methadone. Because Methadose is pre-manufactured, it is not compounded by the pharmacist at the time of delivery. Methadose is covered under PharmaCare Plan C. As a result of these changes, Ms. Shaver alleges that all patients who are reliant on PharmaCare Plan C coverage were required to switch from oral compounded methadone to Methadose. Ms. Shaver also alleges that the College of Pharmacists amended its policies to prohibit pharmacists from dispensing oral compounded methadone effective March 1, 2014.
- [9] Ms. Shaver alleges that the Mallinckrodt defendants negotiated with British Columbia and the College of Pharmacists to be the exclusive provider of Methadose in British Columbia.
- [10] Ms. Shaver alleges that Methadose is a less effective treatment than compounded methadone and as a result, she and the proposed class members suffered harm, including physical symptoms of withdrawal from methadone and adverse consequences when users relapsed into using non-prescription drugs as a result of the ineffectiveness of Methadose.
- [11] In the notice of civil claim filed to commence the action, Ms. Shaver pleaded negligent misrepresentation against the Mallinckrodt defendants, British Columbia, and the College of Pharmacists, failure to warn against the Mallinckrodt defendants, a breach of s. 7 of the Charter of Rights and Freedoms by British Columbia and the College of Pharmacists. She seeks general damages, special damages, aggravated, punitive, and exemplary damages, and an injunction restoring patient access to compounded methadone pursuant to s. 24(1) of the

Charter of Rights and Freedoms.

- [12] In October 2020, the Mallinckrodt defendants and 63 affiliated debtors sought bankruptcy protection, including a stay of proceedings, under Chapter 11 of the United States Bankruptcy Code before the United States Bankruptcy Court for the District of Delaware. On October 16, 2020, the Mallinckrodt defendants sought and obtained a recognition order from the Ontario Superior Court of Justice ordering, among other things, a stay of all Canadian proceedings, including this action, against the Mallinckrodt defendants pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA").
- [13] On December 4, 2020, the parties appeared before me to address scheduling various applications. At that appearance, I was advised that British Columbia and the College of Pharmacists brought an application in the CCAA proceedings for a stay of the proceedings against them in this action but it did not proceed at the time the stay pertaining to the Mallinckrodt defendants was granted. I was advised that there was a date arranged in the CCAA proceedings to schedule that motion. In the interim, British Columbia and the College of Pharmacists sought that no steps be undertaken in this action.
- [14] I declined to hold the action in abeyance without a stay order from the CCAA court or an application for a stay in front of me. As a result of hearing submissions on other issues that needed to be addressed, I set Ms. Shaver's application to compel British Columbia and the College of Pharmacists to file responses to the notice of civil claim returnable by January 18, 2021. I also set that day to hear the sequencing application that Ms. Shaver, British Columbia, and the College of Pharmacists asserted was appropriate to determine whether the proposed applications by British Columbia and the College of Pharmacists to strike Ms. Shaver's notice of civil claim be heard before certification. I directed that if any party wished to bring a stay application, it should be brought after the application about responses to the notice of civil claim and the sequencing application.
- [15] Ms. Shaver delivered this application. British Columbia and the College of Pharmacists delivered applications pertaining to sequencing. Ms. Shaver delivered an amended notice of civil claim on January 11, 2021. Most significantly, the amendments to the notice of civil claim deleted the negligent misrepresentation cause of action and added failure to investigate to the failure to warn cause of action (alleging a duty to investigate in addition to a duty to warn).
- [16] On January 14, 2021, the parties appeared before me to address British Columbia and the College of Pharmacists' position that the application to require responses to the notice of civil claim and the sequencing applications should be adjourned in light of the recently delivered amended notice of civil claim. I declined to adjourn the application to file responses on the basis that I understood that British Columbia and the College of Pharmacists took the position that responses to the amended notice of civil claim should not be filed until after Ms. Shaver delivers her certification materials. Their positions were not based on the content of the notice of civil claim or the amended notice of civil claim, but

rather on the nature of the claim as a proposed class proceeding and the circumstances of this proposed class proceeding. I adjourned the sequencing application because the amendments to the notice of civil claim did affect the nature of the potential application to strike.

Is this application moot?

- [17] British Columbia and the College of Pharmacists take the position that Ms. Shaver's application to require responses to the notice of civil claim is moot because the notice of civil claim, having been amended, is now defunct. The time for response to the amended notice of civil claim has not yet expired, so there is no requirement to file responses.
- [18] I do not accept this submission. While the application pertains to whether the court should require responses to be filed to the notice of civil claim before certification, the general requirement to file a response to a notice of civil claim or an amended notice of civil claim does not arise from an application brought by Ms. Shaver, but from the Rules of Court.
- [19] Rule 3-3 (3) of the Supreme Court Civil Rules requires a person served with a notice of civil claim to file a response to civil claim within 21 days after that service. Where an amended notice of civil claim has been filed and served, Rule 6-1(5) and (6) and (7) of the Supreme Court Civil Rules apply:

Response of a party to amended document

- (5) If a pleading (in this subrule and in subrule (6) called the "primary pleading") is amended under this rule and the amended pleading is served on a party of record under subrule (4) (a), that party
- (a) may amend, under this rule, any pleading he or she had filed in response to the original version of the primary pleading but only with respect to any matter raised by the amendments to the primary pleading, and
- (b) in that event, must, within 14 days after being served with the amended pleading, serve a copy of the filed amended responding pleading on all parties of record.

Failure to serve amended responding document

- (6) If a party on whom an amended pleading is served under subrule (4) (a) does not serve an amended responding pleading as provided in subrule (5),
- (a) the pleading he or she filed in response to the original version of the primary pleading is deemed to be the pleading he or she filed in response to the amended pleading, and
- (b) any new facts set out in the amended pleading are deemed to be outside the knowledge of the defendant.

Responding to amended pleading

- (7) If an originating pleading is amended under this rule and served under subrule (4) (b) on a person who is not yet a party of record, the person has the same period for filing a responding pleading to that amended originating pleading as the party had to file a responding pleading to the original version of the originating pleading.
- [20] Rule 6-1(7) applies because neither British Columbia nor the College of Pharmacists has filed responding pleadings to the notice of civil claim and so they are not yet parties of record: see Rule 1-1(1). Accordingly, the rules provide them 21 days to deliver a response to the amended notice of claim commencing the day after the notice of civil claim was served, January 11, 2021.
- [21] A plaintiff who has not received a response to a notice of civil claim or an amended notice of civil claim within the time set out in the Rules may seek default judgment. There is no provision in the Rules requiring, or even providing, for a plaintiff to make an application to compel a response to a notice of civil claim or an amended notice of civil claim. In practice, it is rare for a plaintiff in a proposed class action to seek default on the basis that the defendant has not filed a response. In some cases, the parties proceed to certification as though the defendant is a party of record. In other cases, the issue is raised at a case planning conference and addressed by consent. In other cases, it becomes the subject of an application, either by the defendant for permission to defer the filing of the response or by the plaintiff to compel a response.
- [22] Since the extinguishment of the appearance from the Rules of Court, there is no means provided for in the rules by which a party named as a defendant becomes a party of record without filing a response. That raises the question as to what standing such a defendant has in the proceeding. I will not decide that issue on this application, because Ms. Shaver did not take the position that British Columbia and the College of Pharmacists lack standing and therefore the issue was not properly joined or addressed on the application before me.
- [23] However, this unsatisfactory procedural situation is such that the assertion that Ms. Shaver's motion is moot is not of assistance in addressing an issue that must be addressed if British Columbia and the College of Pharmacists are to participate in the proceeding. The time passed for them to respond to the primary claim (as it is referred to in the Supreme Court Civil Rules), and they have asserted that they do not intend to respond to the amended notice of civil claim until after Ms. Shaver has filed her certification material unless the court otherwise orders.

- [24] Timing-wise, their position is that they do not intend to file responses until long after the time for responding to the amended notice of civil claim will have expired. In my view, the substantive issue on this application is whether British Columbia and the College of Pharmacists may defer their responses to the primary claim or the amended notice of civil claim until after Ms. Shaver files her certification material. That issue is joined and it is not moot.
- [25] If I am wrong in my analysis of mootness, I have the jurisdiction to direct the timing of delivery of responses to the notice of civil claim or the amended notice of civil claim, regardless of whether the time for delivery has expired, pursuant to Rule 1-3(1) of the Supreme Court Civil Rules which provides for the court to exercise its jurisdiction to make orders to fulfil the object of the Rules to secure the just, speedy, and inexpensive determination of every proceeding on its merits, Rule 22-4(2), which permits the court to extend the time for any action under Supreme Court Civil Rules, and Rule 22-1(7), which grants the court the authority to dispose of any question arising out of an application.
- [26] Accordingly, I am satisfied that if the application is moot, I nonetheless have the jurisdiction to address the timing of responses to the amended notice of civil claim at this juncture.

Is it appropriate to defer the requirement to file responses to the amended notice of civil claim until after certification?

Legal principles

- [27] There has been an evolution of the view taken by courts across the country as to whether defendants should be required to file responsive statements of defence, as they used to be known in this province, or responses to notices of civil claim, as they are now known, before the action is certified. British Columbia and the College of Pharmacists submit that, in the vast majority of cases, responses to notices of civil claim are not required by British Columbia courts to be filed before delivery of certification materials and in some cases, not until after certification has taken place.
- [28] In *British Columbia v. Apotex Inc.*, 2020 BCSC 412, leave to appeal granted 2020 BCCA 186, Mr. Justice Brundrett described the historical practice of British Columbia courts permitting the late filing of responses in class actions. He also commented most recently that practice has "fallen out of favour in British Columbia absent good reason" at para. 83. Mr. Justice Brundrett noted that the discretion to direct the timing of filing responses is within the discretion of the court. The parties before me agree with this statement.
- [29] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74 at paras. 31-34, Mr. Justice Myers decried the practice of deferring filing statements of defence until after the action has been certified, noting that experience shows the practice creates difficulties, is not justified by cost savings given the financial stakes in class actions, and generally is not for a legitimate purpose, given that complete pleadings crystallize the issues. He said that the historical practice ought to be revisited, and if the court were to allow a statement of

defence to be deferred, it should be based on a "good reason".

- [30] I conclude that if there was a weight of authority in British Columbia, or a common practice of judicial sanction to delay delivery of responses to notices of civil claim until after the certification, the tide turned on that approach with the decision of Mr. Justice Myers in *Pro-Sys*.
- [31] As noted by Madam Justice Griffin, then of this court, in *Shaver v. British Columbia*, 2017 BCSC 108 at para. 80 (the plaintiff Shaver is the same plaintiff Shaver in this case, but that action had a different subject matter than this action), while the court has the discretion to waive the requirement for a defendant to file a defence until after certification, the case law has evolved away from that approach which was driven by the concern that the claim would change after the certification hearing. Madam Justice Griffin concluded that the statement of defence should be filed in a timely way to assist in identifying common issues. She also explained that closing the pleadings focuses the issues before certification, facilitates the certification record that is informed by the issues between the parties as defined by the pleadings, and makes appeals of certification and the delays associated with appeals less likely.
- [32] I agree with these comments as general propositions. I add that complete pleadings may not only raise common issues but may also assist in determining the prevalence of a proposed common issue in an action if it is certified, and therefore assist with preferable procedure assessment.
- [33] For example, in a negligence claim, the plaintiff must establish that the defendant owes a duty of care. In such cases, whether a duty of care was owed to the class is generally stated to be a common issue. If the defendant, in a response to civil claim, admits that it owed a duty of care, the issue is common but is not an issue that will be the focus of the contested matters in a case, and so that common issue receives less weight in determining the preferable procedure than if it were a contested common issue.
- [34] In addition, the Class Proceedings Act requires a plaintiff to have 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": s. 4(1)(e)(ii). A representative plaintiff who does not have responses to civil claim identifying what the defendant asserts is relevant is hampered in fulfilling this task, and therefore the court is hampered in understanding whether the representative plaintiff's proposed plan does indeed set out a workable method of advancing the proceeding.

- [35] I conclude that the question is whether, on the specifics of the case, there is a "good reason" (as described by Mr. Justice Myers in *Pro-Sys*), to permit the response to the notice of civil claim to be filed at a date other than the time at which it is due under the Supreme Court Civil Rules. If there is a good reason, it must be weighed against the advantage of having a complete set of pleadings underlying the certification materials, as described by Griffin J. in *Shaver*, and as I have also described.
- [36] British Columbia and the College of Pharmacists rely on *Poundmaker Cree Nation v. Canada*, 2017 FC 447, in which Madam Justice Strickland reviewed jurisprudence across Canada in deciding what the proper approach on this issue should be under the Federal Court Rules of class proceedings, and set out the following factors:
- a) whether the statement of defence would serve any useful purpose prior to certification because it will be essential to a determination of the issues to be addressed at the certification motion or likely to be of assistance to the Court;
 - b) whether requiring responses to be filed prior to certification will advance the just efficient and least costly resolution of the litigation;
 - c) whether the nature of the proceedings and the rights asserted are relevant contextual factors;
 - d) the complexity of the matter;
 - e) the amount of time and effort involved to prepare the statement of defence;
 - f) whether the statement of defence may have to be entirely reformulated, depending on the outcome of the certification hearing; and
 - g) whether there is any obvious prejudice to the plaintiff.
- [37] These factors may be applied in accordance with the decision of Myers J. in *Pro-Sys*, and Griffin J. in *Shaver* to answer the questions of whether there is a "good reason" to not require responses to be filed before certification materials being delivered and whether that good reason outweighs the benefits of having a complete set of pleadings to inform the certification, the identification of certification issues, and the analysis of certification issues. In that regard, I would not apply factor (a) in the manner described by Strickland J. in *Poundmaker*. It is not a question of whether the response to civil claim is "essential" to a determination of the issues to be addressed at a certification motion. It is enough that it be useful to determine the issues to be addressed at the certification motion. The presumption is that it will be useful. The burden is on the defendant to establish that the circumstances are such that the responses ought not to be required when they are due: *Poundmaker* at para. 21.

Is there a good reason to defer the time to deliver responses to the amended notice of civil claim until after Ms. Shaver delivers certification materials?

- [38] British Columbia and the College of Pharmacists submit that efficiency, effectiveness, and fairness are served by timing the delivery of responses to the amended notice of civil claim after Ms. Shaver delivers certification materials for the following reasons:
- a) the burden of establishing that a case ought to be certified is on the plaintiff. British Columbia and the College of Pharmacists have no onus to define the issues for certification, rather they respond to the certification of the case as proposed by the plaintiff. They will be better positioned to respond to the notice of civil claim once they see how Ms. Shaver seeks to certify it;
 - b) British Columbia and the College of Pharmacists seek to strike portions of the amended notice of civil claim. Assuming those applications are heard before the balance of the certification matters, the amended notice of civil claim may have to be significantly reformulated and certification material tailored to the reformulated claim. Responses delivered before the reformulations of the claim and certification material will be a waste of the resources necessary to commit to preparing responses now;
 - c) at heart, this is a product liability claim. The manufacturer of the product is not participating because of the CCAA stay. The College of Pharmacists, in particular, says it is hampered in its ability to do the necessary investigations to respond to the claim without access to the manufacturer; and
 - d) Ms. Shaver has not provided any cogent reason as to why it will be prejudiced by responses being delivered after certification materials are delivered, and so the fairness concerns for British Columbia and the College of Pharmacists in terms of their ability to respond at this time outweigh any fairness concerns to Ms. Shaver.

The Certification Burden

- [39] British Columbia and the College of Pharmacists submit that requiring responses before certification is not in accord with the burden of certification. British Columbia and the College of Pharmacists argue that it is not for them, through their pleadings or otherwise, to identify common issues or provide the structure for the preferable procedure analysis. British Columbia and the College of Pharmacists say that the proper approach is for Ms. Shaver to identify common issues, state why the certification is the preferable procedure and satisfy all of the tests in s. 4 of the Class Proceedings Act.
- [40] In support of this argument, the College of Pharmacists submits that the Class Proceedings Act anticipates responses to be filed after certification. It points to s. 2(3) of the legislation. Section 2 as a whole reads as follows:

Plaintiff's class proceeding

2 (1) A resident of British Columbia who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class.

- (2) The member who commences a proceeding under subsection (1) must
- (a) make an application to the court for an order
 - (i) certifying the proceeding as a class proceeding, and
 - (ii) subject to subsection (4), appointing the member as the representative plaintiff for the class proceeding, and
 - (b) give notice of the application for certification to
 - (i) the representative plaintiff for any multi-jurisdictional class proceeding, and
 - (ii) the representative plaintiff for any proposed multi-jurisdictional class proceeding
- that has been commenced elsewhere in Canada and that involves the same or similar subject matter.
- (3) An application under subsection (2) must be made
- (a) within 90 days after the later of
 - (i) the date on which the last response to civil claim was served, and
 - (ii) the date on which the period prescribed by the Supreme Court Civil Rules for service of the last response to a notice of civil claim expires without that pleading having been served, or
 - (b) at any other time, with leave of the court.
- (4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.
- [41] The College of Pharmacists submits that by requiring the certification application to be made within 90 days of the date on which the last response to civil claim was served or the date on which the period prescribed by the Supreme Court Civil Rules for service of the last response expires, the legislation anticipates that certification materials will be served before responses are filed. Ms. Shaver submits that because of the words "the later of" in s. 2(3)(a), the College of Pharmacists' submission cannot be correct. She submits that what the provision provides is that the plaintiff cannot apply for certification until after the last response has been served unless responses are not served within the time provided for in the Rules, in which case the plaintiff must proceed to file for certification notwithstanding the responses have not been filed. I agree with Ms. Shaver's interpretation of the provision based on the plain reading of the section.
- [42] In addition, the submission that requiring responses to a notice of civil claim to be filed before delivery of certification materials is inconsistent with the burden of certification conflates certification evidentiary requirements with the requirement to plead. They are different and they further different litigation objectives. Pleadings provide the parties and

the court with notice of what the plaintiff claims and what the defendants (and other parties, if any) assert by way of defence to those claims or claims over. By doing so, they also define the issues in the litigation as a whole. Certification materials, based on the issues as defined in the pleadings, propose a class definition, delineate each party's positions as to what are common issues, and set out each party's positions as to whether a class proceeding is the preferable procedure to resolve those common issues, in part with reference to individual issues (also identified by reference to the pleadings), and whether there is a representative plaintiff who has proposed a plan for resolving the common issues.

- [43] British Columbia and the College of Pharmacists also submit that because this is a complex class proceeding, there is no utility in requiring them to file responses until Ms. Shaver has delivered her certification materials and they have a better understanding of what Ms. Shaver says are common issues and the reason she asserts that a class proceeding is the preferable procedure. British Columbia and the College of Pharmacists also submit that the amended notice of civil claim does not include appropriate particulars of Ms. Shaver's claim and that the best method of obtaining those further particulars is through the certification material.
- [44] In response, Ms. Shaver submits that responses to the amended notice of civil claim are necessary because there are at least three issues that require crystallization before certification:
- 1) the defendants take a formal position on limitation period defences, a defence which has been suggested but is not the subject of a pleading;
 - 2) because the College of Pharmacists is a statutory body, it may seek to avail itself of defences, for example, statutory immunity, arising from its statute and Ms. Shaver should know what its position is in that regard; and
 - 3) Ms. Shaver cites various facts that she anticipates may be the subject of conflicting evidence and it wishes to know what position British Columbia and the College of Pharmacists take on those facts.
- [45] "Crystallization" is the word that Mr. Justice Myers used in *Pro-Sys*. Madam Justice Murray also used it in *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2020 BCSC 1290, where she ordered that the defendants were to file their responses to civil claim after the determination of an evidentiary application but before certification. In that case, it does not appear that the issue of the timing of responses was raised until after the defendants applied to strike the affidavits that the plaintiff intended to rely upon at certification. Madam Justice Murray ordered that the applications to strike the affidavits be heard before the certification because the relief sought by the defendants in striking the affidavits was so wide that if the applications were successful in whole or in part, the certification material would have to be substantially revised. After Murray J. determined the sequence of the application to strike the affidavits in relation to the certification motion, the plaintiff raised the issue that the defendants had not filed responses to the notice of civil

claim and sought an order requiring the defendants to file them. In those unusual circumstances which Murray J. (at para. 15) noted as including "hundreds of challenges", including hearsay, unqualified opinion, argument and privilege, were to be addressed at the precertification evidentiary hearing. She concluded that the nature of the objections was such that they would not turn on relevancy as defined by pleadings. Accordingly, she directed that the defendants' responses to the notice of civil claim should be filed after the determination of the evidentiary motion.

- [46] Huebner might be fairly described as a case demonstrating the adage that the "exception defines the rule" when asking what type of reason is a "good reason" to delay the delivery of a defendant's response to the notice of civil claim.
- [47] With regard to limitation periods, British Columbia and the College of Pharmacists have made it known that they view the limitation period as having passed. If that is the case, that is an issue that should be the subject of a formal position set out in a pleading. It may raise a common issue or it may be that the limitation period is argued to be individual in nature and therefore an issue that mandates against certification during the preferable procedure analysis of certification. Either way, the manner in which Ms. Shaver proposes to address it (or not) in the certification materials and British Columbia and the College of Pharmacists' response to that position should be informed by a formal position taken in pleadings, and not by hypothetical positions or ignored because it is not a relevant issue as defined in the pleadings at the time the certification materials are delivered.
- [48] Ms. Shaver argues that because of the nature of the College of Pharmacists as a statutory body, she anticipates that the College may raise a statutory defence such as statutory immunity. If the College raises such a defence, Ms. Shaver may propose that as a common issue. However, in the absence of a response, Ms. Shaver will have to guess as to whether statutory immunity will be a defence or ignore it. If Ms. Shaver ignores it or guesses incorrectly, once the College of Pharmacists delivers its response to the amended notice of civil claim with its response to the certification materials, Ms. Shaver will need to amend her certification material, potentially prompting amendments to the College's response to the amended notice of civil claim or its certification materials.
- [49] In my view, this approach is contrary to common sense and the law as explained in Pro-Sys and the previous Shaver class proceeding.
- [50] In addition, Ms. Shaver submits that certain facts, I assume material facts, are central to the case and knowing which of them are in issue will assist with determining common issues and preferable procedure at certification.
- [51] For example, Ms. Shaver pleads that British Columbia and the College of Pharmacists negotiated that the Mallinckrodt defendants would be the exclusive supplier of Methadose.

- [52] Counsel for British Columbia advised me that British Columbia will certainly be disputing that they negotiated or made an agreement that the Mallinckrodt defendants were the exclusive supplier of Methadose. I presume that British Columbia and the College of Pharmacists will take that position formally in their responses. That will assist with identifying common issues at certification and the prevalence of those common issues in relation to other common issues. It is not of assistance for defendants to simply come to an application like this and advise the court that they will be contesting a given material fact that is contained in the notice of civil claim. It is inefficient and unproductive to go through the material facts in the notice of civil claim at a proceeding such as this to determine which British Columbia and the College of Pharmacists intend to dispute. That is the purpose of their responses to the notice of civil claim.
- [53] I take a detour to address the evidence relating to this submission. Ms. Shaver has tendered an affidavit of a paralegal attaching certain documents which she says shows this exclusive supplier arrangement. British Columbia and the College of Pharmacists object to the use of this evidence on this application on the basis that it is unattributed hearsay, double hearsay, or impermissible opinion evidence. While they acknowledge that affidavit evidence on applications that do not seek final orders can contain hearsay evidence, the source of the information must be identified and double hearsay and opinion evidence is not permitted, citing *AG of Canada v. Acero*, 2006 BCSC 1015; Rule 22-2(13) of the Rules of Court; and *Albert v. Politano*, 2013 BCCA 194 at paras. 19-23. In the latter case, the Court of Appeal noted that where an affiant does not identify the source of the information and the affiant does not attest to her belief in the information, hearsay evidence is not admissible according to Rule 22-2(13) of the Supreme Court Civil Rules.
- [54] Affidavits Number 2 and 3 of Hilary Amenhauser delivered by Ms. Shaver in this matter append documents without identifying their source and the contents of the documents themselves. Some of her statements may properly be characterized as double hearsay. British Columbia also objects to them on the basis that some of the documents that are appended to her affidavit have been annotated with handwriting and it is not clear whether they are true copies of those documents.
- [55] Ms. Shaver argues that because she does not rely on the documents for the proof of their contents, but rather to demonstrate the factual or evidentiary issues that need relevance parameters set out in pleadings, these admissibility issues do not preclude reliance on the exhibits to the affidavits.
- [56] The evidence is not necessary to determine the issue on this application. For the reasons I have already explained, the certification analysis is assisted by knowing whether the defendants dispute material facts pleaded by the plaintiff. Ms. Shaver seeks to demonstrate that those material facts have an evidentiary basis through the Hilary Amenhauser affidavits. While a certification hearing requires some evidence on each of the s. 4 certification requirements, except s. 4(1)(a), evidence supporting the material facts does not assist with whether responses are appropriate before certification.

- [57] The issues that Ms. Shaver asserts require crystallization demonstrate the basic proposition that the pleadings govern what is relevant in an action. For Ms. Shaver to properly structure a certification application, the issues on which the parties are joined should be identified through a full set of pleadings and not only through the notice of civil claim.
- [58] The certification burden does not provide a good reason to defer the filing of responses. In reaching this conclusion, I have not relied on the two Hilary Amenhauser affidavits which are challenged, because I agree that the evidence in them in many cases is not properly constituted and is not admissible on this proceeding in that form.

The Application to Strike

- [59] With regard to the application to strike, the timing of it is still an open question. British Columbia and the College of Pharmacists sought to adjourn their sequencing applications given the delivery of the amended notice of civil claim. That application is now set for February 12, 2021. If British Columbia and/or the College of Pharmacists seek to strike portions of the amended notice of civil claim, the sequencing application will address whether that will occur at certification or before certification. If I permit the application to proceed before certification and if portions of the notice of civil claim are struck, then a response to those portions will be superfluous. If either of those outcomes does not occur, then delaying the requirement to file responses will not have achieved anything.

The Mallinckrodt Defendants

- [60] With regard to the non-participation of the Mallinckrodt defendants, the College of Pharmacists asserts that the case is a product liability case about the effectiveness of Mallinckrodt's product. Because the College of Pharmacists does not manufacture drugs, approve them for prescription and payment, or determine what drugs can be prescribed, the College asserts that it has insufficient understanding of those matters to formulate its defence and cannot access the main defendants, the Mallinckrodt defendants, to undertake the necessary investigation in this complex action.
- [61] These submissions conflate responding to the amended notice of civil claim with discovery rights and proving defences.
- [62] If the Mallinckrodt defendants were not the subject of a CCAA stay, British Columbia and the College of Pharmacists would not have any rights vis-à-vis those defendants to require them to provide information to assist in formulating their defences. Discovery rights do not vest before filing responses and in class actions, they do not arise before certification (except in limited ways related to certification).
- [63] I assume that in some circumstances, before the accrual of discovery rights, certain parties and perhaps often, co-defendants, may cooperate by providing information that assists another party in defending the case. Nothing is preventing British Columbia and the College of Pharmacists from seeking the cooperation of the Mallinckrodt defendants so they may

formulate their responses with the benefit of the information they believe they need from the Mallinckrodt defendants. The College of Pharmacists asserts that the Mallinckrodt defendants are too busy with the bankruptcy and corporate reorganization proceedings for that to be a viable option. There is no evidence of that.

- [64] In any event, the bankruptcy and corporate reorganization proceedings and the stay against the Mallinckrodt defendants are an inconvenient and complicating fact of life in this case for Ms. Shaver, as well as for British Columbia and the College of Pharmacists who view the Mallinckrodt defendants as the main defendants. There is no indication that the bankruptcy or corporate reorganization will conclude in time for responses to be filed after Ms. Shaver has served certification materials, and no basis on which to conclude that the Mallinckrodt defendants will voluntarily cooperate once it has concluded.
- [65] In addition, the investigation that the College of Pharmacists describes wanting to undertake with the assistance of the Mallinckrodt defendants appears to be in furtherance of proving the defences they will raise, as opposed to formulating a response. Responses to notices of civil claim are always required without the benefit of discovery, and so this submission does not support the timing suggested by British Columbia and the College of Pharmacists.

Lack of Prejudice to Ms. Shaver

- [66] Finally, the College asserts that Ms. Shaver has not shown and cannot show any prejudice if the responses are delayed. As a result, the College asserts that the issues raised by it and British Columbia demonstrate that the balance of fairness lies with deferring the requirement to deliver responses.
- [67] This submission fails to take into account the issues Ms. Shaver raised about having these defendants formally address the limitation period issues they have informally raised, whether the College of Pharmacists seeks to rely on any statutory defences, and to require both of them to formally take a position on the issues and material facts which may or may not be disputed. As I have already described, the identification of common issues, the assessment of preferable procedure, and the development of a litigation plan are informed by the pleadings, not the other way around. Requiring Ms. Shaver to do so without a full set of pleadings is prejudicial.
- [68] While I do not accept that Ms. Shaver is required to establish prejudice on this application, I am satisfied that in this case there will be prejudice and that the balance of fairness is not served by delaying the requirement to deliver responses to the amended notice of civil claim until after Ms. Shaver has delivered certification materials.

Weighing the reasons to defer responses against the benefits of a complete set of pleadings to inform the certification materials and analyses

[69] The only reason advanced by British Columbia and the College of Pharmacists that is a reasoned rationale for deferring the requirement to file responses is the potential for a pre-certification application to strike. When the hypothetical benefit of delaying responses is weighed against the detriment of delaying responses, as described by Myers J. in *Pro-Sys* and Griffin J. in the previous *Shaver* class proceeding, and in the circumstances of this case, given the issues that require crystallization, there is insufficient potential benefit to be gained to permit the delay in filing responses in this case based on the application to strike.

When should British Columbia and the College of Pharmacists be required to deliver their responses?

[70] The time for responses to the amended notice of civil claim expires on February 2, 2021. Ms. Shaver submits that responses should be required by mid-February.

[71] The parties have advised that the application for a stay at CCAA is proceeding on February 10, 2021. Ms. Shaver, British Columbia, and the College of Pharmacists are appearing before me on February 12, 2021, to address the sequencing applications. While I have not acceded to the submission that the complexity and other matters pending the litigation are a good reason to defer the filing of responses until after Ms. Shaver delivers her certification materials, I am of the view that at this time the parties have a lot of matters to deal with in a compressed period of time. Requiring strict compliance with the time to file responses to the amended notice of civil claim is not appropriate.

[72] In light of these circumstances, I conclude that an appropriate time for responses to be delivered is by the end of February. Since February 28, 2021, falls on a Sunday, I order that British Columbia and the College of Pharmacists file and serve their responses to the amended notice of civil claim by Monday, March 1, 2021.

Matthews J.

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