IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ennis v. Johnson & Johnson,*
2024 BCSC 1759

Date: 20240923
Docket: S179011
Registry: New Westminster

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

Between:

Kelly Ennis

Plaintiff

And

Johnson & Johnson,
Johnson & Johnson Consumer Companies, Inc., and
Johnson & Johnson, Inc.

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:	A. Tibbs S.J Roxborough C. Pabla, Articled Student
Counsel for the Defendants:	S.G. McKee R.L. Reinertson K. Russell P. Elahi-Khansari
Place and Dates of Hearing:	New Westminster, B.C. February 6–8, 2024
Place and Date of Judgment:	New Westminster, B.C. September 23, 2024

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Introduction

[1] The plaintiff re-applies to certify this proceeding as a multijurisdictional class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] in relation to talc-based powder products purchased by the proposed class and used perineally. These talc-based products were *manufactured* and sold as Johnson's® Baby Powder ("Baby Powder"). The plaintiff alleges, among other things, that perineal use of Baby Powder caused or contributed to the development of ovarian cancers.

The November 2020 Decision

[2] On November 17, 2020 I gave reasons on the certification application, *Williamson v. Johnson & Johnson*, 2020 BCSC 1746 (the "November 2020 decision"), in which I concluded that the proceeding could be certified subject to the plaintiff providing additional information. Among other things, the plaintiff was to provide a basis in fact for a methodology that could be used in proving the common issues at trial.

[3] In the November 2020 decision, I adjourned the plaintiff's certification application with leave to file new evidence on the methodology issue and further amendments to the Amended Notice of Civil Claim. I also:

a. Struck portions of an expert report from Dr. Mariane Heroux and tendered by the plaintiff because it contained inadmissible opinions on the biological mechanisms that were outside of her scope of expertise.

b. Struck claims pertaining to provincial consumer protection legislation in other provinces, claims for negligent design, negligent testing, and negligent manufacture, claims for civil conspiracy, claims for medical monitoring, and claims for waiver of tort.

c. Approved the plaintiff's claims for breach under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, the *Competition Act*, R.S.C. 1985, c. C-34 and claims concerning negligent failure to warn.

d. Held that the proposed class membership was overbroad. The class definition needed to be narrowed to exclude those who had not suffered loss or damage, men and women who did not use the products perineally and women with ovarian cysts. The class definition also was to be narrowed such that purchasers and user subclasses could only include women in Canada (excluding Québec) who had used the product perineally and who had ovarian cancer. Further, I concluded the subclass including family members to be overbroad, except for family members in Ontario.

e. Concluded there was a basis in fact for a proposed general causation common issue about whether perineal use of Baby Powder causes or materially increases the likelihood of the development of ovarian cancer. However, the evidence at the hearing was insufficient to meet the requirement of a credible methodology or mechanism to establish causation on a class-wide basis.

f. Did not certify the proposed general causation issue without further clarification.

g. Did not deal with the plaintiff's proposed common issues #2 and #3 pending presentation of evidence of methodology to assess causation.

[4] In the result, I left the question of suitability of the claims to a class proceeding in abeyance pending further evidence on the methodology for addressing the causation issue.

[5] Finally, I granted the plaintiff leave to file an amended notice of civil claim to:

1. address the proposed class and subclass of persons who used baby powder perineally and were diagnosed with ovarian cancer;

2. expand the plaintiff's consumer protection claims by properly advancing causes of action under the legislation of other provinces;

3. clarify the category of persons entitled to make claims by reason of their status as family members; and

4. strike paragraphs of the notice of civil claim that did not disclose causes of action.

The Continued Certification Hearing

[6] Since the November 2020 decision, the plaintiff has abandoned claims:

1. against Valeant Pharmaceuticals International, Inc. relating to the Shower to Shower® product (dismissed by the November 2020 decision);

2. regarding ovarian cysts;

3. regarding breach of statutory or express warranties and negligent misrepresentation, previously referenced in the certification application but not the pleadings;

4. regarding negligent design, testing, and manufacture, (dismissed by the November 2020 decision);

5. regarding the future costs of medical monitoring, (dismissed by the November 2020 decision); and

6. for waiver of tort and disgorgement (dismissed by the November 2020 decision).

[7] The plaintiff outlined other issues that arose from the November 2020 decision that narrow the current certification inquiry:

1. The proposed class definition will be amended to include only those women who have been diagnosed with epithelial ovarian cancer after perineal use of Baby Powder. That is, those who merely purchased and used the products but have suffered no provable loss or damage are no longer proposed class members.

2. Provincial health insurers, while accepted to have an interest in the outcome of the action, are no longer proposed as being “class members” with an independent claim.

3. The proposed class definition will exclude individuals who have only ever used Baby Powder within the province of Québec, as these individuals are presumptively included in the certified action in that province.

4. On October 27, 2023, the plaintiff was granted an order to substitute Kelly Ennis as the sole plaintiff in the action late Linda Williamson who passed away in January 2020. Kelly Ennis has been substituted as representative plaintiff.

[8] Ms. Ennis used Baby Powder in the genital region for most of her teenage and adult life. In 2021, she was diagnosed with epithelial ovarian cancer described as “stage 1C1 endometrioid” that was surgically removed.

[9] At this juncture, the plaintiff seeks various orders including certification of this action as a multi-jurisdictional class action.

[10] On this application the plaintiff has adduced new evidence of a methodology to prove causation on a class-wide basis in relation to the plaintiff’s common issue. They rely on an expert opinion from Dr. Daniel W. Cramer, a clinical epidemiologist specializing in obstetrics and gynecology, who opines on perineal use of Baby Powder and epithelial ovarian cancer. This opinion evidence is intended to answer the deficiencies in the plaintiff’s earlier materials on the question of a methodology that might prove the relationship between perineal use of Baby Powder and increased risks to users of developing epithelial ovarian cancer.

[11] The defendants have provided an affidavit which outlines that 88 individual actions have been commenced in BC, Ontario, and Alberta against the defendants alleging personal injuries, including ovarian cancer from use of Baby Powder. The defendants continue to rely on opinion evidence presented in the original application from Dr. Blake Gilks (pathologist and Professor of Pathology and Laboratory

Medicine at the University of British Columbia), and Dr. Robert Kurman, (gynecologic pathologist and Emeritus Professor at Johns Hopkins University School of medicine).

[12] The record before the court now includes a Health Canada assessment that was contemplated in the November 2020 reasons, two affidavits from Ms. Ennis, and the expert opinion of Dr. Cramer, who was also cross-examined on his opinion.

Position of the Parties

Position of the Plaintiff

[13] The plaintiff seeks to address amendments to the pleadings, to the class definition, and to common issues she wishes to certify. The notice of application seeks:

1. an order certifying this action as a multijurisdictional class action;

2. an order defining the class as all women in Canada who have used Baby Powder and their estates, executors and personal representatives, and third parties who have a right to make a claim in relation to said use of Baby Powder. The class will include:

    a. women who have used Baby Powder in the perineal region and were subsequently diagnosed with epithelial ovarian cancer; and

    b. those who, by reason of their relationship to a member of the injury class, are entitled to make claims in respect of the harm to the said members of the other subclasses:

        i. including some members of the injury class who are residents of Ontario, members of the subclass who are deceased and entitled to claims under provincial legislation; but

ii. excluding members of the group in the class of proceedings in the Superior Court of Québec (*Kramar v. Johnson & Johnson*, 2018 QCCS 1846);

1. orders defining additional appropriate subclasses pursuant to consumer protection legislation in the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and New Brunswick;

2. an order stating the nature of the claims and the relief claimed as follows:

    a. This is a class action concerning the negligence of the Defendants in selling its Baby Powder® Baby Powder products without warning of the potential health risks (particularly to women), and seeks recovery for the harms suffered by the Class Members, as well as punitive and exemplary damages;

1. an order certifying common issues including:

    a. whether the use of Baby Powder caused, or materially increased the likelihood of users developing epithelial ovarian cancer;

    b. whether the defendants owe a duty of care to warn the class members of the risks associated with the use of Baby Powder;

    c. whether the defendants' Baby Powder products have any benefits that were unique or that exceeded the benefits of other similar products;

    d. whether the defendants or any of them, breached the duty of care to class members by distributing Baby Powder in Canada, and if so when and how;

e. whether the defendants' failure, if any, to warn of the risk of ovarian cancer constitutes a breach of the relevant consumer protection legislation; and

f. whether an award of punitive damages is warranted;

2. An order adjourning the application for certification to case management so that the court may consider the form, content and manner of dissemination of notices to be distributed advising of the certification of the class action and the manner and time in which class members may opt out of the class action.

Position of the Defendants

[14] The defendants oppose certification of the action because of deficiencies that remain in the pleadings and evidence adduced since the November 2020 decision. In summary, the defendants say:

1. the plaintiff has failed to adduce evidence of a methodology to prove the causal relationship between Baby Powder and epithelial ovarian cancer on a class-wide basis;

2. the proposed amended class definition fails to meet the requirements of the *CPA*, s. 4(1)(b);

3. the evidence does not support the conclusion that a class action is the preferable method to resolve these issues (*CPA*, s. 4(1)(d)); and

4. other claims should be struck from the Third Amended Notice of Civil Claim for disclosing no cause of action (*CPA*, s. 4(1)(a)).

[15] The defendants rely on the uncontroverted evidence of their experts that:

a. ovarian cancer is not a single disease;

b. there are more than 15 types of ovarian cancer (which is in contrast with other cancers involving a single organ such as the prostate area);

c. there are differences in origin, development, signatures, clinical behaviour and risk factors inherent in ovarian cancers;

d. certain types of ovarian cancer are profoundly different diseases – not just minor variance of a single disease – with different causes, genetics, microscopic appearance and clinical outcomes;

e. ovarian cancers are characterized as either epithelial ovarian cancers or non-epithelial ovarian cancers;

f. there are five specific types of epithelial ovarian cancer, each of which are different with respect to cell origins, risk factors, genetic events, patterns of spread, response to therapy and patient outcomes;

g. there is no common biological or causal mechanism for either epithelial or non-epithelial ovarian cancer;

h. there are different risk factors for certain incidences of ovarian cancer; but family histories (genetics) are the most significant risk factor for ovarian cancer; and

i. it is highly unlikely that exposure to a single agent, i.e. talc, could result in the development of such distinctly different neoplasms (tumors).

Analysis

[16] I will address the defendants' responses to the plaintiff's application largely in the sequence set out in their written submissions.

Section 4(1)(c): Common Issues

Deficiencies with the Common Issues Methodology

[17] In the November 2020 decision, I concluded that the plaintiff had failed to demonstrate a plausible and credible methodology capable of establishing a way by which the plaintiff might legally establish the general causation issue on a class-wide basis. The evidence was insufficient and did not adequately provide a methodology

to address the causal relationship between the use of Baby Powder and epithelial ovarian cancer.

[18] I concluded that in the absence of a basis in fact for the methodology the first common issue alleging a causal relationship between Baby Powder and ovarian cancer could not be certified. The comments of the Court of Appeal in *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353 at para. 46, leave to appeal to SCC ref'd, 36668 (14 April 2016), remain apposite to the plaintiff's renewed application for certification:

> [46] The Supreme Court did not say in *Microsoft* that what is required is evidence of a specific type of "methodology". Instead, it required a way to test the alleged common issue at trial. That is what is needed to fulfill the "methodology" requirement. In *Stanway* it was satisfied by the existence of a robust study which established general causation. There was a realistic way to prove the common issue at trial. That is what matters.

[19] In response, the plaintiff now relies on Dr. Cramer's November 2, 2021 opinion setting out his conclusions as follows:

> … I have sought to show how the general association between genital-Baby Powder use and increased ovarian cancer risk fits major characteristics for a causal association including: statistical significance, strength, cause precedes effect, consistency, absence of bias and confounding, dose-response, and biologic credibility. The overall estimate of the association from meta-analyses is greater and more significant than most associations with genetic variance from Genome Wide Association Studies, accepted by the scientific community as real. Importantly, I have shown that the strength of the association and the dose-response have been under-estimated by the failure to take histologic type of ovarian cancer, menopausal status, and hormone therapy into consideration. In terms of biologic credibility, similarities of the in-vitro and in-vivo effects of asbestos and Baby Powder suggest that the carcinogenic pathway is similar to that between asbestos and mesothelioma. Based upon my review of this evidence, it is my opinion to a reasonable degree of medical, scientific and epidemiologic certainty that the general association between Baby Powder use in the genital area and ovarian cancer is a causal one.
>
> [Emphasis added.]

[20] The plaintiff contends this report is a complete answer to the defendants' assertion there is no methodology to establish general causation. The plaintiff argues that Dr. Cramer's opinion meets the true test on this issue and demonstrates "there is a *workable methodology*" such that the case can be efficiently prosecuted:

see *Charlton v. Abbott Laboratories, Ltd*., 2015 BCCA 26 at para. 63 (emphasis in original).

[21] The question at this stage is whether the substance of Dr. Cramer's report shows some basis in fact of how general causation of the common issues can be established at trial.

[22] The defendants argue that Dr. Cramer's opinion does not provide a methodology to establish general causation of the specific types of epithelial ovarian cancer he said could be associated with the use of Baby Powder.

[23] The defence contends further that even if the evidence was strong enough to constitute a methodology, the Cramer opinion does not advance the class members' claims. Individual issues will dominate the resolution of the common ones because evidence concerning the individuals' personal histories, circumstances, histological factors and characteristics must be examined.

[24] Moreover, the defence argue Dr. Cramer fails to use the odds ratio of 2.0 benchmark as the minimum for associations likely to be causal. He said that an odds ratio of 1.29 does not disqualify the association between talc and ovarian cancer as being causal. In his assessment of the causal relationship between Baby Powder and epithelial ovarian cancer, he assesses the causal impact of Baby Powder with multiple other factors specific to the person before concluding whether Baby Powder is a cause of an individual's epithelial ovarian cancer.

[25] The defendants contend that Dr. Cramer's beliefs "support biologic credibility of the talc and ovarian cancer association", but that he does not opine there is one biological mechanism whereby talc use could cause all types of epithelial ovarian cancer.

[26] The defendants compare this finding with the uncontradicted opinion of the defendants' expert, Dr. Kurman, that it is highly unlikely that exposure to a single agent, such as talc, could result in the development of tumors.

[27] In summary, the defendants contend the plaintiff has failed to demonstrate "a realistic way to prove the common issue at trial" for all types of epithelial ovarian cancer and thus the certification application should be dismissed.

[28] The Court in *Charlton* said:

> [111] The question that ought to have been asked at the certification hearing in relation to both types of claims, is not whether the resolution of the general causation question will advance the class claims, but rather, whether there is a reasonable prospect of doing so.

[29] The plaintiff has conceded that the proposed common issues criteria is overbroad because it does not limit the claims to individuals who used Baby Powder perineally and developed epithelial ovarian cancer as opposed all ovarian cancers. The plaintiff proposes to restrict the class to women who developed epithelial ovarian cancer because there is no basis in fact of an association of other types of cancer with perineal Baby Powder use.

[30] In this analysis, the Court must be satisfied that Dr. Cramer's methodology will have a reasonable prospect of establishing loss on a class wide basis. On this point, the test is whether the plaintiff has established a realistic way (methodology) to resolve the common issues at trial: see *Miller* at para. 46. Further, as the Court explained in *Miller*, in cases such as this where associations between Baby Powder use and development of ovarian cancer were analysed on the Bradford-Hill criteria, those criteria are useful in assessing the sufficiency of the proposed methodology:

> [58] None of the Bradford-Hill criteria bring indisputable evidence for or against the cause-and-effect hypothesis and none are required *sine qua non*. Thus, although I accept that a gold standard clinical trial could establish general causation in this case, such is not necessary. The respondent argues that addressing some of those factors is sufficient, at this stage, to satisfy the certification requirements, a proposition with which the judge below agreed. To be clear, the Bradford-Hill factors are not a methodology. They are, however, a useful set of factors used by epidemiologists to analyse the available evidence to establish causation. Consideration of those factors can also be useful in addressing the sufficiency of the information available at the certification stage, to determine whether the plaintiff has passed the "some basis in fact" threshold and to establish whether there is some viable, plausible way in which general causation could be proven at trial.
>
> [Emphasis added.]

[31] The defendants contrasted the opinions of their experts and that of Dr. Cramer concerning a number of issues relating to ovarian cancer. For example, ovarian cancer is not a single disease because there are 15 types of ovarian cancer. There are differences in origin, development and signatures in clinical behaviour and can be profoundly different diseases. Ovarian cancers may be epithelial or non-epithelial.

[32] There are five specific types of epithelial ovarian cancer which have different cell origins, risk factors, genetic events, patterns of spread and response therapy. The defendants' experts say there is no common biological mechanism for the five types of epithelial ovarian cancer and the risk factors, including family histories, are varied.

[33] Although I accept these conclusions are helpful to the Court where they are not in conflict with evidence tendered by the plaintiff, it seems to me there is now conflict between those opinions and Dr. Cramer's opinions at least to some degree. I will not address the possible conflicts in this evidence at the certification stage.

[34] The defendants set out three discrete submissions concerning the plaintiff's failure to provide evidence of a methodology to address the general causation issue on a class-wide basis.

[35] First, Dr. Cramer opined that the relative risk of developing ovarian cancer depends on histological subtypes of epithelial cancer, and that different subtypes of epithelial ovarian cancer are affected by different risk factors. Dr. Cramer confirmed that there are two types of epithelial ovarian cancers that have no association with Baby Powder use, including invasive mucinous and clear cell cancers. He also said that there is no association between perineal Baby Powder use and post-menopausal women with ovarian cancer.

[36] On this point, it is difficult to understand why the injury subclass would include persons whose epithelial ovarian cancers could have no association with perineal Baby Powder use.

[37] The defendants' second point focused on Dr. Cramer's use of the 1.29 odds ratio. In his own "general causation" analysis he calculated the relative risk ratio involving Baby Powder and ovarian cancer for individuals, taking into account their histological type of epithelial ovarian cancer, menopausal status, medical history and other individual characteristics in order to calculate a relative risk which he assigned as the potential risk factors for epithelial ovarian cancer in certain patients. These included family history, ethnicity, genetics, body mass index, diet, smoking history and reproductive history. He acknowledged that the odds ratio of 2.0 is sometimes a benchmark for a minimum association to likely be causal but, in his studies, Dr. Cramer formulates his own odds ratio after taking into account a wide range of factors unique to the individual in combination with use of Baby Powder.

[38] Notwithstanding that there is only an odds ratio or relative risk of 1.29, representing an average increased risk for all types of epithelial ovarian cancer of 29% with "ever use" of Baby Powder in genital hygiene, Dr. Cramer explains that a Bradford-Hill paper said that an odds ratio of less than 2.0 can be causal if "… there is no evidence that random error, bias, or confounding affected the study…."

[39] When the defendants cross-examined Dr. Cramer he discussed how his opinions concerning the role Baby Powder plays in the onset of epithelial ovarian cancer are influenced by a multitude of factors. He examines the individual's clinical records, the histological type of cancer, any history of endometriosis, children born to the patient, ovulatory cycles, and whether the cancer was invasively serous. As an example, Dr. Cramer said that a history of endometriosis is a factor in certain types of epithelial ovarian cancer that preclude Baby Powder as a cause of those cancers. He said he could not attribute Baby Powder as a cause where the person is diagnosed with a germline mutation in a tumor (BRCA 1 or 2 gene) because the evidence of a germline mutation would obviate that possibility. He also said a person's history of endometriosis would "trump genital talc use in terms of a causal factor". In this same instance, he said data supporting an association between Baby Powder and epithelial ovarian cancer would be difficult to find in cases where the patient had a history of endometriosis.

[40] Based on this evidence, the defendants contend that Dr. Cramer presented no methodology for assessing whether Baby Powder use creates a risk of epithelial ovarian cancer across the entire class. The defendants contend that Dr. Cramer has used his own data to assess relative risk ratios for use of Baby Powder based on the patient's own histological type of cancer and menopausal status, and compares that ratio with the risk he assigns to the patient's other risks, and therefore that his opinion cannot be applicable to the entire class.

[41] The third contention is that Dr. Cramer addressed various biological mechanism theories that he believes "support biologic credibility of the Baby Powder and ovarian cancer association", but that he does not conclude that one biological mechanism could cause all types of epithelial ovarian cancer.

[42] The defendants contend that their experts' opinions are not contradicted by Dr. Cramer. They argue he did not demonstrate "a realistic way to prove the common issue at trial".

[43] Dr. Cramer referred to eight meta-analyses which reference a broad range of epidemiological studies indicating a statistically positive association between the use of Baby Powder and ovarian cancer. I accept the defendants' criticism that some of Dr. Cramer's analyses used odds ratios were not in-line with the generally accepted causation standards measuring the association of Baby Powder use to epithelial ovarian cancer at 1.29. However, he framed his opinion forcefully based upon the meta-analysis of the association between Baby Powder and ovarian cancer data and his ability to make judgements concerning the relative risks inherent in perineal use of Baby Powder. He concluded "to a reasonable degree of medical, scientific and epidemiologic certainty that the association between Baby Powder use in the genital area and ovarian cancer is a causal one".

[44] In *Stanway v. Wyeth Canada Inc*., 2012 BCCA 260 the Court addressed a challenge of the methodology requirement where there was an issue concerning hormone therapy alleged to cause breast cancer. The discussion was apposite to this case and the positions taken by the defendant:

[52] Wyeth disputes that there exists in this case a "propensity to injure" or, as referred to in *Harrington*, "general causation". As noted, Wyeth's central submission is that the plaintiff did not provide evidence as to how the "causal connection" between hormone therapy and breast cancer might be proven given the numerous other risk factors. Wyeth argues that, at most, the evidence only shows an "association" between hormone therapy and breast cancer, which Wyeth submits does not equate to a causal connection. Accordingly, Wyeth contends there was no evidence to support the certification of the common question of a "causal connection."

[53] As the Court observed in *Harrington*, the division between general and specific causation affects certification. This division is examined in an article by Patrick Hayes entitled *Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification*, 19 J. Env. L. & Prac. 190 at 195:

> Proving causation in the context of toxic substances, however, puts the added burden on plaintiffs to establish two types of causation, both general and specific. This is because, unlike the causal connection between being hit by a car and suffering a broken bone, for instance, the causal connection between a toxic substance and a disease is not as easy to decipher. Thus, a plaintiff must first prove "general" or "generic" causation--that a particular substance is capable of causing a particular illness. The issue must be addressed, whether explicitly or implicitly, in toxic torts litigation, since it is axiomatic that "an agent cannot be considered to cause the illness of a specific person unless it is recognized as a cause of that disease in general." Next, a plaintiff must prove "specific" or "individual" causation--that exposure to a particular toxic substance did, in fact, cause the plaintiff's illness.

…

[55] However, as has been stated many times, on a certification hearing, the court is not to weigh the competing evidence. Here there is evidence that, if accepted at the trial of the common issues, may answer the general causation question as to whether there is a causal connection between hormone therapy and breast cancer. A positive answer would obviously move the litigation forward, although individual class members may face formidable challenges in establishing causation specific to themselves.

[56] In saying this, I have not overlooked Wyeth's argument that, at best, the plaintiff's evidence – that uses the phrase "causal association" – merely established an "association" between hormone therapy and breast cancer and not actual causation, or the "causal connection" certified as a common issue. In my opinion, this argument amounts to semantics not substance. The word "association" is synonymous with the "connection" the plaintiff seeks to establish, and these two words should not be interpreted in isolation. Their meaning is dependent on the modifying adjective, which, in both cases, is "causal". Thus, in my view, both expressions clearly refer to general causation. The fact that Dr. Kirsh chose "association" to describe the potential link does not render the common question unsupported by evidence.

> …
>
> [58] Furthermore, I am not persuaded the plaintiff had to establish, at this stage of the proceedings, the methodology by which the court can determine that hormone therapy causes breast cancer. That determination will necessarily be informed by the expert evidence at trial; if no methodology is available, it is difficult to see how general causation will be established. However, there is in my view sufficient evidence to support the general causation issue posed, which deserves to be tried.
>
> [Emphasis added.]

[45] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*], Justice Rothstein held:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[46] Dr. Cramer's opinion is premised in part on his belief that the odds ratio of 1.29, which was below the 2.0 accepted standard, could establish a reliable measure of the general association between genital-Baby Powder use and increased ovarian cancer risks. At page 19 of his report, he describes a process by which Baby Powder enters the vagina and traverses the endometrial cavity and fallopian tubes to reach the ovaries. He describes how Baby Powder can be transported to local lymph nodes and disrupt local immune processing. He describes how genital mucosa might affect "humoral immunity". He described how Baby Powder use "fits with other events, such as repeated ovulation and endometriosis" that increase ovarian cancer risk through chronic inflammatory pathways. Further, he discusses how macrophages ingest Baby Powder in tissues and release DNA-damaging reactive oxygen species in adjacent cells. He said the association between Baby Powder and epithelial ovarian cancer is stronger in pre-menopausal women or post-menopausal women who have used hormone replacement therapies.

[47] In the end, Dr. Cramer has reached a conclusion that medically, scientifically and epidemiologically, the association between Baby Powder used in the genital area and ovarian cancer is a causal one. At this stage in the certification hearing, the court does not address conflicts in the evidence or questioning of the doctor's opinion or which experts' conclusions might be accepted at the common issues trial.

[48] I accept that it is necessary that some evidence of data is necessary to underpin a methodology to be applied as a condition of certification. Dr. Cramer has discussed how he uses data to confirm causal connections between Baby Powder and epithelial ovarian cancer.

[49] I am satisfied that the evidence and conclusions proffered by Dr. Cramer establish there is some basis in fact that a methodology can be gleaned from the opinion he presented. I come to this conclusion in light of the comments of Savage J.A. in *Miller* that methodology in the context of this hearing should not be confused with a "scientific methodology":

> [33] In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, it refers to whether there is *any* plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim. As noted in *Andriuk*, not every case will require expert evidence (para. 11).
>
> [34] The methodology requirement must also be considered in light of the policy objectives of class actions: the object is to promote fair and efficient resolution of the common issues. If there is no way that the common issues could realistically be established in a class action proceeding, then these goals would not be achieved and a class action should not be certified. It is that concept which underpins the methodology requirement described in *Microsoft*.
>
> [Emphasis added.]

[50] The discussion in *Stanway* also addresses whether a plaintiff can prove "general causation" when the question is whether a toxic substance was "capable of causing a particular illness". There, the court rejected the defendant's submissions that an association between hormone therapy and breast cancer was insufficient to prove causation. The court concluded that an "association" was synonymous with making a "connection" between the toxic substance and the cancer. In this case,

Dr. Cramer has described a methodology for determining the connection Baby Powder may have in the development of epithelial ovarian cancer.

[51] In *Stanway,* the court also considered an association between the hormone therapy and breast cancer as sufficiently describing a methodology for determining a basis in fact for assessing a causal connection between the two.

[52] Similarly, the role of Baby Powder in the development of ovarian cancer as part of Dr. Cramer's analysis establishes a plausible way in which the plaintiff can establish general causation.

[53] Moreover, at paras. 33-34 of *Miller*, Savage J.A. said the methodology requirement must be "considered in light of the policy objectives of class actions" with a view to promoting "fair and efficient resolution of common issues", and that a plaintiff must be able to show a "plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim."

[54] In my view, the authorities confirm that in the context of toxic tort class actions proof of legal causation is challenging and the methodology requirement is not as strict or inflexible to the extent that the word "association" is synonymous with the "connection" the plaintiff seeks to establish: *Stanway* at paras. 54 and 56.

[55] The approach to the methodology requirement is informed to some degree by the policy objectives of promoting fair and efficient resolution of common issues. In this case, the consequences of rejecting certification because proof of a methodology was weak could unduly deprive epithelial ovarian cancer victims of the opportunity to advance their claims when there is a plausible way by which to establish the general causation issue embedded in their claim.

[56] These comments do not obviate the conclusion reached in para. 34 of *Miller* that: "If there is no way that the common issues could realistically be established in a class action proceeding, then these goals would not be achieved and a class action should not be certified."

[57] Recognizing that the court does not resolve conflicting issues at this stage of the certification application, I am satisfied that Dr. Cramer has opined on a plausible way in which the plaintiff may prove the causal relationship between Baby Powder and epithelial ovarian cancer. While the defendants focus on the 1.29 (not causal) and 2.0 (causal) risk ratios, Dr. Cramer has considered various risk ratios in his analysis that lead to a positive conclusion on causation. Although he does not state that there is one biological mechanism whereby perineal Baby Powder use causes epithelial ovarian cancer, he carefully summarized his findings and observations that led him to the conclusion of a causal relationship. In my view, this analysis demonstrates a plausible way the plaintiff may be able to prove general causation in this case. There is a "realistic way to prove the common issue at trial": *Miller* at para. 46.

[58] It is important to the fair and efficient resolution of the common issues that the plaintiff be able to proceed to litigate that question. Although the plaintiff may not be able to prove the causal relationship between Baby Powder and epithelial ovarian cancer, this possibility does not defeat the certification of this class action proceeding at this stage.

[59] After considering Dr. Cramer's analysis and opinion, I am satisfied he has met the very low bar of demonstrating a methodology that suggests Baby Powder is a contributing cause to the development of epithelial ovarian cancer in some individuals. The evidence from Dr. Cramer will move this litigation forward.

Does the proposed General Causation Issue Significantly Advance Individual Claims?

[60] In the November 2020 decision I addressed the common issue question and indicated that the common issue proposed could be satisfied once there was evidence of a methodology to prove causation on a class-wide basis.

[61] Since issuing those reasons, the plaintiff has presented and relies on the Dr. Cramer's opinion. Further, in *Price v. H. Lundbeck A/S*, 2022 ONSC 7160**,** affirmed 2024 ONSC 845 (Div. Ct.), Justice Glustein gave a decision after a successful appeal of the 2018 *Price* decision which I was referred to in the

November reasons and submissions. This information informs my assessment of whether the general causation issue significantly advances the individual claims in this case.

[62] In the plaintiff's reply submissions, they propose that the common issue should be revised to read as follows:

> Did the use of Baby Powder in the perineal region cause, or materially increase the likelihood of the development of epithelial ovarian cancer?

[63] The plaintiff also suggests the class should include:

> All women [persons] in Canada who have used Johnson's Baby Powder in the perineal region and were subsequently diagnosed with epithelial ovarian cancer.

[64] The defendant contends there must be a "reasonable prospect" of resolving the general causation questions commonly for the class as a whole and that this finding will advance the claims of the proposed class: see *Charlton* at para. 111.

[65] Certification of the common issues must "significantly advance" the claims of all class members to be certifiable under the *CPA*: see *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 32.

[66] The defence contends that the proposed general causation question does not advance the claims of the proposed class. They argue Dr. Cramer's testimony demonstrates that the proposed common issue (general causation) will not significantly advance the individual claims of class members because class members who develop a specific type of epithelial ovarian cancer cannot distinguish between those types of epithelial ovarian cancer. Thus, each plaintiff will need to establish the common issue that use of Baby Powder in the perineal region is capable of materially increasing the likelihood of the development of epithelial cancer. The next issue is whether the evidence of their personal circumstances, histories, histological background, and other personal characteristics at the individual issues stage will be necessary to establish the cause of their specific epithelial ovarian cancers.

[67] The defence argues, at this point, that even if Baby Powder causes or contributes to the development of epithelial ovarian cancer, this finding will be, at best, a small component of each class member's evidence necessary to prove the individual's claims concerning the role Baby Powder may have in causing that individual's epithelial ovarian cancer.

[68] Dr. Cramer said that he requires consideration and investigation into other potential causes, including a multitude of factors such as lifestyle, genetic and family history, as well as the potential links with Baby Powder and the specific type of ovarian cancer sustained by a class member.

[69] The defence suggest it is not possible to connect the allegations inherent in the proposed common issue with clinical outcomes for women who have been diagnosed with a particular type of ovarian cancer. They contend that without taking into account the individual circumstances of each cancer patient the general causation question does not advance the claims of the proposed class.

[70] The class members will need to rely on Dr. Cramer's opinion to establish on a class-wide basis that perineal use of baby Powder causes or materially increases the likelihood of the types of epithelial ovarian cancer suffered by each and every potential class member: see *Price* at para. 129.

[71] Moreover, the plaintiff does not ask to exclude those persons from the class who have been diagnosed with epithelial ovarian cancer which is demonstrably unconnected with the use of Baby Powder. In my view, there is a connection between the class definition and the proposed general causation issue such that the question will lead to an answer that will apply to persons suffering all types of epithelial ovarian cancer included in the class definition.

[72] In *Price* the court dealt with a class claim that an antidepressant drug was a teratogen, an agent that causes malformations in embryos. The common issue proposed was whether Celexa was a teratogen, but the plaintiff did not seek to link Celexa to any specific congenital malformation.

[73] One question concerned whether the answer to the proposed common issue question would advance the litigation for the class members. As discussed above, the methodology must offer a realistic possibility of establishing loss on a class-wide basis. In *Price*, the court said that:

> [89] An issue stated in general terms, even if it results in a finding common to the class, will not be appropriate as a "common issue" to support certification if it only provides "context" and does not yield concrete answers to real claims that would advance the litigation in a meaningful way: *Dennis v. Ontario Lottery and Gaming Corp.*, 2013 ONCA 501, 116 O.R. (3d) 321, at paras. 58-59, 66, 68-70, leave to appeal refused, [2013] S.C.C.A. No. 373; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, 84 C.C.L.I. (5th) 124, at paras. 56, 59-60, leave to appeal refused, 2019 CanLII 37480 (S.C.C.).

[74] In refusing to certify the general causation question, the Court concluded that the proposed common issue was a "soft pitch" that would not advance the plaintiffs' claim. The plaintiffs were not alleging that Celexa caused particular congenital malformations and the court concluded nothing would be gained in the litigation by a finding that Celexa was a teratogen (the very question that was asked in the general causation issue). The defendants contended that not all class members would be affected by the teratogenicity and the common issue was so general as to not advance the claim. At para. 135 the court concluded that there were no savings to be achieved in the context of a class-action trial because of the complexity of the individual trials.

[75] The defence contends that the proposed common issue question in this case does not distinguish between types of epithelial cancers, and that the entirety of the evidence concerning the capacity of Baby Powder to develop epithelial ovarian cancer would be repeated in the individual issues trials. Thus, the proposed general causation question does not advance the claims of the class and the proposed question should not be certified.

[76] The narrow causation question proposed by the plaintiffs is whether Baby Powder causes, or materially increases the likelihood of the development of epithelial ovarian cancer. The plaintiff contends that a finding that Baby Powder is

capable of causing epithelial ovarian cancer would materially advance each class member's claim.

[77] As indicated in *Stanway*, the test will be whether Baby Powder is capable of causing epithelial ovarian cancer and the trial of the common issues will determine if that connection has been proved. If proven, the question would assist the class members in their individual trials notwithstanding that answer to the question will not answer all of the issues faced by individual class members in the second stage of the trial process: see also *Harrington v. Dow Corning Corp*., 2000 BCCA 605 at para. 42.

[78] There is a distinction between *Price* and the facts in this case concerning the methodology and common issue question. In *Price*, the proposed common issue question did not ask whether Celexa caused any particular malformations, and the court found that such defects have no common etiology. The Class Proceedings Judge concluded that there was a lack of commonality between the proposed class. The court recognized that a positive answer to the question whether Celexa was a teratogenic substance would leave each individual person to show that their specific congenital malformation had been caused by Celexa. The issue could not be narrowed because the plaintiffs led no evidence of a methodology to establish, on a class-wide basis, that Celexa could cause any particular congenital malformation. The common issue therefore "seized on superficial commonality" only.

[79] Unlike *Price*, a favourable answer to the common issues question in this case will prove Baby Powder is capable of causing all types of epithelial ovarian cancer. Based on Dr. Cramer's opinions, individual trials will be limited to the extent to which the individual factors may operate to eliminate or include Baby Powder as a cause of the individual's specific epithelial ovarian cancer. If the answer to general causation question is negative, then no one in the class will succeed.

[80] It remains important, however, that the answer to the common issue question will benefit the entire class. As such, the class should not include persons with

epithelial ovarian cancers which are known to have no association with Baby Powder use.

[81] In the trial decision in *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544, aff'd 2015 BCCA 353 [*Miller*], Justice Punnett addressed a similar issue where he rejected the proposition that a plaintiff's ability to show a common issue at a general level would not advance the litigation because each class member would be required to show sexual dysfunction was due to the medication and not some other cause. He concluded:

> [173] I am satisfied that the plaintiff has provided sufficient evidence to establish a rational relationship between the proposed class definition in the sense that the response to the question raised by this common issue can be extrapolated to each potential class member to at least some extent. It is an issue that is relevant to the claims of all class members.
>
> [174] Accordingly, this common issue assists in avoiding duplication of fact-finding or legal analysis and moves the litigation forward. In my view establishing that treatment with Propecia and/or Proscar increases the risk of persistent sexual dysfunction in men would resolve a fundamental aspect of the issue of liability.
>
> [175] I do however agree with the defendants that the question as posed by the plaintiff is susceptible to different answers. This issue must be narrowed to read: "Can ingesting Propecia or Proscar cause sexual dysfunction which persists after ceasing to take Propecia or Proscar?"

[82] In that case, the court directed that the issue be narrowed to read: "can ingesting Propecia or Proscar cause sexual dysfunction which persists after ceasing to take" them?

[83] In my view, the question in this case should be narrowed to whether Baby Powder can cause or contribute to the development of all types of epithelial ovarian cancer, or to exclude persons with those types of epithelial ovarian cancer for which Baby Powder cannot be a cause or contributing factor: see *Bartram v. GlaxoSmithKline Inc.*, 2012 BCSC 1804, aff'd 2013 BCCA 462 at para. 35.

[84] This latter concern may be more properly considered an issue for the class definition. Certification of the common issue must be narrowed to ensure that the answer will advance the claims of all of the class, which should include only those persons experiencing a type of epithelial ovarian cancer which is associated with the

use of Baby Powder. I will leave it to the plaintiff to formulate a change to the class definition or the common issue definition. Subject to those changes, the common issue as modified can be certified.

Do the Proposed General Causation Issues Remain Overbroad?

[85] The defendants argue that the plaintiff's description of the general causation issue relates to all ovarian cancers generally. However, Dr. Cramer said that scientific studies in the Health Canada assessment are limited to questions relating to epithelial ovarian cancer and not all ovarian cancers.

[86] The plaintiff accepts that the current framing of the common cause issue ought to be narrowed to: Did perineal use of Baby Powder cause or materially increase the likelihood of the development in persons of epithelial ovarian cancer.

[87] I will certify the common issue on those narrower terms as noted above.

Are the Other Proposed Common Issues Interdependent and Not Certifiable?

[88] The defendants contend that absent a general causation common issue, the other proposed common issues (e.g. asking whether the defendants owed a duty of care to warn class members of the risks of talc) are subordinate to and depend on certification of the general causation issue. Absent a proposed common issue concerning general causation, this action should not be certified.

[89] I have concluded that there is a certifiable general causation issue and the subordinate claims will not fall away.

Should the Plaintiff's Design Proposed Common Issue be struck?

[90] The plaintiff includes in the Renewed Amended Certification Application a common issue question concerning benefits that may have been unique to the defendants' products that exceeded the benefits of other products. The defendants contend that the claim for negligent design has been struck and the proposed common issue concerning benefits of the defendant's product is not rationally connected to the pleadings and should not be certified.

[91] The plaintiff concedes that this question should not be certified and no order will be made on proposed common issue concerning benefits that were unique to or exceeded the benefits of other similar products.

Section 4(1)(b): Class Definition

Is the Proposed Class Overly Broad or Can the Class be Defined More Narrowly?

[92] The defendants contend the proposed class definition does not comply with the reasons for judgment. The plaintiff argued that the proposed class definition limits claims to women who have used Baby Powder in the perineal region and were subsequently diagnosed with ovarian cancer.

[93] They contend that on a broad level the proposed members of the class will know whether or not they are women and whether or not they used Baby Powder. The goal is to include all women who used Baby Powder in the perineal region and were diagnosed with ovarian cancer. Subclasses are defined with reference to the province in which the Baby Powder was purchased.

[94] The plaintiff contends that the proposed common issues must be read together with the definition of the class and that the certification application should be read in light of the pleadings which are intended to be limited to epithelial cancer.

[95] The plaintiff concedes that the common issue should be restricted to whether the use by persons in Canada of Baby Powder in the perineal region caused or materially increase the likelihood of the development of epithelial ovarian cancer, and that the injury subclass be restricted to women who were subsequently diagnosed with epithelial ovarian cancer.

[96] On this point, the conclusions of Horsman J. (as she then was) in *MacKinnon v. Pfizer Canada Inc*., 2021 BCSC 1093 at para. 83, rev'd in part on other grounds 2022 BCCA 151, underscore the fact that limiting the class to specify "women" could "arbitrarily exclude potential class members, for example individuals who identify as non-binary". Similarly, in this case, the gender-specific inclusion of women only is

not necessary and may be too restrictive given the potential of non-binary individuals who may have used Baby Powder in the perineal region and subsequently diagnosed with epithelial ovarian cancer.

[97] I am satisfied that the class definition and change to the common issue proposed by the plaintiff can be certified to include *persons* who have used Baby Powder in the perineal region and were subsequently diagnosed with epithelial ovarian cancer. Eliminating the gender description of the class will obviate the risk of excluding potential class members who are non-binary.

[98] The defendants also argue that including residents of Québec who are not members in the class of proceedings in the Superior Court of Québec (the Kramar action) as class members in this action is contrary to the conclusions reached in the November 2020 decision at paras. 328–332, which directed that class members should not include potential class members in the province of Québec.

[99] The plaintiff did not oppose the defendant's position on this point. I am satisfied that any class definition should exclude all Québec class members.

[100] Next, the defence says there is no evidence that two or more family members of the plaintiff or class members have rights to recover.

[101] The plaintiff argued that the former plaintiff, Ms. Williamson, had a child alive at the time of her death. The plaintiff contends this is some evidence of existence of family members who would have a claim to recover.

[102] In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at paras. 131–136 the court addressed the statutory requirement that there must be an identifiable class of two or more persons for certification to be granted.

[103] In this case, there is no evidence of two or more family members who would have a claim to recover.

[104] While *Singer* sets out the principle requiring identification of two or more persons with claims for certification to be granted, that conclusion is less forceful if

the circumstances of the claims indicate that more than one person is likely to have a claim.

[105] In *Douez v. Facebook, Inc.,* 2018 BCCA 186 at para. 53, leave to appeal ref'd [2018] S.C.C.A. No. 298, the Court said it was not necessary to provide evidence that more than one person had a claim that could be made, when it is likely apparent from the nature of the claim that other persons exist. In other words, the nature of the claim and pleadings can be sufficient to demonstrate the existence of other claimants

[106] The difference between *Singer* and *Douez* is evident in the language used. In *Singer* the court focused on the absence of any evidence (as a basis in fact) that two or more family members will have a relevant claim in refusing to certify a claim. The court also declined leave to file further evidence about putative class members with an interest in the proceeding: *Singer* at para. 135.

[107] In *Douez*, the court said:

> [53] While representative plaintiffs must show that there are two or more individuals who have a relevantly similar claim, it is not necessary that they show that any individual (other than themselves) is sufficiently motivated by their claim to bring the matter to court. Further, it is not generally necessary for a representative plaintiff to specifically demonstrate, through affidavit evidence, that a second person has a claim. As the Ontario Court of Appeal stated in *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para. 70: "Ordinarily, the existence of more than one claim will be apparent from the very nature of the claim being advanced." See also *Hoy v. Medtronic Inc.*, 2003 BCCA 316 at paras. 56–58 and *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165 at paras. 26–32.

[108] Similarly, in *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111, the Court referred to the passage in *Douez* above and held as follows:

> [58] In my view, the same reasoning applies in this case. The existence of other potential claimants is evident on the basis of the facts pleaded, namely, that there was a class-wide evacuation and Do Not Use Water Orders. It is not necessary in the circumstances of this case for the respondent to demonstrate specifically that any other one of the potential claimants wishes to litigate the claim.

[109] The distinction between these approaches seems to emanate from the facts surrounding the claims. In this case, there is evidence that Ms. Williamson was survived by one child after her death. Other than that evidence, the existence of other potential claimants is not evident from the nature of the claim being advanced or on the facts pleaded.

[110] In this case there is evidence of 88 individual actions seeking relief similar or identical to the relief claimed in this proposed class proceeding.

[111] Plaintiff's counsel suggested it might be possible to provide evidence of other potential claimants. I am satisfied it would be appropriate to take the approach of Cullity J. in *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (Ont. S.C.J) to grant leave to the plaintiff to file evidence establishing other putative claim members with an interest in the proceeding can be identified.

[112] Finally, the plaintiffs agree that the proposed class definition, 2.(a) should only include persons who used Baby Powder perineally and subsequently developed epithelial ovarian cancer. The defendant repeats its objection to the inclusion of Québec residents who might not be members certified in the Kramar action. They are excluded from the class members in this case.

Section 4(1)(d): Preferable Procedure

[113] The plaintiff bears the burden of establishing that a class proceeding is the preferable procedure to resolve the common issues of claimants. The analysis must take into account the purposes of class proceedings including judicial economy, access to justice, and behaviour modification: *Pro-Sys* at para. 137.

[114] First, the plaintiff must demonstrate that this class proceeding would be a fair, efficient, and manageable means to advance the claim. Second, they must establish that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 48. The test takes into account the importance of the common issues in relation to the claims as a whole: *Hollick* at paras. 28–30.

[115] Section 4(2) of the *CPA* provides a list of five questions that must be considered in determining if a class proceeding is the preferable procedure to resolve the common issues. These are:

a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

d) whether other means of resolving the claims are less practical or less efficient;

e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[116] Because this is an application for certifying this as a multi—jurisdictional class action, the following sections of the *CPA* must also be addressed:

> **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)t o 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.

Orders in multi-jurisdictional certification

4.1 (1)The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order

(a) certifying the proceeding as a multi-jurisdictional class proceeding, if

(i) the requirements in section 4 (1) are met, and

(ii) the court determines, having regard to section 4 (2) and (3), that British Columbia is the appropriate venue for the multi-jurisdictional class proceeding,

(b) refusing to certify the proceeding, if the court determines that it should proceed as a multi-jurisdictional class proceeding in another jurisdiction, or

(c) refusing to certify a portion of a proposed class, if that portion of the class contains members who may be included within a proposed class proceeding in another jurisdiction.

(2) If the court certifies a multi-jurisdictional class proceeding, it may

(a) divide the class into resident and non-resident subclasses,

(b) appoint a separate representative plaintiff for each subclass, and

(c) specify the manner in which and the time within which members of each subclass may opt out of the proceeding.

[117] In conducting the preferability analysis I will first address the considerations applicable under s. 4(2), before proceeding to consider the multi-jurisdictional nature of this class proceeding under ss. 4(3) and 4(4).

Preferability under s. 4(2) of the *CPA*

[118] In *Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145, the court referred to the application of the preferability requirement under s. 4(2) of the *CPA*:

> [42] In *Hoy v. Medtronic, Inc.*, 2003 BCCA 316, Finch C.J.B.C., after referring to each of *Hollick* and *Rumley*, said:
>
> > [43] A judge, in determining whether a class proceeding is preferable, is therefore obliged to evaluate the common issues in context, and must consider, as one of at least five factors, whether the common issues predominate over individual issues.
> >
> > …
> >
> > [46] In summary, s.4(1)(d) requires a court to be satisfied that a class proceeding would be the preferable way of resolving the common issues, viewed in the context of the claims as a whole. Section 4(2) requires a court to consider five factors relevant to the preferability question, including whether the common issues predominate over individual issues.
> >
> > [Emphasis added.]
> >
> > …
>
> [47] In British Columbia, some consideration of the explicit and mandatory factors in s. 4(2) of the *CPA* constitutes a necessary aspect of this weighing and balancing exercise: *Campbell v. Flexwatt Corp.* (1997), 1997 CanLII 4111 (BC CA), 44 B.C.L.R. (3d) 343 at paras. 61, 64, 67, 1997 CanLII 4111 (C.A.), leave to appeal to SCC ref'd, 26433 (14 May 1998); *Rumley* at para. 35; *Hoy* at para. 46. This is in addition to any other factors that the judge considers relevant. Here, for example, the judge factored the difficulties with the fifth proposed common issue into her preferability analysis.

[119] The Court in *Lewis* also quoted from *Class Actions in Canada, 2nd ed*. (Toronto: Thomson Reuters), underscoring the importance of s. 4(2) as "…designed to assist the court in evaluating the efficiency and manageability of the proposed class action".

Plaintiff's Position

[120] The plaintiff contends that this class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. The analysis must take into account the three principal advantages of class actions: judicial economy, access to justice and behaviour modification.

[121] They argued the cost, time and complexity of individual trials illustrate the substantial advantages to the class if certification is ordered. Extensive efforts including discovery, obtaining expert opinion evidence, and managing complex medical, scientific and other factual issues will be necessary to prove the general causation claim that Baby Powder is capable of causing epithelial ovarian cancer. The costs to individuals would be prohibitive and discourage claimants from proceeding on an individual basis. Common issue trials obviate the need for multiple individual trials focused on proving a common issue which otherwise would be beyond the means of any claimants.

[122] Common issue trials achieve greater efficiency for the court and ensure access to justice for many claimants. Allowing the common issues to be tried in a class proceeding impacts defendants and will influence their behaviours. Behaviour modification is an important aspect of class proceedings that can streamline a process of resolving common issues for all claimants. This is particularly true where, as here, the plaintiff challenges actions of vendors of an alleged hazardous material to members of the public.

[123] The plaintiff argues that the defence misrepresents Dr. Cramer's opinion in regard to his non-reliance on the 1.29 relative risk ratio of individuals developing epithelial ovarian cancer caused by Baby Powder.

[124] The plaintiff notes that Dr. Cramer does not rely on that ratio when assessing the specific causation of an individual's epithelial ovarian cancer. After performing an analysis of data pertaining to persons with epithelial ovarian cancer, he calculates and odds ratio which takes into account all of the factors. This process all will be an

important part of the inquiry conducted by Dr. Cramer to determine whether Baby Powder has played any role in the development of the persons cancer.

The Defendant's Position

[125] The defendants contend that the class proceeding is not the preferable procedure as proposed by the plaintiff because it will not resolve the proposed common issues or significantly advance individual claims.

[126] Regardless of the outcome of a common issue trial in this matter, there will be a multiplicity of individual trials because there are multiple types of ovarian cancers with diverse origins and causes that will not be addressed at a common issue trial. The defence contends that certification will not promote judicial economy or improve access to justice. The defendants argue the court should decline to certify the claim because the individual issues will predominate over common issues: *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 39.

[127] The defendants contend that Dr. Cramer's evidence demonstrates that a class action is not the preferable procedure for resolving the claims of the proposed class because of the complex and extensive measures that will be required to prove the individual claims.

[128] The defendants argue that Dr. Cramer eschews the general odds ratios and only goes so far as to say that the 1.29 odds ratio does not contradict the possibility that Baby Powder has caused a person's ovarian cancer. Because Dr. Cramer performs an analysis of a wide range of details in analyzing the origins of an individual's epithelial ovarian cancer, his evidence merely points to a conclusion either that Baby Powder is, or is not a cause of the epithelial ovarian Cancer .Thus, they contend a resolution of the general causation issues will not significantly advance the situation of the individual class members who will be required to prove the connection or causation of their type of epithelial ovarian cancer by Baby Powder. The proposed common issues trial will be inefficient and uneconomic.

[129] The defendants' approach is highlighted by the comments of McLachlin C.J.C. at para. 32.in *Hollick* that, where the common issue is "negligible in relation to the individual issues", trials may not significantly advance the action. In that case, the Court was not persuaded that the class action would be the preferable procedure because the consequences of noise and physical pollution were not distributed evenly to all class members.

[130] If the resolution of the individual claims requires particular evidence and individual fact-finding at the liability and damages stages of the litigation, a class action may not result in significant judicial economy. The defendants argue that the evidence of an association between Baby Powder use and ovarian cancer is weak and, could lead to a presumption against causation except possibly as explained by Dr. Cramer. Ultimately, the defendant rests its opposition on comments made in *Kumar v. Mutual Life Assurance Co. of Canada,* 2003 CanLII 48334 (Ont. C.A.) at paras. 52–53:

> [52] Many of the comments made by the court in *Hollick* are applicable to this case. Although class actions will be allowable even where there are substantial individual issues, preferability "must take into account the importance of the common issues in relation to the claims as a whole" (*Hollick* at para. 30). Resolution of the proposed common issues would, in my view, have almost no impact on the claims for the reasons set forth above. In terms of judicial economy, as was said in *Hollick* at para. 32 "any common issue here is negligible in relation to the individual issues". Thus, "[o]nce the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action".
>
> [53] It seems to me that the comments of Winkler J. in *Mouhteros* ***v.*** *DeVry Canada Inc.* (1998), 1998 CanLII 14686 (ON SC), 41 O.R. (3d) 63 (Gen. Div.) at 73 apply to this case: "[C]ertification in this case will result in a multitude of individual trials, which will completely overwhelm any advantage to be derived from a trial of the few common issues".
>
> [54] I am not persuaded that the appellant has shown that allowing a class action would serve the interests of access to justice. In this respect, the fact that Clarica has established an ADR programme to deal with policyholders' complaints about the premium offset is a relevant, although probably minor, consideration. See Hollick at paragraphs 33-5. More importantly, it seems to me that since resolution of the common issue would play such a minimal role in resolution of the individual claims, the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals and not members of the class.

[131] The defendants argue that the plaintiff's litigation plan demonstrates no explanation or details of how it will handle a complex and lengthy individual causation and damages trial. Because each individual trial will involve complex analysis of each individual claim, the trial process will not be aided by an answer to the proposed common issue question and the trial process would be inefficient and unmanageable.

[132] Given the multiplicity of different types of ovarian cancers, including origins and causes, resolution of the common issue will nevertheless require the repetition of much of the evidence at the individual issues trial and undermine judicial economy and access to justice.

[133] The defendants contend there is a substantial group of individuals who have commenced actions in BC, Ontario and Alberta against the defendants pleading allegations similar to those advanced in this case. They argue that the number of potential class members who have opted to commence their own proceedings does not support certification of this action, underscoring that many litigants are interested in controlling the prosecution of separate actions as opposed to participating in the class proceeding.

[134] They contend that the predominance of individual issues can be a significant consideration in the preferable procedure analysis: see *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para 187.

Analysis on Section 4(2) of the CPA

[135] The following is my analysis on the requirements set out in s. 4(2) of the *CPA*.

a. Whether questions of fact or law common to the members of the class predominate over questions affecting only individual members

[136] There will be questions of fact and law, including the common issue question, applicable to all members of the class that will affect members individually. The predominant issue is whether Baby Powder is capable of causing or contributing to development of epithelial ovarian cancer. That question must be answered for all

class members and can importantly be a significant step in resolution of claims for all class members. I find that the common issue, once decided will move the litigation forward for all class members and assist each individual class member in proving their individual claims.

[137] The defendants argued that the individual claims will predominate over the common issues trial and that a class proceeding will be inefficient and lack cost savings. The principle was helpfully framed in *Kumar*:

> [54] I am not persuaded that the appellant has shown that allowing a class action would serve the interests of access to justice. In this respect, the fact that Clarica has established an ADR programme to deal with policyholders' complaints about the premium offset is a relevant, although probably minor, consideration. See *Hollick* at paragraphs 33-5. More importantly, it seems to me that since resolution of the common issue would play such a minimal role in resolution of the individual claims, the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals and not members of the class.
>
> [Emphasis added.]

[138] In this case, similar to the reasons in *Stanway* at para 55, a positive answer to the common issue question of whether there is a causal connection between perineal use of Baby Powder and epithelial ovarian cancer will move the litigation forward notwithstanding that class members may face "formidable challenges in establishing causation specific to themselves". There is no question that the individual liability and damages trials will be complicated but will be enormously aided by a finding in their favour of the question. There will be significant efficiency achieved in this class proceeding the existence of individual issues should not defeat certification.

b. Whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions

[139] Nothing in the evidence persuades me that individual class members would prefer to conduct their own claims notwithstanding that there are some 88 outstanding claims regarding Baby Powder and ovarian cancers. Although the individual claims will be complex, resolving the question of whether Baby Powder is

capable of causing ovarian cancers will significantly advance the individual claims. There was no evidence concerning the stage to which these other proceedings have advanced or whether the are proceeding at all.

[140] The duplication of litigation processes involved in entirely separate actions, including discoveries, pretrial proceedings, repetition of opinion evidence, and other costs, multiplied by many class members would be inefficient. Considering the cost and complexity of proceeding with separate actions, a significant number of the proposed class will be less likely to exercise an interest in controlling the litigation through separate actions.

c. Whether the class proceeding would involve claims that are or have been the subject of any other proceedings

[141] I am informed that a class action proceeding concerning Baby Powder and ovarian cancers has been certified in the province of Québec and restricted to residents of the province of Québec. There is apparently a class proceeding commenced in the province of Alberta, and a class proceeding commenced in Ontario presently awaiting a dismissal application and a certification hearing. There are also apparently 88 individual claims outstanding in Canada but there was little information that could inform this court on the preferability question in that regard.

[142] I will deal with the multi-jurisdictional issues arising from the Ontario class action later in my analysis on ss. 4(3) and 4(4) of the *CPA*. For the purposes of s. 4(2)(c), however, I am satisfied that the fact that this class proceeding involves claims that are the similar to other proceedings does not impede certification of this action.

d. Whether other means of resolving the claims are less practical or less efficient

[143] Nothing in the evidence persuades me that other means would be practical or efficient for resolving the common issues between the class members. There is

simply no evidence concerning the interests of other litigants, save and except in the Ontario class proceeding, which I address below.

[144] The proposed class in this case includes all users of Baby Powder perineally in Canada and who have developed epithelial ovarian cancer. There was no evidence concerning other means of resolving the claims that would be more or less practical or efficient. Given the multijurisdictional impact of this proceeding, the practicality or efficiency of other options is not apparent on the record.

[145] The comment of Justice N. Smith at para. 47 in *Bartram* addressing the evidentiary problems facing potential class litigants is apposite to this case. He said:

> [47] the common issues will require extensive discovery to determine the state of GSK's knowledge at various times, expert evidence on the general state of scientific knowledge and research at those times, and expert evidence on the general causation. I can think of nothing that would be less efficient, more costly and more limiting of access to justice than require each class member to separately obtain and adduce the same evidence. I doubt that the issues raised could be litigated in any procedure but a class action.'

[146] The administration of this class proceeding could arguably be less difficult if it was conducted geographically closer to the centre of the country. The Ontario plaintiffs suggest there will be considerable inconvenience for Ontario class members to attend in British Columbia. The means proposed by the Ontario class members is to favour Ontario as the jurisdiction in which this claim should be brought on behalf of users of Baby Powder in Canada. Nevertheless, the answer to this question favours the preferability of this class action to resolve these claims, in part because that proceeding is not sufficiently advanced.

e. Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means

[147] I cannot conclude that the administration of this case in a class proceeding would create greater difficulties than those likely to be experienced by the proposed class members if individual claims were made. In my view, this consideration has a neutral effect on the preferability analysis. There was no evidence concerning other

means that might create lesser difficulties than those experienced if there was another means to resolve this dispute.

[148] The plaintiff also addressed the defendants' experts' opinions that causation of ovarian cancer by Baby Powder is "highly unlikely due to exposure to a single agent". The plaintiff contends that "highly unlikely" is not impossible or bound to fail and that it is not appropriate to weigh these determinations at the certification hearing.

[149] Moreover, the defendants' experts do not acknowledge that Baby Powder is capable of causing epithelial ovarian cancer. They contend it is unlikely that exposure to a single agent could result in different tumors and there is no biological or causal mechanism for either epithelial or non-epithelial cancers.

[150] The plaintiff argues that Dr. Cramer's approach to "specific causation" is not relevant to the certification inquiry. If the plaintiff succeeds at establishing general causation, the plaintiff recognizes there may still be factors to consider that might undermine an individual's claim. I agree with the plaintiff's submissions on this point in part because I find that impact of the resolution of the common issues will not be minimal for the individual claimants. Although the individuals will have complex causation issues to consider in their individual trials, those issues will not predominate.

[151] I accept there will be a need for numerous individual inquiries but these will not overwhelm the common issues, the goals of class actions, including the fair, efficient and manageable process cannot be accomplished in an economical process.

[152] The existence of complex individual issues are not matters that should deprive the potential class members of their opportunity to pursue the claims as a class. Matthews J in *Bowman v Kimberly-Clark Corporation*, 2023 BCSC 1495 at paras. 247–249 said that the existence of complex individual issues does not usually render certification of the common issues inappropriate. She noted that class

proceedings are preferable in product liabilities cases in spite of time-consuming individual claims.

Conclusion on requirements set out in s. 4(2) of the CPA

[153] In view of Dr. Cramer's opinions concerning the multiple factors affecting an analysis and conclusion concerning the impact of Baby Powder use on victims experiencing epithelial ovarian cancer, I conclude that a trial of the common issues is the preferable procedure to resolve these issues. I accept the fact that multiple types of ovarian cancers with diverse causes and origins will, after a common issues trial on the issue of causation, result in complex individual trials. Nevertheless, resolution of the common issues trial will move the litigation forward in a way that will benefit all of the class members. Such a process will respect judicial economy and is likely to improve access to justice.

[154] Subject to my reasons regarding the multi-jurisdictional nature of this class proceeding under ss. 4(3) and 4(4), and taking into account the objectives of class actions, I find that this class proceeding will be the preferable procedure for the fair and efficient resolution of the common issues.

Preferability under ss. 4(3) and (4) of the *CPA*

[155] As above, the multi-jurisdictional nature of this class proceeding requires that I 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 a proceeding commenced elsewhere: *CPA*, s. 4(3).

[156] Under section 4(2)(c) of the *CPA*, in the determination of the preferable procedure for resolution of common issues, the court must consider all relevant matters including that the class proceeding involves claims that are the subject of other proceedings. At this juncture, the court is asked to exercise its discretion whether the certification application in this case should be dismissed and carriage of the class proceedings should be allowed to proceed in Ontario. Alternatively, the issue is whether the court should stay the certification application before this Court pending the outcome of the applications in the Ontario proceeding.

[157] In *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447 Goepel J.A. discussed the preferability issue in multijurisdictional class proceedings commenced in BC and elsewhere in Canada. He noted at para. 66 that the court must decide whether to certify the local action or send it elsewhere.

[158] Justice Goepel observed that the certification court is required to determine preferability of claims raised in other proceedings in the context of the certification analysis, but that the decision that cannot be made in an evidentiary vacuum.

[159] The Saskatchewan Court of Appeal in *Ammazzini v. Anglo American PLC,* 2016 SKCA 164 discussed the mechanism to assist in the preferability analysis where two claims are raised in proceedings in other jurisdictions. The court said:

> [45] As for s. 5.1 in particular, it was clearly designed as a mechanism for helping to ensure that certification judges in Saskatchewan are fully apprised of two things when they turn to the question raised by s. 6(2), *i.e.*, whether it would be preferable for the claims or common issues raised by claims commenced in Saskatchewan to be resolved in class actions in other jurisdictions. The first is the nature and status of class proceedings in other jurisdictions. The second is the views or perspectives of the representative plaintiffs in other class proceedings as to whether it would be preferable to resolve questions or issues outside of Saskatchewan

The Ontario and BC Class Proceedings

[160] The Ontario class proceeding was commenced by Ontario plaintiffs on May 18, 2016 (the Ontario action) on behalf of a national class including “all women resident in Canada who purchased and/or used JOHNSON’S baby powder”. The Ontario action pleads that the defendants were negligent in the design, development, testing, manufacturing, licensing, assembly, distribution, importing and/or exporting, marketing and sale of Baby Powder. There are 350 putative class members that have contacted or retained Ontario counsel; approximately 40% of Canada’s population resides in Ontario and a similar percentage of Baby Powder users likely reside in Ontario.

[161] This proceeding was commenced on March 24, 2016 (the “BC action”) and amended in May 2016. Plaintiff’s counsel in this action initially brought the action on

behalf of “all persons of British Columbia and Canada who have purchased or used Johnson’s Baby Powder or Shower to Shower® including their estates”.

[162] Initially, the BC action was an opt-out class action for BC residents and an “opt in” action for class members residing outside BC. This difference in procedure was sufficiently different that Ontario counsel did not seek a stay of the BC action.

[163] In 2018, the *CPA* was amended, adopting an opt-out class regime. At this juncture, the Ontario and BC actions began to overlap in a more meaningful way.

[164] Submissions on the certification application in BC were heard in February 2020. In the November 2020 reasons, I declined to certify the BC action until further steps were taken as noted above.

Ontario Plaintiffs’ Position

[165] At this juncture, the Ontario plaintiffs seek an order dismissing or adjourning the plaintiff’s certification application in this action pending determination of the defendant’s application to dismiss the Ontario plaintiffs’ claims for want of prosecution. If that motion is unsuccessful, the Ontario plaintiffs will continue with a certification motion currently scheduled to take place in November 2024.

[166] Submissions were made by Mr. Rochon on behalf of Rochon Genova LLP and Howie Sacks & Henry LLP, counsel for the Ontario plaintiffs who are seeking orders dismissing or delaying the decision on certification in this case pending the defendant’s applications in the Ontario court to dismiss their certification application due to unreasonable delay and abuse of process.

[167] The thrust of the Ontario plaintiff’s submissions was that it would be preferable that this multijurisdictional class action proceed in the province of Ontario for a number of reasons:

a. the vast majority of potential class members are resident in Ontario;

b. Ontario counsel were prepared to advance their certification application in Ontario earlier than British Columbia counsel;

c. Ontario counsel are better prepared, more skilled and competent to advance this claim, and Ontario counsel have better experts than those proposed by the Merchant Law Group (MLG).

[168] A large portion of the Ontario plaintiffs' application involved significant criticisms of MLG as counsel for the class in this action and the superior credentials and accomplishments of Ontario counsel, Rochon Genova LLP and Howie Sacks & Henry LLP. MLG recognize these firms as competent and good class counsel but contend that this section of the *CPA* was not designed for nor should be used to conduct a carriage motion at this juncture.

[169] At the outset, I was concerned about Ontario counsel's approach to their application in this matter. Ontario counsel filed a November 27, 2023 affidavit from Jessica Marshall (the Marshall affidavit), articled student, stating that the information in her affidavit came from her own personal knowledge except where stated to be on information and belief and where she relied on hearsay, she would include the source of that information.

[170] The Marshall affidavit is replete with assertions of fact based on information provided to her by Mr. Rochon. In addition, Ms. Marshall makes assertions of fact which were most likely based on information and belief from Mr. Rochon but not expressly stated that way. At para. 17 of the Marshall affidavit, she said "Ontario's counsel are eminently qualified to present the proposed class and to advance the matter forward, not only to certification but to a determination of the merits." I doubt very much that an articled student would be capable of testifying to that assertion as a fact. These types of assertions continue throughout the Marshall affidavit and are inappropriately in the nature of argument rather than statements of fact.

[171] In my view, this effort by the Ontario law firm offends the general rule that lawyers in BC should not speak to their own affidavits. In my view, the practice of a lawyer informing an articled student about certain facts and relying on that articled student to include those facts in their affidavit results in the lawyer speaking to their own assertions of fact in that affidavit. This is not a case where the affiant's affidavit

dealt with noncontroversial matters. The reasons lawyers do not speak to their own affidavits are well-known and when a lawyer speaks to an affidavit based on their assertions of facts which are relied on by an articling student, it is the lawyer's assertion of truth that underscores the affidavit. In my view, Rule 2.1-3 of the *Code of Professional Conduct for British Columbia* is thus breached.

[172] This is not a case where the affidavit is sworn by someone in counsel's firm who is not depending on the truthfulness and reliability of counsel's affirmation of facts which are based on information and belief. When the basis of information and belief is from counsel themselves, it is my view the admonition against speaking to one's own affidavit should be respected.

[173] Further, it is somewhat unseemly for counsel to provide evidence and submissions extolling his own firm's virtues and reputation as class counsel and criticizing counsel for the other party in a flawed affidavit, in an effort to wrestle the claim from British Columbia. It would be disingenuous to suggest that counsel was not speaking to his own evidence t that was, in effect, his assertion of the facts in the application. It may be that counsel misunderstood the general rule in this province. However, this presentation undermines my confidence in his judgment.

[174] Ontario counsel referred to a number of authorities which were highly critical of plaintiff's counsel. That may be the case but MLG countered with assertions that it has successfully and competently prosecuted other class action lawsuits.

[175] As set out above, the Ontario plaintiffs seek an order dismissing the certification application or a stay of proceedings pending the outcome of applications in the Ontario claim scheduled for September 24 – 26, 2024. They contend that this court has a broad discretion under s. 4(1)(d) to make this order in the best interests of all potential class members.

[176] the Ontario plaintiffs contend that their action is more robust with more exhaustive pleadings and should be the preferable procedure for advancing the claims. They contend it is not in the best interests of the class members to have the B.C. Action certified provincially or nationally.

[177] The Ontario plaintiffs set out a critical and damning summary of the shortcomings and substandard handling of the BC claim by MLG. In part, they contend the MLG action is not better prepared to advance the claims of all potential class members contrasted with the compelling advantages of better preparation and background of Ontario claim class counsel.

[178] They contend that the Ontario counsel were not informed of the BC action until after November 17, 2020 and were thus deprived of an opportunity to make submissions at the original certification application.

[179] Examples of MLG's poor performance include the fact that the 2018 Notice of Application for certification was not delivered in 2020 to allow Ontario counsel to make submissions as to the preferability of the Ontario action.

[180] Ontario plaintiffs argued that MLG's failure to provide an adequate record and evidence at the February 2020 certification hearing resulted in adjournment of the certification process, which indicated they lacked the appreciation of the factual and scientific basis underlying the claim. The Ontario plaintiffs cite other failures including failure to establish a claim in negligent design, breach of consumer legislation and other provinces, and other pleading deficiencies.

[181] The Ontario plaintiffs contend that MLG was ill-prepared for the initial certification application at which time evidence tendered by the plaintiff's expert was not wholly admitted and the court was not satisfied that a methodology to prove a common issue had been presented. Further, MLG was ill-prepared with expert evidence to prove the existence of a methodology at the first certification hearing and the application was adjourned. In the result, the Ontario plaintiffs contend MLG's conduct represents a lack of appreciation for the scientific complexity and factual matrix of the claim.

[182] Moreover, the Ontario plaintiffs argue MLG's initial pleadings were deficient and the BC claim is now unduly narrow. Ontario plaintiffs claim their action will allow for a "broader recovery for class members", including an expanded claim for

negligent design, testing and manufacture, and breaches of provincial consumer protection legislation.

[183] They contend MLG delayed unnecessarily from February 2020 until November 2021 to obtain the Cramer report and this dilatory approach demonstrates the risk of compromising the class proceeding.

[184] Ontario plaintiffs provide summaries of three experts they intend to rely on concerning general causation and methodology for establishing general causation. They believe that their record is better prepared and their experts have established the causal relationship between talc and ovarian cancer.

[185] In September 2021, the Ontario plaintiffs attempted to reach an agreement on the timetable of their proceeding. That offer was rejected and in November 2021 on the eve of a potential dismissal of the Ontario action Justice Perell directed that the defendants stay of proceedings and abuse of process motion would be held simultaneously at the hearing of the certification motion. Due to the bankruptcy proceedings initiated by the defendant, the BC and Ontario plaintiffs' proceedings were stayed for almost 2 years. On September 19, 2023 that stay of proceedings was lifted.

[186] The Ontario plaintiffs argue that Rochon Genova LLP has a record of successfully representing a number of class action claims in Canada (but not British Columbia) the details of which were set out in written argument. The Marshall affidavit asserts that Mr. Rochon's firm is "eminently qualified to represent the proposed Class and to advance the matter forward…". She also swears they have experience in litigating complex product liability actions and a record of "vigorously prosecuting class actions that they advance…".

[187] The Ontario plaintiffs contend no preference should be given to the choice of proceeding with the BC action simply because it's certification hearing will be completed first. The Ontario action is the preferable procedure for a fair and efficient resolution of the common issues and that this court should refuse to certify the BC Action.

[188] The Ontario plaintiffs argue that their proposed certification record includes claims that are not made or have been excluded from the Plaintiff's Third Amended Notice of Civil Claim (the "Third ANOCC") as a result of my decision in November 2020. It would therefore be in the interests of all potential class members that these claims be advanced in the Ontario action.

[189] Last, the Ontario plaintiffs warned that the defendants' response to its involvement on this hearing could be an effort at "forum -shopping", in that it may be seeking to take advantage of the poor quality claim advanced by MLG.

BC Plaintiff's Position

[190] The plaintiff argues that the Ontario plaintiffs have ventured beyond the scope and ambit of its permission to make submissions at the certification hearing in s. 3.1 of the *CPA*.

[191] The plaintiff contends that there is no relevance to the Ontario plaintiffs' submissions concerning deficiencies at the first certification hearing because those shortcomings have been remedied and this proceeding should be certified. Moreover, in the November 2020 decision, certain aspects of the application were conditionally certified.

[192] The evidence confirms that the Ontario plaintiffs claim was commenced May 18, 2016 but there was no communication between the Ontario counsel and the defendants counsel between June 2016 and September 16, 2021. The Ontario plaintiffs claim has not been posted on the Canadian Bar Associations Online Class Actions database. Conversely, the plaintiff did not give notice to the Ontario plaintiffs of their impending certification application in 2019-2020.

[193] The plaintiff contends that its application for certification was heard at first instance in February 2020 and that the Ontario certification record was filed in February 2021, one year later.

[194] Absent any communication from Ontario plaintiffs' counsel, until September 16, 2021, the defendants took the position that the five-year delay between

commencing the claim should result in a dismissal of the claim as an abuse of process or delay.

[195] The plaintiff argues that there has been no explanation from the Ontario plaintiffs' counsel of the five-year delay between commencement of their action in Ontario in 2016 and the delivery of their certification record when faced with the defendants' dismissal application for want of prosecution in October 2021.

[196] The plaintiff asserts that the Ontario plaintiffs' certification motion includes expert reports from three individuals that are substantially similar to reports filed in United States talc litigation, with the addition of a specific causation opinion from a Dr. Clarke–Pearson. The inference to be drawn from this fact is that the Ontario plaintiffs have not performed to the level they suggest has been accomplished.

[197] The Ontario plaintiff's certification record was filed one year after the certification hearing took place in this case and under threat of a dismissal for want of prosecution. This five-year delay is inconsistent with Ms. Marshall's assertion, presumably informed by Mr. Rochon, that his firm vigorously prosecutes class actions.

[198] Plaintiff's counsel in this case object to the inflammatory, self-serving and opinionated submissions made by Ontario counsel that were absent any attempt at objectivity or professional respect. Ontario plaintiffs' reliance on their description of Mr. Rochon's firm as "leading experts that bolster the validity of the Ontario action" and "highly reputable counsel" used in submissions were not helpful.

[199] The plaintiff contends that nothing in the evidence demonstrates that MLG are not competent counsel or that Rochon Genova LLP and Howie Sacks & Henry LLP are more competent counsel.

[200] The plaintiff contends that the unexplained five-year delay in the Ontario proceeding to filing its certification record and the impending application to dismiss that claim do not favour the preferability of the Ontario claims. The plaintiff submitted a Notice of Application for certification of this multi – jurisdictional action on

September 25, 2023 following the dismissal of proceedings in Bankruptcy Court on August 11, 2023 in the United States.

[201] The plaintiff contends that the Ontario plaintiffs are seeking further delay in order to remedy their dilatory approach to the Ontario class plaintiffs. They contend there is no justification to wait for the Ontario motion dismissing the Ontario plaintiff's claims.

[202] If the Ontario plaintiffs are unsuccessful and the plaintiff's certification application is dismissed, there is a potentially disastrous outcome for all potential class members in Canada.

[203] The plaintiff contends that certification should proceed in British Columbia and, if the Ontario plaintiffs claim is certified, then a supplementary certification application may be necessary.

[204] The plaintiff also contends that the Ontario plaintiffs challenge to their expert's opinion should not be resolved in this application. They contend that this Court is unable to assess the qualifications of the Ontario plaintiffs' experts in comparison to the plaintiff's experts. In any event, if the Ontario experts have additional evidence for use in the common issues trial, those opinions could be used in the British Columbia claim.

Analysis on ss. 4(3) and 4(4) of the CPA

[205] I conclude that the Ontario plaintiffs' right to make submissions at the certification hearing did not extend to seeking relief by way of dismissal or adjournment of the certification application. However, they were entitled to make submissions and provide evidence at the certification hearing. The thrust of the Ontario plaintiffs' submissions is that the BC action is not preferable because the Ontario action is broader and more robust and will advance the claims more effectively.

[206] I have already decided above, under s. 4(2)(c), the fact that this class proceeding involves claims that are similar to the subject of other proceedings does

not impede certification of this action. At this juncture, under ss. 4(3) and 4(4), I must be satisfied that it would be preferable to resolve the common issues raised in the BC claims in this province rather than in the proceeding in the province of Ontario.

[207] This determination must be guided by the four objectives set out in s. 4(4)(a) and the factors set out in s. 4(4)(b):

> 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.

[208] In this case, notwithstanding the heavy criticisms of MLG levelled by Ontario counsel, I recognize that the paramount consideration under s. 4(4)(a) is safeguarding the interests of the parties and promoting the ends of justice.

[209] Taking all of the s.4(4)(a) objectives into account, my analysis on the factors set out in s. 4(4)(b) is as follows.

(i) The alleged basis of liability, including the applicable laws

[210] The basis of alleged liability appears to be similar in both actions. However, the Ontario claims include a wider range of claims some of which this court has refused to certify including in the area of negligent design and marketing. Moreover, MLG did not lead certain other causes of action that may be considered in the Ontario certification application.

[211] Absent a decision in the Ontario application, I cannot conclude that the basis of liability in that action exceeds the quality of the claims extant in this case.

(ii) The stage that each of the proceedings has reached

[212] I am taking into account that the BC action has reached a point where this court has determined certification can be granted subject to changes described in the November 2020 decision and these reasons. The plaintiff has presented additional opinion evidence and other changes to class definitions thus addressing the shortcomings in the initial application.

[213] The Ontario plaintiffs commenced their action in May 2016 and took no steps to move that proceeding forward until facing the threat of a dismissal in 2021. That claim might yet be dismissed for want of prosecution or delay but the hearing of that application will occur at the same time as the certification application. There is no certification order in Ontario and I am satisfied that comity does not affect my conclusions at this stage: see *N&C Transportation Ltd. v. Navistar International Corporation*, 2022 BCCA 164 at paras 47-48

[214] In the result, this is an unusual circumstance in which a class claim in this province is more advanced than the Ontario class claim and the competing interests of the class plaintiffs in each province may be better resolved in applications after the Ontario certification application is resolved.

(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

[215] This factor engages the allegations of the Ontario plaintiff concerning MLG's competence and history in class proceeding litigation. In the November 2020 decision I accepted that the BC plaintiff's litigation plan satisfied the minimal requirements to achieve certification in February 2020 and there have been no changes to that plan. I recognize that during much of this time between February 2020 and 2024 the defendant was involved in bankruptcy proceedings and the class claims in Canada were stayed.

[216] Under this factor, Ontario counsel pointed to deficiencies in MLG's handling of the BC claim, including its delay in bringing forward new evidence to address the methodology deficiency that impeded the certification application in February 2020.

[217] Although Ontario counsel are critical of BC counsel's management of the BC claim, Ontario counsel did not obtain its opinion evidence until September 2021, which is five years after they commenced the Ontario claim. Overall, I am not satisfied that the diligence and focus of counsel for the Ontario plaintiff demonstrates a focused plan to advance the interests of their class plaintiffs.

[218] In my view this factor does not favour the conduct of the litigation by either party to date and is a neutral factor in this part of the analysis.

(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

[219] The Alberta proceeding has not been a factor in my consideration of this issue.

[220] It is not unreasonable to assume that there will be class members in all provinces, except Quebec, and their participation in either class proceeding will be more difficult due to the distances between them and the province where the class claim is certified.

[221] I recognize that more people live in Ontario than any of the other provinces where class members will reside, but this factor cannot be determinative. I heard no evidence on how class members in other provinces can participate remotely for some or all of the procedural steps in the litigation.

[222] There will be some bias in favour of litigating these claims in Ontario but I received no submissions on either plaintiff's plans to accommodate others in other provinces. In my view this factor is neutral in the preferability analysis.

(v) The location of evidence and witnesses

[223] On this part of the analysis I received no submissions. It is obvious that all class members in other provinces will be compelled to litigate these claims in a province distant from their own. Witnesses and experts will be forced to travel to trial locations.

[224] This factor will, in my view, favour the litigation taking place in Ontario in that it will be closer to more prospective class members than BC. Nevertheless, I am not convinced that the distances involved are sufficient to preclude BC counsel from litigating almost any Canada-wide multi-jurisdictional claim in this province on the basis of distance from the litigants alone.

Conclusion on Preferability

[225] As set out above, the Ontario plaintiffs contend that the proceedings in that province will ensure the broadest possible access to justice to class members, and that Ontario counsel are better equipped to understand the nuances and necessary foundations for the action and seek certification on complex issues.

[226] In my view, the evidence does not provide much support for discriminating between the claims in both jurisdictions on the basis of s. 4(4)(b)(i) and (iii).

[227] Although the issue concerning claims under the Ontario consumer protection legislation have been rejected in the BC action, claims under the Ontario legislation may still be advanced separately.

[228] Under s. 4(4)(b)(ii), (iv) and (v), the court is instructed to take into account the factors pertinent to each class proceeding. The overarching concern is the balancing of each class claimant's circumstances and their ability to obtain a just and expeditious result. The location of class members and the ability of representative plaintiffs to participate in the proceedings, and the location of evidence and witnesses are important, but I did not receive much assistance in the evidence to help resolve these questions

[229] Under s. 4(4)(b)(ii), the BC action has reached a point where certification can be granted, subject to the preferability decision. The plaintiff's initial certification claim was accepted in part but subject to additional opinion evidence and other changes. The plaintiff has addressed the shortcomings in the initial application

[230] The Ontario plaintiffs commenced their action in May 2016 and apparently took no steps to move that proceeding forward until facing the threat of a dismissal in 2021. That claim might yet be dismissed for want of prosecution or delay but the hearing of that application will occur at the same time as the certification application.

[231] As things stood in February 2020, I was satisfied that the stage reached in the BC proceedings favours BC as the preferable proceeding, particularly for the reasons set out in the November 2020 decision (although I was not aware of the Ontario action at the time). I concluded that this class proceeding would be certified subject to:

i. Receiving more compelling evidence of a methodology to prove the common cause question;

ii. A narrowing of the proposed class and sub-class;

iii. Expanding the consumer protection claims to ensure all claims under provincial legislation are adequately presented;

iv. Clarifying category of persons entitled to make claims by reason of their status as family members; and

v. Changing the proposed class representative plaintiffs.

[232] It is obvious that the population of the province of Ontario is dramatically greater than the population of British Columbia. The Ontario plaintiffs contend the individual class members will be restricted in their ability to participate in the proceeding if the British Columbia proceeding is found to be the preferable jurisdiction for the claim to proceed.

[233] To accede to the Ontario plaintiffs' argument would suggest that, where proceedings have been commenced in multiple jurisdictions, class proceedings for multi-jurisdictional claims could rarely be prosecuted in a province other than Ontario (or maybe Québec) simply because of the size of its population.

[234] I take into account the difficulty and inconvenience to a large component of the class if the BC class proceeding is certified. To require large numbers of residents of Ontario and other provinces to establish their individual claims to damages in British Columbia could be daunting. Nonetheless, accepting the population estimates made by Ontario counsel, 60% of potential class members would be required to pursue their individual claims in the province of Ontario. I recognize that there will be additional burdens on class members outside of British Columbia to prove individual claims. I am not persuaded that this difficulty works to favour the province of Ontario as the preferable proceeding. There were no submissions or evidence on this point except for the general distribution of the population in Canada.

[235] I am most troubled by the pending application to dismiss the Ontario action. It might very well be that the British Columbia action is the only one that can protect the interests of class members. To dismiss or delay certification of the British Columbia proceeding would not be in the interests of justice or the interests of the potential class members.

[236] On the other hand, if the dismissal application fails, the Ontario Court would be required to consider the preferability of proceeding with that claim, the result of

which would be to prevent certification in British Columbia on a practical if not a technical basis.

[237] In this case, the basis of liability is similar but not identical between the two provinces. This factor does not favour the proceeding commenced in Ontario.

[238] On balance the British Columbia proceeding is more advanced than the Ontario action. Most importantly, the Ontario action is facing the prospect of a dismissal of the claim for delay with little explanation from Ontario counsel concerning the reasons for or length of delay in that province. There was a paucity of evidence concerning the viability of the litigation plans, the capacity and resources for advancing the proceeding on behalf of the class. None of these factors assisted the court in determining the preferred location for the conduct of this multi-jurisdictional class proceeding.

[239] As noted above, Ontario counsel asserts the obvious difference in the populations of British Columbia and Ontario is important. Other than the obvious difficulties in class members instructing counsel in British Columbia, travelling to British Columbia and addressing individual trials, there was no evidence dealing with these issues. Neither was there evidence concerning the location of evidence and witnesses.

[240] In *Tharani v. LifeLabs Inc.*, 2020 BCSC 1670, Justice Iyer (as she then was) discussed the options relating to “carriage contests” under the *CPA*. She observed that in *Fantov*, Goepel J.A. said that there can be stay of proceedings to prevent an abuse of process before a certification hearing

[241] Although a delay in certification pending the application to dismiss the Ontario action for want of prosecution or abuse of process may have been appropriate, the Ontario certification application was proposed to be heard at the same time. Counsel did not explain how or why it would be appropriate to delay the certification decision in this proceeding while the court in Ontario may have simply certified the action in that province.

[242] Overall, I am satisfied that this class proceeding should take place in British Columbia, in part because I have already made orders indicating certain claims will be certified and others would be certified pending the filing of additional evidence. This has been done, and I find that a class proceeding in the province of British Columbia is the preferable proceeding and continued certification is granted at this time subject to the findings I have made above concerning the class definition and common cause issue.

[243] This conclusion is based on the facts known at this point in time, and in recognition of the uncertainty stemming from the application to dismiss the Ontario claim for want of prosecution and the extent to which the Ontario claim might be certified.

[244] Once the dismissal application in Ontario has been decided, the parties will have leave to make further submissions.

[245] I therefore order that the British Columbia proceeding be certified, and if the Ontario claims are certified, then sections 12 and 13 of the *CPA* provide an avenue to resolve what would then become a carriage dispute to avoid the duplication of actions.

Miscellaneous Issues

CPA, s. 4(1)(a): the Subrogated Health Care Claim with Respect to the Province of Québec Fails to Disclose a Cause of Action.

[246] The defendants contend that the Third ANOCC is deficient in that it pleads claims that do not disclose a cause of action, notably, that there is a subrogated health care claim in the Province of Québec seeking healthcare recovery costs stemming from the effects of Baby Powder on residents of that province. I understand that the plaintiff concedes that this claim in the Third ANOCC is inconsistent with the Québec class proceeding and those claims made, and should not include the subject of healthcare costs in this action.

CPA, s. 4(1)(a): Claims under the Ontario Consumer Protection legislation cannot be made in this proceeding

[247] The remaining cause of action question is whether there is sufficient detail in the proposed Third ANOCC disclosing causes of action under provincial consumer protection legislation for residents of Alberta, Saskatchewan, Manitoba, Ontario, Québec and New Brunswick.

[248] The defendants argued that the amendments concerning claims under Ontario consumer protection legislation cannot succeed in light of decisions in the Supreme Court of British Columbia that the Ontario legislation requires privity of contract between buyers and sellers in order to engage the Consumer Protection legislation.

[249] It is conceded that class members would typically purchase Baby Powder from retailers and not the defendant and would not have any such claims. The plaintiff contends that Ontario's law is "uncertain" and these claims are therefore not bound to fail.

[250] The plaintiff referred to the Ontario decision of *James Richardson v. Samsung Electronics Canada Inc*., 2019 ONSC 6845, which held that privity of contract was required to advance claims under the Ontario consumer protection legislation. The plaintiff argued that "a half dozen Superior Court decisions" have reached the opposite conclusions and urged this court to conclude that the law is uncertain and to permit that claim to be included in the Third ANOCC.

[251] Against that proposition is the decision in *MacKinnon* rejecting a similar claim that British Columbia decisions have determined that privity of contract is required under the Ontario Act, and it was plain and obvious that claims under the Ontario act are bound to fail.

[252] I conclude this court is bound to follow *MacKinnon* and, for the reasons set out in that decision, accept that privity of contract is required in Ontario to advance a claim under the consumer protection legislation. In the result, the plaintiff's request

to decline to follow *MacKinnon* is misguided and it is plain and obvious that claim cannot succeed. It will not be certified.

CPA, s. 4(1)(b): Claims Concerning Residents of Québec

[253] The plaintiff's Third ANOCC pleads a subrogated claim for healthcare costs with respect to the province of Québec. This issue has been resolved by agreement with the plaintiff.

[254] The defendants contend that the current proposed class includes Québec residents. There is a Québec proceeding involving nearly identical allegations that has been authorized in Québec but applying a different standard for authorization.

[255] The defendant argues that this court should refuse to certify as class members Québec residents as provided for in s. 4(1)(c) of the *CPA*.

[256] The plaintiff concedes that the proposed class definition should exclude individuals who have ever used Baby Powder within the province of Quebec, as these individuals are presumptively included in the authorized Kramar action.

CPA, s. 4(1)(a): Do the Pleadings Disclose a Cause of Action?

[257] The defendant recognizes that certification should not be denied, assuming the facts pleaded are true, unless it is plain and obvious the pleaded claims are bound to fail or have no reasonable prospect of success: see *Pro-Sys* at para. 63. In the November 2020 decision, the pleadings were found to disclose causes of action for breaches of the British Columbia consumer protection legislation, the *Competition Act*, and negligence in failure to warn.

Class Period

[258] The defendants contend that the class should not extend indefinitely into the future. Class members must be identified after the certification order and notice given to the class.

[259] The defence relies on *Douez* where the court determined that the end point for determining the proposed class definition should be the date of this decision.

[260] I am satisfied that the end date the class definition cannot be indefinite and the class definition should be amended to include a limitation to the date of this judgment.

Conclusion

[261] This proceeding will be certified as a multi-jurisdictional class action in accordance with the directions given in these reasons and the November 2020 reasons.

[262] To the extent necessary, the application is adjourned to permit the appropriate amendments to be made.

"Armstrong J."