COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mentor Worldwide LLC v. Bosco,*
2023 BCCA 127

Date: 20230322
Docket: CA47917

Between:

Mentor Worldwide LLC and Johnson & Johnson Inc.

Appellants
(Defendants)

And

Denée Jesanna Bosco, Kimberly Dawne Hestdalen, Stephanie Nicole Marto, and Jaime Lyn Hoolsema

Respondents
(Plaintiffs)

Before: The Honourable Justice Dickson
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated October 26, 2021 (*Bosco v. Mentor Worldwide LLC*, 2021 BCSC 2098, Vancouver Docket S190084)

Counsel for the Appellants:	R.L. Reinertson K. Russell
Counsel for the Respondents:	A. Leoni S.L. Herra
Place and Date of Hearing:	Vancouver, British Columbia February 1, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 22, 2023

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Justice Dickson
The Honourable Justice Griffin

Summary:

The appellants challenge an order of a chambers judge dismissing their application for production of the respondents' medical records in advance of a certification hearing in a proposed class proceeding. HELD: Appeal dismissed. The chambers judge did not err in exercising her discretion to decline to order the production of records that were not necessary to inform the issues at the certification hearing.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] The appellants, Mentor Worldwide LLC and Johnson & Johnson Inc., appeal the order of a chambers judge dismissing their application for the production of the respondents' medical records in advance of a certification hearing under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[2] The respondents seek to certify a class action on behalf of all persons in Canada who have been implanted with Mentor silicone or cohesive gel breast implants ("Mentor Breast Implants") since October 19, 2006. They allege that there are defects in the Implants, and that the appellants failed to warn users about risks associated with their use. The three proposed representative plaintiffs each swore an affidavit in support of the certification application attesting to having received the Mentor Breast Implants, and describing the various health issues they subsequently experienced. Prior to the certification hearing, the appellants applied for production of the respondents' medical records pursuant to Rule 22–1(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*].

[3] The chambers judge, who is the assigned case management judge, held that the pre-certification production of the medical records was not necessary to inform the certification process. In dismissing the application, the chambers judge expressed concern that an order for production in the circumstances of this case would cause the certification hearing to become mired in the merits of individual claims. In order to succeed on appeal, the appellants must demonstrate that the chambers judge committed a reviewable error in the exercise of her discretion.

[4] The appellants argue that the chambers judge erred in applying an overly-onerous test for the production of medical records. They say that the approach of the

British Columbia courts to pre-certification document production is unnecessarily narrow and is out-of-step with the approach taken in other jurisdictions. The appellants allege other related errors by the chambers judge, including that she misconceived expert evidence demonstrating the relevance of the records to matters in issue at the certification hearing, and failed to consider the fact that the respondents' affidavits on certification do not comply with s. 5(5)(b) of the *CPA*.

[5] The respondents say that the appellants have not shown any error in the exercise of discretion by the chambers judge that would warrant appellate intervention. The respondents emphasize the high level of deference to be accorded to the discretionary decision of a case management judge in declining to order the pre-certification production of records.

Factual Background

[6] The respondents commenced this action in January 2019 under the *CPA*. They allege that: (1) there are manufacturing defects in the Mentor Breast Implants; (2) the appellants failed to conduct adequate testing to allow for the identification and disclosure of risks; and (3) the appellants failed to adequately warn women of the risks associated with the Implants. The specific risks associated with use of the Mentor Breast Implants are said to include anaplastic large cell lymphoma ("BIA-ALCL"), connective tissue disease ("CTD"), and autoimmune/ inflammatory syndrome induced by adjuvants or breast implant illness ("ASIA/BII").

[7] The notice of civil claim pleads that the appellants are liable for common law torts as well as statutory causes of action. The pleaded claims include negligence and duty to warn, as well as remedies under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. The respondents seek to recover personal injury damages, special damages, loss of income, and cost of future care, in addition to punitive damages. The respondents also claim for the recovery of health care costs under the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27.

The respondents' certification application

[8] On October 30, 2020, the respondents delivered their notice of application for certification and six affidavits, which included the affidavits of the respondents, Ms. Bosco, Ms. Marto, and Ms. Hoolsema. The fourth respondent, Ms. Hestdalen, did not provide an affidavit and is not named as a proposed representative plaintiff in the certification application. The substance of the affidavit evidence of the proposed representative plaintiffs was concisely and accurately summarized by the chambers judge in her reasons as follows:

> [17] The affidavits of Ms. Bosco, Ms. Marto, and Ms. Hoolsema are substantially similar. All plaintiffs depose, in part, as follows:
>
> a) They were implanted with Mentor Breast Implants;
>
> b) They were in good general health before their Breast Implant surgery;
>
> c) They believed the Breast Implants were safe and they were unaware of the risks of developing CTD, BII, or BIA-ALCL;
>
> d)They would not have had Breast Implant surgery if they had known of some or all of the associated risks;
>
> e) They developed a variety of health issues after their Breast Implant surgery;
>
> f) Those plaintiffs who have had explant surgery to remove the Breast Implants have enjoyed an improvement in their symptoms; and
>
> g) Those plaintiffs attribute this improvement in their symptoms to the removal of the Breast Implants.

[9] The respondents' certification material also included affidavits from two expert witnesses: (1) Dr. Diana Zuckerman, a health policy analyst, and (2) Dr. Jan Willem Cohen Tervaert, a professor of medicine. These affiants address the general health issues that they consider to be associated with Mentor Breast Implants, including the prevalence of breast implant illness ("BII") in persons who have received the Implants. They do not comment on, and do not appear to have been provided with copies of, the affidavits sworn by the proposed representative plaintiffs.

[10] The orders sought by the respondents in the certification application include the appointment of the three proposed representative plaintiffs to represent a class defined as:

> "All persons who were implanted with silicone or cohesive gel breast implants which were variously designed, developed, tested, licensed, assembled, labelled, marketed, instructed for use, distributed and/or sold by one of the Defendants ("Mentor Breast Implants") in Canada during the Class Period."

[11] Schedule A to the certification application sets out a list of proposed common issues under various headings. The proposed common negligence/duty to warn issues are stated as follows:

> 1. Did the Defendants, or any of them, owe a duty of care to class members?
>
> 2. Did the Defendants, or any of them, breach a duty of care to class members, and if so, when and how?
>
> 3. In particular, were Mentor Breast Implants distributed and sold within Canada during the Class Period defective or unfit for their intended use, due to one or more of a propensity to cause BIA-ALCL, CTD, ASIA/BII, and/or by virtue of containing toxins?
>
> 4. If the answer to question (3) is yes, did the Defendants know or ought to have known that the Mentor Breast Implants were defective or unfit for their intended use, and if so, when?
>
> 5. Did the Defendants, or any of them, fail to warn, or fail to adequately warn, class members and surgeons with respect to the risk of BIA-ALCL, ASIA/BII and/or CTD? Did the Defendants, or any of them, fail to warn, or fail to adequately warn, class members and surgeons with respect to the level of toxins contained in Mentor Breast Implants?

[12] The other proposed common issues are grouped under the headings "Consumer Protection Issues", "Competition Act Issues", "Toxic Tort", and "Damages Issues".

The appellants' application for document production

[13] Following delivery of the certification application, the appellants requested production of the respondents' medical records. The respondents declined to produce the records.

[14] On May 14, 2021, the appellants filed the notice of application for production that grounds the present appeal. The appellants sought orders for the production of

medical records of the proposed representative plaintiffs from five years prior to the date of their implant surgery to the present. Specifically, they sought: (1) all records of healthcare professionals who investigated, diagnosed and/or treated the representative plaintiffs for any of the health complaints set out in their affidavits; (2) all records of physicians or surgeons who implanted or explanted the implants, and the records of the health care institutions where such surgeries were performed; (3) all available prescriptions/pharmaceutical records of the proposed representative plaintiffs; (4) MSP health care services reports; and (5) any documents relating to BC Ministry of Health or government coverage or reimbursement of medical costs of surgery or medical care outside the province.

[15] In support of their application for production, the appellants tendered the affidavit of Dr. Scott Barr, a plastic surgeon. Dr. Barr deposes that he was retained by the appellants and asked to provide a written report on the following issues:

> 1. Whether the proposed representatives were implanted with Mentor silicone or cohesive gel implants and whether [they] have any of the conditions specified in the proposed common issues, i.e., BIA-ALCL, CTD, ASIA/BII.
>
> 2. Whether the symptoms or complaints listed in the proposed representative plaintiffs' […] affidavits are one common condition or disease (or not), and whether their complaints have a common cause.
>
> 3. What conditions, diseases, factors or other variables, if any, could result in the various symptoms or complaints set out in the representative plaintiffs' affidavits?

[16] Dr. Barr opines that the information provided in the affidavits of the proposed representative plaintiffs is "inadequate to answer the questions presented to me". He provides a lengthy list of medical records that he says he requires from the respondents in order to answer the questions. The relief sought by the appellants in their notice of application for production contains a less expansive list of records than that set out in Dr. Barr's report.

[17] In advance of the hearing of the appellants' application for production, the respondents delivered a further affidavit appending the operative reports, product stickers, and implant registration forms demonstrating that Ms. Marto and Ms. Hoolsema were implanted with Mentor Breast Implants.

[18] By the time of the hearing of the appellants' application for production on August 26, 2021, the appellants had not filed a response to civil claim or a response to the certification application, and no date had been set for the hearing of the certification application.

The chambers judgment

[19] The chambers judge began her analysis by addressing the requirements for certification. She observed that the respondents bear the burden of demonstrating that there is "some basis in fact" to satisfy the requirements in ss. 4(1)(a)–(e) of the *CPA*. This standard, as the judge explained, does not involve an assessment of the merits, but rather addresses the procedural question of whether the action can appropriately proceed as a class action: Reasons at paras. 34–41.

[20] The chambers judge next turned to the test for pre-certification document production. She stated that it was "common ground" that the pre-certification production of medical records in class proceedings is "both exceptional and case specific": Reasons at para. 42. She referred to several decisions of the Supreme Court of British Columbia that set out the governing approach: *Achtymichuk v. Bayer Inc.*, 2018 BCSC 1159 [*Achtymichuk*], *Charlton v. Abbott Laboratories Ltd.*, 2013 BCSC 21 [*Charlton*], and *Cantlie v. Canadian Heating Products Inc*., 2014 BCSC 228 [*Cantlie*]. These cases establish two principles: (1) that the burden of showing that the records should be disclosed is on the applicant, and (2) that to meet this burden the applicant must show that the records sought are necessary to inform the certification process: Reasons, at paras. 43–44, 46. The chambers judge stated:

> [45] When the test is applied correctly and issues relevant at certification are distinguished from the merits of the claim, it will only be the exceptional case where such production is warranted: *Cantlie* at para. 43.

[21] The chambers judge distinguished *Stanway v. Wyeth Canada Inc*., 2010 BCSC 1497 [*Stanway*], a case that was heavily relied on by the appellants. She noted that *Stanway* had been distinguished in several more recent decisions of the Supreme Court of British Columbia: Reasons at paras. 48–50.

[22] In considering whether the production of the respondents' medical records was necessary to inform the certification hearing in this case, the chambers judge drew assistance from the decision of Justice N. Smith in *Bartram v. Glaxosmithkline Inc.*, 2011 BCSC 1174 [*Bartram*]. The chambers judge noted the similarity between *Bartram* and this case—in both instances, the defendants adduced the affidavit of an expert deposing that the expert required the pre-certification production of medical records in order to offer opinions about possible alternative causes of the individual plaintiffs' medical issues. She quoted the analysis of Justice N. Smith at paras. 20–21 of *Bartram*. In these paragraphs, Justice N. Smith held that while evidence of general medical principles would be relevant to the general causation analysis on the certification application, evidence of the medical history of particular members of the proposed class would more likely result in premature consideration of the merits of their individual claims. The chambers judge concluded that the pre-certification production of the records at issue in the present case was unnecessary for the same reasons: Reasons at para. 61.

[23] The chambers judge rejected the appellants' argument that the medical records were required to ensure an adequate evidentiary record at the certification hearing. As the evidentiary onus is on the plaintiff, the chambers judge considered any inadequacy in the evidentiary record to be the respondents' risk to run: Reasons at para. 64. The chambers judge was also of the view that the appellants' arguments conflated general causation (a proposed common issue) and individual causation (which is relevant to the merits of the individual claims). In her view, the appellants were effectively seeking evidentiary proof of the facts as they related to individual claims: Reasons at para. 70.

[24] The chambers judge concluded that pre-certification production of the respondents' medical records was not necessary to inform the certification process in this case. She noted that she was "wary of allowing the certification application to become mired down in the merits of individual claims": Reasons at para. 68.

[25] Accordingly, the chambers judge declined to order pre-certification production of the respondents' medical records.

Issues on appeal and standard of review

[26] At the time the appellants filed their notice of appeal on November 24, 2021, there was no requirement for an appellant to seek leave to appeal orders made under R. 22-1(4) of the *SCCR*: *Ip v. Wilson*, 2019 BCCA 189 at para. 2. Under the current *Court of Appeal Rules*, B.C. Reg. 120/2022, such orders are limited appeal orders and therefore appealable only with leave. However, this change only applies to appeals commenced after July 18, 2022: *Chestacow v. Workers' Compensation Appeal Tribunal*, 2022 BCCA 369 at para. 19. The appellants therefore bring this appeal as of right.

[27] On the appeal, the appellants allege that the chambers judge:

a) erred in principle by applying too onerous a test for disclosure of the respondents' medical records in advance of their certification application;

b) erred in failing to consider or give sufficient weight to the respondents' own pleadings and evidence;

c) erred by misconceiving the uncontroverted expert evidence that the medical records are necessary for the appellants to provide an opinion in response to the respondents' certification application;

d) erred in principle by concluding that the respondents' medical records are only relevant after the certification stage; and

e) erred in principle in failing to take into account the relevant consideration that the respondents' affidavits do not comply with s. 5(5)(b) of the *CPA*.

[28] It is common ground that the decision of the chambers judge is subject to a high level of deference on appeal, as it involves an exercise of discretion by a case management judge. To justify appellate interference with a discretionary decision,

the appellants must establish that the chambers judge erred in principle, failed to consider or weigh all relevant circumstances, clearly and demonstrably misconceived the evidence, or made an order resulting in a clear injustice. The standard will be even more deferential where the order is made by a case management judge: *Strohmaier v. K.S.*, 2019 BCCA 388 at paras. 21–22; *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 at para. 32.

Discussion

The nature of a certification hearing

[29] In considering the various errors alleged by the appellants, I begin with a review of the principles that govern the scope and purpose of a certification hearing. These principles inform the limits that the courts have placed on pre-certification discovery.

[30] As the Supreme Court of Canada has reiterated on numerous occasions, the certification stage of a class proceeding is not concerned with the merits of the action. Rather, it is concerned with its form and whether the action can properly proceed as a class action: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16 and 25 [*Hollick*]; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99 [*Pro-Sys*]; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 68 [*Sun-Rype*]; *AIC Limited v. Fischer,* 2013 SCC 69 at para. 43 [*Fischer*].

[31] In order to have an action certified as a class proceeding in British Columbia, the proposed representative plaintiff must establish the criteria set out in s. 4(1)(a)–(e) of the *CPA*:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[32] The requirement in s. 4(1)(a) that the pleadings disclose a cause of action is assessed on the same test as on a motion to strike pleadings under R. 9-5(1) of the *SCCR*. The question is whether, assuming the facts pleaded are true, it is plain and obvious that the plaintiff's claim has no reasonable prospect of success: *Pro-Sys* at para. 63.

[33] For the remaining criteria in s. 4(b)–(e), the plaintiff must present sufficient evidence to show 'some basis in fact' that the requirements for certification are met: *Hollick* at para. 25. This does not involve an assessment of the merits. Thus, for example regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred: *Pro-Sys* at para. 110. The purpose of the 'some basis in fact' requirement is to ensure that that the action can proceed on a class basis without "foundering at the merits stage" because the certification requirements are not met: *Pro-Sys* at para. 104.

[34] The evidentiary threshold that the plaintiff must meet on a certification hearing is a low one: "*some* basis in fact is to be contrasted with *no* basis in fact": *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 104. This evidentiary requirement must be understood in the context of the *CPA* scheme, which envisions that applications for certification will be brought at the early stages of the proceeding: *Nissan v. Mueller*, 2022 BCCA 338 at para. 136. As the merits are not being argued on certification, the record does not have to be exhaustive: *Fischer* at para. 41. While the defendant is entitled to respond to the plaintiff with its own evidence, the

court cannot engage in any detailed weighing of conflicting evidence: *Sun-Rype* at para. 68; *Fischer* at para. 43.

The approach to pre-certification document production in British Columbia

[35] The *CPA* does not expressly address pre-certification document production. A series of decisions of the Supreme Court of British Columbia, following on the enactment of the *CPA*, established the rule that parties do not have an automatic right to document discovery prior to certification. The concerns that animate the restricted right of pre-certification discovery include the delay and expense that would inevitably ensue from broad discovery rights, which would undermine the scheme of the *CPA*. Questions of proportionality and fairness are also relevant. Absent a limiting rule, parties could face potentially onerous extensive, and/or intrusive discovery obligations before the case had even been certified as a class action. Accordingly, the general rule has developed that pre-certification production of documents will only be ordered where it is necessary in order to inform the certification process: *Mathews v. Servier Canada Inc.* (1999), 65 B.C.L.R. (3d) 348 (S.C.) at 349–350; *Hoy v. Medtronic Inc.*, 2000 BCSC 1105 at para. 8; *Samos Investments v. Pattison*, 2001 BCSC 440 at para. 20; *Kimpton v. Canada (Attorney General)*, 2002 BCSC 67 at paras. 12–16; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663 at paras. 23–25.

[36] This general rule applies to pre-certification applications for production of a plaintiff's medical records: production is ordered only where the defendant demonstrates that it is necessary to inform the court at the certification hearing. The question of necessity is to be assessed by reference to the procedural purpose of a certification hearing, and the limited nature of the evidentiary burden on a plaintiff. See *Bartram* at paras. 11–16*,* 21; *Stanway* at para. 21; *Cantlie* at paras. 33–38; *Charlton* at paras. 42–44; and *Achtymichuk* at paras. 6–9. The reference in the caselaw to production only being ordered in "the exceptional case" does not create a different or higher standard. As explained by Justice Sharma in *Cantlie*, where the test of "necessary to inform the court at the certification hearing" is applied correctly,

"it will only be the exceptional case where such production is warranted": *Cantlie* at para. 43.

[37] The chambers judge thoroughly reviewed the relevant cases at paras. 42–65 of her reasons. It is not necessary to repeat her careful analysis. The governing approach in British Columbia is helpfully summarized in a more recent Chambers judgment of Justice Griffin in *Abbotsford (City) v. Mosterman*, 2022 BCCA 448 (Chambers). Justice Griffin noted that "[i]t is well established that document discovery does not precede certification applications": at para. 26. She observed that this limitation applies to both plaintiffs and defendants, and held that:

> [27] …It is precisely to avoid bogging down the certification process that a party requesting documents before certification must be sufficiently precise in their request and show that the documents will inform the certification process: *Pro-Sys BCSC* at paras. 25–29; *2007513 Alberta Ltd. v. Pet Planet Franchise Corp.,* 2022 ABCA 310 at para. 12; *Tetefsky v. General Motors Corp.,* 2010 ONSC 1675 at para. 38, aff'd 2011 ONCA 246.

[38] The following principles emerge from the British Columbia case law: (1) there is limited scope for document production prior to a certification hearing, (2) any application for pre-certification production must focus on the certification criteria, (3) the onus is on the applicant to show that document production is necessary to inform the court's assessment of the certification criteria, and (4) that onus cannot be discharged by bare assertions that documents may be relevant to the certification criteria—the applicant must be precise in their request and explain how the requested documents will inform the issues on certification. To that I would add that principles of proportionality and fairness to the parties may also be at play. The question of whether production should be ordered is contextual and fact-specific.

The approach to pre-certification document production in other jurisdictions

[39] The appellants argue on appeal that the approach to pre-certification production of medical records is "markedly different" in British Columbia than in other provinces. They suggest that there is a more restrictive approach in British Columbia than, in particular, Ontario and Saskatchewan, where applications for production are

more routinely granted. As I understand the appellants' argument, they suggest that this Court should endorse the less restrictive approach to document production taken in other jurisdictions.

[40] Cross-jurisdictional comparisons in this area must be undertaken with some caution. There are differences in the provisions of the various class proceeding statutes in force in other provinces, as well as differences in the procedural rules that govern civil proceedings such as the availability of cross-examination of affiants. Nonetheless, I can see no substantive difference in the principles applied by the courts in Ontario, Saskatchewan and British Columbia on applications for pre-certification document production.

[41] Some Ontario decisions, including *Brown v. Janssen Inc.*, 2015 ONSC 1434 [*Brown*], *Dine v. Biomet Inc.*, 2015 ONSC 1911 [*Dine*] and *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2015 ONSC 7821 [*Batten*], refer to the test for pre-certification production as one of "relevance" to the issues on certification. Other decisions, including a decision of the Ontario Court of Appeal, state the test as whether production is "necessary to inform the certification process": *Tetefsky v. General Motors Corp.*, 2011 ONCA 246 at para. 38; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 87 at para. 41. Regardless, I do not see any principled difference between the tests of "relevant to the issues on certification" and "necessary to inform the certification process". The approach in Ontario, as in British Columbia, is to view requests for pre-certification document production through the lens of the certification criteria, with due concern for the risk of allowing what is meant to be a purely procedural application to become enmeshed in premature consideration of the merits.

[42] The appellants place heavy emphasis on the judgment of Justice Perell in *Batten*. In *Batten*, Justice Perell ordered pre-certification disclosure of the plaintiffs' medical records in a proposed class action against the manufacturer of a blood-thinning drug known as Pradaxa. Justice Perell emphasized that class actions are "not monolithic", and that the relevance of a proposed representative plaintiff's

medical records on a certification motion will depend on the nature of the particular case being certified: at para. 27. Justice Perell considered it "obvious just based on the pleadings" that more medical evidence was required to confirm that the proposed representative plaintiffs had ingested Pradaxa and that "more extensive medical records are relevant to the certification criteria": at paras. 31 and 35. It is difficult to draw more general guidance from *Batten* in the absence of an explanation in the judgment of which specific certification criteria the records were considered relevant to, and how they were relevant.

[43] The issue of the pre-certification production of a plaintiff's medical records was addressed by Justice Belobaba in two decisions that are referred to in *Batten*: *Brown* and *Dine.*

[44] *Brown* involved a proposed class action against the manufacturers of anti-psychotic drugs that were alleged to have caused a condition known as gynecomastia or male breast growth. The plaintiffs consented to producing limited categories of medical records. The defendants sought the broader production of records relating to the diagnosis and treatment of gynecomastia. At para. 12, Justice Belobaba stated as follows in relation to the plaintiff's argument that the records were relevant to the common issue and preferability criteria:

> …If the defendant wants this court to order the production of additional medical record evidence because it "may be relevant" to a certification issue, it has to explain how. It cannot simply rely on the bald assertion that the additional evidence "may be relevant."…

[45] The application for production in *Brown* was, therefore, dismissed.

[46] In *Dine*, the plaintiff sought to certify a claim against the manufacturer of allegedly defective hip implants. Justice Belobaba noted the importance of judicial discretion to control the discovery process, holding that "if the class action is to remain viable as a vehicle for improved access to justice, it cannot be front end-loaded at the certification stage with evidence that is unnecessary and irrelevant": at para. 13. He described the Ontario rule on pre-certification disclosure as requiring "that the defendant must satisfy the court that the additional medical records are

relevant to the issues on the certification motion", and noted that the court had the power to control the discovery process to ensure "both relevance and fairness": at para. 12. Justice Belobaba concluded that the defendant had not established that the plaintiff's medical records were relevant to any certification requirement, other than the requirement of a representative plaintiff who would fairly represent the class. The plaintiff was accordingly ordered to produce a limited category of medical records to show that he had actually been implanted with the defendant's product: at paras. 33–35.

[47] These cases illustrate that courts may reach different outcomes in different cases, based on a fact specific analysis of how the records at issue relate to the certification criteria. However, they do not reflect any substantive differences in approach to pre-certification document production, which is consistently focussed on the matters in issue at a certification hearing.

[48] The current approach of the Saskatchewan courts appears to be consistent with the law in Ontario and British Columbia. In *Ahlquist v. GlaxoSmithKline Consumer Healthcare Inc.*, 2015 SKQB 192, Justice Elson undertook a comprehensive cross-jurisdictional review of the law on pre-certification document production. He dismissed the plaintiff's argument that courts have trended away from ordering pre-certification disclosure, noting that any unevenness in orders for disclosure is dictated by the specific facts of each case. At para. 85, he held that the caselaw on this issue reflects:

> …the basic principle that pre-certification disclosure and production must generally be relevant to the inquiry into the applicable certification requirements, subject only to considerations of overall fairness and, more recently, proportionality.

[49] The Alberta Court of Appeal has recently stated the test for pre-certification discovery in the same terms—the applicant must demonstrate that the discovery is necessary to inform the certification process: *2007513 Alberta Ltd. v. Pet Planet Franchise Corp.*, 2022 ABCA 310 at para. 12.

[50] The appellants say that even if the same basic principles are applied to applications for pre-certification discovery in other jurisdictions, courts in British Columbia exercise their discretion to order document production more conservatively. Even assuming the truth of this assertion could be demonstrated—a doubtful assumption given the fact-specific and contextual nature of the issue—I cannot see how it would provide a proper basis for appellate interference. This Court's role on this appeal is to determine whether the chambers judge has committed any reviewable error in the exercise of her discretion. In the absence of any such error, this Court cannot interfere with her exercise of discretion on the basis that the outcome of the application might have been different if had been brought before another judge in another province.

[51] For these reasons, I conclude that the appellants' reliance on the approach to pre-certification discovery in other jurisdictions does not assist their arguments on appeal.

The alleged errors of the chambers judge

[52] The appellants allege that the chambers judge erred in law in applying a test for pre-certification production of records that was too onerous. Alternatively, they say she made a number of errors in her exercise of discretion that warrant appellate intervention. I will address each error in turn.

(a) Did the chambers judge err in applying an overly-onerous test for the pre-certification production of records?

[53] The appellants argue that the chambers judge applied an overly-onerous test, based on her observation that pre-certification production is available only in "the exceptional case": Reasons at para. 42, 44–45. The appellants say this suggests that the chambers judge required the appellants to show that this case is exceptional, rather than merely establishing the relevance of the records to issues on certification. The appellants say the chambers judge was mistaken in holding that the production of records was limited to the 'the exceptional case'. Further, they say that her reasons reflect a misapprehension of the appellants' position in stating that

it was “common ground” that ‘the exceptional case’ standard governed: Reasons at para. 42.

[54] The appellants’ argument reflects a misreading of the chambers judge’s reasons. She did not say that the test for pre-certification document production required the appellants to demonstrate that this was an exceptional case. Instead, she held, in accordance with well-established law, that the appellants had to show that production of the records was necessary to inform the matters in issue at the certification hearing: Reasons at paras. 44–45, 54, and 68. The chambers judge did comment that pre-certification discovery will only be ordered in “the exceptional case”. This commentary does not reflect the imposition of a higher standard than the test of “necessary to inform the certification process”. Instead, it reflects the reality that where the test for pre-certification production of records is correctly applied, production will be warranted only in the exceptional case. This is the point that was made by Justice Sharma at para. 43 of *Cantlie*, quoted above, and is referenced by the chambers judge at para. 45 of her reasons.

[55] In my view, the chambers judge stated the correct test. In applying that test she was ultimately not persuaded that production of the respondents’ medical records was necessary to inform the certification process in this case: Reasons at para. 68.

(b) Did the chambers judge err in failing to give sufficient weight to the respondents’ own pleadings and evidence?

[56] The appellants argue that the chambers judge erred in failing to account for the fact that the respondents put their medical history in issue in their certification application material. Each of the three proposed representative plaintiffs swore affidavits listing various health symptoms they have experienced since receiving the Mentor Breast Implants, and attesting to their “suspicion” that they have developed BII. The facts set out in the respondents’ affidavits are then repeated in the notice of application. The appellants say that the certification hearing will not function as a meaningful screening device if they are not permitted to challenge the respondents’

assertions regarding their conditions, diagnoses and treatment. Thus, they say, production of the respondents' medical records is necessary to the proper performance of the court's gatekeeper role on certification.

[57] The appellants' argument ignores the fact that the merits of the respondents' individual claims are not in issue at the certification hearing. The certification hearing will not resolve the question of whether the respondents, or any other individual class member, developed any of the conditions listed in the proposed common issues as a result of receiving Mentor Breast Implants. The respondents' proposed common issues concern questions of general causation: whether the Mentor Breast Implants are unfit for their intended use due to their propensity to cause BIA-ALCL, ASIA/BII, and/or because they contain toxins. It appears that the respondents intend to rely on expert evidence—the affidavits of Drs. Zuckerman and Tervaert—to establish some basis in fact for the commonality of the proposed common issues.

[58] Under the respondents' proposed class definition, any person would be a member of the class if they were implanted with Mentor Breast Implants during the class period. Their proposed definition does not require any putative class member to establish that they developed one of the conditions listed in the proposed common issues. Two of the proposed representative plaintiffs have produced medical records to show that they were implanted with Mentor Breast Implants during the class period. The chambers judge held that additional records, beyond those already produced, would not assist in the determination of whether the requirements in s. 4(1)(b) [identifiable class of 2 or more persons] and s. 4(1)(e) [a representative plaintiff who would fairly and adequately represent the interests of the class] were met: Reasons at para. 55.

[59] At the hearing of this appeal, the appellants pressed their argument that the respondents' medical records are relevant to ss. 4(1)(b) and s. 4(1)(e) of the *CPA*. They argue that without the records there is no way to determine whether the respondents developed any of the conditions listed in the proposed common issues. They say that such a determination is necessary to the assessment of whether each

of the proposed representative plaintiffs has a “colourable claim” against the appellants as per *Hollick* at para. 19.

[60] I cannot see the relevance of *Hollick* at this stage of the proceeding. Paragraph 19 of *Hollick* addresses the requirement that the plaintiff demonstrate a rational connection between the class as defined and the asserted common issues. This is a question to be addressed at the certification hearing. The respondents’ proposed class is defined as persons who received the Mentor Breast Implants during the class period. There are no additional limiting criteria. It will be open to the appellants to argue at the certification hearing that the class definition as proposed is overbroad. The appellants can press the case that there is no rational connection between the class as defined and the proposed common issues unless the class is limited to persons who received Mentor Breast Implants *and* developed one of the conditions listed in the proposed common issues. The appellants do not require the respondents’ medical records to advance such arguments, which are premature at this stage.

[61] The same can be said of the appellants’ related argument based on the certification decision in *Felker v. Teva Branded Pharmaceutical Products R*, 2022 BCSC 1813 [*Felker*]. In *Felker*, the plaintiffs sought to certify a class action involving a prescription drug that was alleged to cause users to develop pigmentary maculopathy. In her certification decision, the judge in *Felker*, who I note is the chambers judge in the present case, determined that the proposed class should be confined to include only individuals with pigmentary maculopathy. Due to the narrowing of the class definition, there were no proposed representative plaintiffs who fit the class definition. The plaintiffs were granted leave to file an additional affidavit to identify a proposed class member who met the revised class definition.

[62] The appellants say that *Felker* illustrates that the respondents’ medical records are necessary to inform the certification requirements in ss. 4(1)(b) and (e). They will argue at the certification hearing that the proposed class definition is overbroad, and that it should be narrowed to include only those individuals who

received Mentor Breast Implants, and have one of the conditions listed in the proposed common issues. In that event, the appellants say, medical records concerning the respondents' medical complaints and diagnoses will be needed in order to assess whether they are in the class.

[63] This argument is also premature. It presumes the outcome of the certification hearing; that is, that the proposed class definition will be found to be overbroad. The suitability of the class definition is a matter to be addressed at the certification hearing. The appellants do not explain how the pre-certification production of the respondents' medical records are necessary to inform the court's consideration of the proposed class definition. Notably, the same argument advanced by the appellants on appeal was considered and rejected by the chambers judge. She held that "[w]hether the proposed class is sufficiently well-defined is an issue to be determined at the certification hearing", and she was not persuaded that the respondents' medical records would assist in that determination: Reasons at para. 56. I see no error in principle in the chambers judge's analysis.

[64] The appellants also argue that the chambers judge erred in finding that the 'some basis in fact' standard does not impose an evidentiary requirement on a plaintiff, and that it could be satisfied by assertions of fact. The appellants say that this error is demonstrated in the chambers judge's observation that the plaintiff must show "some basis in fact, and not "some basis in evidence": Reasons at para. 41. The appellants say this error led the chambers judge to misconstrue the significance of unsupported assertions of fact in the respondents' affidavits and notice of application.

[65] There is no question that, as *Hollick* makes clear, the plaintiff must demonstrate an evidentiary basis for certification: *Hollick* at para. 25; *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27. It would be an error for the chambers judge to hold otherwise. However, I do not agree with the appellants' interpretation of para. 41 of the reasons for judgment. In that paragraph, the chambers judge was drawing a distinction between evidence tending to prove the allegation of a fact, and evidence tending to prove the fact. That is, she was

distinguishing evidence going to matters in issue on a certification hearing and evidence going to the merits. Other passages from the reasons for judgment make it clear that the chambers judge correctly understood the evidentiary burden on respondents to establish 'some basis in fact' for the certification requirements: Reasons at paras. 34, 36, 64.

[66] For the foregoing reasons, I am not persuaded that the chambers judge was obliged to order the production of the respondents' medical records simply because their medical history was described in the certification application material. The test for pre-certification production of records is not that the content of the records is referenced in a certification application, but rather that production is necessary to inform the certification process. In finding that production was not warranted in this case, the chambers judge cited and applied the correct principles.

(c) Did the chambers judge err in misconceiving the expert evidence of the relevance of the respondents' medical records to issues on certification?

[67] The appellants next argue that the chambers judge misconceived Dr. Barr's "uncontroverted" expert evidence, and failed to consider his opinion that he required the respondents' medical records in order to opine on:

a) whether the proposed representative plaintiffs have any of the conditions specified in the proposed common issues;

b) whether the symptoms or complaints listed in their affidavits are one common cause or disease; and

c) whether their complaints have a common cause.

[68] The appellants say that the chambers judge failed to consider or address the appellants' arguments that these questions are relevant to the assessment of whether there are common issues (s. 4(1)(c) of the *CPA*) and whether any of the respondents are appropriate representative plaintiffs for the proposed common issues (s. 4(1)(e) of the *CPA*).

[69] The chambers judge did not fail to consider or address these arguments. Rather, she was not persuaded of their merit. As I have already reviewed, the chambers judge concluded that the production of additional medical records, beyond those that had been provided by two of the respondents to show that they had received Mentor Breast Implants, was not necessary to inform the court's consideration of the requirements of ss. 4(1)(b) and (e) of the *CPA*. For the reasons I have already stated, I see no error in the chambers judge's analysis.

[70] In relation to commonality, the chambers judge was persuaded by the logic of Justice N. Smith's decision in *Bartram*, which she found raised similar issues. In *Bartram*, Justice N. Smith addressed expert evidence similar to Dr. Barr's evidence in the present case. Among other things, the expert in *Bartram* deposed that he required the pre-certification production of medical records in order to determine the cause of the plaintiffs' cardiovascular injuries, and offer opinions about possible alternative causes. In dismissing the application for production, Justice N. Smith noted that it was open to the defendants to adduce evidence about possible alternative causes without having the individual medical records of the proposed representative plaintiffs. He expressed concern that the introduction of individual records at this stage would be more likely to "improperly confuse" the issues: at para. 21. The chambers judge adopted this reasoning.

[71] At the hearing of this appeal, the appellants were unable to particularize how Dr. Barr's opinions on the respondents' individual medical records would assist the court in resolving the matters in issue on the certification hearing. It appears likely that the diagnoses of the medical conditions of putative class members will be controversial. This is not a controversy to be resolved on a certification hearing. The appellants will no doubt wish to adduce evidence to show that the symptoms reported by the respondents could have multiple potential causes, in order to demonstrate that there are no common issues or that individual issues overwhelm the common issues. However, they do not need the respondents' medical records in order to advance such arguments. Indeed, Dr. Barr's affidavit reviews at length the various alternative, and common, causes that he opines might explain the

respondents' reported complaints and symptoms. The appellant's arguments can be effectively advanced at a certification hearing without inviting a merits-based assessment of the cause of the respondents' particular symptoms through ordering the pre-certification production of their medical records.

[72] More to the point, Dr. Barr's evidence was addressed by the chambers judge. She explained her reasons for rejecting his opinions on the necessity for pre-certification production of medical records. The chambers judge was properly concerned with ensuring that the certification hearing did not "become mired down in the merits of individual claims": Reasons at para. 68. I see no error in principle in her treatment of Dr. Barr's evidence.

(d) Did the chambers judge err in concluding that the respondents' medical records are relevant to individual issues on the merits, and therefore only relevant after the certification stage?

[73] The appellants argue that the chambers judge erred in assuming that evidence relevant to the individual merits of the respondents' claims could not also be relevant to, and necessary for, an assessment of the certification criteria.

[74] The chambers judge made no such error. Nowhere in the reasons does the chambers judge state that evidence cannot be relevant to both the certification hearing and the merits of individual claims. Her conclusion, rather, is that the pre-certification production of medical records was not necessary to inform the certification process in this case. I have already reviewed at length the appellants' various arguments as to why the chambers judge is said to have erred in her analysis in reaching this conclusion. For the reasons previously stated, the appellants' arguments lack merit.

(e) Did the chambers judge err in failing to take into consideration that the respondents' affidavits do not comply with s. 5(5)(b) of the CPA?

[75] The appellants' final ground of appeal is that the chambers judge erred in failing to address their arguments based on s. 5(5)(b) of the *CPA*. Section 5(5)(b) imposes an obligation on each party to a certification application to file an affidavit

swearing that the party knows “of no fact material to the application” that has not been disclosed. The appellants say that s. 5(5)(b) places an onus on a party to disclose the facts that have been put into issue on the certification application, including an onus to disclose documents that may support or refute factual assertions in a certification application.

[76] I do not agree with the appellants’ interpretation of the effect of s. 5(5)(b). This interpretation would inevitably lead to onerous document production obligations on all parties to a certification application, undermining the purposes of the *CPA*. Section 5(5)(b) requires each party only to verify that all facts “material to the application” have been disclosed. The phrase “material to the application” must be understood by reference to the scope of the certification hearing, which is about the form of action and not the merits of the underlying claim: *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794 at para. 10. Section 5(5)(b) does not require a proposed representative plaintiff to produce medical records that are not necessary to inform the issues on certification.

[77] The chambers judge did not err in failing to interpret s. 5(5)(b) as imposing an obligation on the respondents to produce their medical records.

Disposition

[78] The appellants have demonstrated no error by the chambers judge in her exercise of discretion in this case. I would dismiss the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Griffin"