IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Morel v. Koninklijke Philips N.V.,*
2023 BCSC 625

Date: 20230419
Docket: S216008
Registry: Vancouver

Between:

John Morel

Plaintiff

And:

Koninklijke Philips N.V., Philips Electronics Ltd., Philips North America LLC., Philips RS North America LLC, and Respironics Inc.

Defendants

- and -

Docket: S219243
Registry: Vancouver

Between:

Sheldon Nathanson

Plaintiff

And:

Koninklijke Philips N.V., Philips Electronics Ltd., Philips North America LLC., and Philips RS North America LLC

Defendants

Before: The Honourable Madam Justice Ker

Reasons for Judgment on Carriage Motion

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Place and Date of Hearing:	Vancouver, B.C. June 16-17, 2022 September 20, 2022
Place and Date of Judgment:	Vancouver, B.C. April 19, 2023

Table of Contents

INTRODUCTION

[1] This ruling addresses an application – referred to as a carriage motion – brought in two proceedings commenced under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. Two groups of law firms are competing for the right to conduct a lawsuit. Each has commenced an action against a group of defendants (collectively referred to as the "Philips Defendants"), to recover damages on behalf of users of certain "Breathing Devices"[1] (defined below) stemming from a Health Canada warning about the devices and a global recall of the devices by the Philips Defendants in June 2021.

[2] In this matter there are two proposed representative plaintiffs: Mr. John Morel (the "Morel Action") and Dr. Sheldon Nathanson (the "Nathanson Action"). The defendants in both actions are now largely the same: Koninklijke Philips N.V., Philips Electronics Ltd., Philips North America LLC., and Philips RS North America LLC.[2] However, the Morel Action also names Respironics Inc. as a defendant in its action.

[3] A consortium of counsel (the "Consortium"), lead by Rice Harbut Elliott LLP ("RHE LLP") are counsel for the plaintiff in the Morel Action, which now includes four other actions commenced in other Canadian provinces. They initiated the Morel Action on June 24, 2021. Klein Lawyers LLP ("Klein LLP") represent the plaintiff in the Nathanson Action. They initiated the Nathanson Action on October 4, 2021.

[4] Each group of counsel for the plaintiffs contend that they are the better and more deserving firm, as well as have the better case for the prosecution of a national class action against the defendants.

[5] Counsel for the Philips Defendants took no position on the application.

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[1] The Morel Action has referred to the devices as "Respiratory Devices" and the Nathanson Action has referred to the devices as "Airway Machines".

[2] An earlier iteration of the Morel pleadings named slightly different defendants but a second amended Notice of Civil Claim filed in the Morel Action on May 19, 2022, has resulted in both actions naming the same defendants, although the Morel Action also names Respironics Inc as a defendant.

BACKGROUND

[6] The Philips Defendants design, engineer, manufacture and sell the Breathing Devices. These devices assist individuals with their breathing while sleeping. The scope of their market is international.

[7] The Breathing Devices include at least three different categories of device:

i. a Continuous Positive Airway Pressure device, referred to as a "CPAP";

ii. a BiLevel Positive Airway Pressure device, referred to as a "BiLevel PAP"; and,

iii. a mechanical ventilator.

[8] The Breathing Devices contain a foam component surrounding the edge of the device that covers a patient's nose and mouth. The foam component, made of a polyester-based polyurethane, is a sound abatement feature designed to reduce the noise emitted by the Breathing Devices when in use.

The Recall of the Breathing Devices

[9] On or about April 26, 2021, the Philips Defendants disclosed to investors a possible risk associated with the degradation of the sound abatement foam (the "Foam Defect").

[10] On or about June 14, 2021, the Philips Defendants issued a recall notice for the Breathing Devices related to the Foam Defect. The recall notice was issued in the United States.

[11] On or about June 23, 2021, Health Canada issued a recall and safety alert advising Canadians of the Foam Defect and recall by the Philips Defendants.

[12] The recall was precipitated by the discovery that the foam may degrade by (i) breaking down into particles which may be inhaled or swallowed by users, or (ii) through the release of volatile organic compounds (VOCs) or chemicals (gases) that may be inhaled, which could lead to negative health effects. Users of the Breathing Devices that suffer from the Foam Defect may well inhale the released chemicals and degraded particles that make their way into the Breathing Device's air

pathway. Adverse health effects could include headaches, airway irritation, cough, chest pressure, sinus infection, nausea/vomiting, as well as toxic and carcinogenic effects. Users of these Breathing Devices run the potential risk of developing cancer.

[13] The class actions raise claims arising out of the Defendants' alleged defective design, engineering, testing, development, manufacturing, marketing, distributing and sale of the Breathing Devices.

The Proposed Proceedings in British Columbia

[14] On June 24, 2021, RHE LLP filed a national class action proceeding in the Supreme Court of British Columbia with Mr. Morel as the named plaintiff. The Morel Action was submitted to the Canadian Bar Association ("CBA") Class Action database on or about June 25, 2021.

[15] On October 4, 2021, Klein LLP filed a national class action in the Supreme Court of British Columbia with Dr. Nathanson as the named plaintiff. Approximately one month later, the Nathanson Action was submitted to the CBA Class Action database on November 7, 2021.

Other Proposed Class Proceedings in Canada

[16] In addition to the Morel and Nathanson Actions, class actions were filed in several other provinces. They have all agreed to join the Morel Action and now form the Consortium behind the Morel Action.

[17] The dates of the filings in the other jurisdictions and their agreement to join the Morel Action are outlined below:

Jurisdiction	**Date of Filing**	**Style of Cause and Court File #**	**Date filed with CBA Database**	**Date Action Joined the Consortium**
Québec	July 9, 2021	*Roy c. Respironics et al.* (Court File #500-06-01154-216) – the Roy Action	July 13, 2021	December 2021 – January 2022

Ontario	July 16, 2021	*Gray v. Philips Electronics Ltd. et al.* (Court File #CV-21-00665742-00CP) – the Gray Action	July 19, 2021	August 2021[3]
Nova Scotia	July 21, 2021	*Moore v. Koninklijke Philips N.V. et al.,* (Court File #507852) – the Moore Action	July 30, 2021	December 2021 – January 2022
Newfoundland and Labrador	August 27, 2021	*Kehoe v. Koninklijke Philips N.V. et al.,* (Court File #2021-01G-4594CP) – the Kehoe Action	No information provided	May 2022

[18] In addition to the above enumerated Canadian class actions, proposed class actions have also been filed in a number of jurisdictions in the United States.

[19] When two proposed class proceedings are filed in the same jurisdiction on the basis of the same facts and allegations, against similar or the same defendants, counsel for the plaintiffs must either co-operate and consolidate their claims, or the court must intervene and stay one of the actions, permitting the other to go forward with carriage of the matter.

[20] Carriage motions are expensive, can delay the adjudication of the litigation, may force counsel to reveal their strategy, and pit plaintiffs' counsel against one-another. While co-operation is preferable, it is not always possible. Thus, Canadian courts have established a test for determining which action is in the best interests of the proposed class and should be awarded carriage of the matters: see *Ewert v.*

[3] It appears that the Consortium was formed when the Morel Action and the Gray Action agreed to join together in August 2021.

Canada (Attorney General), 2014 BCSC 215; *Rogers v. Aphria Inc.,* 2019 ONSC 3698; *Wong v. Marriott International Inc.,* 2020 BCSC 55; *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCSC 331 [*Moiseiwitsch BCSC*], aff'd, 2022 BCCA 321 [*Moiseiwitsch BCCA*].

[21] Plaintiffs' counsel in the Morel and Nathanson Actions have been unable to come to a co-operative arrangement. These reasons address the competing carriage motions brought by the two plaintiffs, each seeking carriage of a national class action law suit.

ISSUE

[22] The issue before this Court is whether carriage of a proposed national class action filed in BC against the Philips Defendants should be awarded to the Morel Action or the Nathanson Action.

[23] The action which does not obtain carriage will be stayed pending the certification determination.

LEGAL PRINCIPLES GOVERNING DETERMINATION OF CARRIAGE MOTIONS

[24] In *Ewert,* Justice Blok aptly described the general principles that animate the hearing of a carriage motion:

> [12] The general scenario faced by a court on a carriage application was put this way in *Smith v. Sino-Forest Corporation*, 2012 ONSC 24 [*Sino-Forest*]:
>
> > [2] Practically speaking, carriage motions involve two steps. First, the rival law firms that are seeking carriage of a class action extoll their own merits as class counsel and the merits of their client as the representative plaintiff. During this step, the law firms explain their tactical and strategic plans for the class action, and, thus, a carriage motion has aspects of being a casting call or rehearsal for the certification motion.
> >
> > [3] Second, the rival law firms submit that with their talent and their litigation plan, their class action is the better way to serve the best interests of the class members, and, thus, the court should choose their action as the one to go forward. No doubt to the delight of the defendants and the defendants' lawyers, which have a watching brief, the second step also involves the rivals hardheartedly and toughly reviewing and criticizing each other's work and pointing out

> flaws, disadvantages, and weaknesses in their rivals' plans for suing the defendants.
>
> [13] In the present cases the two steps described above have been rolled into one; nonetheless, that overall description is certainly apt here.
>
> [14] The overall objective was stated in *Sino-Forest* as follows:
>
> > [16] In determining carriage of a class proceeding, the court's objective is to make the selection that is in the best interests of class members, while at the same time being fair to the defendants and being consistent with the objectives of the *Class Proceedings Act, 1992*: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 48; *Setterington v. Merck Frosst Canada Ltd.*, *supra*, at para. 13 (S.C.J.); *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.), at para. 14. The objectives of a class proceeding are access to justice, behaviour modification, and judicial economy for the parties and for the administration of justice.
> >
> > …
> >
> > [19] In addition to identifying relevant factors, the carriage motion jurisprudence provides guidance about how the court should determine carriage. Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class: *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), sub. nom *Mignacca v. Merck Frosst Canada Ltd.*, leave to appeal granted [2008] O.J. No. 4731 (S.C.J.), aff'd [2009] O.J. No. 821 (Div. Ct.), application for leave to appeal to C.A. ref'd May 15, 2009, application for leave to appeal to S.C.C. ref'd [2009] S.C.C.A. No. 261.

[25] Those observations are equally apposite for the carriage motion in this case.

Factors to be Considered on a Carriage Motion

[26] The factors to be considered on a carriage motion are intended to determine which competing actions will best advance the interests of the putative class members, while also promoting the objectives of the *CPA*: *Ewert* at paras. 14–15, 18; *Moiseiwitsch BCSC* 331 at para. 11; *Moiseiwitsch BCCA* at paras. 9, 45

[27] The factors to be considered on a carriage motion are not in issue. The governing test to be applied in determining which action should be granted carriage of a proposed class action proceeding when more than one action on the same matter has been commenced was set out by Justice Perell in *Rogers* at para. 17. These non-exhaustive factors were succinctly summarized by Justice D. MacDonald

in *Wong.* More recently, Chief Justice Hinkson cited this test with approval in *Moiseiwitsch BCSC* at para. 12, as did Justice Voith in *Moiseiwitsch BCCA* at para. 9.

[28] While there is no universal formula of factors to be considered, counsel agree that the considerations are to be guided by the following non-exhaustive factors:

(1) The quality of the proposed representative plaintiffs;

(2) Funding;

(3) Fee and consortium agreements;

(4) The quality of proposed class counsel;

(5) Disqualifying conflicts of interest;

(6) Relative priority of commencement of the action;

(7) Preparation and readiness of the action;

(8) Preparation and performance on carriage motion;

(9) Case theory;

(10) Scope of causes of action;

(11) Selection of defendants;

(12) Correlation of plaintiffs and defendants;

(13) Class definition;

(14) Class period;

(15) Prospect of success: (leave and) certification;

(16) Prospect of success against the defendants; and

(17) Interrelationship of class actions in more than one jurisdiction.

(See *Rogers* at para. 17; *Wong* at para. 24; *Moiseiwitsch BCSC* at para. 12).

[29] In *Wong* at paras. 25–26, MacDonald J. clarified that:

> Different factors speak to different considerations on a carriage motion. As Perell J. explained in *Rogers*:
>
> > [18] It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel. [Footnote omitted.]
>
> The courts discourage a "tick the boxes" approach to carriage motions. The focus should be the broader goal of promoting the best interests of the class members and fairness to the defendants: *Strohmaier CA* at para. 41. When factors are very similar, or have only minor differences, a court may assess them as neutral or not refer to them at all: *Strohmaier CA* at paras. 76 — 77. The circumstances of each case will determine how much weight should be given to each factor.

DISCUSSION

[30] I will address the applicable factors in turn. The jurisprudence makes clear that not all of the factors listed above require consideration in every case. Indeed, on the hearing of this application, counsel for both the Morel Action and the Nathanson Action conceded that many of the listed factors were neutral in the assessment process. Despite the fact that many of the enumerated factors are largely neutral, I will consider each in turn.

(1) The Quality of the Proposed Representative Plaintiffs

[31] Representative plaintiffs play an important role in class proceedings. As observed in *Azar v. Strada Crush Limited,* 2020 ONSC 549 at para. 22:[4]

> Section 5(1)(e)(i) of the CPA requires for certification that "there is a representative plaintiff . . . who . . . would fairly and adequately represent the interests of the class". This is more than just a formal requirement. The representative Plaintiff plays a substantive role in moving a class action forward. As the Supreme Court has put it, "The proposed representative "need not be 'typical' of the class, nor the 'best' possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class": *Western*

[4] Section 4(1)(e) of BC's *CPA* is identical to s. 5(1)(e) of Ontario's *Class Proceedings Act*, *1992*, S.O. 1992, c. 6.

> *Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), para 41.
>
> (See also *Richard v. HMTQ,* 2007 BCSC 1107, at para. 42.)

[32] However, a proposed representative plaintiff will only be rejected by the court when that plaintiff clearly will not, or cannot, represent the class: *Moiseiwitsch BCSC* at para. 15.

[33] The plaintiff in the Morel Action (Mr. Morel) is a resident of Nanaimo, BC. He is 79 years old and retired. He suffers from sleep apnea and has used a CPAP machine for 25 years. Since 2014, he has purchased and used two of the recalled Breathing Devices.

[34] Mr. Morel is described as an engaged representative plaintiff. He follows the news on this recall, regularly sends relevant information to counsel, and has participated in preparing and executing affidavits in support of certification and carriage of the action. He has also participated in a virtual town hall meeting with counsel and other class members.

[35] The plaintiff in the Nathanson Action (Dr. Nathanson) is a resident of Vancouver, BC. He is a clinical associate professor in the Faculty of Medicine at the University of British Columbia and has been teaching for approximately 20 years. His teaching responsibilities include tutoring medical students through real-life case studies, some of which involve patients with respiratory diseases, including Obstructive Sleep Apnea. He was a clinical physician from 1976 to 2015, and specialized in the primary care and treatment of patients with breathing difficulties, including Obstructive Sleep Apnea.

[36] Dr. Nathanson also has personal knowledge of the issues in this proposed class action. He was diagnosed with sleep apnea in the early 2000s and for approximately the last 15 years has been using a CPAP machine almost every night. His treating physician has advised him to continue using a CPAP machine. Dr. Nathanson was involved in a sleep study in August 2021, and was diagnosed as suffering moderate to severe sleep apnea.

[37] Under the circumstances, and in light of Dr. Nathanson's professional and personal experience with sleep apnea and Breathing Devices, I find that the inclusion of Dr. Nathanson as the proposed representative plaintiff provides a modest advantage to counsel for the Nathanson Action regarding this factor.

(2) Funding

[38] Both sets of plaintiffs note that the issue of funding is more relevant to actions in Ontario where there is a risk of substantial adverse costs awards. As MacDonald J. noted in *Wong* at para. 39:

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

[39] In this case, both actions are self-funded. The Consortium contends that it is better resourced than Klein LLP. While the Consortium may be better resourced due to the aggregation of law firms through agreements to join, and the larger pool of counsel to provide the services, on balance I find that this factor is neutral in the assessment.

(3) Fee and Consortium Agreements

[40] The fee arrangement can be an important factor on a carriage motion, as it can vitally affect the interests of the class. In some cases, the fee arrangement is determinative of the issue of carriage: *Wong* at para. 43 and cases cited therein; *Moiseiwitsch BCSC* at para. 40.

[41] The Consortium has a co-counsel agreement (the "Consortium Agreement") that includes counsel from four other Breathing Device class actions from across Canada, *i.e*. the joined Roy, Gray, Moore and Kehoe Actions. The Nathanson Action is not included in this agreement. The Consortium Agreement outlines that the Morel

Action will be managed by a three-person steering committee. Decisions are to be made by consensus, or by a majority decision if there is a disagreement.

[42] The initial Consortium Agreement also contains a dispute resolution process wherein the matter will be referred to ADR Chambers in Toronto, Ontario, pursuant to their standard form mediation agreement and rules in operation at the time. Should mediation fail to resolve any impasse, the matter will be referred to a named arbitrator or alternate, again with ADR Chambers, to be resolved by means of arbitration under Ontario's *Arbitration Act*, 1991, S.O. 1991, c. 17. The arbitrator's decision will be final and binding. Updated and modified co-counsel agreements for the various firms with actions in Ontario, Québec, Nova Scotia and Newfoundland and Labrador appear to now provide for dispute resolution procedures to occur in BC instead of Ontario.

[43] In so far as fees and disbursements are concerned, the Consortium Contingency Fee Retainer Agreement provides for a legal fee of 30% of the amount recovered in the Morel Action. Disbursements are also part of the amount to be recovered by the Consortium, although not until the matter is successfully concluded, and no interest will be charged on the disbursements. Legal fees, disbursements and applicable taxes will only be charged if the action is successful.

[44] However, "Schedule A: Example of Fee Calculation", which is attached to the Consortium Contingency Fee Retainer Agreement and outlines how legal fees will be charged, creates confusion as it sets out an example of 33.33% of the recovery amount and charges HST of 13% on both the legal fees and disbursements. Of course, GST and PST in BC is only 12%. Moreover, the example fee calculation includes an 10% levy payable to the CPF, likely the Ontario Class Proceeding Fund.[5]

[5] It might well be that the Schedule A: Example of Fee Calculation is a standard form example from an Ontario law firm. Passages in the Consortium retainer agreement at paras. 25, 31 and 40, that denote a female client (pronouns she/her) have been crossed out and substituted to reflect a male client (with handwritten pronouns he/his) in respect of the Morel Action.

[45] Klein LLP also has a contingency fee retainer agreement which provides for a legal fee of 33.33% of the amount recovered in the Nathanson Action. Disbursements are also part of the amount to be recovered by Klein LLP. Interest of 10% per annum, not compounded, will be charged on the disbursements. Legal fees and disbursements and applicable taxes will only be charged if the action is successful. Although there is no mention of taxes in the Klein LLP retainer agreement, it is assumed that the agreement would require the payment of 12% PST and GST on the legal fees and disbursements.

[46] Klein LLP undertakes to reduce its legal fees to 30% if the Consortium's legal fees are actually 30%, and also undertakes to not charge interest on the disbursements as a means of neutralizing the difference on fees between the two actions.

[47] Klein LLP also contends that the Consortium Agreement does not provide details of the agreements with the other proceedings that have joined the Morel Action. In arguing that this is a factor that weighs against the Consortium, Klein LLP relies upon the following observation from MacDonald J. in *Wong*:

> [55] The BC Consortium was formed after the actions were commenced and appears to be primarily strategic. There is no evidence before me how they intend to resolve differences between them if differences arise regarding strategy, timing, responsibilities, rewards, and other such factors: *Joel v. Menu Foods Genpar Ltd.,* 2007 BCSC 1482 (B.C. S.C.) at paras. 113 — 114. There are nine lawyers involved with no clear road map regarding how they will work together. There is the statement in the Class Action Retainer Agreement that "in the event of a disagreement concerning whether certain instructions are in the best interest of the Class, the matter may be submitted to the court for directions". I agree with Sache counsel that this statement appears to be directed at conflicts between the proposed representative plaintiffs and counsel.
>
> [56] Since all fees are reasonable in terms of the proposed classes, I place little weight on this factor. A lack of a clear mechanism to address conflicts between counsel in the BC Consortium weighs against the Wong Action.

[48] Respectfully, I do not agree that the Consortium has not outlined how it will resolve potential differences between their out of province members. The dispute resolution clauses in the Consortium Agreement at paras. 5, 17–18 outline a process

for resolving any differences in approach. There is a clear mechanism in place to address conflicts between counsel.

[49] Though fees are an important factor in a carriage motion, courts must take care to not simply endorse the lowest fee as being in the best interest of the class, as "[l]ower fees may not provide the proper incentives for counsel to litigate a particular class or class actions in the future": *Moiseiwitsch BCSC* at para. 46.

[50] However, akin to the finding at *Moiseiwitsch BCSC* at para. 46, given the magnitude of the claims in the proposed actions, I give no weight to that concern.

[51] Accordingly, I find this factor to be neutral.

(4) The Quality of the Proposed Class Counsel

[52] Although assessing the quality of the proposed class counsel should not devolve into a beauty contest, the act of engaging in a comparative analysis of the experience and expertise of the two proposed groups of counsel can sometimes take on the appearance of doing just that. However, MacDonald J. in *Wong* at para. 57, citing *Ewert* at para. 14, described the task of the court as:

> …not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class.

[53] The real question, as framed in *Wong* at para. 58, is:

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

[54] Both the Consortium and Klein LLP have extensive experience in class actions, including medical product and pharmaceutical class actions. Both firms have contacted and commenced working with counsel in the United States in tandem to co-ordinate – and no doubt share – litigation strategies and information related to the Foam Defect that precipitated the recall of the Breathing Devices. Indeed, the affidavit evidence supports that both the Consortium and Klein LLP have

contacts and associations with American firms involved in the parallel litigation that is occurring in the United States.

[55] It is worth noting that in the United States, there is a steering committee of the American Multidistrict Litigation group ("MDL") that is advancing the litigation against the Philips Defendants in that country. Apparently there are in excess of 100 cases filed as part of the MDL and the leadership team of the steering committee consists of 33 lawyers. Both the Consortium and Klein LLP have contacts and working relationships with law firms that are part of the American MDL case.

[56] Without doubt, Klein LLP is a pioneer in Canadian class action litigation with over 25 years of experience in this area, including in medical products class action cases.[6] This will be of benefit to the class. On the flip side, it appears that currently there may only be three lawyers from Klein LLP currently handling the Nathanson Action. While that might change, given the potential scope of the size of the class, the information before the Court at this juncture is that there are three counsel involved in the brief.[7]

[57] In so far as the Consortium is concerned, they are national in scope. As outlined in their submissions, lead counsel on the Morel Action are RHE LLP, Sotos LLP and Thomson Rogers LLP ("TR LLP"). Lead counsel on the RHE LLP team is Anthony Leoni, a member of the BC and Saskatchewan bars. Lead counsel on the Sotos LLP team is Louis Sokolov, a member of the Ontario and BC bars. Lead counsel on the TR LLP team is Stephen Birman, of the Ontario bar. Collectively, the three firms have more than 20 lawyers who focus their practices primarily or exclusively on class actions. They also employ a team of clerks and other support staff with experience in addressing and responding to class member inquiries relating to large scale class proceedings.

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[6] Lawyers at Klein LLP were counsel for the plaintiffs in six of ten medical product class actions: *Bartram v. GlaxoSmithKline Inc.,* 2013 BCCA 462; *Chalmers v. AMO Canada Company,* 2009 BCSC 689; *Harrington v. Dow Corning Corp.,* 2000 BCCA 605; *Jones v. Zimmer GMBH,* 2011 BCSC 1198, aff'd 2013 BCCA 21; *Stanway v. Wyeth Canada Inc.,* 2012 BCCA 260; *Miller v. Merck Frosst Canada Ltd.,* 2013 BCSC 544, aff'd 2015 BCCA 353.

[7] There can be no doubt that a number of paralegals and other legal administrative support staff would also form part of the Nathanson Action team.

[58] The three firms involved in the Morel Action are experienced, skilled and have complementary expertise relevant to this proposed class action. RHE LLP describes itself as among BC's leading injury trial lawyers and conduct, on average, 5–10 major injury trials per year in BC courts. RHE LLP has acted in numerous product liability and medical liability class action claims, including certified claims relating to medical products such as breast implants and other cases involving pharmaceutical and medical products.

[59] Sotos LLP has been recognized as one of Canada's leading class action firms representing plaintiffs. It is experienced in litigating class actions to merits decisions at trial and on summary judgment and has been counsel on several of the leading cases concerning the entitlement to and assessment of aggregate damages in class proceedings.

[60] TR LLP was established in 1936 and has brought national class proceedings in respect of institutional abuse and has been counsel in numerous other class proceedings, including those involving product and pharmaceutical liability. TR LLP conducts on average 2–3 injury and malpractice trials per year.

[61] Collectively, members of the Consortium have a broad base of experience in class actions, including in medical product and pharmaceutical related matters, as well as a breadth of litigation experience in a variety of areas of the law.

[62] Lead counsel in the Consortium are joined by counsel in the three other actions filed in Québec, Nova Scotia and Newfoundland. Counsel for the plaintiff in the Roy Action is Consumer Law Group, a Québec-based class action law firm with extensive experience in complex litigation emphasizing consumer protection, antitrust, drugs and product liability class actions. Counsel for the plaintiff in the Moore Action is Valent Legal, a civil litigation firm based in Halifax, Nova Scotia specializing in personal injury claims and class proceedings. Counsel for the plaintiff in the Kehoe Action is Bob Buckingham of Bob Buckingham Law, a boutique litigation firm in St. John's, Newfoundland.

[63] Counsel in the Roy, Moore and Kehoe Actions are leading class action counsel in their respective jurisdictions and have considerable class action experience including, collectively, in medical and pharmaceutical class actions. Counsel in the Roy Action are fluently bilingual and experienced in advancing claims under Québec's *Civil Code of Québec*, S.Q. 1991, c. 64, which is the basis for some of the claims of the Québec class members. That counsel from the Roy, Moore and Kehoe Actions may take a lesser role in the conduct of the Morel Action does not mean they are uninvolved: they may well assist in managing and gathering information from the class members in their respective jurisdictions.

[64] In my view, an important component that informs the assessment of the quality of the proposed class counsel is understanding the potential magnitude of the size of the proposed class action. The national class has the potential of consisting of approximately 100,000 persons from across every province and territory.

[65] The Consortium is a team that is national in scope and this may provide an advantage to the class on a number of levels, including:

i. The Consortium has a broader base of connection with class members at the local community (provincial/territorial) level. Significantly, the Consortium has already registered approximately 4,400 persons from across Canada who have been directly affected by the recall of the Breathing Devices, with only 689 of this number from BC;

ii. Approximately 400 of these registered individuals are French-speaking. Class counsel will need to be able to provide the same level of service to both the French-speaking class members from Québec and the English-speaking class members across the country. Class counsel may also have to advance claims based on the *Civil Code of Québec*. Counsel in the Morel Action, through counsel with the Roy Action, have the ability to carry this part of the brief.

iii. By virtue of its size, the Consortium is very well resourced. Given the magnitude of this proposed class action – which is both national and international in scope – the Consortium group appears to have a much larger team of lawyers, clerks, administrative support staff and infrastructure to handle a case of this magnitude.

[66] While the Morel Action appears to have significantly more resources at this juncture of the proceedings, Klein LLP does have offices in Vancouver and Toronto. They also have an affiliated firm, Klein Avocats Plaideurs Inc., in Montreal, and are able to engage with class members from across the country in both official languages.

[67] In this case, both counsel teams are very experienced and possess the necessary legal skills to advance the claim. However this is, as noted by MacDonald J. in *Wong* at para. 58, only part of the calculus in the assessment. The other components in the equation are whether the counsel teams have the resources and capability to advance a substantive claim.

[68] While Klein LLP's experience in pursuing class actions is well established, based on the evidence on this motion it is unclear to the Court that it currently has the same level of resources and capabilities to advance this particular class action, as compared to the Consortium.

[69] Overall, I find this factor to weigh in favour of the Morel Action.

(5) Disqualifying Conflicts of interest

[70] Counsel for the plaintiffs in each action contend there are no apparent conflicts of interest and both submit that this factor is neutral. I agree and so this factor plays no role in the assessment process.

(6) Relative Priority of the Commencement of the Action

[71] On this factor, the Morel Action was filed one day after the Health Canada recall warning. The Nathanson Action was not officially initiated until its filing was made on October 4, 2021, some three and a half months after the Morel Action. The Nathanson Action explains the delay as resulting from extensive research into viable causes of action, potential defendants, the underlying facts of the case, as well as time spent in collecting relevant documents.

[72] In some respects, first to file vs. a more deliberative approach can be a double-edged sword. In *Ewert*, Blok J. found the relative priority of the

commencement of the action went to the “first to file” firm – which filed 11 days before the competing law firm. However, Blok J. noted at para. 43 that in general, “first to file” should not be given much weight. This is particularly true where the filings are relatively close in time. Justice Blok further explained that he declined to give it much weight because giving it weight “might encourage law firms to engage in an unseemly rush or ‘unedifying scramble’ to the court registry”: *Ewert* at para. 43.

[73] In this proposed class action, the Morel Action was filed very quickly after the Health Canada warning. In some respects the quick filing may have been done in haste. The Morel Action has since filed two sets of Amended Notice of Civil Claims in order to properly capture the appropriate defendants, to amalgamate the other actions from the rest of the country into the Morel Action, and to add evidence.

[74] On the other hand, the delay by the Nathanson Action, both in filing and in submitting to the CBA database, has hindered moving this proposed class action forward. Additionally, this carriage motion has further impeded the progress of the case. The Consortium points to recent amendments found in s. 13.1(3) of Ontario’s *Class Proceedings Act* which now directs that carriage motions “shall be made no later than 60 days after the day on which the first of the proceedings was commenced, and shall be heard as soon as is practicable”. The Consortium argues that this legislative direction in Ontario supports its position that late-filed competing claims are contrary to the best interests of the class members. In essence, the class members have to wait to have their day in court when there is a dispute as to which lawyers should have conduct of the case. This is not in the best interests of the class.

[75] While there is merit to both proceeding with dispatch and slowing things down in avoiding a race to file, in the end, given the larger delay than more than just a few days as was the case in *Ewert*, I find that this factor weighs marginally in favour of the Morel Action.

(7) Preparation and Readiness of the Action

[76] As MacDonald J. noted in *Wong* at para. 78, preparation and readiness is not an overriding or determinative factor on a carriage motion. In *Wong,* the hearing judge concluded that all counsel on that carriage motion demonstrated a considerable level of commitment to their actions. In *Wong*, little weight was placed on this factor.

[77] Similar to the circumstances in *Wong,* I am prepared to conclude that all counsel on the carriage motion have demonstrated a considerable level of commitment to their actions.

[78] The Consortium for the Morel Action was, at the time of the hearing, marginally farther along in its preparations than Klein LLP for the Nathanson Action. Nevertheless, both actions are in their nascent stages.

[79] Both the Consortium and Klein LLP have retained experts, albeit in seemingly different fields.[8]

[80] Both the Consortium and Klein LLP appear to have websites for online registration of class members, although it appears that the website offered by the Consortium is in both official languages whereas the Klein LLP website is only in English.

[81] Both the Consortium and Klein LLP have contacts and involvement with American law firms involved in the American MDL Litigation, wherein they are reviewing information and strategies for the conduct of the litigation.

[82] Both the Consortium and Klein LLP are reviewing the literature, reports and updates issued by the manufacturers of the Breathing Devices, as well as Health Canada and US FDA materials available on the recalled Breathing Devices.

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[8] The Morel Action has retained one expert, a professor of medicine who is also an expert in respiratory medicine. The Nathanson Action has retained two experts: an expert in biomechanical engineering and a professor of medicine and director of pulmonary diagnostics for a Washington State health care system.

[83] While the Consortium has filed its certification materials, Klein LLP is in the process of assembling its certification materials. Klein LLP points to jurisprudence that suggests it is a disservice to class members to file certification materials in the face of a carriage motion: *Winder v. Marriott International Inc.,* 2019 ONSC 5766 at paras. 112–114; *Reid v. Google LLC,* 2022 BCSC 158 at paras. 70–71; *Moiseiwitsch BCCA* at para. 47.

[84] Various submissions were made regarding the Nathanson Action's lack of certification materials, and regarding the alleged deficiencies of the Morel Action certification materials. In respect of preparation and readiness of the respective action, I am of the view that these points effectively cancel each other out, providing neither party with an advantage over the other. As noted above, both actions are in their early stages. While the Consortium has a seemingly minimal head start on the Morel Action as compared to Klein LLP and the Nathanson Action, in the end, I find this factor to be largely neutral.

(8) Preparation and Performance on the Carriage Motion

[85] Courts have suggested that law firms seeking carriage should hire independent counsel to argue the motion on their behalf: *Quenneville v. Audi AG,* 2018 ONSC 1530 at para. 4; *Moiseiwitsch BCSC* at para. 104. However, the reality is that in most cases, counsel with conduct of the actions argue their own carriage motions.

[86] In this case, all counsel were respectful of the skill and abilities of each other, with one significant exception. Counsel for the Nathanson Action engaged in a seemingly detailed and focused critique of the Morel Action, by outlining what they contend are six fatal flaws to the Morel Action (which I will address under a different factor below). In doing so, Klein LLP significantly expanded on an argument only generally addressed in its filed written submissions.[9]

[9] In the written argument filed by Klein LLP they argued in general terms that (i) the evidence in the Morel Action was deficient to support the support the common issues (at para. 9); (ii) the Morel Action had failed to comply with the rules of evidence (at paras. 49, 51, 53, 70 & 80); and (iii) the Morel Action had "lumped" all defendants together (at paras 78 & 80).

[87] While I am satisfied that counsel for the plaintiff in each action were well-prepared to argue the carriage motion, the oral submissions made by Klein LLP amounted to a dissection – and fairly pointed critique – of the Morel Action and its purported flaws. To that extent, counsel for the Morel Action were taken by surprise at the Nathanson Action approach.

[88] I agree with counsel for the Morel Action that the Nathanson Action approach on the carriage motion was to engage in a "mini drive-by" certification argument – something not required on a carriage motion. It could also be detrimental to the proposed plaintiffs in that the Defendants have now had a mini discovery and dissection of the Morel Action.

[89] To put it bluntly, as noted in *Smith v. Sino-Forest Corporation*, 2012 ONSC 24 at para. 3, through its watching brief, counsel for the Philips Defendants have now had an opportunity to observe and learn of the purported flaws and weaknesses in the Morel Action's plans for suing their clients. Indeed, as Voith J.A. noted in *Moiseiwitsch BCCA* at para. 47, it is not appropriate for counsel to make extensive submissions on the strengths of their legal theories, and it may be adverse to the interests of the class members when this is done, especially where counsel for the defendants are present as observers.

[90] However, counsel on the Morel Action were able to effectively pivot and largely neutralize issues arising from the purported fatal flaws advanced by the Nathanson Action. While this factor is ordinarily neutral, considering the totality of the circumstances in this case, I find this factor to weigh marginally in favour of the Morel Action.

(9) Case Theory

[91] Recently, in *Moiseiwitsch BCCA*, Voith J.A. writing for the Court, enumerated five overarching and uncontroversial legal propositions that framed the appeal of the carriage order made by Hinkson C.J.S.C. Those overarching propositions and principles, more specifically points three through five (at paras. 45–50), apply with equal force to the determination of a carriage motion in the first instance. In respect

of the case theory and an examination of the respective theories advanced by the two proposed competing actions, it is critical to recall that this is not the certification hearing. As MacDonald J. so adroitly noted in *Wong* at para. 82, at this stage it is neither possible nor appropriate to embark on a detailed analysis of the merits of this class proceeding.

[92] Justice Voith went further in *Moiseiwitsch* at para. 47, noting as follows:

> Fifth, the extent to which a court can assess the merits of a claim on a carriage application is limited. This is a somewhat elusive concept, as it would not be in the interests of the class to award carriage to a proposed claim that is entirely meritless. Nevertheless, at such an early stage of the proceedings it is not appropriate for counsel to make extensive submissions on the strengths of their legal theories. In fact, with the defendants usually present as observers on a carriage motion, this kind of extensive review may well be adverse to the interests of class members: see, for example, *Sharma* at para. 89 and *Locking v. Armtec Infrastructure Inc.*, 2013 ONSC 331 at para. 22.Though some of these constraints have been identified in the case law of this province (see for example *Wong* at paras. 82 and *Strohmaier v. British Columbia (Attorney General)*, 2018 BCSC 1613 at paras. 44, 48) they have been more fully developed in Ontario's carriage jurisprudence, and were summarized in *Mancinelli CA*:
>
> > [42] The appellants acknowledge that the merits of the respective claims are not at issue on a carriage motion. In [*Setterington v. Merck Frosst Canada Ltd.* [2006] O.J. No. 376], at para. 19, Winkler J., as he then was, said that the claim may be scrutinized for "glaring deficiencies" or to see whether it is "fanciful or frivolous". See also: [*Smith v. Sino- Forest Corporation*, 2012 ONSC 24 at para. 20. Apart from this, however, he said it is inappropriate for the court to embark on an analysis of which claim is most likely to succeed.
> >
> > …
> >
> > [45] In my view, it is and should be the rule that the court should not enter into an examination of the underlying merits of the respective claims on a carriage motion. . The motion judge gave three good reasons for the rule: (i) it is impossible to predict how the litigation will unfold and which claims will succeed and which will not; (ii)it is unfair and inappropriate to undertake such an analysis in full view of defence counsel; and (iii) a merits analysis should not be done on a carriage motion when it is not done on certification. I respectfully agree.
> >
> > [46] It is also my view, consistent with the jurisprudence, that there may be cases in which the actions are sufficiently indistinguishable that, to use the language of [*Locking*], "a more detailed analysis may be necessary": see, *e.g.,* [*Sharma*]. This analysis will not consider the merits but will consider, as the Divisional Court said in *Locking*, at para. 23, "the nature and scope of the causes of action advanced and the theories advanced by counsel for their approach to the case". This

> may include an assessment of the efficiency and costs of the competing strategies. I regard this factor as important, but not necessarily of greater importance than every other factor.

[93] In their submissions, both the Consortium and Klein LLP acknowledge that their actions are fairly similar, and both stand a chance of success. However, they each contend their action is superior to the other. Each contend their respective case theory is better and broader, thus more capable of providing access to significantly more individuals negatively impacted by the conduct of the Philips Defendants.

[94] When considering this factor, courts should only assess whether there are "conspicuous or egregious problems" or "readily apparent advantages or disadvantages in the competing theories": *Wong* at para. 82.

[95] In my view, there are no conspicuous or egregious problems apparent in either action, nor are there readily apparent advantages or disadvantages in the competing theories advanced. Accordingly, I find this factor to be neutral.

(10) Scope of Causes of Action

[96] The causes of action in the Morel Action include: breach of warranty (implied and express) and unconscionability of the time limits; *Competition Act* claims; Consumer Protection claims for eight different provinces; estate claims; claims on behalf of family members under various provincial / territorial statutes, e.g. *Fatal Accidents Claims*; Healthcare Costs Recovery Claims; Negligence (being Negligent Design and Manufacture); specifics in respect of claims under the *Civil Code of Québec* and Québec's *Charter of Human Rights and Freedoms*; and Unjust Enrichment.

[97] The causes of action in the Nathanson Action include: breach of warranty (express only); *Competition Act* claims, albeit with less specificity than the Morel Action; Consumer Protection Claims, albeit with some notable variations to the claims advanced by the Morel Action; a smaller pool of family member claims than the Morel Action; Healthcare Cost Recovery Claims albeit only under the British

Columbia legislation; Negligence (being Negligent Design and Manufacture); a general claim under the *Civil Code of Québec*; and Unjust Enrichment.

[98] Each side points to flaws in the approach of the other in respect of the specifics or otherwise of the causes of action advanced by the other action. The Nathanson Action has advanced a number of criticisms of the Morel Action, including: how the Consumer Protection Act claims are characterized; how the *Competition Act* "misrepresentation" claims are advanced;[10] and that the claim for medical monitoring costs is not actionable. The Morel Action contends that the Nathanson Action contains causes of action that were pleaded baldly and without specifics.

[99] Significantly, however, both actions are substantially similar in a general sense. Both actions also appear to be fairly broad in scope, which may expand the basis of the claim for class members. The biggest difference between the two actions appears to be the Morel Action's inclusion of estate claims (which the Nathanson Action has not included).

[100] Returning to the astute observations of MacDonald J. in *Wong*, two points are apparent: (i) pleading broadly or narrowly is of little import in a carriage hearing; and, (ii) at the stage of a carriage motion, it is inappropriate for the Court to determine whether each and every cause of action will ultimately succeed: at paras. 88 and 92. The question for the Court is whether the causes of action are viable: *Wong* at para. 93.

[101] Here, as in *Wong,* counsel have provided reasonable rationales for the causes of action they have advanced. While there may be a slight concern that the Nathanson Action has not plead any form of estate claims, this is a minor difference that could well be remedied by the Nathanson Action if granted carriage of the action. In the end, I place little weight on this factor and conclude that it too is neutral in the overall calculus.

[10] Describing them as mere "puffery", which are not actionable.

(11) Selection of Defendants

[102] The plaintiffs in the Morel and Nathanson Actions now largely claim against the same defendants, save for the Morel Action's claims against Respironics Inc.

[103] Counsel in the Nathanson Action contends that Respironics Inc. is a fictitious entity. For this reason, along with the fact that the Morel Action has now twice amended its pleadings to bring the proposed defendants into conformity with the defendants named in the Nathanson Action, they argue this factor weighs in favour of the Nathanson Action.

[104] Respectfully, I do not view the naming of Respironics Inc. as a defendant in the Morel Action to be something that is woefully inadequate or that will result in the failure of the Morel Action. As counsel for the Morel Action noted, if they are wrong about Respironics Inc., they can discontinue against that defendant; if the Nathanson Action is wrong about Respironics Inc., they could move to add them as a defendant.

[105] In the greater scheme of the balancing process that the Court must undertake, I find this factor to be neutral.

(12) Correlation of Plaintiffs and Defendants

[106] The Consortium contends that there is no difference between the two actions on this factor and argues that it is therefore neutral in the assessment process.

[107] Klein LLP advances a more nuanced approach to this factor. They argue that the Morel Action, in addition to pursuing a fictitious entity in Respironics Inc., has improperly lumped the Defendants together without parsing out their individual roles, such as manufacturer, distributor, marketer, and researcher.

[108] To this end, Klein LLP contends the Morel Action does not provide each individual Defendant with information on the case being made against them. In contradistinction to the Morel Action, the Nathanson Action specifies the different roles of the various defendants to the Nathanson Action.

[109] Klein LLP cites the decision in *Spencer v. Transat A.T. Inc.,* 2022 BCSC 145 at paras. 114–116 to support its position that the Morel Action's lumping of defendants weighs in favour of the Nathanson Action.

[110] While the decision in *Spencer* highlights the importance of distinguishing between defendants, it is notable that the issue discussed in *Spencer* was at the certification stage. And, in paras. 118, 121 and 125 of *Spencer*, Justice Winteringham alludes to the potential for the plaintiff to reapply for certification if she amended her pleadings and reapplied for certification. Such a remedy would occur far later in the proceedings than the stage we see now in the case at bar. If there is a significant problem with lumping of the Defendants in the Morel Action, recourse is available. The plaintiff has the remedy of separating the Defendants into classes such that the drafting adheres to the underlying principle that the pleadings disclose to each individual defendant the case being made against them: see *British Columbia v. Apotex Inc.* 2022 BCSC 1, rev'd in part 2022 BCCA 366. Further, the Defendants will thereby have particulars.

[111] Overall, it cannot be said that one of the actions has a more viable claim against each defendant named in the respective actions than the other. Accordingly, I find this factor to be neutral.

(13) Class Definition

[112] The Morel Action is brought by a representative plaintiff on his own behalf and on behalf of a national class. Further, it has amalgamated related actions from four other jurisdictions. And so, the Morel Action, through the creation of the Consortium, represents the prosecution of a single case on behalf of a national class that has a plan for dealing with the multijurisdictional complexities of this case. The Nathanson Action, on the other hand, is not joined with other actions – within BC or nationally. Instead, there is one representative plaintiff, seeking carriage of a national class within the Province of British Columbia.

[113] In so far as the specifics of class definition are concerned, the Morel Action pleads a broader range of classes in its action than just purchasers of the recalled

Breathing Devices. As part of the proposed class members, the Morel Action includes: estates of users of the devices; family members; purchasers; and users of the devices who did not purchase or lease them.

[114] The Nathanson Action acknowledges that its proposed class members do not currently include users of the devices but proposes to amend its claim to include users, estate and family members if granted carriage of the proceedings: see *McSherry v. Zimmer GMBH*, 2012 ONSC 4113 at paras. 80, 136–137.

[115] What is apparent on this point is that while the Morel Action currently has a wider class definition, and therefore is more likely to create access for more people in the compensation claim, I do not find the different class definitions to be of any import. If necessary, the class definition can be amended. Accordingly, I find the class definitions of each proposed action to be a neutral factor.

(14) Class Period

[116] The Morel Action claims a class period from January 1, 2008.

[117] Klein LLP contends that the Nathanson Action does not contain a class period, rather the claim includes all the of the Breathing Devices that were subject to the recall. However, the Nathanson Action appears, on a plain reading of the pleadings, to define the class period as commencing from products recalled as of January 1, 2009.[11]

[118] The class period in the Morel Action seemingly includes more individuals. I find that, on balance, this factor weighs marginally in favour of the Morel Action.

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

[119] The Consortium contends that the assessment of either parties' prospect of success on a certification hearing is difficult to evaluate because the Morel Action has delivered its certification materials, and the Nathanson Action has not. The

[11] Nathanson Notice of Civil Claim at paras. 4 and 59(a).

Consortium submits that while this factor slightly favours the Morel Action, it is not to such an extent as to materially affect the outcome of the carriage application.

[120] Klein LLP, on the other hand, advances a number of points to suggest that this factor weighs in favour of the Nathanson Action. In their submissions, Klein LLP argues that the central allegation of these actions is that the recalled Breathing Devices were negligently designed. As this is a fundamental feature of the actions, expert evidence will be required to prove this allegation. Klein LLP contends that their two retained experts – a professor in biomechanical engineering and a professor in medicine at the University of Washington, who is also the Director of Pulmonary Diagnostics for the VA Puget Sound Health Care System – are the more appropriate and needed experts than the expert retained by the Morel Action. The Consortium, in comparison, has retained a professor in Medicine, who is the Astra-Zeneca Chair in Occupational and Environmental Lung Disease as well as the Canada Research Chair in Occupational and Environmental Lung Disease at the University of British Columbia.

[121] Klein LLP also contends that the Morel Action certification materials do not comply with the rules of evidence.

[122] In oral submissions, Klein LLP spent considerable time focusing on what they describe as glaring deficiencies in the materials provided by the Consortium. The arguments appeared to focus more on the prospect of success against the Defendants than the prospect of success on certification.

[123] Klein LLP's arguments on prospect of success on certification demonstrated a deep knowledge of the various issues that may well arise in which ever action advances. Respectfully, however, it is not the court's role on a carriage motion to conduct a detailed analysis or forensic autopsy of the specific merits of the prospects of success on certification in each action: *Wong* at para. 107. Moreover, there is no certification record yet filed by the Nathanson Action from which any such comparative analysis could be conducted, should it be warranted. Suffice to say, I am not persuaded that the Morel Action presents conspicuous or egregious errors that doom it at the certification stage and I am unable to make anything other than a

cursory assessment of the Nathanson Action in the absence of certification materials. On balance, I find this factor to be neutral.

(16) Prospect of Success Against the Defendants

[124] As noted in *Wong* at para. 108:

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

[125] In the case at bar, Klein LLP conducted a detailed dissection of the Morel Action and its proposed certification materials. They contend that the Morel Action contains glaring deficiencies in that the materials do not disclose some evidence or some basis in fact to support certification of various common issues. As mentioned elsewhere in these reasons, Klein LLP argued that there were six deficiencies or “fatal flaws” in the Morel Action materials:

i. There is no basis in fact for three of the four defendants;

ii. There is no basis in fact for the warranty claims;

iii. Aggregate damages claims always require an expert for certification and the Morel Action does not have one;

iv. There is no basis in fact for medical monitoring;

v. Allegations of design defect requires an expert for certification and the Morel Action does not have one; and

vi. There is no basis in fact for the false representation claim.

[126] In my view it is not necessary to deal with the six alleged fatal flaws in the Morel Action as advanced by Klein LLP. Frankly, Klein LLP’s approach to dissecting the Morel certification materials was surprisingly detailed. In many respects, I agree with the Consortium that such a focused attack on certification could be said to undermine the interests of the class.

[127] The Consortium grounded its response by arguing that Klein LLP had mischaracterized the "some basis in fact" test for the certification criteria in s. 4(1)(a)–(e) of the *CPA*. "Some basis in fact" at the certification stage does not require evidence on a balance of probabilities. Indeed, at the certification stage the standard of proof focuses on whether there is "some basis in fact" which establishes each of the certification requirements – not whether there is "some basis in fact" for the claim itself: *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57, at paras. 99–104.

[128] For the purposes of the certification process, "some basis in fact" can be established through a wide variety of sources, including: affidavits from the representative plaintiff and other class members, together with exhibited documentation contemporaneous to the adverse event experiences;[12] information in the defendants' materials;[13] evidence from American proceedings;[14] certification proceedings from other jurisdictions;[15] industry documents highlighting knowledge of a problem and remediation efforts;[16] and evidence of recalls and complaints by members of the proposed class about the defective product.[17] Moreover, there is a distinction to be made between some basis in fact for the purposes of the certification hearing as distinguished from proving the case at trial.

[129] As Justice Punnett noted in *Miller v. Merck Frosst Canada Ltd.*, 2011 BCSC 1759:

> [35] Whether the class representative must show some basis in fact for each of the certification requirements is addressed by determining whether additional information is required for the certification hearing bearing in mind that the concern at this stage is limited to procedure, not the merits of the claim (*Jones v. Zimmer GMBH*, 2010 BCSC 1504 (B.C. S.C.), para. 22).
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> [36] As noted by Strathy J. in *Roveredo v. Bard Canada Inc.*, 2010 ONSC 5240 (Ont. S.C.J.):

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[12] See for instances *Parker v. Pfizer Canada Inc.*, 2012 ONSC 3681; *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544.
[13] *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942.
[14] *Bartram v. GlaxoSmithKline Inc. 2012 BCSC 1804; Bartram (Guardian ad litem of) v. GlaxoSmithKline Inc.*, 2013 BCCA 462.
[15] *Dembrowski v. Bayer Inc.*, 2015 SKQB 286; *G.C. v. Merck Canada Inc.*, 2019 SKQB 42.
[16] *Evans v. General Motors Canada Company*, 2019 SKQB 98.
[17] *Spring v. Goodyear Canada Inc.*, 2020 ABQB 252.

> [9] It is not always easy to separate, prior to the certification hearing, where an examination of the "basis in fact" ends and an impermissible excursion into the merits begins. Nor is it always easy to say whether a particular piece of evidence, viewed in isolation, will assist the court in addressing the certification test....

[37] A similar concern was voiced by Lax J. in *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, 176 A.C.W.S. (3d) 947 (Ont. S.C.J.), as follows:

> 15 The plaintiffs have an evidentiary burden to show "some basis in fact" for each of the certification requirements other than the requirement in section 5(1)(a) that the claim discloses a cause of action. "Some basis in fact" is an elastic concept and its application can be vexing. It is sometimes easier to articulate what it isn't, rather than what it is. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial.
>
> 16 These thresholds do not have to be met on a certification motion as there is no assessment of the merits at the certification stage. Certification is a procedural motion focusing on the form of the action. As such, the court is required to assess whether there is a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of the behaviour of wrongdoers: *Sauer v. Canada (A.G.*), [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402.

[38] The definition of "fact" is defined in the Concise Oxford English Dictionary as "a thing done or performed." Phipson on Evidence, 17th ed (2010) pp. 1-11 states:

> No satisfactory definition of the term "fact" has been or perhaps can be given. Broadly it applies to whatever is the subject of perception or consciousness. But juridically it has generally to be distinguished from *law*, sometimes from *opinion* and sometimes from *testimony* and *documents*. It is not possible always to apply these distinctions consistently.

[39] While the basis in fact is more than simply disclosing a cause of action, the assertion of facts is still restricted to facts and not the evidence needed to prove them.

[40] The Supreme Court of Canada in *Hollick* did not state "some basis in evidence." It stated "some basis in fact." The difference is important. One goes to the merits of the claim, the other to whether the assertions made are sufficient to allow the court to determine if the proceeding is of the type that is suitable for certification.

[Emphasis added.]

[130] And, as Chief Justice Bauman noted in *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22:

> [57] The certification judge is not to conduct an adjudication on the merits. There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 99 [*Pro-Sys*], citing *Hollick v. Toronto (City),* 2001 SCC 68 at para. 25. The evidence at this stage "goes only to establishing whether these questions are common to all the class members": *Pro-Sys* at para. 110. Said another way: "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis": *Grossman v. Nissan Canada,* 2019 ONSC 6180 (Ont. S.C.J.).

[131] The distinction as between evidence on a certification motion and the "some basis in fact" requirement was also reviewed by Justice Murray in *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts,* 2021 BCSC 837:

> [13] While an assessment of the merits of the claim does not occur at the certification hearing there must be an evidentiary basis for each of the requirements for certification: *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540 [*Ernewein*] at para. 25. I take that to mean that there must be some factual basis for the assertions put forth. Mere opinion of affiants without an evidentiary basis will not suffice.
>
> [14] Evidence filed in certification motions must meet the ordinary criteria of admissibility: *Sharp v. Royal Mutual Funds Inc.* 2019 BCSC 2357 [*Sharp*] at para. 26, citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263 at para. 25. As was said by Newbury J.A. in *Ernewein* at para. 32:
>
> > Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants.
> >
> > [Emphasis added.]
>
> [15] A certification hearing is an interlocutory motion. The following rules of evidence apply:
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> > 1) An affidavit must state only what an affiant would be able to testify to at trial: Rule 22-2(12);
> >
> > 2) An affidavit may contain statements as to information and belief if the source of the information and belief is given: Rule 22-2(13). The person who gave the information must be identified: *Albert v. Politano*, 2013 BCCA 194 [*Albert*] at paras. 19-22;

> 3) For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" or "evidentiary basis" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 [*Pro-Sys SCC*] at paras. 99-105; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25; *Ernewein* at paras. 25-26;
>
> 4) While the evidentiary burden on a certification motion is low (the "some basis in fact" test), that burden must be discharged by evidence which meets the usual criteria for admissibility: *Harris v Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967 [*Harris*] at para. 37; *Ernewein* at para. 31;
>
> 5) Evidence may be excluded if its prejudicial effect outweighs its probative value. This will include evidence that may confuse, mislead, or distract the trier of fact's attention from the main issues, lead to irrational conclusions, unduly occupy the trier of fact's time, and impair a fair hearing: *Harris* at para. 38, citing *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 18 and *R. v. Potvin*, [1989] 1 S.C.R. 525 at para. 2;
>
> 6) Evidentiary rulings must be made in the context of the particular pleadings and the particular facts of each case: *Harris* at para. 50, *Pro-Sys SCC* at para. 104;
>
> 7) On a certification motion, the court has the court has an important gate-keeping role with respect to the admissibility of evidence, and it is not appropriate or fair to shirk that responsibility by saying let it in, and the objections will go to weight rather than admissibility: *Harris* at para. 37.

[132] What I take from the foregoing is that at the certification hearing there needs to be admissible evidence addressing the certification criteria enumerated in s. 4(1) of the *CPA*. The evidentiary burden, although low – ostensibly the "some basis in fact" test – nevertheless requires admissible evidence.

[133] While Klein LLP has pointed to what it characterizes as glaring deficiencies, this is not the certification hearing. Having considered the six fatal flaws advanced by Klein LLP and the Consortium's reply to these points, I am not persuaded that there are "glaring deficiencies" undermining the prospects of success for the Morel Action. Nor are there any such deficiencies in the Nathanson Action. On balance I find this factor to be neutral.

(17) Interrelationship of Class Actions in More Than One Jurisdiction

[134] Much like MacDonald J. in *Wong*, I find the most important factor in the case at bar is the interrelationship of class actions in other jurisdictions. Though the other issues are undoubtably important, the crucial issue to determine is whether the existence of overlapping national class actions, in a number of different provinces, will properly promote the best interests of the class members and provide fairness to the defendants.

[135] The Roy, Gray, Moore and Kehoe proposed national class actions, filed in Québec, Ontario, Nova Scotia and Newfoundland and Labrador respectively, have all joined the Morel Action. As part of their contract with the Consortium, the Roy, Moore and Kehoe actions have agreed to seek stays from their respective courts and not to advance related class actions anywhere else.

[136] Klein LLP argues that the Court ought not to be concerned about what might happen to these other proposed actions if Klein LLP is granted carriage of the class action. They contend that it is clear from the agreements that those counsel intend to pursue the action in BC. Klein LLP says that if carriage is granted to the Nathanson Action, those other actions would be free to join them. Klein LLP is willing to work with counsel from other jurisdictions.

[137] Respectfully, I do not interpret the co-counsel agreements signed as between the counsel in the other jurisdictions and counsel for the Morel Action as necessarily being contracts that would carry over to Klein LLP if the Nathanson Action was granted carriage of the class action. Indeed, there is a considerable amount of uncertainty as to whether carriage being granted to Klein LLP would in fact result in one national class action continuing in BC or the revival of national class actions in other provinces. Counsel for the Consortium were very clear that the contract for co-counsel and the related stays of the class actions in the other provinces is only a contract as between the Consortium counsel.

[138] In my view, the potential for the revival of the class actions in Québec, Nova Scotia and Newfoundland and Labrador, if carriage is granted to Klein LLP and the

Nathanson Action, is not a hollow threat but a realistic possibility. Multiple proceedings in different provinces would be in the interests of nobody. One national class action is in the best interests of the proposed class, conserves scarce judicial resources, is fairer to the Defendants, and avoids the potential embarrassment of conflicting decisions from different jurisdictions across the country: *Wong* at para. 131.

[139] There is an interrelationship of five different national class actions under the one umbrella of the Consortium, which is national in scope. The Consortium is directed by a national team that is capable of servicing all members of the class no matter their location in Canada. This is undoubtedly in the best interests of the class and avoids the prospect of multiple overlapping proceedings.

[140] Accordingly, I conclude that this factor weighs heavily in favour of the Morel Action.

CONCLUSION

[141] To determine who should have carriage of the class action with respect to the recall of the Breathing Devices by the Philips Defendants, I have considered the applicable factors outlined in *Rogers*, *Wong* and *Moiseiwitsch* within the context of the submissions of counsel and the materials filed on the hearing of the carriage motions. I am satisfied that it is in the best interests of the class members to grant carriage of this action to the Morel Action as represented by the Consortium.

[142] Corollary to that grant, I order that the Nathanson Action is stayed until the certification application in the Morel Action is decided, pursuant to s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the inherent jurisdiction of this Court.

[143] In addition, I order that the commencement of further class proceedings in the Province of British Columbia against the defendants named in the Morel Action, seeking to advance the same claims as those advanced in that action are prohibited without leave of the Court until the certification application in this action is decided.

[144] I further order that the Morel Action has liberty to apply for a continuation of the Order staying the Nathanson Action if certification is granted in the Morel Action.

[145] If certification is not granted in the Morel Action, or that action is discontinued against all defendants or withdrawn, the stay of the Nathanson Action and the prohibition against the commencement of further class proceedings in the Province of British Columbia shall both be lifted.

[146] Each party shall bear their own costs of this application.

"Ker J."