# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nippon Yusen Kabushiki Kaisha v. Ewert,* 2023 BCCA 142

Date: 20230403
Dockets: CA48713; CA48715; CA48716

Docket: CA48713

Between:

**Nippon Yusen Kabushiki Kaisha, NYK Line (Canada), Inc., and NYK Line (North America) Inc.**

Appellants
(Defendants)

And

**Darren Ewert**

Respondent
(Plaintiff)

And

**Kawasaki Kisen Kaisha, Ltd., "K" Line America, Inc., EUKOR Car Carriers, Inc., Wilh. Wilhelmsen Holding ASA, Wilh. Wilhelmsen ASA, Wallenius Wilhelmsen Logistics Americas, LLC, Wallenius Wilhelmsen Logistics AS, Wallenius Lines AB, WWL Vehicle Services Canada Ltd., Höegh Autoliners AS, and Höegh Autoliners, Inc.**

Respondents
(Defendants)

- and -

Docket: CA48715

Between:

**Kawasaki Kisen Kaisha, Ltd., and "K" Line America, Inc.**

Appellants
(Defendants)

And

**Darren Ewert**

Respondent
(Plaintiff)

And

**Nippon Yusen Kabushiki Kaisha, NYK Line (Canada), Inc., NYK Line (North America) Inc., EUKOR Car Carriers, Inc. Wilh. Wilhelmsen Holding ASA, Wilh. Wilhelmsen ASA, Wallenius Wilhelmsen Logistics Americas, LLC, Wallenius Wilhelmsen Logistics AS, Wallenius Lines AB, WWL Vehicle Services Canada Ltd., Höegh Autoliners AS, and Höegh Autoliners, Inc.**

Respondents
(Defendants)

- and -

Docket: CA48716

Between:

**EUKOR Car Carriers, Inc. Wilh. Wilhelmsen Holding ASA, Wilh. Wilhelmsen ASA, Wallenius Wilhelmsen Logistics Americas, LLC, Wallenius Wilhelmsen Logistics AS, Wallenius Lines AB, and WWL Vehicle Services Canada Ltd.**

Appellants
(Defendants)

**Darren Ewert**

Respondent
(Plaintiff)

And

**Nippon Yusen Kabushiki Kaisha, NYK Line (Canada), Inc., NYK Line (North America) Inc., Mitsui O.S.K. Lines, Ltd., Mitsui O.S.K. Bulk Shipping (U.S.A.), Inc., Kawasaki Kisen Kaisha, Ltd., "K" Line America, Inc., Nissan Motor Car Carrier Co., Ltd., World Logistics Service (USA) Inc., Höegh Autoliners AS, and Höegh Autoliners, Inc.**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated November 1, 2022 (*Ewert v. Nippon Yusen Kabushiki Kaisha*, 2022 BCSC 1908, Vancouver Docket S134895).

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| Place and Date of Hearing: | Vancouver, British Columbia<br>February 16, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>April 3, 2023 |

**Written Reasons by:**
The Honourable Mr. Justice Harris

**Concurred in by:**
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

***Summary:***

*The appellants, defendants in three separate class action proceedings in BC, Ontario, and Quebec, challenge an order dismissing their application to consolidate the actions into a Single Common Issue Proceeding ("SCIP") in BC. The appellants claim the chambers judge erred in principle by considering factors relevant to a forum non conveniens analysis instead of using the legal test for amending certification orders pursuant to the Class Proceedings Act [CPA]. They also claim the judge erred by placing weight on discovery rules in respective provinces that were not in evidence, and by finding prejudice to potential umbrella purchaser members of the Ontario action.*

*The respondent plaintiff applied to quash the appeal for failure to seek leave, raising the preliminary issue of whether this Court has jurisdiction to hear the appeal. Held: This Court has jurisdiction to hear the appeal, but the appeal is dismissed. This Court has jurisdiction to hear the appeal pursuant to s. 36 of the CPA. On the merits of the appeal, the chambers judge was alive to the relevant factors and considerations necessary to decide the application. He found principled reasons for dismissing the BC SCIP, which he properly balanced against factors weighing in favour of granting the application, coming to a reasoned and sound conclusion on the evidence before him.*

**Reasons for Judgment of the Honourable Mr. Justice Harris:**

## Introduction

[1] The appellants appeal an order dismissing their application for a Single Common Issue Proceeding ("SCIP"), the effect of which would consolidate the trial of common issues in three class actions in BC, Quebec, and Ontario into a single class proceeding in BC. In order to achieve this objective, the appellants, who are defendants in the respective class proceedings, applied to amend the order in BC certifying a class of BC residents. The proposed amendments would have expanded the class to create both a "National Class" consisting of class members in the certified BC action as well as the proposed class members in the uncertified Ontario Action (except for umbrella purchasers, defined below), and a "Quebec Class" consisting of class members in the authorized Quebec action. The amendments would have also expanded the certified common issues to integrate those common issues certified and authorized in the BC and Quebec actions, respectively, with the issues proposed as common issues in the Ontario proceeding. The order sought

was conditional on orders in Quebec and Ontario staying the class proceedings there to facilitate the SCIP in BC.

[2] In advance of the hearing of these appeals on their merits, the respondent applied to quash the appeals, contending that leave to appeal was required, but not sought.

[3] These appeals accordingly engage two principal issues. The first is whether this Court has the jurisdiction to hear them. This issue arises from the operation of s. 36 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], which identifies those types of orders made under the *CPA* for which a right of appeal lies. The second engages the substantive decision under appeal; namely, whether the judge erred in principle in dismissing the application.

[4] For the reasons that follow, I conclude that the Court has jurisdiction to hear the appeal, but would dismiss it.

## Background

[5] Before addressing the two principal issues, it is important to set out the relevant procedural history of this appeal in the statutory context.

[6] This class proceeding was ultimately certified as a BC-only class. It does not include any non-BC residents.

[7] The order the appellants applied for sought to amend the existing BC certification order as follows:

> a) The Class definition be expanded to create a “National Class” consisting of class members in the Certified British Columbia Action and the proposed class members in the uncertified Ontario Action (except for umbrella purchasers) and a “Quebec Class” consisting of class members in the authorized Quebec Action.

b) The certified common issues be amended to integrate the certified common issues in the British Columbia Action and the authorized common issues in the Quebec Action, which will include:

   i. the common issues relating to the *Competition Act* statutory claim, which are applicable to both the National Class and the Quebec Class;

   ii. the common issues relating to the common law tort and restitution claims, which are applicable to only the National Class;

   iii. the common issues relating to the *CCQ* claim, which are applicable to only the Quebec Class;

   iv. the common issue relating to the punitive damages, which applicable to only the National Class; and

   v. the common issues relating to interest and distribution, which are applicable to both the National Class and the Quebec Class.

c) The representative plaintiff in the British Columbia Action would be appointed as representative plaintiff of the National Class and the representative plaintiff of the Quebec Action would be appointed as representative for the Quebec Class.

d) A bilingual Canada-wide notice would be published at a time and manner to be approved by this Court as well as the Quebec Superior Court (the "Quebec Court") and the Ontario Superior Court of Justice (the "Ontario Court").

[8] The appellants made complementary applications in the Quebec Superior Court and the Ontario Superior Court of Justice to facilitate the SCIP in BC, asking for a stay of proceedings in those jurisdictions pending resolution of a SCIP by the BC Supreme Court. The operation of the proposed order in BC was conditional on the stay of proceedings in the other jurisdictions. The appellants sought to have the applications heard at a joint hearing, or to have the courts confer about the issues in accordance with the principles set out in the *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions* (the "Judicial Protocol").

[9] At a Judicial Management Conference, the BC case management judge directed that the BC SCIP application not be set down until after the Quebec Court had decided whether to stay the action there pending the hearing of this application. On March 15, 2022, the Quebec Court heard the Quebec SCIP application which sought to stay the Quebec action until the BC court had made a final determination

of a BC SCIP. On April 19, 2022, the Quebec Court dismissed the Quebec SCIP application, and ruled that the Judicial Protocol did not apply to the Quebec action: *Option Consommateurs c. Nippon Yusen Kabushiki Kaisha,* 2022 QCCS 1338. The appellants sought and were granted leave to appeal the dismissal of the Quebec application. That appeal was heard on March 10, 2023, after the hearing of this appeal, and is currently under reserve. The BC SCIP application below was heard and decided with the knowledge that the Quebec Superior Court had refused the stay, but that leave to appeal had been granted.

[10] The appellants' application proceeded in BC as a stand-alone application, and not as a joint hearing or one engaging any conferral between the courts under the Judicial Protocol.

[11] The statutory basis for the order the appellants sought in the court below is unclear. The appellants' underlying application to amend the certification order relied on ss. 4(3), 4(4), 4.1, 8(3), 12, and 44(2) of the *CPA*, and the inherent jurisdiction of the court. It was brought, as can be seen above, as an application to amend an existing certification order, not directly as an application for a replacement certification order. There is, I think, some force to the contention that the order sought in substance goes beyond seeking an amendment of an existing order, so fundamental is its effect on the existing order. But I will put that issue aside for the time being.

[12] Section 8(3) of the *CPA* provides the court with the authority to amend a certification order on the application of a party or class member. Section 8 defines what must be included in a certification order. This includes a definition of the class, the appointment of a representative plaintiff, an explanation of the nature of the claims and relief, and a description of the common issues.

[13] Section 44(2) of the *CPA* is a transitional provision. It was enacted in 2018 as part of amendments to the *CPA* intended to facilitate multi-jurisdictional class proceedings. It reads:

> 44 ...
>
> (2) If a proceeding was certified as a class proceeding before the coming into force of this section, the court may, on application by a party to the proceeding,
>
> (a) amend the certification order so that persons who would have been members of the class, but for not being resident in British Columbia, are included as members of the class, and
>
> (b) order that notice of the amended certification order be given to members of the class who are not resident in British Columbia.

[14] As is discussed further below, the parties disagree as to whether s. 44(2) applies to the facts here.

[15] The 2018 amendments also introduced ss. 4(3), 4(4) and 4.1 of the *CPA*, which were enacted to address class proceedings outside of BC, and the nature of orders that may be made in multi-jurisdictional class actions.

[16] Section 4(3) of the *CPA* requires the BC court to consider whether a class proceeding in the province which involves the same or similar subject matter as proceedings elsewhere in Canada should have all or some of the claims and common issues dealt with by the BC court or elsewhere. Section 4(4) outlines the guiding objectives and factors the court must consider when making that determination.

[17] Those sections read:

> 4 ...
>
> (3) 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.

> (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.

[18] Section 4.1 permits applications to certify multi-jurisdictional class proceedings. Although referred to in the notice of application, and briefly referred to in the factum, it did not ground a primary submission before us. As I understand the gravamen of the appellants' position, the application was to amend the existing application, rather than a free-standing or fresh application for a new multi-jurisdictional class proceeding.

[19] Section 12 of the *CPA* grants the court the authority to determine the conduct of proceedings:

> The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[20] Although inherent jurisdiction was relied on, no substantive submissions were made about it as providing a jurisdictional basis for the application, probably in light

of the fact that inherent jurisdiction had little, if any, role to play given the extent of the statutory rules.

**Does this Court have jurisdiction to hear the appeal?**

[21] The issue of whether this Court has the jurisdiction to hear the appeals engages three sub-questions.

[22] First, were the appellants required to seek leave to appeal, and, having not done so, should their appeals be quashed? This was the position formally advanced by the respondent on his application to quash. Second, does the order the appellants appeal from fall within s. 36 of the *CPA*, meaning there exists an appeal as of right? Third, if it does not, does s. 36 of the *CPA* operate as an implied prohibition extinguishing an appeal that might otherwise lie under the general jurisdiction of the Court found in the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*CAA*]?

**The Court's appeal jurisdiction: general principles**

[23] As a matter of first principle, this Court is a statutory court and its appeal jurisdiction is defined by statute. The first source of appellate jurisdiction is found in the *CAA*. Section 13 of the *CAA*, (formerly, s. 6) provides, *inter alia,* a right of appeal from an order of a judge of the Supreme Court. The order under appeal is, of course, such an order. The question is whether the *prima facie* right to appeal has been displaced by another enactment.

[24] Section 13 appeal rights are qualified by s. 13(3) of the *CAA* which reads:

> If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal from an order or matter referred to in subsection (1), that enactment prevails.

[25] The *Court of Appeal Rules,* B.C. Reg. 120/2022 [*Rules*], stipulate when an application for leave to appeal is required:

> 12 A party bringing an appeal or cross appeal must apply for leave to appeal if any of the following apply:
>
> (a) the order being appealed is a limited appeal order;

> (b) an enactment, other than the Act, requires leave from the court or a justice to appeal or cross appeal the order being appealed;
>
> (c) the party bringing the appeal or cross appeal does not know whether leave of the court is required to bring the appeal or cross appeal.
>
> [Emphasis added.]

[26] Finally, s. 36(1) of the *CPA* provides for appeals from specified orders:

> 36 (1) Any party may appeal to the Court of Appeal from
>
> (a) an order certifying or refusing to certify a proceeding as a class proceeding,
>
> (b) an order decertifying a proceeding,
>
> (c) a judgment on common issues, and
>
> (d) an order under Division 2 of this Part, other than an order that determines individual claims made by class or subclass members.

**Is leave to appeal required?**

[27] As noted above, the respondent applied to quash the appeals, contending that leave to appeal was required, but not sought. The respondent concedes that the order under appeal is not a limited appeal order and so does not fall under R. 12(a) of the *Rules*. The respondent's primary submission in support of the requirement to seek leave is that the jurisdictional basis of the order was uncertain, and, therefore, R. 12(c) of the *Rules* required an application.

[28] There is no merit to this argument. In my view, R. 12(c) goes no further than requiring a leave application in circumstances where a party does not know if leave is required because they do not know whether the proposed appeal is from a limited appeal order or not, or there is uncertainty about whether another enactment (here the *CPA*) requires leave.

[29] Neither of these conditions apply here. As noted, the respondent concedes that the order under appeal is not a limited appeal order that requires leave. There is no uncertainty in respect of that matter. Further, there is no uncertainty about whether an appeal under the *CPA* requires leave. Nothing in that statute imposes a

leave requirement. Hence the only uncertainty is about whether a right of appeal exists at all, not whether an appeal lies if leave is granted. Accordingly, R. 12(c) has no application.

[30] But even if that were incorrect and an application for leave were required, it is far from obvious that the appropriate remedy is to quash the appeal for a procedural misstep. Rather, a likely outcome is that the division would consider whether leave should be granted as a condition of, or in conjunction with, hearing the appeal.

**Is there a right of appeal arising from s. 36(1) of the *CPA*?**

[31] The respondent submits that the order under appeal does not fall within the orders listed under s. 36(1) of the *CPA*, in respect of which a right of appeal is conferred. This is so, as I understand it, because an order refusing to amend a certification order is not an order certifying or refusing to certify a class proceeding for the purpose of s. 36(1)(a), and none of the other sections providing a right of appeal apply.

[32] The respondent says that s. 36(1) operates as an exhaustive code. If an order is not listed, it cannot be appealed. Read in conjunction with s. 13(3) of the *CAA*, s. 36(1) of the *CPA* operates as an enactment implicitly providing there is no right of appeal except for the orders listed. Hence, the combined effect of the sections is to oust the general jurisdiction to appeal orders of a judge of the Supreme Court.

[33] In my view, the short answer to this submission is that, for jurisdictional purposes, the order below should be treated as one dismissing a proposed amendment to an existing certification order. As such, it falls within s. 36(1)(a) of the *CPA*. I am satisfied that, on a proper reading of s. 36(1)(a), the refusal to amend the certification order was substantively a refusal to certify the class proceedings on different terms, for example, by changing class membership, the common issues and the relief sought. The language of s. 36(1)(a) is broad enough to capture this application, at least to the extent it relied on s. 8(3) of the *CPA*. As such, this order under s. 8(3) falls within s. 36(1)(a) and, accordingly, the *CPA* confers a right of appeal.

[34] Interpreting s. 36(1)(a) to apply only to an application by a plaintiff to certify a class proceeding, or by a defendant under s. 3 of the *CPA* (which was not relied on by the appellants), is overly restrictive. Section 8 of the *CPA* identifies the requirements of a certification order. As noted above, amongst other matters, a certification order must: describe the class; appoint a representative plaintiff; state the nature of the claims asserted on behalf of the class; specify the relief and the common issues; and address opt-out mechanisms. Amendments of certification orders can profoundly affect the metes and bounds of a class proceeding, and can be just as significant to the parties as an original order. It would be anomalous if only an original order to certify or refuse to certify was appealable under s. 36(1)(a), but not orders reconfiguring, by amendment, the terms and conditions of the certification order as the proceeding progresses. In order to further the purposes of the *CPA*, and applying the modern approach to statutory interpretation, s. 36(1)(a) is broad enough to confer jurisdiction on this Court to entertain the appeal.

[35] Above, I acknowledged force to an argument that the application before the court was so radical in its effect on the existing certification order that in its true nature it should properly be conceived of as a fresh certification order. Accordingly, I am persuaded that, for jurisdictional purposes, the application was sufficiently grounded in s. 8(3) that a right of appeal exists. As a result of this conclusion, I do not need to address the jurisdictional issue from the perspective of whether s. 44(2), s. 4.1 or s. 4(3) and (4) of the *CPA* also confer a right of appeal under s. 36.

**What is the effect of s. 36(1) of the *CPA*?**

[36] While what I have said is sufficient to dispose of the application to quash for lack of jurisdiction, it is worthwhile to say something more about the effect of s. 36(1) of the *CPA*. Section 36(1) must have some legal effect when read in light of s. 13 of the *CAA*. If any order made by a Supreme Court judge under the *CPA* was appealable under s. 13, the section would be otiose.

[37] This Court had the opportunity to consider this issue in *Strohmaier v. K.S.*, 2019 BCCA 388 [*Strohmaier*]. There, the Court, in connection with whether a carriage order could be appealed, observed at para. 34:

> The same applies in British Columbia. In my view, s. 36(1) of the *Class Proceedings Act* addresses appeal rights only in respect of specified orders made after certification has been either granted or refused. It does not restrict appeal rights in respect of orders not specifically addressed in the statute, particularly orders made prior to certification—many that are the type made in other kinds of litigation. [Emphasis added.]

[38] From this, I take it that authority in this Court supports the view that if the order is specifically addressed in the statute, but is not listed in s. 36(1) of the *CPA*, then no appeal will lie under s. 13 of the *CAA*. On the other hand, if an order made in a class proceeding is not specifically addressed, then an appeal will lie under s. 13 of the *CAA*. As the court noted in *Strohmaier*, many of these orders are of a type made in other litigation. Finally, if the type of order is listed in s. 36(1) of the *CPA*, the order is appealable.

### Disposition

[39] I would dismiss the application to quash.

## Did the chambers judge err in principle in refusing the SCIP application?

### Procedural background

[40] In order to understand the substantive issues on appeal, it is necessary to provide further details of the background to these proceedings to understand how the judge exercised his discretion to dismiss the application.

[41] As stated above, the order under appeal concerns three separate class action proceedings in BC, Ontario, and Quebec. The BC action has been certified and the Quebec action authorized (in BC parlance, certified). The Ontario action, which contains a proposed national class, has not proceeded to a certification application.

[42] Class membership does not overlap. The BC action relates only to a BC class. The Quebec action relates only to a Quebec class. The Ontario action, if

certified, would include both Ontario residents and residents in Canada outside BC and Quebec. As well, class definition differs as between BC and Quebec. The Quebec claim includes so-called “umbrella purchasers” described below, whereas umbrella purchasers were not certified as part of the BC action.

[43] The appellants are vehicle carriers who transport cars, trucks, and other equipment across oceans to Canada using specialized cargo ships referred to as roll-on/roll-off (“RoRo”) vessels. The three actions each allege that class members were harmed by the same alleged international conspiracy regarding the supply of RoRo vehicle shipping services (“RoRo Services”) between February 1, 1997, and December 31, 2012.

[44] Canadian distributors first take possession of vehicles transported to Canada via RoRo Services at ports in BC or, for trans-Atlantic shipments, Nova Scotia. These distributors sell the vehicles to dealers, who, in turn, sell the vehicles to end-users located throughout the country. The appellants are alleged to have overcharged foreign vehicle manufacturers for RoRo Services. This inflated price was passed on to Canadian direct and indirect purchasers who, in turn, overpaid for their vehicles. The class members of all three actions include stakeholders throughout this supply chain who are alleged to have paid inflated prices for the vehicles.

[45] A sub-group of class members, referred to as “umbrella purchasers”, are direct purchasers of RoRo Services from non-defendant providers of RoRo Services, as well as purchasers or lessees of vehicles transported to Canada by non-defendant RoRo Services.

[46] In the BC action, the certification order sets out common issues related to alleged breaches of ss. 45 and 36 the *Competition Act,* R.S.C. 1985, c. C-34; alleged common law tort and restitution claims predicated on alleged violations of the *Competition Act*; and one common issue in respect of the tort of predominant conspiracy. The Quebec authorization judgment includes the same issues related to alleged breaches of ss. 45 and 36 of the *Competition Act*, as well as common issues

related to alleged breaches of the fault requirement in Article 1457 of the *Civil Code of Québec*, C.Q.L.R. c. CCQ-1991 [*CCQ*].

[47] It is worthwhile to note how the proceedings have unfolded in different provinces. Initially, certification was sought in BC. It was refused. The focus then shifted to Quebec, where the action was authorized. This Court reversed the refusal to certify the BC action, except for the claim of the umbrella purchasers. The respondent says that, since the initial refusal to certify in BC, the plaintiffs have focused on advancing their case in Quebec, and have taken steps to progress the litigation there. The only action they have taken in BC relates to the resolution of an unsuccessful jurisdictional challenge by a defendant, with whom they now have a settlement in principle. The respondent's position, supported by all of the representative plaintiffs, is that the litigation should proceed by way of a SCIP in Quebec, an offer which the appellants have not accepted. Failing agreement on a SCIP, the respondent's asserted position is that the plaintiffs would proceed to trial in Quebec, and then seek to have any judgment in favour of the Quebec class recognized, or be given effect to, elsewhere.

**The chambers judgment**

[48] After setting out the positions of the parties, the judge began his analysis with an overview of relevant legal principles. The judge noted how the general principle of avoiding duplication in multi-jurisdictional class actions should not override the question of whether there are facts or law that make a particular action different from others. He also noted that a plaintiff has a *prima facie* entitlement to their own forum, and that the onus is on the defendant to clearly establish that another forum has a significant advantage over the plaintiff's selected forum: at paras. 27–32.

[49] In the judge's view, there were two relevant considerations which justified dismissing the application. The first was the plaintiffs' consortium's desire to pursue the claim in Quebec, in part because it was said that jurisdiction's document production requirements were beneficial to them. The second was that the appellants' proposal to proceed with a BC SCIP prejudiced the interests of umbrella

purchasers in the proposed Ontario class. The BC SCIP, as proposed by the appellants, would exclude these umbrella purchasers, meaning their claims would have to be adjudicated outside of the BC SCIP: at paras. 33–36.

[50] The judge was unconvinced by the appellants' argument that BC was a more appropriate venue for geographic reasons. He was of the opinion that the location of the port of arrival was irrelevant to questions of the appropriate venue for the proceedings, noting that the vehicles were ultimately distributed across the country: at para. 39.

[51] The judge was satisfied the plaintiffs should presumptively be able to choose the forum in which the litigation proceeds, and that the appellants had not proven the existence of a clearly more appropriate alternative, nor that another forum has a significant advantage over the plaintiffs' selected forum. The judge concluded by noting that, in his opinion, an obvious solution was to proceed with a Quebec SCIP, a proposal which "for undisclosed reasons" the appellants had rejected: at paras. 41–43.

[52] Overall, he remained unpersuaded that proceeding with a SCIP in BC was appropriate in the circumstances, and in the face of the respondent's proposal to consent to a SCIP in Quebec.

**Issues on appeal**

[53] The issues before this Court are as follows:

i) whether the judge erred by failing to consider and apply the legal tests for amendments to certification orders pursuant to the *CPA*;

ii) whether the judge erred by applying standards and concepts pertinent to an application to decline jurisdiction of *forum non conveniens* on an application to amend the BC certification order;

iii) whether the judge erred by giving significant weight to differences in provincial discovery rules asserted by the plaintiff that were not in evidence; and

iv) whether the judge erred in finding prejudice to umbrella purchaser members of the putative class in the Ontario Action.

## Analysis

[54] The order under appeal is a discretionary order and, as such, is entitled to a high degree of deference: *Strohmaier* at para. 20; *N&C Transportation Ltd. v. Navistar International Corporation,* 2022 BCCA 164 at para. 16 [*Navistar*].

### Positions of the parties

[55] I begin by noting that, in this case, both sides acknowledge that a SCIP is the preferable way to resolve the common issues, but disagree about where it should take place. A SCIP in Quebec is only possible under Quebec law with the consent of all parties. The appellants have not consented and say that, in any event, while certain defendants who have settled in principle remain parties, their consent is necessary and has not been forthcoming.

[56] The respondent objects to a SCIP in BC, saying that the plaintiffs' consortium is presumptively entitled to advance their case in their preferred jurisdiction. The respondent says Quebec is preferable, because the authorized action there includes umbrella purchasers. The respondent is also of the view that Quebec discovery rules, at least as they relate to categorization, are more advantageous to the plaintiffs' consortium or, perhaps, more onerous on the defendants than the BC rules. In his view, the common goal of a SCIP could be readily accomplished if the appellants were to consent to one in Quebec.

[57] The core submission advanced by the appellants on the merits of the appeal is that the judge made a reversible error by failing to exercise his discretion in accordance with the language of ss. 8(3) and 44(2) of the *CPA,* together with the objectives and principles related to multi-jurisdictional proceedings set out in ss. 4

and 4.1 of the *CPA*. Instead, he erroneously viewed the SCIP application through the legal framework applicable to the common law doctrine of *forum non conveniens*. The appellants contend these errors displace the deference otherwise owed to what is acknowledged to be a discretionary order.

[58] The respondent contends that the sections relied on do not authorize the order sought, but submits that, in any event, the judge properly considered the factors relevant to deciding whether a SCIP should be ordered in BC. Accordingly, there is no basis to interfere with his exercise of discretion.

[59] The respondent says that s. 44(2) of the *CPA* does not apply to the facts in the case at bar. It is a transitional provision that applies only if a class proceeding had been started before the 2018 amendments to the *CPA*, which allowed national class proceedings in BC to be certified on an opt-out basis, rather than an opt-in: see *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at para. 98. Other cases, such as *Navistar*, also confirm that the amendments permit plaintiffs who had previously started a BC class proceeding to expand the class and add related causes of action. Here, the action was certified after the amendments, and the class proceeding relates only to a BC class. The respondent claims that, for both of those reasons, s. 44(2) has no application in the circumstances of this case and, further, there is no authority supporting the proposition that this section permits defendants in a BC-only certified class proceeding to expand the action into a multi-jurisdictional class proceeding.

[60] Similarly, the respondent contends that there is no authority supporting the use of s. 8(3) of the *CPA*, the provision permitting the amendment of a certification order, as the statutory basis for the relief sought in these circumstances. Further, in the respondent's view, the case management powers found in s. 12 of the *CPA* cannot be relied on to make such significant changes to a BC-only class proceeding. The proposed order profoundly alters the nature of the certified proceeding, and is not merely an exercise of ancillary case management powers used expeditiously to further the certified proceeding.

[61] The respondent says, equally, s. 4(3) and (4) of the *CPA* cannot serve as the statutory basis for the order sought. This is not a situation where a proposed or actual multi-jurisdictional class proceeding has been commenced elsewhere in Canada, as is contemplated by these provisions.

[62] Finally, the respondent says that this application cannot be seen as an application to certify a multi-jurisdictional class proceeding under s. 4.1, if the section is available to defendants. He says that the material before the court does not satisfy the criteria for certifying a class proceeding as required in such an application.

[63] As I observed above, although the appellants relied on s. 4.1 in their notice of application below, and briefly in their factum, the primary basis of their argument relies on ss. 8(3) and 44(2), and the criteria in s. 4, together with the case management powers under s. 12. As well, neither below nor here have they attempted to rely on s. 3 of the *CPA*, which contemplates a defendant's application to certify a class proceeding in certain circumstances.

**Did the judge use the wrong legal framework?**

[64] There is, I think, considerable force to the respondent's argument that s. 44(2) is a transitional provision that permits multi-jurisdictional class proceedings certified before the 2018 amendments to be converted from an opt-in class to an opt-out. This proceeding was certified after the amendments, and relates only to a BC class. The section provides no obvious basis for an application by the appellants in these circumstances.

[65] Moreover, similarly, s. 4(3) and (4) have no clear application where the application is not for a determination of whether a multi-jurisdictional class proceeding should be resolved in another jurisdiction elsewhere in Canada. There was no application by the respondent or the representative plaintiffs in the Ontario or Quebec actions to have the court order that the proceedings be resolved in Ontario or Quebec as part of a multi-jurisdictional class proceeding of a SCIP in Quebec. It is also not clear whether the plaintiff's proposal for a SCIP in Quebec qualifies as a proposed multi-jurisdictional class proceeding commenced elsewhere in Canada.

The proposal is to convert a single jurisdiction class proceeding into a SCIP. Finally, no one is suggesting that Ontario is the preferable forum for resolving common issues, even if the existing proceeding qualifies as a proposed multi-jurisdictional class proceeding.

[66] Having said that, there is a clear public interest in courts in different provinces coordinating class proceedings with substantially the same issues and parties brought in multiple jurisdictions. Such coordination promotes judicial efficiency and avoids duplication and inconsistent verdicts. Likewise, comity requires respect for the jurisdiction of other provinces. These pressing imperatives have led to legislative reform, and also the adoption of the Judicial Protocol.

[67] I am sympathetic to the compelling and eloquent submission advanced by counsel for the appellants that courts must find a way to promote efficiency and harmony to avoid the risks and expense of uncoordinated class proceedings in multiple jurisdictions. I did not understand counsel for the respondent to dissent from that proposition.

[68] I have concluded it is not necessary to determine, conclusively, the statutory basis upon which the court below could make the order sought. I am prepared to assume, without deciding the substantive point, that such an order is available in the right case pursuant to s. 8(3) of the *CPA*, informed by other provisions of the statute as they inform its object and purpose.

[69] Assuming, therefore, there is a statutory basis to determine whether to make an order of the type sought, I see no error in the exercise of the judge's discretion to dismiss the application and, accordingly, no basis for appellate intervention.

[70] I am also persuaded that the considerations found in s. 4(4)(a) and (b) of the *CPA* are relevant to a determination of whether a SCIP is required and, if so, whether it is preferable that the SCIP be in BC. At the least, these considerations identify the type of factors one would expect to structure the analysis, even if they are not statutorily mandated. For the purposes of the discussion that follows, I am

prepared to accept, as the appellants urge, that the factors identified in s. 4(3) and (4)(a) and (b) articulate relevant considerations in deciding whether a SCIP should be ordered in BC. In my view, those subsections capture considerations which further the objectives of the *CPA* specifically, and the orderly management of multi-jurisdictional litigation more generally. Again, those sections provide:

> (3) 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.
>
> (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.

[71] I observe, by way of introduction, that the language of s. 4(3) requires the judge to determine whether it would be preferable for some or all of the claims to be decided in a proceeding elsewhere, having regard to the specific considerations set out in s. 4(4). It seems to me that this direction necessarily captures many of the same types of considerations that determine the outcome of an application to decline jurisdiction on the basis of *forum non conveniens*. There is a significant

overlap between the two types of applications, and I see no necessary error in principle in the judge's analysis being informed by the type of considerations relevant to a *forum non conveniens* application, even though the tests and onuses in the two situations are not necessarily the same.

[72] In this case, I am persuaded the judge had regard to the considerations found in s. 4(3) and (4). The judge referred to the defendants' position and reliance on both ss. 44(2) and 4(4) as factors bearing on the preferable forum analysis: at paras. 19–20. He analysed the significance of those factors at paras. 29–32. In my view, when the judge identified the two relevant circumstances that supported dismissing the application, he was giving effect to those preferability considerations. Further, he rejected other factors said to support the BC SCIP proposal at paras. 37–40. None of this supports the contention that the judge failed to apply the considerations in s. 4(4) and resorted, instead, to an inapplicable and irrelevant *forum non conveniens* test.

[73] I agree that the judge's phrasing of his conclusion at para. 41 that: "[t]he defendants have not proven the existence of a clearly more appropriate alternative, nor have they demonstrated that another forum enjoys a significant advantage over the plaintiffs' selected forum", is capable of suggesting the substitution of a *forum non conveniens* test for a determination guided by s. 4. If that indeed be an error, reading the judgment as a whole, I do not think he fell into it. The judge had regard to the considerations captured by s. 4(4), and had to decide whether it was preferable to order a BC SCIP. The appellants had to discharge the burden of demonstrating BC was the preferable jurisdiction, even if, arguably, not required to go so far as showing it was "clearly the more appropriate forum". As I see it, when read as a whole, the judge concluded that the appellants had not discharged their burden.

**Did the judge err by giving weight to discovery rules not in evidence?**

[74] The judge found principled reasons to conclude that BC was not the preferable forum to litigate the SCIP. The critical factors he isolated were the

plaintiffs' desire to proceed in Quebec, and the potential prejudice umbrella purchasers in Ontario and elsewhere would suffer by excluding their potential claim from the SCIP. The judge was also influenced, I think it fair to infer, by the failure of the appellants to consent to a SCIP in Quebec.

[75] The appellants say these conclusions rest on error. They contend there was no evidence supporting the existence of juridical advantages to the plaintiffs under the Quebec document discovery rules. He failed, accordingly, to decide the application on the record before him.

[76] I am prepared to accept that there was no evidence of the advantages of the Quebec discovery rules before the judge. Certainly, there was evidence that a motion is pending in Quebec to determine the extent and scope of those obligations. But, in my view, the judge's reliance on this factor was only a partial illustration justifying the plaintiffs "choice of forum", as I shall explain.

[77] The appellants further contend that the judge erred in applying a presumption that the plaintiffs' choice of forum should be given significant weight. They say that the respondent had demonstrated his satisfaction with BC as an appropriate forum by pursuing certification here initially, in preference to Quebec. The focus only shifted because certification was initially denied.

[78] I would not give effect to that argument. The judge approached the issue of the plaintiffs' role as *dominus litus*, recognizing that the class actions were being prosecuted by a plaintiffs' consortium, not just by the respondent. That is, different members of the plaintiffs' consortium may well have legitimate interests in proceeding in Quebec beyond document production issues. Document production issues were only part of the reason for the desire to proceed in Quebec.

[79] As a matter of principle, plaintiffs are presumptively entitled to prosecute their cases in the forum of their choice. Clearly, this is not an untrammelled entitlement, and there are circumstances where it must give way to the orderly management of litigation. This entitlement may be overridden in circumstances where a court should

decline jurisdiction, issue anti-suit injunctions, or simply override a plaintiff's wishes in case management. At the least though, a plaintiff's wishes are entitled to significant weight. The judge did not err in giving them weight, even if reliance on the document production issue was misplaced in the absence of evidence.



[80] In my opinion, there are a number of factors in this case that weigh in favour of respecting the plaintiffs' *prima facie* entitlement to proceed in Quebec, even if no SCIP occurs there. The imposition on the plaintiffs' control of their case if the order had been made is profound. In substance, the plaintiffs' deliberate choices about how to proceed, with BC and Quebec-only classes coupled with a potential national class in Ontario, would be overridden. In effect, the plaintiff in BC would be forced to amend his pleadings. He would be forced to litigate issues that had not been certified in BC. The existing certification order has not certified the umbrella purchasers as class members, and issues specific to them are not part of the BC order. A different class definition would be forced on the plaintiffs, bringing into BC parties who object to their case being decided here. These are all, in my opinion, significant and radical incursions into the plaintiffs' entitlement to manage their case. I would think that such incursions would require compelling reasons to be justified as a proper and reasonable exercise of discretion by a judge.

[81] I do not say that all of these factors were necessarily in the mind of the judge in dismissing the application. But appeals are from orders not reasons; we are entitled to have regard to factors arising properly from the record in deciding whether a discretionary order such as this should be interfered with.

**Did the judge err by finding prejudice to the umbrella purchasers?**

[82] The appellants also claim the judge erred by concluding that granting a BC SCIP would prejudice potential umbrella purchasers in the Ontario proceeding, who would need to resolve their claims in a separate proceeding outside BC. They say that their proposal of a BC SCIP benefits the proposed Ontario class generally, because it offers them an uncontested certification as a national class. With respect to umbrella purchasers in Ontario, in particular, they say the chance these

purchasers would be certified in Ontario is, in any event, remote. This is said to be so because the evidence led in the BC certification hearing did not meet the "some evidence in fact" standard to certify a common issue, and there is no good reason to seek to relitigate the issue in Ontario, and no reason to anticipate a different result.

[83] I am not persuaded that the judge did err. A separate trial would be necessary for the umbrella purchaser claims, and would potentially require those class members to incur the costs of litigating those claims separately. Moreover, it is far from obvious that the Ontario plaintiffs could not augment the evidence on a certification application to meet the relevant standard. It is no response to this potential prejudice to say the prospect of umbrella purchasers being certified in Ontario is remote. I am not persuaded the judge erred in concluding that a BC SCIP would prejudice those umbrella purchasers by isolating them as the only uncertified or unauthorized potential class members.

**Did the judge err by placing weight on the possibility of a Quebec SCIP?**

[84] Finally, I turn to the appellants' argument that the judge erred in placing weight on the possibility of a Quebec SCIP. They say that a Quebec SCIP is impossible. As discussed, as we are given to understand, pursuant to the *QCC,* the consent of all parties is required for the Quebec Court to take jurisdiction in respect of non-resident claims. As I understood the argument, the current situation is that there are defendants who have not consented to a Quebec SCIP. Those defendants have reached settlements in principle, but court approval has not been sought and they remain parties. Moreover, the appellants have not consented to a Quebec SCIP nor, they submit, have they received a proposal capable of being accepted. They say that the requirement for unanimous consent holds them hostage to the plaintiffs' unreasonable demands.

[85] I accept that the judge took the view that the provision of consent to a Quebec SCIP was a ready solution to the appellants' aspiration to have a SCIP, but I do not think that he relied on that factor in dismissing the application. The judge's comment is simply an observation about a practical means to have a SCIP, after concluding

that BC was not the preferable forum for a SCIP. It is important to recognize that the application before the judge was not a contest about whether there would be a SCIP in BC or Quebec. The issue was only whether there should be a SCIP in BC. The judge's determination only holds that it is not preferable to order a SCIP in BC. No doubt the advantages of BC versus other jurisdictions may be relevant to the analysis, but he was deciding only whether the plaintiffs' wish to litigate in Quebec (with or without a SCIP) should be overridden by imposing on them a BC SCIP. Whether a SCIP could take place in Quebec was not material to the outcome.

[86] I make one final observation about the "impossibility" argument. Clearly, the appellants could consent to a SCIP in Quebec. They say they have not received a reasonable or realistic proposal. The plaintiffs disagree, and claim not to understand why what they say is a detailed proposal has not been responded to. The order sought in BC contained relatively few provisions beyond amending the class, appointing representative plaintiffs, and articulating common issues. It did not purport to impose terms on the conduct of the litigation, the scope of discovery, timelines, or other factors involved in the progress of the litigation. Presumably, all of those details were left to be negotiated or case managed, with the court resolving interlocutory applications as needed. I appreciate that there is much ice below the surface of this particular berg, but it is not obvious why the appellants would not consent to a Quebec SCIP on fundamentally the same terms as they sought in BC, at least once the issue of settling defendants has been dealt with.

**Disposition**

[87] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Mr. Justice Butler"