IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tanchak v. British Columbia,* 2023 BCSC 428

Date: 20230321
Docket: S186178
Registry: New Westminster

Between:

Sarah Tanchak

Plaintiff

And

His Majesty the King in Right of the Province of British Columbia and the Attorney General of Canada

Defendants

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

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:	E.F.A. Merchant, K.C.
Counsel for Ms. Varley and Ms. Lukowich, representative plaintiffs in Federal Court Action, T-2166-18 (Toronto):	C. Poltak
Counsel for the Defendant, His Majesty the King in Right of the Province of British Columbia:	L. Mauro K. Reilly
Counsel for the Defendant, Attorney General of Canada:	J. Smith
Place and Date of Hearing:	New Westminster, B.C. February 21, 2023
Place and Date of Judgment:	New Westminster, BC March 21, 2023

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Introduction

[1] The narrow issue on this application is whether the representative plaintiffs in a Federal Court certified class action (the members of the class are individuals across Canada), have standing to bring an application to have this action stayed as an abuse of process against one of the defendants. The timing of that application, if standing is granted, is not in issue at this time. That will be the subject of an upcoming sequencing application as the defendants in this action also intend to bring their own application for a stay, or to strike the pleadings, and wish to do so in advance of a certification hearing.

[2] The applicants, Shannon Varley and Sandra Lukowich, are the representative plaintiffs (the "Varley Plaintiffs") in the certified class proceeding *Varley v. Canada (Attorney General)*, Federal Court Action T-2166-18 (Toronto) (the "Varley Action"). The sole defendant in that action is the Federal Crown.

[3] Ms. Tanchak is the proposed representative plaintiff in this action (the "Tanchak Action"). The defendants are the Federal Crown, and His Majesty the King in Right of the Province of British Columbia ("Province").

[4] The Varley Plaintiffs seek standing to bring an application for a stay of the Tanchak Action against the Federal Crown on the basis that it is an abuse of process. The defendants consent to the application for standing. Ms. Tanchak opposes the application.

Background Facts

[5] The Varley Action concerns the "60's Scoop", the events generally beginning in the 1950s and continuing to the 1990s, of taking children of Indigenous families and placing them with non-Indigenous foster or adoptive parents.

[6] The Varley Action follows a series of class actions against the Federal Crown concerning the 60's Scoop which culminated in the 2018 certification of a class action and approval of a pan-Canadian settlement agreement (the "2018 Settlement"): *Riddle v. Canada*, 2018 FC 641. The 2018 Settlement encompassed

the claims advanced by Indigenous peoples with status under the *Indian Act*, R.S.C., 1985, c. I-5, and those who are Inuit, but did not include the claims of Indigenous peoples without status and those who are Métis.

[7] In 2018, the Varley Action was commenced against the Federal Crown on behalf of Métis and Non-Status individuals who had been taken in the 60's Scoop (all other Indigenous peoples who did not benefit from the 2018 Settlement).

[8] At about the same time, other actions against the Federal Crown concerning the 60's Scoop and covering the same proposed class (Métis and Non-Status individuals) were commenced: *LaLiberte v. Canada (Attorney General)*, 2019 FC 766 at paras. 6–8. Counsel in those other actions agreed to form a consortium and to consolidate the actions before the Federal Court (the "LMO Actions"). The Merchant Law Group ("MLG"), counsel for Ms. Tanchak in this proceeding, was a member of the LMO consortium of law firms. As a result, a carriage motion between the Varley Action and the LMO Actions was required.

[9] On May 31, 2019, the Federal Court ordered that the claims against the Federal Crown on behalf of the Métis and Non-Status individuals be advanced in the Varley Action (the "Carriage Order"), and stayed the LMO Actions: *Day v. Canada (Attorney General)*, 2019 FC 766.

[10] The proposed representative plaintiffs in the LMO Actions appealed the Carriage Order, and on July 13, 2020 the Federal Court of Appeal dismissed the appeal: *LaLiberte v. Day*, 2020 FCA 119.

[11] On June 10, 2021, the Federal Court certified the Varley Action as a class proceeding: *Varley v. Canada (Attorney General)*, 2021 FC 589. The order (the "Certification Order") defines the class as:

> All Indigenous persons, as referred to by the Supreme Court of Canada in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, at para. 6, excluding Indian persons (as defined in the *Indian Act*), and Inuit person, who were removed from their homes in Canada between January 1, 1951 and December 31, 1991 and who were placed in the care of non-Indigenous foster or adoptive parents.

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[12] Thus, the class includes persons taken in B.C. In his reasons, Justice Phelan noted the existence of overlapping actions that had been filed in the superior courts of several provinces, including by MLG, and found the following:

> [18] There are a number of overlapping claims filed in provincial superior courts. To date, none of those claims have been certified despite the fact that some are several years old and no steps have been initiated by proposed class counsel in those cases (the Merchant Law Group).
>
> [19] Give[n] the nature of the claim in this case, there is a presumption in favour of a national class. There are no aspects which are unique or specific to one or more provinces.
>
> [20] Experience from the 60's Scoop cases and the Indian Day School decision (*McLean v. Canada*, 2019 FC 1076) confirm the uniquely suitable nature of a federal class proceeding.
>
> [21] The Court has considered the CBA Class Action Protocol. This case suits a federal court class proceeding.

[13] The Tanchak Action was commenced in 2016 (prior to the 2018 Settlement) as a proposed class action on behalf of all Indigenous peoples who were taken in the 60's Scoop. This therefore included Status, Inuit, Non-Status, and Métis individuals. When the 2018 Settlement was reached, the Tanchak Action, along with multiple other actions which had been commenced, were addressed in the 2018 Settlement and in the order approving the settlement (the "Approval Order").

[14] The Approval Order provided that class members agreed to release the Federal Crown from any claims in relation to the 60's Scoop, but did not preclude claims against third parties that are restricted to what such third party may be directly liable for, and which do not include what such third party may be jointly liable for together with the Federal Crown, such that the third party has no basis to seek contribution and indemnity from the Federal Crown. Further, the releasors were deemed to agree that if they brought or continued their action against another person (in this case the Province) then the releasors would expressly limit their claims to exclude any portion of the Federal Crown's responsibility.

[15] On November 8, 2022, Ms. Tanchak filed an Amended Notice of Civil Claim (the "ANOCC"), which may exclude those who benefitted from the 2018 Settlement. Whether those amendments comply with the 2018 Settlement, is an issue between

the parties. The ANOCC also asserts claims against the Federal Crown which the Varley Plaintiffs allege are duplicative of those advanced in the Varley Action and which were the subject of the Carriage Order and Certification Order. The extent of any overlap is also a contested issue.

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Issues

[16] The arguments raised two main issues:

a) Does s. 3.1 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] preclude any standing of the Varley Plaintiffs to raise abuse of process? and

b) Should the Varley Plaintiffs be granted public interest standing?

Does s. 3.1 of the *Class Proceedings Act* Preclude any Standing of the Varley Plaintiffs to raise abuse of process?

[17] Section 1 of the *CPA* defines a “multi-jurisdictional class proceeding” as a proceeding brought on behalf of a class of persons that includes persons who do not reside in B.C. When a plaintiff makes the required application for an order certifying the proceeding as a class proceeding, s. 2(2)(b) requires that the proposed representative plaintiff give notice of the application to the representative plaintiff for any certified or proposed multi-jurisdictional class proceeding that has been commenced elsewhere in Canada and that involves the same or similar subject matter.

[18] Section 3.1 states:

> 3.1 A person who receives notice of an application for certification under section 2 (2) (b) may make submissions at the certification hearing.

[19] Subsections 4(3) and (4) provide objectives and factors a Court must consider at the certification hearing, when there are multi-jurisdictional actions:

> 4(1) Subject to subsections (3) and (4), the court must certify …
>
> …
>
> (3) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada and involves

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> 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.
>
> (4) When making a determination under subsection (3), the court must
>
> (a) be guided by the following objectives:
>
> (i) to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;
>
> (ii) to ensure that the ends of justice are served;
>
> (iii) to avoid irreconcilable judgments, if possible;
>
> (iv) to promote judicial economy, and
>
> (b) consider relevant factors, including the following:
>
> (i) the alleged basis of liability, including the applicable laws;
>
> (ii) the stage that each of the proceedings has reached;
>
> (iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;
>
> (iv) the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative plaintiffs to participate in the proceedings and to represent the interests of class members;
>
> (v) the location of evidence and witnesses.

[20] Section 4.1 provides for different orders the Court may make, including refusing to certify the proceeding as a class action, and staying it in favour of a multi-jurisdictional action in another jurisdiction.

[21] Ms. Tanchak submits that the government has legislated in this area by enacting s. 3.1 of the *CPA*, and therefore the Varley Plaintiffs may only have standing to make submissions at the Tanchak Action certification hearing. The legislature has directed how the Varley Plaintiffs will have standing and when they will have it. This does not include the right to otherwise intervene in the progression of the Tanchak Action prior to certification by bringing applications that seek specific relief. It is not open to the Courts to “improve” on legislation if it is of the view that s. 3.1 is too restrictive. Ms. Tanchak relies on the decisions in *Ammazzini v. Anglo*

American PLC, 2016 SKCA 164, and *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447, as supporting this position.

[22] The Varley Plaintiffs submit that while s. 3.1 grants them standing to make submissions at a certification hearing, it does not displace the Court's authority to control proceedings to prevent abuse of process, or their ability to apply for standing to seek a stay for abuse of process. Further, they are not seeking standing to apply for a stay under the *CPA*; rather, they are seeking standing to apply for a stay for abuse of process, something which is specifically permitted in *Fantov*.

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[23] I will first address Ms. Tanchak's argument regarding *Ammazzini*. The class proceeding legislation in Saskatchewan and BC are almost identical. The Court held that the right to make submissions under the Saskatchewan equivalent of s. 3.1 (s. 5.1), does not include a right to file an application for a stay as opposed to simply make submissions and tender evidence at the certification hearing: at paras. 49–51. However, in my view, the Court was referring to the rights conferred by that section: at para. 35. The Court stated, "s. 5.1 does not authorize a representative plaintiff who appears pursuant to that provision to bring an application for a stay": at para. 51. I do not read the decision as addressing standing for an application on the basis of abuse of process. The applicant for the stay in the Court below relied on s. 5.1 to establish standing, and the court there did not find it necessary to address a stay for abuse of process: *Ammazzini v. Anglo American PLC*, 2016 SKQB 53, at paras. 17, 21, and 61-62. The Justice in that Court stated:

> [61] As I have noted, the second ground for the application for a conditional stay is abuse of process. The principles of abuse of process remain potentially applicable, even in light of the expanded provisions of the Act in ss. 6 and 6.1, as discussed by Justice Zarzeczny in *Brooks v The Federal Crown (Attorney General)* at paras 23-24.
>
> [62] As I am granting the stay on the basis of the provisions of the Act, however, it is not necessary for me to consider this ground.

[24] In *Fantov* at para. 65, Justice Goepel referred to the reasons of Justice Zarzeczny in *Brooks v. Canada (Attorney General)*, 2009 SKQB 54, which concerned applications for a stay for abuse of process. In *Brooks*, the Court found that "virtually all, if not all of the concerns raised by the applicants" in support of the

stay applications were "intended to be, and for that matter, mandated to be considered by the court during the certification application of this class action": para. 21. These were "now specifically and legislatively required to be addressed by the court at the certification stage and after a certification hearing has been conducted": para. 23. However, "[t]his is not to say that there might not arise some circumstances where an application to stay a multi-jurisdictional class action for abuse of the court's process might be appropriate": para. 24. Justice Goepel also referred to *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512 [*DALI*], an Ontario case not governed by the new amendments, where the Court stated at para. 8 "where parallel proceedings are not an abuse of process but nonetheless raise questions of preferability, these questions are best addressed at certification under the preferability criterion".

[25] Justice Goepel adopted the reasons of Justice Zarzeczny:

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

[26] However, Justice Goepel further stated:

> [70] In *Brooks*, Justice Zarzeczny acknowledged that there may arise circumstances where it is appropriate to decide an application to stay a multi-jurisdictional class action for abuse of the court's process in advance of certification. I agree with that proposition.

[27] In my view, *Fantov* does not prohibit the Varley Plaintiffs from ever having standing to bring an application for abuse of process. I therefore do not accede to

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Ms. Tanchak's argument. *Fantov* holds that the proper timing of a stay application will depend on whether the stay application is being brought on the grounds of abuse of process. Stay applications which are based on issues of overlapping jurisdiction in other provinces or courts (the multi-jurisdictional objectives and factors the Court would consider under s. 4 of the *CPA*), are to be heard concurrently with certification. Where abuse of process is asserted, that application may be heard prior to certification: at paras. 66–71. However, it may not always be appropriate to hear it prior to certification. For example, in *Brooks*, Justice Zarzeczny's comments were made in the context of applications to stay for abuse of process, and he dismissed the applications as he found that the bases of the abuse of process application were the same as what would be considered at certification.

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[28] In summary, s. 3.1 does not preclude the Varley Plaintiffs from ever having standing to apply to stay the Tanchak Action for abuse of process, including an application to be heard at the certification hearing. The timing of that application (which necessarily involves a consideration of the proper characterization of the basis of the application), is something that will be addressed at the sequencing application, where the defendants will also be addressing the timing of their intended applications for a stay/strike.

[29] I pause here to note that I heard another set of arguments from the Varley Plaintiffs regarding the jurisdiction of this Court to grant standing. This was in response to Ms. Tanchak's arguments that s. 3.1 precluded them from being granted standing. In summary, the Varley Plaintiffs submitted that the Court had three sources of authority to grant such standing: (1) s. 8(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*] which they also submit confirms their "right" of standing; (2) the case management powers in Rule 5-3 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 and in particular sub-rules 5-3(1)(n) and 5-3(1)(v); and (3) the Court's inherent jurisdiction. I heard arguments in response from Ms. Tanchak that: (1) s. 8(3) of the *LEA* does not grant a right of standing; (2) Rule 5-3 does not grant this Court the unfettered power to in effect make any order it deems necessary; and (3) that while the Court does have inherent jurisdiction to address abuse of process

and grant standing, it should not do so when s. 3.1 of the *CPA* has specifically provided otherwise. As I have rejected Ms. Tanchak interpretation that s. 3.1 precludes the Varley Plaintiffs from obtaining and this Court from granting standing, I need not address these other arguments further.

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[30] The Court has inherent jurisdiction to address abuse of process: *Fantov* at para. 53; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37 [*C.U.P.E.*]. Inherent jurisdiction may be used "in addition to the powers conferred by the Rules of Court, to prevent abuses of process": *Yates v. Lee*, 2014 BCSC 1298 at paras. 25-26.

Should the Varley Plaintiffs be granted public interest standing?

[31] The Varley Plaintiffs submitted that in the class action context, standing should be addressed using the factors considered in exercising discretion for public interest standing. This was the approach used in a series of decisions arising from the Indian Residential School Settlement Agreement. In *Fontaine v. Canada (Attorney General)*, 2014 BCSC 2531 at para. 24, Justice B. Brown relied upon the case planning powers s. 12 of the *CPA*, and the inherent jurisdiction of the Court to grant standing to a non-party to make a request for directions. Justice Brown applied the test for public interest standing. This was followed in subsequent decisions: 2015 BCSC 1386 at para. 29, and 2017 ONSC 2487 at para. 150. Ms. Tanchak did not take issue with this approach and addressed those factors.

[32] In a proposed class action, a case management judge may exercise the case management powers in Rule 5-3 in a manner that is "informed by the provisions [and] object of the *CPA*": *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 at para. 40. The objects of class proceeding legislation are the furtherance of judicial economy, access to justice, and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 27.

[33] The Varley Plaintiffs submit that Courts have taken a broad approach to standing to raise abuse of process as this serves the underlying rationale and focus of the abuse of process doctrine, which is the "integrity of the administration of

justice, not the interests of any particular party”: *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261 at para. 36; *C.U.P.E.*, at paras. 43, 51. They submit that Courts have permitted non-parties to raise abuse of process issues: *Asquith v. George Weston Limited*, 2018 BCSC 1557, aff’d 2019 BCCA 447 (this is *Fantov*); and *DALI* at para. 11.

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[34] Ms. Tanchak submits that while Courts have generally taken a broad approach to abuse of process and the granting of standing, these have been in circumstances where there is no other prescribed manner in which the concerns of the person seeking standing may be addressed. That was in the case in *Asquith* (when the enactments to the *CPA* had not yet been enacted, but were by the time *Fantov* was decided in the Court of Appeal), and in *DALI*, where the Ontario legislation did not include the multijurisdictional provisions that exist in the *CPA* and which had a broader and more permissive *LEA* which provided standing. Here, the legislature has enacted the amendments to the *CPA* to address the Varley Plaintiffs’ arguments.

[35] The test for public interest standing was addressed in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] at para. 16:

a) there is a serious issue to be tried;

b) the prospective litigant is directly affected or has a genuine interest in the issues raised; and

c) the proposed suit is a reasonable and effective means of bringing the issue before the Courts.

[36] The Court must assess and weigh these factors, cumulatively, flexibly, generously, and in light of the underlying purposes of limiting standing: *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 [*Council of Canadians*] at paras. 28-29. Those purposes are efficiently allocating scarce judicial resources and screening out mere busybodies, ensuring the courts

have the benefit of the views of those most directly affected, and preserving the proper role of Courts and their relationship with branches of government: at para. 29. The Court must also consider the purposes that justify granting standing, which are legality and ensuring access to justice: at para. 30.

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[37] With that review, I turn to the factors to be considered in exercising the discretion to grant standing.

Serious Issue to be Tried

[38] A serious justiciable issue will arise when the issue is “far from frivolous”: *Council of Canadians* at para. 49.

[39] The Varley Plaintiffs submit there is a serious issue to be tried, as the Tanchak Action is an abuse of process because:

a) the Federal Court denied carriage to MLG, and ordered that the claims of Non-Status and Métis individuals proceed in the Varley Action;

b) the Federal Court explicitly concluded that the prosecution of the Varley Action as a national class proceeding is in the best interests of the class members, notwithstanding the provincial actions filed by MLG;

c) with respect to the claims against the Federal Crown, the Tanchak Action duplicates the claims advanced in the Varley Action. Those claims have already been certified by the Federal Court (the opt out period having expired in November 2021). Of all the members of the certified class, only two opted out; and

d) there have been lengthy delays in the advancement of the Tanchak Action.

[40] The Varley Plaintiffs submit that in the class action context, Courts have concluded that proposed class actions should be stayed as abuse of process where they are duplicative and have no legitimate purpose: *Fantov* at para. 71; *Hafichuk-Walkin et al. v. BCE Inc. et al*, 2016 MBCA 32 at para. 40, leave to appeal to SCC

ref'd 37011 (22 December 2016); *Piett v. Global Leaning Group Inc.*, 2021 SKQB 232 at para.49, leave to appeal ref'd 2022 SKCA 141.

[41] Ms. Tanchak argues that while the Varley Plaintiffs describe their intended application as one rooted in abuse of process, in reality it is nothing more than an argument that the multijurisdictional preferability issues should be addressed prior to the certification hearing itself and without the benefit of a certification record. These are all "certification issues dressed up as issues related to abuse of process" and should be addressed at the certification.

[42] In response to the Varley Plaintiffs' arguments as to whether there is a serious issue to be tried, Ms. Tanchak submits:

a) a carriage determination in one province is neither binding nor a bar to a subsequent consideration of those issues in BC, and is a factor to be considered in a carriage motion in BC and at certification: *Tharani v. LifeLabs Inc.*, 2020 BCSC 1670. The Carriage Order impacts only the LMO Actions in the Federal Court, and there has not been a carriage determination in BC;

b) the Federal Court's determination that a "national" class is preferable is irrelevant in circumstances where this action is differently constituted and involves the Province. In any case, it is not a finding that is binding on this Court at certification;

c) any issues of duplication or overlap are statutorily to be considered as a certification issue with the benefit of a certification record. Without that, the Court cannot know what the certified class definition or common issues would be, and cannot determine whether there is in fact overlap with the Varley Action or resolve the question of whether that overlap is preferable. There is no formal proposal for a class definition presently before the Court, although the ANOCC makes it clear that (a) the proposed class will include any Indian or Aboriginal person who was apprehended by either of the defendants in B.C. between January 1, 1951 and December 31, 1991, and placed into non-Aboriginal homes; and (b) to the extent that the class includes members of

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the class in the 2018 Settlement, those individuals will not be able to recover from the Federal Crown but may recover from the Province. Ms. Tanchak intends to honour the spirit of the 2018 Agreement; however, the precise form of the class definition is a certification issue. Further, overlapping class actions can be complementary: *Jiang v. Peoples Trust Company*, 2018 BCSC 299 at paras. 64-68, aff'd 2019 BCCA 149; and

d) if there is any delay in prosecuting the Tanchak action, it can be fully explained, and in any event the Varley Plaintiffs do not and could not assert any prejudice.

[43] In my view, the Varley Plaintiffs have raised a serious question to be tried regarding abuse of process. Abuse of process is a justiciable issue. While parallel proceedings may exist and are not necessarily abusive, actions have been stayed for abuse of process where they are duplicative and have no legitimate purpose. I acknowledge Ms. Tanchak's argument that some of the Varley Plaintiffs' arguments may overlap with what would be considered under s. 4(3) and (4) of the *CPA* at a certification hearing. However, ultimately, that is a timing issue that will be addressed at the sequencing hearing and not a standing issue.

Genuine Interest

[44] This factor considers whether the person seeking standing has "a real stake in the proceedings or is engaged with the issues they raise": *Downtown Eastside* at para. 43; *Council of Canadians* at para. 51.

[45] The Varley Plaintiffs submit that they have a genuine interest in the issues because if the Tanchak Action is certified, it will cover class members who are already members of the certified class in the Varley Action. As representatives of a national class, the Varley Plaintiff have a responsibility to ensure that the interests of the class members are protected and that their claims are efficiently and justly resolved. Allowing the Tanchak Action to continue would only serve to create "chaos and confusion" for class members, the parties and the Courts: *Wilson v. DePuy International Ltd.*, 2019 BCCA 440 at para. 53, leave to appeal to the SCC ref'd,

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39044 (27 August 2020). Further, the Varley Plaintiffs are uniquely situated, and the Court would benefit from their perspectives in any strike/stay application which is brought by the Federal Crown or the Province, and will ensure this Court is fully apprised of the impact that the continued prosecution of the Tanchak Action will have on the interests of Métis and Non-Status individuals.

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[46] Ms. Tanchak submits that the Varley plaintiffs are not impacted by the Tanchak action and do not have a genuine interest because until there is an application for certification, their substantive rights are not engaged. They already have a right of participation, and it is at the certification hearing. They have not sought standing to respond to any application for a stay/strike to be brought by the Federal Crown or the Province.

[47] In my view, the Varley Plaintiffs have a genuine interest and a real stake in these proceedings. The Varley Plaintiffs represent a certified class of persons who are included in the putative class described in the Tanchak Action pleading. As representatives of a national class, the Varley Plaintiffs have an interest in ensuring that the class members are protected and that their claims are efficiently and justly resolved. Further, the Court would benefit from the Varley Plaintiffs perspectives and will ensure this Court is apprised of the impact that the continued prosecution of the Tanchak Action will have on the class that is already certified.

Reasonable or Effective Manner

[48] The Varley Plaintiffs submit that other than their own abuse of process application, there is no other reasonable and effective manner in which these perspectives can be brought to the Court, or using the more liberal description of this factor in *Downtown Eastside*, argue that an abuse of process application is a reasonable and effective matter to bring those perspectives and concerns to the Court.

[49] Ms. Tanchak submits that the Varley Plaintiffs already have a right of participation, and it is at the certification hearing.

[50] While I agree that the Varley Plaintiffs will be able to bring their concerns forward at a certification hearing, they will not be able to advance an abuse of process application, which engages a different test to multi-jurisdiction preferability, and which potentially may be brought prior to certification, unless they are granted standing.

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Conclusion and Order

[51] Weighing all the factors cumulatively, purposively, and flexibly, in all the circumstances, I exercise my discretion to grant the Varley Plaintiffs standing to bring an application for abuse of process. I also grant them standing for the upcoming sequencing application. I make no finding on whether the abuse of process application may be brought in advance of a certification hearing. That will be the subject of the upcoming sequencing application at which time the timing of the intended applications by the Federal Crown and Province will also be addressed.

“Norell J.”