

CANADA / JUDGMENT

Wong v. Marriott International Inc.

2020 BCSC 55

COURT

Supreme Court of British Columbia

DECIDED

16 January 2020

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2020 BCSC 55 Wong v. Marriott International Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Marriott International Inc.,

2020 BCSC 55

Date: 20200116

Docket: S1813846

Registry: Vancouver

Between:

Kenneth Wong, Michael Barry James, and Poonam Bhinder

Plaintiff

And

Marriott International, Inc., Luxury Hotels International of

Canada, ULC dba Marriott Hotels of Canada, Starwood Hotels &

Resorts Worldwide, LLC, and Starwood Canada ULC

Defendants

- and -

Docket: S1813823

Registry: Vancouver

Between:

Sheila Sache

Plaintiff

And

Marriott International, Inc., and Starwood Hotels &
Resorts Worldwide, LLC

Defendants

- and -

Docket: S190401

Registry: Vancouver

Between:

Kevin Krygier

Plaintiff

And

Marriott International, Inc., Luxury Hotels International of
Canada, and Starwood Canada ULC

Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for Kenneth Wong:

C. Dennis

R. Power

Counsel for Sheila Sache:

M. C. Canofari

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Counsel for Kevin Krygier:

A. Tanel

D. Cartwright

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.

November 25 and 26, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 16, 2020

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Introduction

- [1] In 2018, the defendants publicly acknowledged unauthorized access to the private, personal, and financial information of individuals from its guest reservation database (the "Data Breach"). Approximately 500 million guests were affected globally. The accessed information included names, addresses, passport numbers, and credit card information. The proposed class actions concern this Data Breach.
- [2] The defendants are Marriott International, Inc., Luxury Hotels International of Canada, ULC dba Marriott Hotels of Canada, Starwood Hotels & Resorts Worldwide, LLC, and Starwood Canada ULC (collectively, "Marriott").
- [3] This application is a carriage motion by a consortium of law firms seeking carriage of a regional class affected by Marriott's Data Breach. In a carriage motion, the court decides which of several overlapping actions should proceed to the certification stage. One action is chosen and the others are stayed. The three proposed representative plaintiffs are Mr. Kenneth Wong, Mr. Michael James, and Ms. Poonam Bhinder (the "Wong Action"). All three proposed plaintiffs are BC residents. The Wong Action proposes a provincial class of BC residents.
- [4] Boughton Law Corporation ("Boughton") brought a second proposed BC action. The proposed representative plaintiff is Ms. Sheila Sache (the "Sache Action").
- [5] Koskie Minsky LLP ("Koskie") brought a third proposed action on behalf of a national class, excluding Quebec. The proposed representative plaintiff is Mr. Kevin Krygier (the "Krygier Action").
- [6] The Wong Action seeks: i) to be granted carriage of their proposed Data Breach class proceeding; and ii) the two related proceedings, the Sache Action and Krygier Action, be stayed until certification in the present action is determined.
- [7] There are multiple factors courts consider when determining who should have carriage. In this case, many of the factors have little weight or are neutral. The deciding factor is the interrelationship of class actions in more than one jurisdiction.

Background

The Data Breach

- [8] Class action proceedings were filed against Marriott in BC and across Canada for the Data Breach which occurred between 2014 and 2018. Wong counsel set out the background in its submissions:

Marriott International, Inc. owns and manages hotel properties throughout Canada and across 130 other countries.

Starwood Hotels & Resorts Worldwide, LLC ("Starwood") began operating in 1994 with 30 hotel properties and grew to be the owner, operator, or franchisor of over 1200 properties around the world. Starwood brand properties include Sheraton, Westin, and W Hotels.

In 2015, Marriott International, Inc. acquired all Starwood brand properties.

On November 30, 2018, Marriott announced that since 2014 there had been unauthorized access to a guest reservation database maintained by Starwood, which contained personal and financial information for approximately 500 million individuals. The accessed information included names, addresses, passport numbers, and credit card information.

[Footnotes omitted.]

- [9] As a result, numerous individuals across Canada, including BC, had their data compromised.

The Proposed Proceedings in BC

- [10] Six class proceedings were filed against Marriott in BC in respect of the Data Breach:

- a) Mr. Michael James commenced an action on behalf of all BC residents on December 13, 2018 (the "James Action"), represented by Hammerberg Lawyers LLP;
- b) Mr. Matthew Wenman commenced an action on behalf of all Canadian residents on December 17, 2018 (the "Wenman Action"), represented by Acheson Sweeney Foley Sahota LLP;
- c) Ms. Sheila Sache commenced an action on behalf of all BC residents on December 21, 2018 (the "Sache Action"), represented by Boughton;
- d) Mr. Kenneth Wong commenced an action on behalf of all "individuals residing anywhere in the world (subsidiarily in Canada or British Columbia)" on December 24, 2018 (the "Individual Wong Action"), represented by Evolink Law Group;
- e) Ms. Poonam Bhinder commenced an action on behalf of all Canadian residents filed January 3, 2019 (the "Bhinder Action"), represented by Garcha & Company; and

- f) Mr. Kevin Krygier commenced an action on behalf of all Canadian residents filed January 14, 2019 (the "Krygier Action"), represented by Koskie.
- [11] In February 2019, counsel for Mr. James, Mr. Wong, and Ms. Bhinder (collectively, the "BC Consortium") entered into an agreement to jointly prosecute the James Action, the Individual Wong Action, and the Bhinder Action.
- [12] On September 3, 2019, the BC Consortium filed an amended notice of civil claim consolidating the actions commenced by Mr. James, Mr. Wong, and Ms. Bhinder into the Wong Action.
- [13] On November 18, 2019, the plaintiff in the Wenman Action filed a notice of discontinuance and does not seek carriage. Therefore, this motion is to decide carriage between the Wong Action, Sache Action, and Krygier Action.

Other Proposed Class Proceedings in Canada

- [14] Counsel in the Sache and Wong Actions have not made claims elsewhere in Canada.
- [15] Koskie has carriage of a regional class proceeding filed in Nova Scotia and is working with counsel regarding a proposed national class proceeding against Marriott filed in Alberta.
- [16] Koskie also sought carriage on behalf of a consortium in Ontario. In *Winder v. Marriott International Inc.*, 2019 ONSC 5766 [Winder], Justice Perell awarded carriage of the proposed national class action against Marriott to Siskinds LLP. The Koskie action was stayed.
- [17] In summary, there are three proposed national class actions in Ontario, Alberta, and BC. There is a proposed regional class action in Nova Scotia for all maritime residents. There is also a proposed regional class action in Québec and the two proposed regional class actions in BC. There are also numerous class proceedings filed against Marriott in respect of the Data Breach in the United States. As noted in Winder at para. 69, "[u]nlike the situation in the United States, there is no available pan-Canadian procedure to address the situation of overlapping class actions in several provinces."
- [18] Where there is more than one class proceeding brought regarding the same defendant and the same subject matter, a proposed representative plaintiff may bring a carriage motion to stay the other actions: *Settingington v. Merck Frosst Canada*, 2006 CanLII 2623 at para. 9 (Ont. S.C.J.). Wong counsel have brought such a motion before this Court.

Issue

- [19] The issue before this Court is whether carriage of a proposed class action filed against Marriott in BC should be awarded to the Wong Action, Sache Action, or Krygier Action.
- [20] The two actions which do not obtain carriage will be stayed pending the certification determination.

Carriage Considerations

- [21] The Class Proceedings Amendment Act, 2018, S.B.C. 2018, c. 16 [CPAA], amended the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA], to allow multijurisdictional class proceedings, including proceedings with persons who do not reside in BC. It establishes rules for determining the appropriate jurisdiction for multijurisdictional class proceedings. Along with the 2018 Judicial Protocol, it encourages coordination and uniformity in multijurisdictional class actions, while respecting the independence of judges and courts.
- [22] There are several sources of this Court's jurisdiction to decide carriage of a class proceeding. Section 12 of the CPA authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Section 13 of the CPA authorizes the court to "stay any proceeding related to the class proceeding on the terms the court considers appropriate." The court also has "broad jurisdiction under the Supreme Court Civil Rules to make orders as to the conduct of civil proceedings, as well as s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253 which mandates the avoidance of a multiplicity of proceedings": *Strohmaier v. K.S.*, 2019 BCCA 388 at para. 35 [Strohmaier CA].
- [23] The question before me is which action is most likely to advance the interests of the class members, provide fairness to the defendants, and promote access to justice, behavior modification, and judicial economy: *Strohmaier CA* at para. 41; *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571 at para. 13 [Mancinelli].
- [24] In determining which action is in the best interests of the class, BC courts consider a list of overlapping and non-exhaustive factors. The factors to consider in determining which action should proceed were set out by Perell J. in *Rogers v. Aphria Inc.*, 2019 ONSC 3698 at para. 17 [Rogers]:
- (1) The Quality of the Proposed Representative Plaintiffs;
 - (2) Funding;
 - (3) Fee and Consortium Agreements;
 - (4) The Quality of Proposed Class Counsel;
 - (5) Disqualifying Conflicts of Interest;
 - (6) Relative Priority of Commencement of the Action;
 - (7) Preparation and Readiness of the Action;
 - (8) Preparation and Performance on Carriage Motion;
 - (9) Case Theory;
 - (10) Scope of Causes of Action;

- (11) Selection of Defendants;
 - (12) Correlation of Plaintiffs and Defendants;
 - (13) Class Definition;
 - (14) Class Period;
 - (15) Prospect of Success: (Leave and) Certification;
 - (16) Prospect of Success against the Defendants; and
 - (17) Interrelationship of Class Actions in more than one Jurisdiction.
- [25] Different factors speak to different considerations on a carriage motion. As Perell J. explained in *Rogers*:
- [18] It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel. [Footnote omitted.]
- [26] The courts discourage a "tick the boxes" approach to carriage motions. The focus should be the broader goal of promoting the best interests of the class members and fairness to the defendants: *Strohmaier CA* at para. 41. When factors are very similar, or have only minor differences, a court may assess them as neutral or not refer to them at all: *Strohmaier CA* at paras. 76-77. The circumstances of each case will determine how much weight should be given to each factor.
- [27] The Wong Action and Sache Action seek to advance an action in this Court on behalf of all BC residents. The Krygier Action seeks to advance an action in this Court on behalf of all Canadian residents. Despite being reluctant to choose between different firms and plaintiffs, I must determine whether carriage should be awarded to the Wong Action, Sache Action, or Krygier Action.

Preliminary Issue

- [28] At the outset of the hearing there was an evidentiary objection to a number of reply affidavits tendered in the Wong Action. The objection from both respondents was the affidavits are not proper reply evidence. They argue that in the Wong application for carriage, counsel stated the correct test but did not provide the necessary evidence. In their reply affidavits they provided the proper evidence--the fee and retainer agreement--which should have been part of their case at the outset. Counsel is not allowed to split its case in an attempt to address deficiencies in their original materials.

- [29] Wong counsel argues the evidence is relevant and should be admitted. He noted it is telling there was no claim of prejudice by the respondents. The respondents have had the reply affidavits since early October, six weeks prior to the hearing. The Supreme Court Civil Rules, B.C. Reg. 168/2009, state the applicant's response affidavits must be served at least one day before the application hearing: R. 8-1(13). In addition, Wong counsel advised Sache counsel that they could put in additional evidence, but they received no response.
- [30] Counsel should have anticipated at the outset this evidence was material. But I agree with Wong counsel the evidence is relevant. While technically splitting their case by addressing deficiencies in their original materials in reply[1], there was no unfair surprise resulting in prejudice to the respondents. They had six weeks to respond to the new evidence and Krygier counsel and Sache counsel did not seek an adjournment.
- [31] In addition, at the hearing Sache counsel advised the Court that their proposed fees are actually 15% of any recovery regardless of the stage at which the action is resolved. This is contrary to what was said in the fee agreement attached to Ms. Sache's affidavit. Similarly, in Krygier counsel's written argument it advised it is willing to reduce its contingency fee if that were an important factor in the court's analysis. I find all counsel have provided new evidence or positions after they submitted their application or response materials.
- [32] In the absence of prejudice I am not prepared to take a strict approach to the admissibility of this reply evidence. The affidavit evidence will assist this Court in assessing the issues. I am exercising my discretion in favour of the Wong Action; I accept the reply affidavits into evidence.
- [33] For the same reason I am allowing Wong counsel to rely on cases that were not included in their notice of application. There was no prejudice and Sache counsel, who raised this issue, did not request an adjournment. Counsel were well prepared and ably responded to the new cases they received the Friday before the hearing.

Carriage Considerations

Deciding Factors

- [34] Although I address each factor, many are neutral or have little relevance to this carriage motion. I will focus on those factors to which I attribute weight in my decision.
- [35] The Wong plaintiffs retained independent counsel to represent them at the carriage hearing. This was based on Perell J.'s comments in *Quenneville v. Audi AG*, 2018 ONSC 1530 at paras. 2-4. Although Wong counsel in the carriage motion before me was persuasive, his submissions demonstrate little regarding the quality of counsel retained in the underlying action, including their performance on the carriage motion. Despite this observation, I emphasize nothing turns on this strategy.
- (1) The Quality of the Proposed Representative Plaintiffs

[36] The quality of representative plaintiffs is a minor factor in a carriage contest: *Strohmaier v. British Columbia (Attorney General)*, 2018 BCSC 1613 at para. 29 [Strohmaier SC]; *Winder* at paras. 80-81. While all the representative plaintiffs appear to be suitable plaintiffs in this proceeding, Krygier counsel have extensive experience managing national class actions. The suitability of the representative plaintiffs will be more fully canvassed at the certification hearing. I find this to be a minor factor in this carriage motion.

(2) Funding

[37] External funding to provide indemnity against adverse cost awards (and occasionally disbursements) is considered on a carriage motion. In Ontario funding is an important factor. The court considers: i) whether the proposed class counsel make their commitment to a class action contingent upon securing third party funding; and ii) whether the representative plaintiffs are indemnified against the risk of an adverse cost award: *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 at paras. 176-179 [Kowalyshyn]; *Winder* at paras. 88-92. The first consideration is sometimes referred to as a "bailout" provision.

[38] In *Winder* at para. 89, Perell J. stated third party funding could be "a deal breaker" on a carriage motion. In *Kowalyshyn* at para. 178, he said exposure to an adverse cost award would be a "devastating risk" for the representative plaintiffs.

[39] These issues are less important in BC than they are in Ontario. In BC, courts cannot award costs against an unsuccessful party in a class proceeding except under specific circumstances, such as abusive conduct by the party: *CPA*, s. 37. This is significantly different from Ontario's approach, which allows for cost awards at all stages of the proceedings: *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 31. There can be costs prior to the certification hearing in BC: *Great Canadian Gaming Corporation v. British Columbia Lottery Corporation*, 2018 BCSC 370 at para. 9. However, costs are rarely ordered against an unsuccessful representative plaintiff in BC.

[40] Only the Wong Action has agreed to indemnify its clients against an adverse cost award: *Class Action Retainer Agreement*, clause 22. Neither the Wong Action nor the Sache Action has a provision allowing counsel to discontinue the action if third party funding is not secured. The Sache Action is not dependent upon third party funding. By contrast, in the Krygier Action, the Contingency Fee Retainer Agreement has a clause which states:

14. In the event that funding for disbursements and/or an indemnity for the payment of adverse cost awards is not obtained from a third-party funder, the Client acknowledges that Class Counsel may seek to discontinue the Action on a without costs basis.

[41] In addition to there being significant differences in risks facing unsuccessful Ontario and BC plaintiffs in a certification hearing, Krygier counsel argues that whether or not there is a bailout provision, firms can withdraw in proper circumstances. Koskie is simply being transparent regarding when it might withdraw.

[42] Given the differences between BC and Ontario, I place little weight on this factor.

(3) Fee and Consortium Agreements

[43] All counsel agree the fee agreement is an important factor in the carriage hearing and in some cases it is determinative: *Chu v. Parwell Investments Inc. et al*, 2019 ONSC 700 at paras. 24-26 [Chu]. As stated by Chief Justice Strathy for the court, fees vitally affect the interests of the class: *Mancinelli* at para. 18.

[44] Wong counsel argues it has significantly lower fees than the *Sache* and *Krygier* Actions. The BC Consortium's fees will be 3% to 25% of the total recovery obtained on behalf of the class. The exact percentage will depend on the stage at which the action is resolved.

[45] It was drawn to my attention at the hearing that there was a mistake in the undated Contingency Agreement attached to Ms. *Sache's* affidavit sworn on October 9, 2019. Ms. *Sache's* affidavit stated the contingency fee is 15% of the award whereas the Contingency Agreement states: "The Client will pay for the Firm's legal services rendered under this Agreement and the Legal Fee will be calculated as 25% of the Recovery after deducting all outstanding disbursements not paid by the Defendant." *Sache* counsel advised the Court, consistent with Ms. *Sache's* affidavit, their proposed fees are actually 15% of any recovery regardless of the stage at which the action is resolved. Other counsel accepted this explanation and I have no reason to take issue with it.

[46] Given the change in fee in the *Sache* Action, the *Wong* Action does not have significantly lower fees than the *Sache* Action. Wong counsel will only have lower fees if the action is settled prior to the certification hearing.

[47] *Koskie* has a detailed agreement with its client. The firm receives 33% of any recovery[2] regardless of the stage of the proceeding. This is significantly higher than the fees of the other two proposed class actions at all stages of the proceeding. *Krygier* counsel argue this is a fair and reasonable fee and is materially identical to numerous fee agreements which have been court approved in the past.

[48] *Krygier* counsel urges caution regarding a "race to the bottom" in terms of counsel fees. He notes that one purpose of class proceedings legislation is to empower the bar to pursue class claims. A low fee structure may provide a disincentive to pursue these claims because they are not economically viable. Counsel asks that I examine the retainer agreement in the *Wong* Action carefully in terms of the incentive structure it creates. As counsel states:

The retainer purports to pay class counsel 3-8% of the class' recovery, if the action is settled prior to certification. Presumably, this 3-8% would then be split in some way between the 5 member-firms of the *Wong* Consortium, generating each firm a contingency fee of 1% or less. This arrangement strongly disincentives counsel from attempting to reach an early resolution.

- [49] The submissions regarding the economic viability of the actions have merit. Although not directly on point, the Uniform Law Conference of Canada Civil Law Section, Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues [Uniform Law Conference][3] made a similar observation in the context of multiple provincial class actions. The Uniform Law Conference identifies best practices for the coordination of multijurisdictional class actions. At para. 18 of the report, it states multiple class actions "will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members."
- [50] Krygier counsel further state their retainer agreement is similar to the retainer in the Sache Action although the Sache retainer is marginally lower at 25%. Counsel stated in its written submissions "to the extent that the Court is concerned with [the] difference between the two percentages, Krygier counsel is prepared to undertake to reduce its contingency fee to 25%."
- [51] While fees are an important factor in a carriage motion, courts must be careful not to simply endorse the lowest fee as being in the best interest of the class. Lower fees may not provide the proper incentives for counsel to litigate a particular class action or class actions in the future. A lower fee may also incentivise counsel to settle at an earlier stage that may not be in the best interest of the class.
- [52] The fee of 25% appears to be the most reasonable of the three proposed fees. Krygier counsel undertook to reduce its contingency fee to 25% if this Court is concerned with the difference. I find an 8% difference to be significant. I accept Krygier counsel's undertaking that if they are granted carriage they will reduce their contingency fee to 25%.
- [53] In terms of the BC Consortium agreement, Wong counsel attached their Class Action Retainer Agreement to Mr. James' reply affidavit. I have already ruled this affidavit and the other reply affidavits are admissible. In clause 34 of their Class Action Retainer Agreement, Wong counsel do not anticipate nor address conflicts of interest between lawyers within the consortium. Clause 34 provides:

The Clients acknowledge the obligation to act in the best interests of the Class and that the Attorneys is not obliged to follow instructions that are not in the best interests of the Class. In the event of a disagreement concerning whether certain instructions are in the best interests of the Class, the matter may be submitted to the court for directions.

- [54] Sache counsel argues this clause only addresses conflicts between class members and their lawyers. Sache counsel argues a provincial class does not benefit from a large consortium of four law firms all located close to each other, apart from two counsel from Quebec.[4]
- [55] The BC Consortium was formed after the actions were commenced and appears to be primarily strategic. There is no evidence before me how they intend to resolve differences between them if differences arise regarding strategy, timing, responsibilities, rewards, and other such factors: *Joel v. Menu Foods Genpar Limited*, 2007 BCSC 1482 at paras. 113-114.

There are nine lawyers involved with no clear road map regarding how they will work together. There is the statement in the Class Action Retainer Agreement that "in the event of a disagreement concerning whether certain instructions are in the best interest of the Class, the matter may be submitted to the court for directions". I agree with Sache counsel that this statement appears to be directed at conflicts between the proposed representative plaintiffs and counsel.

[56] Since all fees are reasonable in terms of the proposed classes, I place little weight on this factor. A lack of a clear mechanism to address conflicts between counsel in the BC Consortium weighs against the Wong Action.

(4) The Quality of Proposed Class Counsel

[57] The quality of proposed counsel is a threshold question. I am not determining which lawyers are the best. Slight or marginal differences in experience is a neutral factor. The quality of counsel should not devolve into a beauty contest but some comparison is inevitable. Justice Blok in *Ewert v. Canada (Attorney General)*, 2014 BCSC 215 [Ewert], citing *Smith v. Sino-Forest Corporation*, 2012 ONSC 24, described this difficult task:

[14] [T]he task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class.

[58] The question is whether counsel have the experience, resources, and capability to advance a substantive claim: Strohmaier SC at para. 57. The approach focusses on "which case is in the best interests of the proposed class to advance. Counsel's experience and expertise are but one part of that approach": *Laliberte v. Canada (Attorney General)*, 2019 FC 766 at para. 30 [Laliberte].

[59] Wong counsel argue its action is brought by a group of capable BC lawyers with the experience and resources to prosecute an action in this province. Wong counsel described the BC Consortium as follows:

Zoel Zanatta, Kevin McLaren, and Alexia Majidi of Hammerberg Lawyers LLP, one of the largest personal injury law firms in British Columbia with extensive resources and experience with high-value contingency files;

Mathew Good of Mathew P. Good Law Corporation in Vancouver, who practices almost exclusively in the area of plaintiff-side class actions, is currently counsel or co-counsel in several putative class actions in British Columbia and other courts across Canada, and has a long history with class proceedings in this province. Mr. Good is included in the B.C. Consortium through a co-counsel agreement with Hammerberg Lawyers LLP;

Simon Lin of Evolink Law Group in Greater Vancouver, who is counsel in several ongoing class actions before this Court, the Superior Court of Quebec, and the Federal Court of Canada. Mr. Lin also has a bachelor's degree in computer science and experience with database technologies and database security;

Jeremie Martin and Sebastien Paquette of Champlain Avocats in Montreal, experienced litigation lawyers who have acted as counsel in various class actions including several certified multi-jurisdictional class actions. Mr. Martin and Mr. Paquette are included in the B.C. Consortium through a co-counsel agreement with Evolink Law Group; and

K.S. Garcha and Paul Sanghe of Garcha & Company, a British Columbia firm focused on plaintiff-side class actions and personal injury matters, which is counsel in several current and recent product liability and data breach cases before this Court.

[Footnotes omitted.]

[60] Wong counsel argue they have the most experience prosecuting class actions concerning privacy, consumer protection, and product liability in jurisdictions across Canada. They have eight reported cases in BC.

[61] Sache counsel describe Boughton as a full service, locally owned, Vancouver-based law firm. It has the resources, capacity, and expertise to prosecute the Sache Action to resolution. Counsel emphasize Boughton is a member of Meritas, a premier global alliance which requires strict adherence to uncompromising service standards to maintain status as a member. Meritas has member law firms in each Canadian jurisdiction.

[62] Mr. Mark Canafori is the head of Boughton's class action group and has extensive experience in litigation and class actions. Mr. Martin Sennott has broad complex commercial litigation experience, including acting for large groups in fraud and insolvency matters.

[63] Krygier counsel describe Koskie as a firm with class action experience across the country. It has acted as class counsel on a variety of topics and has evolved the law of class proceedings. Counsel argues Koskie lawyers are professional, reputable, and recognized for maintaining close contact with and producing excellent results for class members.

[64] It was pointed out by opposing counsel that Koskie has experience in class actions but Mr. Baert and Mr. Tanel have only one reported decision in BC. Opposing counsel pointed to problems in their pleadings to demonstrate their inexperience in BC.

[65] It was emphasized Sache counsel have no significant experience in class proceedings. They have only one reported decision in BC. They also have no significant experience litigating breaches of privacy.

- [66] Krygier counsel provided affidavit evidence their firm has the resources available to handle the information technology, communications, and document review infrastructure that will be required in this type of case: Krygier submissions at para. 16. Mr. Oppal, a lawyer at Boughton, deposed Boughton can prosecute complex litigation matters involving technology, data security, and privacy breaches. The Wong affidavits were silent on this point.
- [67] All the firms before me have the financial wherewithal to advance and prosecute the class action on behalf of their class members. All have capable and experienced lawyers with some history with class proceedings. The firms have sufficient resources to litigate against a powerful defendant. Lastly, minor problems in the pleadings that were put to me can be remedied by way of amendments. It is appropriate that any issues regarding the pleadings be more extensively canvassed at the certification stage.
- [68] I find this to be a neutral factor.
- (5) Disqualifying Conflicts of Interest
- [69] Wong counsel argues i) there is a lack of clarity as to whether Krygier counsel would stay the BC action in favour of the Alberta action; and ii) there is no evidence before this Court of any mechanism regarding how Koskie might resolve conflicts of interest issues between their various proposed actions.
- [70] In response, Krygier counsel argue Wong counsel do not have a mechanism to address conflicts between counsel.
- [71] While noting that multiple representative plaintiffs in multiple jurisdictions is common, I address Koskie's other actions under the "Interrelationship of Class Actions in More than one Jurisdiction" section. I addressed the lack of a mechanism to address conflicts of interest between counsel in the Wong Action under the "Fees and Consortium Agreements" section.
- [72] I place no weight on these issues under this factor.
- (6) Relative Priority of Commencement of the Action
- [73] Since the actions were brought within a relatively close period of time, I decline to give this factor any weight on this motion: Ewert at para. 43.
- (7) Preparation and Readiness of the Action
- [74] Two of the proposed plaintiffs have taken steps to advance their claims, Mr. Krygier and Ms. Sache. Of the two, Krygier counsel has progressed the furthest in their preparation. According to Krygier submissions at para. 21, they have:
- a. researched the facts surrounding the data breach;

- b. made freedom of information requests to the Privacy Commissioner of Canada with respect to the findings of any investigation regarding the data breach;
- c. corresponded with and met with counsel pursuing litigation arising out of this incident in the United States;
- d. consulted with counsel for the defendants;
- e. researched and developed an extensive theory of liability, particularly in respect of intrusion upon seclusion;
- f. consulted with and retained experts; and
- g. attended conferences and litigation meetings in the US.

[75] Sache counsel states in its application response at para. 44:

Boughton is better prepared to represent the proposed class. After research into the claims against Marriott, Boughton has communicated with counsel for Marriott as well as counsel for other proposed representative plaintiffs in other jurisdictions. Boughton has begun arranging cooperation amongst counsel across jurisdictions, and fully expects to cooperate with such counsel who obtain carriage in other jurisdictions. However, Boughton is prepared to fully prosecute the Sache Action in British Columbia to its conclusion.

[76] Sache counsel argued that it will bring efficiency to the proposed class action. It has two lawyers and staff at Boughton dedicated to the Sache Action. It is equipped to prosecute complex litigation matters involving technology, data security, and privacy breaches. It has a dedicated website for the Sache Action. Similarly, Krygier counsel points to their efficiencies with its proven capability to review tens of thousands of documents in an effective manner. Koskie is affiliated with a BC law firm and has a communications department which can engage with the putative class through various media in English and French. Wong counsel did not disclose what work, if any, they have undertaken to move this action forward.

[77] Sache counsel argues the materials filed by Wong counsel do not "meet the standards expected of a pleading or evidence submitted by counsel are capable of representing the best interests of the class": application response at para. 45.

[78] Preparation and readiness is not an overriding factor in a carriage hearing: Winder at paras. 108-115; Laliberte at paras. 49-50; Quenneville at paras. 96-97 [Quenneville]. All counsel demonstrate a considerable level of commitment to their actions. I place little weight on this factor.

(8) Preparation and Performance on the Carriage Motion

[79] I note the oversight of Wong counsel in not producing their retainer agreement as part of their initial application materials under this factor. Their reply affidavits contained important evidence for a carriage motion. As applicants, they bear the onus of proof on the motion. Courts across the country list fee agreements as an important factor to be

considered on a carriage application: Chu at paras. 4, 24-26. As stated by the Ontario Court of Appeal in Mancinelli at para. 18: "The proposed fee arrangement between class counsel and the representative plaintiff is a factor that vitally affects the interests of the class." This is certainly the case in BC: Strohmaier SC at para. 26; Asquith v. George Weston Limited, 2018 BCSC 1557 at para. 15, aff'd 2019 BCCA 447 [Asquith].

[80] Wong counsel did not disclose what work, if any, they have undertaken to move this action forward. I also note the silence from Wong counsel regarding their capacity to manage the extensive communications and document review that accompanies this type of litigation.

[81] The lack of any evidence from Wong counsel regarding these issues and the deficiencies in the carriage motion materials prior to the involvement of counsel who appeared at the carriage hearing demonstrates a lack of preparation for this application. While not determinative, I place some weight on this factor.

(9) Case Theory

[82] Krygier counsel argues the lack of understanding of the factual basis for the proposed class proceeding will ultimately make certification more difficult in the Wong and Sache Actions. This is not a certification hearing. At this stage it is neither possible nor appropriate for the court to embark on a detailed analysis of the merits of this class proceeding. The court should only consider whether there are "conspicuous or egregious problems" or "readily apparent advantages and disadvantages in the competing theories": Kowalyshyn at para. 150; Strohmaier SC at para. 44.

[83] I find this factor to be neutral.

(10) Scope of Causes of Action

[84] The causes of action in the Wong Action include: breach of contract; breach of Marriott's privacy statement which incorporates the provisions of the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 [PIPEDA], and the Personal Information Protection Act, S.B.C. 2003, c. 63 [PIPA]; and the statutory tort of violation of privacy contained in the BC Privacy Act, R.S.B.C. 1996, c. 373.

[85] The causes of action in the Sache Action include: negligence; breach of contract; and breach of statutory duties under PIPEDA and PIPA.

[86] The causes of action in the Krygier Action include: breach of contract; negligence; the tort of intrusion upon seclusion; waiver of tort; and breach of the BC Privacy Act as well as other provincial privacy acts.

[87] The Sache and Krygier Actions are pleaded broadly; the Wong Action is pleaded narrowly. Wong counsel argues there are benefits to narrower pleadings, such as lessening the complexity of the proceedings and reducing the costs of all parties: Kaplan v. Casino Rama, 2019 ONSC 3310 at para. 9. Krygier counsel argues this Court is capable of addressing multiple causes of action and apart from a longer hearing, there is no downside to broader

pleadings. Krygier counsel adds that where additional causes of action are genuinely viable, the potential for added costs and complexity does not weigh against granting carriage.

- [88] There is no hard and fast rule that a narrower case is to be preferred on a carriage motion. The "ultimate question is whether the proposed strategy is reasonable and defensible": Mancinelli at para. 47. In Mancinelli, the Ontario Court of Appeal upheld the motion judge's decision that it was in the best interests of the class that the proposed action not be limited to one claim when three were genuinely viable: paras. 25 and 48. Moreover, pleading broadly or narrowly is of little import in a carriage hearing: Winder at para. 122.
- [89] Wong and Krygier counsel are critical of Sache counsel for failing to plead a breach of the BC Privacy Act. Sache counsel argue that the BC Privacy Act is subsumed in its negligence claim.
- [90] Wong counsel is critical of the Krygier Action pleadings because it includes the tort of intrusion upon seclusion. Counsel argues this tort is not available in BC: Tucci v. Peoples Trust Company, 2017 BCSC 1525 at para. 153 [Tucci]. While it is not the role of this Court to delve too deeply into the merits at this juncture, I am not persuaded it is plain and obvious there is no common law tort in BC without the benefit of a Court of Appeal decision. This matters little in the case before me because Krygier counsel pleaded the BC Privacy Act.[5] The intrusion upon seclusion tort is not necessary where the BC Privacy Act is pleaded: Tucci at para. 155.
- [91] Lastly, Wong counsel asserts the negligence cause of action advanced by Krygier counsel is not amenable to certification. In response, Krygier counsel pointed to Rumley v. British Columbia, 2001 SCC 69, where the Supreme Court of Canada found it was appropriate to certify a negligence claim where the individual issues of injury and causation would be litigated after the resolution of the common issues.
- [92] At this stage it is inappropriate for this Court to determine whether each and every cause of action will ultimately succeed. As Justice Skolrood stated at para. 44 of Strohmaier SC[6]:
- [I]t is neither possible nor appropriate for the court to embark on a detailed analysis of the merits and case theories of the different proceedings, beyond assessing whether there are 'conspicuous or egregious problems' or 'readily apparent advantages and disadvantages.'
- [93] The question is whether the causes of action are viable. All counsel provided reasonable rationales for the causes of action they have advanced. The one concern is that the Sache Action did not plead the BC Privacy Act. I place some but little weight on this factor.
- (11) Selection of Defendants
- [94] Although the Wong, Sache, and Krygier Actions claim against slightly different defendants within the Marriott corporate structure, there are no conspicuous or egregious problems with the selection of the defendants. I find this factor to be neutral.

(12) Correlation of Plaintiffs and Defendants

[95] Since each action has a viable claim against each defendant named in their respective actions, I find this factor to be neutral.

(13) Proposed Class Definition

[96] The Wong Action is a regional class proceeding brought by the three representative plaintiffs on their own behalf and on behalf of the following proposed class:

All individuals who reside in British Columbia and registered as a guest at any Starwood - branded property prior to November 30, 2018.

[97] The Sache Action is a regional class proceeding brought by Ms. Sache on her own behalf and on behalf of the following proposed class:

Class Members consist of the Plaintiff and all British Columbian resident persons who had their personal information recorded and/or stored by Marriott and had that personal information accessed by an unauthorized individual or individuals on one or more occasions between 2014 and December 1, 2018, or such other class definition or class period as the Court may ultimately decide on the application for certification.

[98] The Krygier Action is a national class proceeding brought by Mr. Krygier on his own behalf and on behalf of the following proposed class:

All Canadian residents, except for Excluded Persons, whose Personal Information was improperly accessed as a result of the Database Breach.

Excluded Persons from the class are the Defendants, their current and former officers and directors, members of their immediate families, and their legal representatives, heirs, successor or assignees.

[99] The most significant difference is the Wong Action and Sache Action propose provincial classes whereas the Krygier Action proposes a national class.

[100] Wong and Sache counsel argue a BC class is preferable. It is worth mentioning that in its original pleadings, Mr. Wong and Ms. Bhinder pleaded a national class. Strategies change as the litigation proceeds but it does undermine their current argument that a BC action is necessary.

[101] The Uniform Law Conference states national actions are often preferable to provincial class actions. An authoritative text on class actions, cited with approval in Kowalyshyn, came to a similar conclusion:

The problems of multiple class actions is particularly intense where there are numerous class actions in several jurisdictions across the country, some or all of which may claim to be national class actions bringing claims on behalf of Class Members across Canada.

The positive attributes of a single national class is that it avoids duplication of fact finding, efficiently uses judicial resources, and eliminates the risk of inconsistent findings. A national class maximizes the efficiencies and access to justice that may be achieved by a class proceeding, and is more fair to defendants. These positive effects are diluted and may evaporate when there are multiple class actions.[7]

[102] In coming to a decision, I must determine if having multiple class proceedings advance concurrently is in the best interests of the class and is fair to the defendants. I will address this issue under the "Interrelationship of Class Actions in More than one Jurisdiction" section.

[103] On a carriage motion courts should not delve too far into the merits. I do not find the different class definitions to be of much import in the current case. I find the class definition to be a neutral factor.

(14) Class Period

[104] The Krygier and Sache Actions identify individuals whose personal information has been compromised. The Wong Action's class definition is open ended in that it does not articulate the need for individuals' personal information to be compromised or a start date for the purposes of defining the class. This means their definition will capture individuals who were in Marriott system prior to the actual Data Breach that began in 2014. As Krygier counsel noted, the class goes back in perpetuity contrary to the reasoning in *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.

[105] Wong counsel provided no justification for this expansive class period. This is contrary to the "rational relationship test" articulated in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38.

[106] It is a weakness of the Wong Action that the class definition does not bear a rational relationship to the common issues of all class members. Mindful that an over-inclusive class "can be pruned"[8] and this issue is more problematic at the certification stage, I place some but not undue weight on this factor.

(15) Prospect of Success: (Leave and) Certification

[107] As previously stated, the three actions present no conspicuous or egregious problems or errors. It is not this Court's role on a carriage motion to embark on a detailed analysis of the merits of the different proceedings: *Winder* at paras. 117-119; *Mancinelli* at para. 42. Consequently, I find this factor to be neutral.

(16) Prospect of Success against the Defendants

[108] While the proposed class proceedings may be scrutinized for "glaring deficiencies", it is inappropriate for this Court to undertake an analysis of which claim is most likely to succeed: Winder at paras. 117-119; Mancinelli at para. 42. Any analysis beyond "glaring deficiencies" is saved for the certification hearing.

[109] I therefore find this factor to be neutral.

(17) Interrelationship of Class Actions in More than one Jurisdiction

[110] I find the most important factor in the immediate case is the interrelationship of class actions in other jurisdictions. While the other issues are important, the crucial issue is whether having numerous regional actions overlapping with what will likely be one national class action will promote the best interests of the class members and provide fairness to the defendants.

[111] Carriage motions are one of the mechanisms available to address the problem of multiplicity of class proceedings. The problems that arise due to a multiplicity of class proceedings and the foundational principles of behavior modification and judicial economy were canvassed by Perell J. in Kowalyshyn at paras. 226, 231-257. He emphasized the Ontario Class Proceeding Act 1992 was designed to provide access to justice where there are classes of plaintiffs while concurrently avoiding a multiplicity of proceedings. In Winder at para. 60 he acknowledged that a multiplicity of proceedings is not always problematic. There will be circumstances where "more than one class action about the same wrongdoing is unobjectionable and even advantageous."

[112] Wong and Sache counsel argue they will advance a claim on behalf of affected BC residents rather than duplicate existing national class actions. They have no other proceedings in Canada regarding this Data Breach.

[113] The Krygier Action is the only action that is pursuing a national strategy. Sache counsel argue the commencement by a plaintiff in more than one action against the same defendant, based on the same dispute, can be an abuse of process. These submissions were directed at the Krygier Action. The court will examine whether a firm's approach undermines the integrity of the adjudicative process: Drover v. BCE Inc., 2013 BCSC 1341 at paras. 20 and 57.

[114] Wong counsel argue Koskie is applying for an overlapping national class actions because the BC members would also be members of the proposed classes in Alberta and Ontario. Wong counsel argue advancing three national proceedings concurrently will result in inefficiency, confusion, and unnecessary expense to class members.

[115] If all actions were to proceed I would agree. At this stage the question is whether there should be a provincial class or a national class. The question is not where the class action should be prosecuted. Jurisdictional issues are generally determined at the certification stage of the proceedings: *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447 at paras. 51 and 66 [Fantov]. As set out in s. 4 of the CPAA:

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

[116] Krygier counsel acknowledges if carriage is granted to its proposed class, the likely result is there will be an application to stay any two of the Ontario, Alberta, and BC actions. It is not anticipated that more than one national class action will proceed against Marriott regarding this Data Breach.

[117] In *Winder*, Perell J. suggested how the multiple national class actions could be dealt with:

[155] To sort out this procedural morass, I suggest that: (a) either the Marriott Defendants simultaneously bring forum conveniens motions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia; or (b) Siskinds LLP simultaneously bring motions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia to settle how many class actions should proceed pursuant to the model of [the] Uniform Law Conference's legislation.

[118] On October 17, 2019 Marriott counsel advised they intend to adopt the first suggestion. Therefore the question is whether a national proceeding is preferable or whether there is a legitimate purpose served in running a parallel class action in BC: *Asquith* at para. 77.

[119] Based on the current jurisprudence, a parallel action should only be permitted if there is a persuasive reason regional interests cannot be subsumed into the national class. National class actions are generally preferable unless there are good reasons why they cannot properly represent provincial or regional interests. The Uniform Law Conference articulated the problems with a multiplicity of class actions as follows:

[17] Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact finding, judicial analysis and pretrial procedures and eliminates the risk of inconsistent findings. It increases access to justice by spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.

- [18] By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are 13 overlapping actions with 13 different counsel. The uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members.[9]
- [120] In the Ontario carriage motion regarding the same defendant and the same Data Breach, Perell J. emphasized the recommendations of the Uniform Law Conference which have been adopted in BC.[10] He held a national class action appeared preferable in this litigation: Winder at para. 147. As Perell J. explained: "Based on the record on the carriage motion, there is a reasonably strong case that a single national class action be it in British Columbia, Alberta, or Ontario would provide access to justice, behaviour modification, and judicial economy": Winder at para. 147.
- [121] If regional interests can be subsumed into the national class, the regional class action(s) may piggyback on a national class action or the parallel action will overlap with other actions across the country. Justice Baker commented on the undesirability of piggyback actions in Asquith at para. 71, as did Perell J. in Winder. I agree that a multiplicity of proceedings is generally not desirable and undermines the purpose of class actions.
- [122] Koskie filed national class actions in Ontario and BC and a regional class action in Nova Scotia. It is also working with counsel regarding the proposed national class action filed in Alberta. In Ontario, Siskinds LLP has carriage of the proposed national class proceeding. Koskie was unsuccessful in the Winder action.
- [123] Koskie counsel argued at the Winder carriage motion that it wanted the Ontario action to proceed: Sayce Affidavit; Hamidi Affidavit, Exhibit U, paras. 81-83. However, Koskie stated before me that it will advance the Krygier Action if it is granted carriage in BC.
- [124] The Wong and Sache Actions contemplate an action in BC but they will overlap with the actions in Alberta and Ontario. While there is no rule that overlapping classes must be avoided, they are often not desirable: Wilson v. DePuy International Ltd., 2019 BCCA 440 at para. 53.

- [125] Relying on Asquith[11], Wong counsel argue the interests of BC class members are different from class members in the rest of Canada. Wong counsel argue its action should proceed because of the availability of the statutory tort under the BC Privacy Act. The BC Privacy Act is unique because it does not require the plaintiffs to prove damages. Further, s. 4 of the BC Privacy Act requires this cause of action to be heard and determined by the BC Supreme Court.[12]
- [126] In Asquith, a proposed bread price fixing class action, Baker J. was persuaded the bread market appeared to be more dispersed in BC than in other Canadian jurisdictions. She also found the Asquith action included an umbrella purchaser claim that could be more readily advanced in BC.[13] In these circumstances, she was unwilling to preclude the development of the action in BC at the carriage stage. At para. 51 she noted the plaintiff Asquith would be faced with more onerous tests at the certification hearing.
- [127] While both Sache and Wong counsel argue a BC action is necessary, Wong counsel had a more persuasive reason--the availability of the BC Privacy Act which relieves proposed class members from proving damages. But the Krygier Action also pleaded the BC Privacy Act. This issue does not distinguish the Wong Action from the Krygier Action. If a national action were to proceed in Ontario rather than BC, the tort of intrusion upon exclusion is available. While not identical to the benefits under the BC Privacy Act,[14] I do not see the difference as significant enough to justify a regional action in BC.
- [128] Moreover, these proposed class actions can be distinguished from the factual matrix in Asquith. In Asquith the plaintiff raised a serious question of regional market differences between BC and other parts of Canada. Baker J. accepted there were regional market differences, as well as the umbrella purchaser claim, which distinguished the Asquith claim from those in other jurisdictions. She acknowledged at para. 55 the David Action was being pursued for a national class in Ontario[15] covering the same subject matter. However, it was being pursued on a theory which did not address the unique considerations of the retail market in BC.
- [129] At this juncture I am not persuaded there are regional differences in BC sufficient to permit a BC class to proceed as a stand alone action. Having a parallel action in BC does not promote judicial economy and may lead to inconsistent outcomes. However this issue will be more fully canvassed at the certification hearing.
- [130] The Krygier Action is a national action. Koskie advised this Court they will seek to have a national class certified in BC if the Krygier Action is granted carriage. The Sache Action and Wong Action might proceed if granted carriage but they could piggyback on other actions, contrary to the statements made by Baker J. in Asquith. Also, in the companion case in Ontario, Perell J. found it determinative that Siskinds LLP envisioned a single national class action proceeding in one province: Winder at paras. 54-76, 137-152.

- [131] At this stage my view is a multiplicity of proceedings is misconceived. A national action is in the best interests of the proposed class, conserves judicial resources, is fair to the defendants, and avoids the embarrassment of conflicting decisions from courts across Canada.
- [132] The interrelationship of class actions favours the Krygier Action. By granting carriage to the Krygier Action there will be a national class action. The question remains whether the BC action, the Ontario action, or the Alberta action will proceed.[16] It will be for the courts to determine which proposed national class action proceeds.

Disposition

- [133] For the above reasons, I grant carriage to Krygier Action.
- [134] The Wong Action and Sache Action are stayed until certification in the present action is finally determined.
- [135] No further proposed class proceedings in respect of the Marriott Data Breach shall be filed in the province of British Columbia without leave of this Court, until certification in the Krygier Action is finally determined.
- [136] Each party shall bear their own costs.

"D. MacDonald J."

- [1] Lost Lake Properties Ltd. v. Sunshine Ridge Properties Ltd., 2009 BCSC 938 at para. 67, aff'd 2011 BCCA 473.
- [2] Costs and disbursements are paid to Koskie prior to calculating recovery.
- [3] Vancouver, BC, March 9, 2005, at para. 18.
- [4] The counsel from Quebec practice in a civil law jurisdiction.
- [5] This concern would only arise if Krygier counsel proceed with the Alberta action rather than the one in BC. If counsel litigate in BC they will have the benefit of the BC Privacy Act.
- [6] Skolrood J. was relying on the judgment in Kowalyshyn.
- [7] W.K. Winkler, P.M. Perell, J. Kalajdzic, and A. Warner, The Law of Class Actions in Canada (Toronto: Thomson Reuters, 2014) at 170.
- [8] Kowalyshyn at para. 215, in the context of class definition.
- [9] Cited with approval in Kowalyshyn.
- [10] The Class Proceedings Amendment Act came into force on October 1, 2018. The Uniform Law Conference recommendations form the basis of the CPAA.

- [11] In Asquith, carriage was given to Camp Fiorante, representing Asquith, over the Strosberg Consoritum, representing Fantov. The court declined to stay the BC action in favour of an Ontario action in which carriage had already been granted to a Strosberg Consortium.
- [12] Absent a forum selection clause: *Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 42-44.
- [13] "Umbrella purchasers are those buyers of commercial bread who bought bread not manufactured by or purchased from any of the Bread Defendants": *Fantov* at para. 18. In *Pioneer Corp. v. Godfrey*, 2019 SCC 42, the Supreme Court of Canada held that umbrella purchasers have a cause of action.
- [14] The tort is actionable without proof of damages.
- [15] Excluding Quebec.
- [16] The Nova Scotia Action may proceed but that issue is not before me. As Perell J. noted at para. 69 in *Winder*, "a carriage motion is an awkward and somewhat limited mechanism because it can only indirectly address the situation that presents itself in the immediate case of overlapping and possibly rival class actions in other jurisdictions."
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