IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Williamson v. Johnson & Johnson,* 2020 BCSC 1746

Date: 20201117
Docket: S179011
Registry: New Westminster

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

Between:

Linda Williamson

Plaintiff

And

Johnson & Johnson,
Johnson & Johnson Consumer Companies Inc.,
Johnson & Johnson, Inc. and
Valeant Pharmaceuticals International Inc.

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:	E.F. Anthony Merchant, Q.C. Anthony Tibbs and Steven Roxborough
Counsel for the Johnson & Johnson Defendants:	S. Gordon McKee Karine Russell
Counsel for Valeant Pharmaceuticals International Inc.:	Thomas D. Gelbman and Sarah McLeod
Place and Dates of Hearing:	New Westminster, B.C. February 24-26, 2020
Place and Date of Judgment:	New Westminster, B.C. November 17, 2020

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Introduction

[1] The plaintiff applies to certify this proceeding as a multijurisdictional class proceeding under the *Class Proceedings Act*, RSBC 1996, c. 50 [*CPA*] in relation to talcum based powder products (the products) used or purchased by the proposed classes. These products were known as Johnson's® Baby Powder ("Baby Powder") and Shower to Shower®.

[2] This action concerns claims that genital or perineal application of talcum powder increases the risks of ovarian cysts and ovarian cancer. The defendants are Johnson & Johnson, Johnson & Johnson Consumer Companies, Inc., Johnson & Johnson, Inc. ("Johnson defendants") and Valeant Pharmaceuticals International, Inc. ("Valeant").

[3] In these reasons, the Johnson defendants and the defendant Valeant will be referred to collectively as the defendants except where there are differences in the interests and roles between the Johnson defendants and Valeant.

[4] From at least 1926 the Johnson defendants sold Baby Powder in Canada. The Johnson defendants have sold Shower to Shower in Canada since 1992. Between 2005 and 2012, a third party manufactured and packaged Shower to Shower, and that product was distributed by the Johnson defendants in Canada. In 2012 the defendant Valeant purchased the rights to manufacture and sell Shower to Shower and did so from 2012 to 2019. After September 2012, the Johnson defendants stopped distributing Shower to Shower.

[5] The talc-based Baby Powder consists almost entirely of talc whereas corn starch based baby powders do not contain talc and are made almost entirely of corn starch. Shower to Shower consists of a blend of talc and corn starch as well as sodium bicarbonate, calcium phosphate and fragrance.

[6] Talc is a naturally occurring mineral mined from the earth and is composed of multiple components creating a soft slippery quality product. It also has multiple other uses unrelated to these proceedings.

[7] The plaintiff's claims against all defendants are based in negligence including failure to warn, failure to properly test the products, breach of warranty and breaches of consumer protection legislation and Canada's *Competition Act*, R.S.C. 1985, c. C-34. The plaintiff also claims remedies for civil conspiracy, medical monitoring and in waiver of tort.

[8] The proposed class would include all persons in British Columbia and Canada, including their estates, executors, personal representatives, corporations or other entities, and third parties who have a right to make a claim in relation to the defendants' products and who have purchased or used the defendants' products.

The Proposed Plaintiffs and their Association with Ovarian Cancer and Ovarian Cysts.

[9] Initially, Linda Williamson is the proposed representative plaintiff and applicant for certification. She died on January 17, 2020. Her daughter, Tammy Robertson, is executrix of her mother's will and proposes to assume her mother's status as plaintiff in this proceeding. Ms. Williamson recognized the obligations and time commitment required to perform the duties of a representative plaintiff and believes she has no conflict with the interests of any other class members.

[10] Before her death, Ms. Williamson provided an affidavit in support of this certification application. She was one member of a proposed resident subclass and was willing to participate as the representative plaintiff alone or with another representative. She said that she had used the defendants' Baby Powder for 2.5 to 3 years before developing an ovarian cyst. She stopped using Baby Powder on recommendation of her physicians. She said that the initial diagnosis of ovarian cancer was corrected after certain tests and a diagnosis of an ovarian cyst was made. She described information given to her by counsel concerning the common issues that are proposed for the litigation. She listed the major steps in this proceeding that counsel has indicated will be followed.

[11] Ms. Williamson did not have epithelial ovarian cancer and the type of cyst removed was not associated with a progression to invasive cancer. She had

undergone a hysterectomy approximately 22 years before she began using the defendants' talcum powder. She was diagnosed with another ovarian cyst in August 2010.

[12] The defendants rely on opinions indicating that the hysterectomy would have effectively precluded any environmental agent, including talc, from ascending into her genital tract or reaching her ovary or her ovarian epithelial cells.

[13] Ms. Williamson was cross-examined on her affidavits on April 18, 2019.

[14] Leann Jenks is another proposed member of the subclass who is willing to participate as a representative plaintiff. She swore affidavits on September 17, 2017 and May 1, 2019.

[15] Ms. Jenks said that she used the defendants' Baby Powder on a regular basis when she was younger and for several years before being diagnosed with ovarian cancer in 2013. The cancer was discovered during an incidental examination for another condition; it was removed entirely. She said she believed the defendants' Baby Powder was safe until her doctors recommended that she stop using the product after she was diagnosed with ovarian cancer.

[16] Ms. Jenks' cancer was in the nature of a "granulosa cell tumor of the left ovary". This is a non-epithelial form of cancer arising deep within the ovary. The origin and behavior of this type of tumor is completely different from those associated with other non-epithelial ovarian cancers or epithelial ovarian cancers.

[17] Ms. Jenks had a family history involving risk factors linked to ovarian cancer. She had a tubal ligation in 2004. This procedure blocked the pathway and prevented transitive environmental agents travelling from her perineum into the uterus, and fallopian tubes to the ovaries. The tubal ligation was after beginning perineal use of Baby Powder and some nine years before her cancer diagnosis.

[18] Ms. Jenks said she was never warned about potential side effects of using the defendants' talc powder products. She is aware of a successful claim against the

Johnson defendants in the United States of America resulting in a $75 million award of damages.

[19] She said she was aware Ms. Williamson was a proposed representative plaintiff and she would be willing to act in place of Ms. Williamson if necessary.

[20] She has been informed by counsel concerning the common issues and the steps necessary to prosecute this proceeding.

[21] In her second affidavit she appended a part of some safety information made by the Government of Canada on December 5, 2019 directed to healthcare professionals in regards to the use of talcum powder. She believes the contents of that report were true. Ms. Jenks was examined on her affidavits on May 8, 2019.

[22] Maria Guerra is the third proposed representative plaintiff. She swore affidavits on September 20, 2017, May 1, 2019, and was examined on her affidavit on May 7, 2019.

[23] Ms. Guerra said she had used the defendants' Baby Powder on a regular basis, including on her genitals, since she was a teenager and several years before being diagnosed with ovarian cancer.

[24] Ms. Guerra's diagnosis of ovarian cancer stage III was made in 1995 when she was in her 30s. She underwent a full hysterectomy and received chemotherapy treatments and radiation for eight months.

[25] Although she had two young children, she was unable to have further children due to the surgery. She had believed the defendants Baby Powder was safe to use and had no idea of potential risks. She would not have continued to use the product had she been aware of the potential side effects including the development of ovarian cancer.

[26] Ms. Guerra had a tubal ligation performed in 1987, approximately eight years before the diagnosis of borderline tumors in 1995. The tubal ligation would have

obstructed the fallopian tubes and prevented the transfer of environmental agents reaching her ovaries.

[27] In Ms. Guerra's affidavit she included a representative plaintiff's litigation plan and a copy of a $75 million award against the Johnson defendants from the United States.

[28] The defendants contend that none of the proposed plaintiffs experienced epithelial cancer and no evidence shows any basis in fact to suggest there is any association between ovarian cysts and talc products. Last, the defendant Valeant contends there is no evidence of a basis in fact that any person experienced cancer associated with Shower to Shower products during the time they were manufactured or sold by Valeant.

The Application

[29] The applicant seeks, in addition to certification, an order defining the class of persons, defining any appropriate subclasses, and appointing Linda Williamson as the representative plaintiff.

[30] The proposed order seeks certification of several classes of individuals, governments and corporate entities as follows:

a) all persons in British Columbia ("Residential Class") including their estates, who at any time before the date of the certification order, who have purchased or used Johnson's ® baby Powder or Shower to Shower ® (the "Products'), including their estates, executors, personal representatives, corporations, other entities, and third parties who have a right to make a claim in relation to said purchase or use of the Products, including:

    a. those who have used the products and as a result are deceased, or have been diagnosed with ovarian cysts or ovarian cancer ("Injury Class");

b. those who use the products and in so doing have been exposed to a material and otherwise avoidable risk to their health ("User Subclass");

c. those who have purchased or otherwise acquired the products ("Purchaser Subclass");

d. those who, by reason of the relationship to a member of the injury subclasses, user subclass, or purchaser subclass, or entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("Family Subclass");

e. those who are entitled to make claims in respect of expenses, costs or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:

i. provincial and federal governments and health departments;
ii. provincial health insurance plans (including the Québec health insurance plan) and other public health entities;
iii. various employers and employee health insurance plans;
iv. any other subrogated claims of members of the class; and
v. all other persons and entities that have and will suffer losses as a result of the acts and omissions of the defendants ("resulting losses subclass");

[31] The application seeks the same order with regard to all persons in Canada.

[32] The order requested includes a statement of the nature of the claims and relief claimed as follows:

> This is a class action covering the defendants talc products. This class action seeks recovery for the harms suffered by the class members, punitive and exemplary damages.

[33] The application outlines the common issues the plaintiff wishes to have certified as follows:

a. Did the defendants' talc products pose an unreasonable risk of serious injury, death and other side effects?

b. Did the defendants' talc products have any benefits that were unique or that exceeded the benefits of other similar products?

c. Having regard to the answers to common issues No. 1 and 2, did the defendants breach the standard of care by distributing talc products for sale in Canada?

d. If the answer to common question No. 3 is no, and having regard to the answer to common question No. 1,

    i. Did the defendants talc products directions for use provide reasonable instructions for using talc products and for managing the risks of death, serious injury, and side effects?

    ii. Did the defendants talc products directions for use provide a clear, current and complete warning of the risks of death, serious injury, and other side effects?

e. Should the defendants account for and disgorge all or any of their revenues from selling talc products in Canada? If so, to whom, for what period, in what amount, and if distributed in the aggregate, on what basis?

f. Does the manner in which the defendants marketed the talc products in Canada warrant an award of punitive damages, and if so, how much should be awarded and to whom and on what basis should they be distributed?

Class Proceedings: General Principles

[34] The goals of the *CPA* reflect the need for procedural tools that promote access to justice, judicial economy and behavioural modification to address challenges brought about by complicated cases affecting harms caused to the public: See *Hollick v. Toronto (City)*, 2001 SCC 68 [*Hollick*] at para. 15 and *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Dutton*] at paras. 27-29.

[35] Keeping in mind the goals of the *CPA*, a certification application is a procedural first step in managing litigation of issues common to multiple plaintiffs. At this stage the court does not weigh or make determinations on the merits of the proceeding but performs a gatekeeper role.

[36] In *Hollick* at para. 15, the Supreme Court of Canada summarized these advantages of class proceedings:

a) enhancing judicial efficiency by avoiding unnecessary duplication in fact-finding and legal analysis;

b) proves access to justice for those claims that might not otherwise be asserted; and

c) encourages modification of actual or potential wrongdoers.

[37] The courts are called on to embrace a liberal and purposive analysis and generously apply the provisions of the *CPA* and to give "effect to the benefits" intended by legislature: *Hollick* at para. 15.

[38] Section 4 of the *CPA* sets out the court's obligation to certify class actions when the criteria are met by the applicants:

> **Class certification**
>
> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (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.

…

Framework

[39] The first step in a certification application under s. 4(1)(a) of the *CPA* is to assess whether the pleadings disclose a cause of action. No evidence is to be considered at this stage of the analysis.

[40] The test concerning the plaintiff's pleadings at the certification stage is whether the proposed causes of action are "certain to fail" or that it is "plain and obvious" the pleading discloses no reasonable cause of action.

[41] If the pleadings are sufficient, then the court functions as a "gatekeeper" and must assess the evidence to ensure the plaintiff has established "some basis in fact" for each requirement of s. 4(1) of the *Act*: See *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353 [*Miller BCCA*] at paras. 21-22.

[42] To satisfy the prerequisites to granting a certification order, plaintiffs must establish "some basis in fact from admissible evidence" that they have satisfied the requirements in s. 4(1)(b) to (e) of the *CPA*.

[43] It is the plaintiff's burden to establish "some basis in fact"; defendants may introduce evidence only to show that there is "no basis in fact" for the plaintiff's assertions: see *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 [*Miller BCSC*] at para. 45.

[44] In this case the plaintiff contends there is "some basis in fact" that talcum powder products are possible causes of ovarian cancer, that the defendants sold

such products that were capable of producing serious and dangerous side effects without significant benefits, and that the defendants failed to warn prospective users of the risks associated with the use of talc. See: *Hollick* at para. 25.

[45] The plaintiff contends the Court must certify this class action because the pleadings disclose a cause of action, there is an identifiable class, there are common issues, class action is the preferable procedure, and there is an adequate representative without conflict on the common issues per *CPA*. s. 4(1)(a)-(e).

[46] The plaintiff contends that the evidence of "some basis in fact" concerning each requirement under s. 4(1)(b) to s. 4(1)(e) is found in:

a) the opinion of Dr. Mariane Heroux, an epidemiologist, who was asked to review the current state of scientific evidence concerning the relationship between the use of talcum powder on the perineum and the risk of epithelial ovarian cancer and to provide an expert opinion on the relationship between the use of talcum powder on the perineum and the risk of epithelial ovarian cancer;

b) a December 5, 2018 letter from Health Canada to healthcare professionals, based on a "draft screening assessment of talcum propos(ing) that exposure to the perineal area for the use of certain products containing talc is a possible cause of ovarian cancer"; and

c) Health Canada publication in the Canada Gazette on December 8, 2018 under the authority of the *Canadian Environmental Protection Act*, *1999*, S.C. 1999, c. 33 [*CEPA*]; and

d) the affidavits of the three proposed plaintiffs.

[47] Central to the defence positions in this application is a challenge to the admissibility of Dr. Heroux's opinion, the Health Canada letter and the Gazette publication. The defence contends that if these documents and opinions are not admissible, the plaintiffs will have failed to establish "some basis in fact" of a

common issue regarding the increased risk of ovarian cancer to users of talcum powder products.

[48] Defence contends that the *CPA* cannot be employed to authorize speculative class proceedings and the court must be alive to fundamental evidentiary shortcomings to prevent class actions from becoming "monsters of complexity and cost": see *Tiemstra v. Insurance Corp. of British Columbia* (1996), 22 B.C.L.R. (3d) 49 (S.C.) at para. 20, aff'd [1997] 38 B.C.L.R. 3(d) 377 (C.A.).

[49] The evidentiary threshold is lower than proof on the balance of probabilities: see *Ring v. Canada (Attorney General),* 2010 NLCA 20 at para. 14; *Miller BCCA* at para. 22. Most important is that resolution of the question is not achieved through weighing of evidence or resolving conflicts in the evidence.

[50] The defendants contend there is insufficient properly admissible evidence of a basis of facts adduced to satisfy the court that there is "some basis in fact" of the common issues alleged. On this point, the defence relies primarily on the comments in *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540 [*Ernewein*]:

> [31] Returning to the case at bar, what "evidentiary basis" did the plaintiffs provide on the question of commonality? Certainly the conclusions reached by Mr. Peña set out above at para. 7 would, had they been properly adduced as expert opinion evidence, have provided a basis for a court to conclude that a series of common questions had been raised with respect to the design of motor vehicles with fuel tanks outside their frame rails. But as has been seen, the Chambers judge acknowledged that Mr. Peña's report was "not evidence", and no challenge to that ruling is made by the respondents on this appeal. 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: see the discussion at paras. 31-52 of *Epstein v. First Marathon Inc.* (2000) 41 C.P.C. (4th) 159 (Ont. Sup. Ct. J.).
>
> [Emphasis added.].

[51] Absent the evidence of some basis in fact necessary to establish that the defendants' negligence or other actions could be a basis of the claims, the claims should not proceed as a class proceeding.

The Plaintiffs' Evidence

[52] I will now discuss the contested evidence.

Dr. Heroux

[53] The plaintiff relies on opinion evidence of Dr. Mariane Heroux.

[54] The defendants challenge the admissibility of paragraphs 54 to 59 of Dr. Heroux's report dated February 2, 2018. In those paragraphs she said:

- Existing literature dealing with talcum powder and ovarian cancer is limited because there is no known biological mechanism through which particles can induce ovarian tumors. There is a paucity of research investigating the possible mechanisms.

- Talc particles were identified in 75% of ovarian tumors and can be explained by migration from the vagina. She describes studies concerning the presence of talc in ovarian tissues but observed a poor correlation between personal use of talc and talc in the ovaries. No epidemiologic study of talc use and epithelial cancer has happened.

- Other postulated hypotheses include the possibility of talc instigating inflammatory responses which may predispose the development of ovarian cancer.

- Other studies suggest that exposure of the lower genital tract to talc might cause changes that could increase ovarian cancer risks.

- A 2008 theory discussed the biologic response to talc suggesting an association between talc use and the risk of ovarian cancer varying by genotype.

- In order to strengthen credibility for an association between talc and ovarian cancer, more studies are needed to look at the proposed biological mechanisms**.**

[55] The basis of the defendants' objections is that Dr. Heroux was not qualified to provide any opinions on talc and possible biological mechanisms of ovarian cancer that are set out at paragraphs 54 – 59 of her report. They also highlight that the scope of Dr. Heroux's opinion was premised on her mandate to opine on epithelial ovarian cancer and this opinion is narrower than the scope of the plaintiff's request for certification in this application.

[56] Dr. Heroux is a nutritional epidemiologist and is not qualified as a medical doctor, gynecologist, toxicologist, oncologist or pathologist. She is not an expert in the causes of ovarian cancer or ovarian tumors or non-cancer cysts.

[57] Prior to this hearing, Dr. Heroux was cross-examined on August 30, 2019. At that proceeding, she defined epidemiology as "the study of the distribution and determinants of health related states or events in specified populations, and the applications of the study to the control of health problems".

[58] The defendants highlight admissions made by Dr. Heroux that she has no experience in diagnosing or treating cancer, does not have expertise relating to talc products or talc use, is not an expert in causes of ovarian cancer or tumors or potential causes of epithelial cancer versus non-epithelial ovarian cancer, and has no specific education or training regarding the biological mechanisms of the development of cancerous or noncancerous tumors.

[59] The defendants also contend Dr. Heroux has not done any study or written any articles relating to foreign body responses or chronic inflammatory responses in the development of cancer.

[60] The entirety of Dr. Heroux's opinions are based solely on review of literature concerning scientific studies she was not involved in and concerned topics outside of her education or expertise. The defendants argue that the report goes beyond

epidemiological issues that might be within her expertise and engages in a series of speculative opinions and hypotheses regarding the biological mechanisms of ovarian cancer.

[61] In *Stout v. Bayer*, 2017 SKQB 329 [*Stout*] at para. 16, the court addressed shortcomings in Dr. Heroux's qualifications to provide expert opinion "concerning Pharmacoepidemiology" relating to use and implementation of permanent birth control products.

[62] In that case the plaintiffs claimed damages for severe pain and discomfort and other related consequences stemming from the use of birth control products. The causes of action advanced were in negligent design and development, negligence in distribution and sales, breaches of warrantees and other claims under the *Food and Drugs Act*, R.S.C. 1985, c. F – 27, the *Competition Act* and other federal and provincial consumer protection legislation, and waiver of tort.

[63] Elson J. outlined principles concerning admissibility of expert evidence addressed in *R. v. Mohan*, [1994] 2 S.C.R. 9 [*Mohan*]; *R. v. Lavallee*, [1990] 1 S.C.R. 852; and *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 [*White Burgess*].

[64] The court concluded that expert opinion pertaining to proposed common issues must survive under the *Mohan* test and *White Burgess* restatement of the same. The expert testimony on a certification motion must meet the admissibility test; once it is admissible the quality of the evidence establishing "basis in fact" is less than the balance of probabilities tests for trial evidence.

[65] Overall, it is generally insufficient for experts to arrive at opinions outside their particular fields of expertise based only on the review of literature published by others who possess the expertise on the subject: see *Stout* para. 47.

[66] While this Court is not bound in any way by the conclusions reached by Elson J., the principles articulated by the court can be applied. The court said at para. 51:

> … I do not accept the proposition that her training and experience, without any specific training or experience in medical device epidemiology, regulation or use, qualifies her to opine on the commonality of any of the proposed common issues. Reading her affidavit, the most one can say is that she applied her training and epidemiology to the review and assessment of documents devoted to a subject about which, before her review, she knew nothing.

[67] In the Court's conclusion, Dr. Heroux's expertise in her field was not transferable to the subject matter before the court simply by way of acquiring information without knowledge. The defendant invites the Court to adopt that reasoning and reject parts of Dr. Heroux's affidavit and opinion. The defendants seek to exclude only certain paragraphs in the opinion affidavit.

[68] I find that Dr. Heroux did not possess the education or training that might qualify her to opine on talc based products, epithelial or non-epithelial ovarian cancers, or the biological mechanisms of cancer of any kind (as per paras. 55 to 59 of her affidavit).

[69] She did not have any expertise concerning the topics addressed under the heading "proposed biological mechanisms" in her report. She conceded she was not trained in medicine, toxicology, biology or oncology. She does not have experience in diagnosing or treating cancer nor did she have expertise relating to talc products or talc use. She was not an expert on the causes of ovarian cancer or tumors or potential causes of epithelial versus non-epithelial cancer. She has no specific education or training regarding the biological mechanisms of the development of tumors. I accept that her expertise as a nutritional epidemiologist did not qualify her to provide the opinions challenged by the defendants because she has not acquired any special or peculiar knowledge through study or experience in respect of the opinions set out in that paragraphs 55–59 of her affidavit: *Mohan* at 25.

[70] In the result, I accept the defendants' submissions that paragraphs 55–59 contain opinion evidence that is not admissible in this application. As requested by the defendants, those paragraphs of her report should be redacted from the report; the balance of her affidavit remains intact and admissible.

[71] I note that in the paragraphs of Dr. Heroux's affidavit not objected to by the defendants, she reported on various studies indicating a 22% to 36% increased incidence of ovarian cancer among users of talc as opposed to the total population. She noted that the evidence did not support a causation link between talc and ovarian cancer and said there was no biological mechanism shown in the studies indicating that talc can induce ovarian tumors.

Health Canada

[72] Health Canada issued a "Dear Healthcare Professional Letter" on December 5, 2018: see Health Canada, *Talc – Potential Risk of Lung Effects and Ovarian Cancer*, (Dear Healthcare Professional Letter) e-Notice via Recalls and Safety Alerts Database, RA-68320 (Ottawa: Health Canada, December 5, 2018) (the "Health Canada Letter") The Health Canada Letter provided advice to healthcare professionals to remind patients to:

- avoid inhaling loose talc powders;
- avoid using products containing talc in the female genital area;
- keep baby powder away from a child's face to avoid inhalation; and
- check the ingredient list on product labels for talc and choose a talc-free alternative if concerned.

[73] The underpinnings of this message were Health Canada and Environment and Climate Change Canada's draft screening assessment of talc proposing that "exposure to the perineal area from the use of certain products containing talc is a possible cause of ovarian cancer" and may be harmful to human health.

[74] The message also said:

> The draft assessment also identified talc as a possible cause of ovarian cancer when there is exposure to or use in the female genital area. The Canadian Cancer Society identifies talc used on the genitals as a possible risk factor for ovarian cancer. Several published method–analyses

> consistently reported a small but positive association with ovarian cancer and perineal talc use.

[75] And the message went on to say that:

> Should the final screening assessment confirm that talc and certain products is harmful to human health, the government will take action to manage the risks identified.

[76] On December 8, 2018, notice of this process under *CEPA* was published in the Canada Gazette, *Publication after screening assessment of a substance – talc*, (2008) C Gaz I, Vol 152, No 49, 4335 [*Gazette*]. It set out the Minister of Health's proposal that talc be added to the schedule of *CEPA* naming substances constituting dangers to human life or health in Canada, subject to public comment and discussions with stakeholders on the development of risk management action.

[77] In their affidavits, both Ms. Guerra and Ms. Jenks appended a copy of the "Dear Healthcare Professional letter" and said they believed the contents of the letter to be true.

[78] On cross-examination both women said they were aware of the letter but neither said they had any personal knowledge about the letter. Each affiant referred to the "potential risk of ovarian cancer as a possible cause of talc powders used or exposed to the female genital area."

[79] The plaintiff contends that communications from Health Canada were also published in the *Gazette* and included the following:

> The meta-analysis of the available human studies in the peer-reviewed literature indicate a consistent and statistically significant positive association between perineal exposure to talc and ovarian cancer. Further, available data are indicative of the causal effect. Given that there is potential for perineal exposure to talc and from use of various self-care products (e.g. body powder, babypowder, diaper and rash creams, genital antiperspirants and deodorants, body wipes, bath bombs), a potential concern for human health has been identified. Based on the available information, it is proposed that there is a potential for harm to human health in Canada at current levels of exposure. Therefore, on the basis of the information presented in this draft screening assessment, it is proposed to conclude that talc meets the criteria under paragraph 64(c) of CEPA as it is entering or may enter the

> environment in a quantity or concentration or under conditions that constitute or may constitute a danger in Canada to human life or health.

[80] The defendants contend that the Health Canada Letter was only a draft screening assessment and lacked any evidential value. It was appended to the affidavits of Ms. Jenks and Ms. Guerra without affirmation that they had been informed by the authors about the reliability of the letter's contents; they did not attest to their belief that the contents of the Health Canada Letter was true. Thus the defendants argue their affidavits were inadmissible on this point.

[81] The defence contends the Health Canada Letter is inadmissible because it constitutes a "draft screening assessment document" that was sent with an invitation for public comment and contains no relevant facts that might support an inference of "some basis in fact" connecting talc and ovarian cancer. The defendants say the *Gazette* report is not admissible proof of any opinions or comments and it too fails to establish the threshold of "a basis in fact" connecting talc to ovarian cancer.

[82] Because the affidavits are hearsay and the Health Canada letter was attached without any averment that the affiants were "informed as to the authenticity and veracity of the contents of the document by the author or someone with personal knowledge of the document and that the deponent believes the facts contained in the document are true" the affidavits do not comply with Rule 22-2(13). Thus, the defence contends the Health Canada Letter is inadmissible.

[83] Moreover, the defendants submit that details set out in this Health Canada Letter and the *Gazette* were analogous to the opinion evidence tendered in *Ernewein* and rejected as evidence of "some basis in fact" for the proposed claim: see *Ernewein* at paras. 8 and 32.

[84] *Ernewein* involved an application for certification of an action related to the design and placement of fuel tanks on the defendant's trucks. The plaintiff proposed to rely on a report prepared by the U.S. Secretary of Transportation (the "Secretary") indicating that the placement of the fuel storage system with tanks outside the frame

increased the safety risk of post-crash fires in the vehicle. The Secretary concluded that the subject vehicle "contained a defect that relates to motor vehicle safety".

[85] The Court of Appeal accepted that, if the Secretary's findings had been properly introduced as expert opinion evidence, there would have been a basis for the court to conclude that a series of common questions had been with raised with respect to the design of the vehicles. The report was not admitted into evidence and that finding was not appealed by the plaintiffs. The court concluded that there was no authority to support the admission of the Secretary's opinion for the purposes of the certification hearing because it did not meet the usual criteria for admissibility. This observation was made with the caveat that class actions are to be treated robustly by the courts.

[86] The defence also relies on *L.M.U v. R.L.U*, 2004 BCSC 95 at paras. 34-37 for the guidance on the use of affidavits and third party documents.

[87] There are two questions to be decided on this point: has the plaintiff sufficiently complied with Rule 22-2(13) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 to make admissible the contents of the Health Canada Letter without assertions by the affiants that each was informed of the authenticity and veracity of the document by the author or someone knowledgeable about it? If authenticity is established, then I must decide whether the contents of the Health Canada Letter or the *Gazette* publication can be accepted and admitted to prove the "some basis in fact" concerning the plaintiff's claim that the defendants' products were a cause of ovarian cancer.

[88] A further issue is whether the substance of the Health Canada Letter is hearsay and opinion evidence, which can be properly admitted through the proposed plaintiffs.

[89] Alternatively, the question is whether publication of the information in the *Gazette* can be admitted and relied upon as some basis in fact to establish the common issues.

[90] The plaintiff relies on the principle that judicial notice of a publication can be taken to support a finding that the facts set out in the Health Canada Letter represent "a basis in fact" for certification of claims that the defendants' products may cause ovarian cancer. Judicial notice was discussed at length in *R. v. Spence*, 2005 SCC 71 at paras. 54 to 69. In particular, para. 68 is helpful:

> 68 I would add this comment: in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, a majority of our Court expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports. This is the approach that had been taken by the litigants in *Sharpe*, *Little Sisters*, *Malmo-Levine* itself and subsequently in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4. We said in *Malmo-Levine* that
>
> > courts should nevertheless proceed cautiously to take judicial notice even as "legislative facts" of matters … are reasonably open to dispute, particularly where they relate to an issue that could be dispositive … [para. 28]

[91] The plaintiff also argues that the "public documents" exception to the hearsay rule permits reliance on the Health Canada Letter notwithstanding the shortcomings highlighted by the plaintiff. They argued that Gomery J. endorsed the principle that government published statistics attached to an affidavit from a person who could not comment on the tables' contents were nonetheless admissible in certification proceedings: See *Corey v. Kruger Products L.P.*, 2018 BCSC 1510 at paras. 37-39.

[92] Moreover, the plaintiffs argue that publication of the screening assessment in the Canada *Gazette* should be taken into account by the Curt.

[93] The plaintiff contends that the Health Canada Letter and the *Gazette* documents contain information admissible pursuant to s. 25 of the *Evidence Act* R.S.B.C. 1996, c. 124*:*

> **Proof of state documents**
>
> **25** (1) …
>
> (3) The existence and the contents, in whole or in part, of an imperial state document may be proved

(b) by producing a copy of the Canada Gazette or a volume of the Acts of the Parliament of Canada purporting to contain a copy of or an extract from it or a notice of it,

(c) by producing a copy of it or an extract from it purporting to be printed by the Queen's Printer for Canada or for a province of Canada,

(d) by producing a copy of it or an extract from it purporting to be

(i) certified as a true copy or extract by the minister, head, deputy minister or deputy head of a ministry or department of the imperial government, or

(ii) an exemplification of it under the imperial Great Seal, or

(e) by producing a copy of it or an extract from it purporting to be certified as a true copy or extract by the custodian of the original document or of the public records from which the copy or extract purports to be made.

(4) The existence and the contents, in whole or in part, of a federal or provincial state document may be proved by producing

(a) a copy of

(i) the Canada Gazette,

(ii) the official gazette for a province,

(iii) a volume of the Acts of the Parliament of Canada, or

(iv) a volume of the Acts of the legislature of a province,

purporting to contain a copy of the state document or an extract from it or a notice of it,

(b) a copy of it or an extract from it purporting to be printed by the Queen's Printer for Canada or for a province,

(c) a copy of it or an extract from it, whether printed or not, purporting to be

(i) certified as a true copy or extract by

(A) the minister, head, deputy minister or deputy head of a ministry or department of the government of Canada or of a province, or

(B) the custodian of the original document or of the public records from which the copy or extract purports to be made, or

(ii) an exemplification of the state document under the Great Seal of Canada or of a province,

and the federal or provincial state document proved must be judicially noticed.

[Emphasis added.]

[94] In *Ewert v. Canada (Attorney General),* 2016 BCSC 962 the court endorsed a generous approach to the evidentiary burdens on a certification application:

> [42] In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 312 D.L.R. (4th) 419, 98 B.C.L.R. (4th) 272, (leave to appeal to S.C.C. dismissed on June 3, 2010; motion to S.C.C. to reconsider the dismissal of the leave application dismissed on May 17, 2012, for both see [2010] S.C.C.A. No. 32), the court at first instance concluded that expert evidence adduced at the certification hearing did not sufficiently demonstrate a workable class-wide methodology to establish harm. The Court of Appeal concluded that the judge at the certification hearing had "set the bar for the appellant too high" (at para. 63). The court went on to describe both the general evidentiary burden on an applicant in a certification hearing and the level of scrutiny applicable to expert evidence in particular:
>
> > [64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].
> >
> > [65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one -- it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
> >
> > > [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.
> >
> > [66] Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial. …
> >
> > [Emphasis added.]

[95] I am satisfied that the Health Canada Letter and the *Gazette* publication, warning physicians about the perineal use of talcum powder, is admissible evidence in this proceeding. They are admissible because they are obviously publications from the Government of Canada. Taking into account that Health Canada's role includes a mandate to prevent and control the use of toxic substances that may endanger human life or health, this document contains evidence of a basis in fact that talc may cause or contribute to the development of ovarian cancer. The documents do not derive from an unofficial or unreliable source of information; they flows from an official website which contains verifiable information that is objectively relevant to the basis in fact of the plaintiff's claims.

[96] The contents of the Health Canada Letter or the *Gazette* are not sweeping or conclusory assertions; they represent the state of study and analysis performed by government and contain some evidence in fact of the connection between talc use and ovarian cancer notwithstanding the tentative nature of those conclusions that were not finalized at the time of publication.

[97] In *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 70 C.P.C. (6th) 27, 2009 CanLII 23374 (Ont Div Ct), the Divisional Court outlined the treatment of evidence necessary to meet the" some basis in fact" test. The court said:

> [73] In *Hollick, supra*, the plaintiff proposed to pursue its claim of nuisance for pollution on behalf of a proposed class [of] persons residing within a defined geographical area. The Supreme Court of Canada found that there was some basis in fact for both an identifiable class and the common issues requirements. The S.C.C. considered the large number of complaints by residents of the area as some basis in fact to satisfy the commonality requirement: *Hollick,* at para. 26.
>
> [74] The requirement that there be an evidentiary foundation -- or some basis in fact -- to support the certification criteria does not include a preliminary merits test and should not involve an assessment of the merits. It is not an onerous requirement. The plaintiffs are not required to indicate the evidence upon which they will prove these issues. The certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: *Hollick*, at paras. 16, 25.

[98] The plaintiffs contend there is a distinction between a basis in fact and a basis in evidence: see *Miller BCSC* at paras. 42-47.

[99] The plaintiff incorrectly contends that defendants are required to establish there is “no basis in fact” for the certification requirements despite the Health Canada Letter and *Gazette*. The fundamental question raised by the defence is whether there is any “basis in fact” if the Health Canada documents are not received into evidence.

[100] Overall, I am also satisfied that the inclusion of the Health Canada Letter and *Gazette* publications should be taken into account on this application. This Court is obliged to take judicial notice of this publication and in my view the information set out meets the “some basis in fact” for the certification of the issues. Once this document is accepted into evidence, it becomes distinguishable from the document tendered and rejected in *Ernewein.*

[101] I accept that there is no evidence of a basis in fact to include “ovarian cysts” in the issues to be certified in this case. I accept that nothing in either Dr. Heroux’s affidavit or the Health Canada Letter or *Gazette* publication implicate or associate ovarian cysts with the perineal use of talc.

[102] During argument, plaintiff’s counsel conceded that inclusion of claims concerning ovarian cysts could be excluded from the common issues she proposes for certification.

The Defendants’ Evidence

[103] Dr. Gavin Stuart, a university professor in obstetrics and gynecology with a history of research and clinical trials regarding gynecological cancers provided an affidavit. He opined on issues concerning ovarian cancer. He reports that ovarian tumors can be benign or malignant (cancer) but that ovarian cancer is not a single disease and there are differences in origin, development, signatures, clinical behaviour and risk factors inherent in ovarian cancers.

[104] The defendants also provided opinion evidence by affidavit from Dr. Blake Gilks, a professor in pathology and laboratory medicine at the University of British Columbia. Dr. Gilks participates in a multidisciplinary team studying ovarian cancers and has extensive history in the area of gynecological pathology. He said ovarian cancer is not a single disease and 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". He states that ovarian cysts are not forms of cancer.

[105] There are more than 15 types of ovarian cancer which observation contrasts with other cancers involving a single organ such as the prostrate or colon.

[106] Ovarian cancers are characterized as either epithelial ovarian cancers or non-epithelial ovarian cancers. The former involve epithelial cells and the latter do not.

[107] There are five specific types of epithelial ovarian carcinoma, each of which are different with respect to cell origin, risk factors, genetic events, patterns of spread, response to therapy and patient outcomes. There is no common biological or causal mechanism for either epithelial or non-epithelial ovarian cancers.

[108] There are different risk factors for certain incidences of ovarian cancer; cancer is fundamentally a genetic disease. Family histories are the most significant risk factor for ovarian cancer. Tubal ligation and hysterectomies decrease the risk of developing ovarian cancer while endometriosis increases the risk of some types of epithelial ovarian cancer.

[109] Dr. Gilks states the hypothesis that perineal talc use causes ovarian cancer is scientifically unjustified.

[110] Finally, the defendants rely on opinion evidence from Dr. Robert Kurman, a professor of gynecologic pathology at Johns Hopkins University, School of Medicine. He too explained different forms of ovarian cancers and opined that "it is highly unlikely that exposure to a single agent, i.e., talc, could result in the development of such distinctly different neoplasms (tumors)".

[111] The opinions of Dr. Stuart, Dr. Gilks, and Dr. Kurman are not directly in conflict with the evidence tendered by the plaintiff. These opinions assist the Court in considering the issues raised under ss. 4(1)(b) to (e).

Analysis

[112] Proceeding on the basis of the above evidence rulings, I will now address each element of s. 4 of the *CPA*.

CPA s. 4(1)(a): Do the pleadings disclose a cause of action?

[113] The first requirement under s. 4(1) of the *CPA* is that the pleadings disclose a cause of action.

[114] The Court must assume the facts pleaded can be proved. Disclosure of a cause of action requires a low threshold and the test is not met only where it is plain and obvious that the pleading fails to disclose a reasonable cause of action. Evidence is not permitted and the standards of proof under Rule 9-5(1)(a) apply: *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 [*Microsoft*] at para. 63; *Koubi v. Mazda Canada Inc*., 2010 BCSC 650 [*Koubi*] at paras. 42-43, rev'd 2012 BCCA 310.

[115] The pleading must include the material facts constituting the element of each cause of action pleaded. The plaintiff bears the onus of showing that the proposed pleadings adequately disclose a cause of action.

[116] The defendants concede that the pleadings adequately describe claims in negligence for failure to warn of the risk of ovarian cancer. However, the adequacy of the other pleadings is criticized by the defendants because the plaintiff has failed to plead the necessary facts to support the enumerated causes of action, namely;

a. under provincial consumer protection legislation;

b. under the *Competition Act*;

c. negligent design [including testing], or negligent manufacturing [including producing, inspecting and supplying];

d. civil conspiracy;

e. medical monitoring; or

f. waiver of tort.

[117] The defendants contend that the Amended Notice of Civil Claim ("ANOCC") does not contain any allegation or cause of action regarding breaches of statutory or express warranties or negligent misrepresentation. This issue is mentioned in the notice of application but not the ANOCC. Absent those facts, the cause of action under those heads have no reasonable prospect of succeeding.

[118] Thus, the defendants seek an order striking paragraphs 50-54, 59-68 and 70-71 of the ANOCC. I will address the defendants' arguments on each claim individually.

a. Consumer Protection Legislation

[119] The plaintiff contends the defendants breached their obligations under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*] because they withheld information from the public and Health Canada about the risks of ovarian cancer and ovarian cysts associated with talc.

[120] The defendants rely on the comments of Madam Justice Newbury in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,* 2014 BCCA 36 [*Wakelam BCCA*] at para. 69 where the court reversed the chambers judge and refused certification of the claim under the *BPCPA*. Newbury J.A. said allegations of breaches under the *BPCPA* depended on proof of a causal connection between the breach and the loss suffered; the court concluded that a claim for a plaintiff's own damage is dependent on proof of causal connection between the contravention of the *BPCPA* by the defendant and loss or damage suffered by the plaintiff. Absent a

pleading of a causal connection between any alleged deceptive act and practice and the loss suffered by any plaintiff, the claim is bound to fail.

[121] The defendants contend the plaintiff's failure to plead the fact that Ms. Williamson relied on the defendants' failure to warn prospective users of the risks of ovarian cysts and cancer in the ANOCC constitutes a failure to plead essential facts and paragraphs 52-54 of the ANOCC, should be expunged.

[122] The plaintiffs contend that on the authority of the chambers decision in *Wakelam* (indexed at *Wakelam v. Johnson & Johnson,* 2011 BCSC 1765, rev'd 2014 BCCA 36 [*Wakelam BCSC*]) it was not necessary to plead reliance by the plaintiffs on the defendants' failure to warn deception under the *BPCPA*. She argues this finding was supported by Mr. Justice Smith in *Jones v. Zimmer GMBH*, 2013 BCCA 21 [*Jones*], where the court concluded that evidence of compensation damages under the *BPCPA* might be necessary at trial but was not necessary at the certification stage.

[123] In *Jones*, Smith J.A. was addressing the question of whether the statutory common issue could be certified in the absence of evidence that the respondents relied on the deceptive acts or practices. The Court concluded that consideration of the evidence of reliance did not arise at the certification stage; findings on the common issue question would move the action along where damages would be addressed.

[124] The adequacy of the pleadings concerning the *BPCPA* claims was not addressed; his remarks concerned only the sufficiency of evidence on the damages issue for the purposes of certification whereas the appeal decision in *Wakelam BCCA* dealt squarely with the sufficiency of the pleading to warn certification of the issue.

[125] However, I am not persuaded that the plaintiff's pleadings do not include allegations of reliance on misrepresentations. In *Jones*, the court adopted the principle that failures to disclose material facts can be the basis of a cause of action

under the *BPCPA*: see *Jones* at para. 56 and *Stanway v. Wyeth Canada Inc*., 2012 BCCA 260] [*Stanway*] at paras. 81-82.

[126] In the Statement of Facts part of the ANOCC, the plaintiff alleges the defendants had been informed about serious health risks of ovarian cancer associated with the use of talcum powder. She alleges the defendants had been asked to withdraw talc products from the market because of the ovarian cancer risk posed by the product.

[127] She also pleads the following:

> 41. Had Ms. Williamson been warned of the potential side effects of using Johnson's® Baby Powder included ovarian cysts she would not have used it. The plaintiff in the class could not be reasonably expected to know that Johnson's® Baby Powder can lead to an increased risk of ovarian cysts.

[128] Ms. Jenks and Ms. Guerra also referred to their reliance on the absence of any warnings concerning use of talc.

[129] Although she did not use the term "reliance", I am satisfied that this assertion in the ANOCC is sufficient to constitute a pleading of reliance that meets the objectives described by the Court of Appeal in para. 69 of *Wakelam BCCA*. I am satisfied that the plaintiff's claim under the *BPCPA* is not bound to fail on this point and will not be struck from the ANOCC.

[130] The defendants contend the plaintiff does not allege any facts pertinent to causes of action under any other provincial statutes and on this basis the plaintiff's pleadings are fatally flawed.

[131] The plaintiff's certification submissions did not address the causes of action under other provincial consumer protection legislation. She seeks to certify this claim as a national class and some fundamental differences exist between the *BPCPA* and other statutes. For example, contractual privity is required for claims advanced under the Ontario's *Consumer Protection Act, 2002,* S.O. 2002, c. 30; there are no facts pleaded on this issue concerning the potential Ontario claimants.

[132] Absent the requisite pleadings I am not prepared to certify this proceeding for consumer protection legislation in other provinces. The plaintiffs will have leave to file a further amended ANOCC if they intend to expand this claim to the legislative protections under statutes of other provinces.

b. The Competition Act

[133] Section 52 of the *Competition Act* sets out the prohibited behaviour concerning representations to the public concerning products:

> False or misleading representations
>
> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> Proof of certain matters not required
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> (b) any member of the public to whom the representation was made was within Canada; or
>
> (c) the representation was made in a place to which the public had access.

[134] The remedy for breaches of the *Competition Act* are set out in s. 36:

> Recovery of damages
>
> 36 (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[135] The defendants stress that omissions do not constitute representations under s. 52 and in contrast to other provincial legislation, there is no obligation of “true and

plain disclosure of all material facts" (see, for example the *Securities Act*, R.S.O. 1990, c. S-5).

[136] In the ANOCC, the plaintiff sets out the claim based on the *Competition Act*. The defendant contends this was not sufficiently pleaded either as a representative or causal connection between a representation and losses allegedly suffered by plaintiffs.

[137] Materially false or misleading representations and omissions do not constitute representations under s. 52 of the *Competition Act*. Absent a common express representation capable of converting an alleged omission into a misrepresentation by implication, it is plain and obvious that a claim for breach under section 52 cannot succeed. Moreover, the *Competition Act* does not impose a general duty of disclosure. See: *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 [*Arora ONSC*] at para. 197 (aff'd *Arora v. Whirlpool Canada LP*, 2013 ONCA 657 [*Arora ONCA*] at para. 50).

[138] The question is whether the defendants' failure to communicate information about risks associated with the use of talc could convert an omission into a misrepresentation by implication. The principle that "omissions can constitute misrepresentations" was recognized in *Aurora ONCA* at para. 51 but in *Williams v. Canon Canada Inc*., 2011 ONSC 6571, the court said "the failure to disclose the alleged defect cannot be a 'representation'" for the purposes of section 52 (para. 227).

[139] In *Arora ONSC*, the chambers judge did not permit the *Competition Act* claim to proceed because it was plain and obvious the pleadings would not support the claim. Perell J. discussed the tension between silence and failures to disclose material facts. He observed that manufacturers are generally under no obligation to disparage their own products and disclose alleged design defects. Thus, no offence was committed under s. 52 of the *Competition Act* in that case. He said:

> [197] As I will discuss in the next section, since the alleged design defect in the washing machines did not make the machines dangerous, it is plain and

> obvious that Whirlpool was not under an obligation to disparage its own product and disclose the alleged design defect. In my opinion, it had no duty of care to disclose, no fiduciary duty to disclose, and no statutory duty to disclose. It was entitled to remain silent, and in my opinion, it is plain and obvious that it did not commit an offence under s. 52 of the *Competition Act*.
>
> [Emphasis added.]

[140] The instant case is significantly different than *Arora* and *Williams*. In *Arora* the court dealt with defects in products that did not constitute a danger to users. In this case, it is alleged the product was dangerous to all users and if Ms. Williamson had been informed by the defendants that there were risks of ovarian cysts (or cancer) associated with talc she would not have used their product.

[141] The defendants challenge the plaintiff's contention that the court's decision in *Wakelam BCSC* (the trial decision) held that it was not necessary to prove the defendants conduct (or failure to act) misled a consumer plaintiff to be actionable. This decision was overturned by the Court of Appeal in *Wakelam BCCA* at paras. 78-92. On appeal, the court found that the causal connection between contravention of the legislation and the plaintiff's loss was necessary. Without an averment of that causal connection, a claim under the *Competition Act* should be struck.

[142] However, I find that the pleadings in this case satisfy any requirement to include a causal connection between the defendants' potential contravention of the *Competition Act* and the damages suffered as a result of the defendants' failure to disclose the risks known to it since 1994. The plaintiff's ANOCC asserts that she would not have purchased or used the defendants' products if she had been informed that the potential side effects of talc use included ovarian cysts. This of course is evidence of reliance and the only complaint a prospective plaintiff might have in the circumstances.

[143] It is quite apparent that Ms. Williamson relied on the absence of information that was in the defendants' possession concerning risks of using their product. But for the defendants' failure to disclose the risks or association between talc and ovarian cysts (or cancer), she would not have use the product. The requisite level of

reliance and misrepresentation might be proved at trial to engage a remedy under s. 52.

[144] Thus, I cannot conclude at this stage that the claims to be advanced under the *Competition Act* are bound to fail. The claim will not be struck from the ANOCC.

c. Negligent Design or Negligent Manufacture

[145] The defendants contend the plaintiff has pled insufficient material facts of negligent design/testing and negligent manufacture to disclose a viable cause of action for each and those claims should be struck.

[146] They contend that there must be a pleading of a duty of care, a breach of the standard of care, damage, and that damage was caused in fact and law by the defendant's breach: see *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at para. 3.

[147] In *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 [*Martin*] at para. 138, Horkins J. discussed the vulnerabilities of claims that do not clearly distinguish between different negligence claims.

[148] In *Bertram v. GlaxoSmithKline Inc.*, 2012 BCSC 1804, aff'd 2013 BCCA 462, N. Smith J. addressed the defendants' complaints that the pleadings were unfocused and alleged broad ranges of conduct. He said:

> [21] Although the alleged particulars of negligence cover a broad range of conduct, I do not accept the defendant's argument that the claim is "unfocussed" or that it improperly combines distinct forms of negligence in a way that will make it difficult to determine how each claim relates to the common issues. Not yet having had the advantage of discovery, which may assist in narrowing the claim, the plaintiffs had no choice but to state particulars that cast as wide a net as possible.

[149] In *Martin* and *Player v. Janssen-Ortho Inc.*, 2014 BCSC 1122 at para. 211, the prerequisite for a successful claim in negligent design was described as requiring pleas of a design defect, substantial likelihood of harm created by the defect and that it was feasible to design the product in a safer manner.

[150] The defendants contend the plaintiff's pleadings are "muddled" and" vague". The pleading includes a bald allegation that talc products were "defective" and the defendants "failed to properly design and test" its products. However, the defendants say the plaintiffs do not plead any facts concerning how the products were defective. The plaintiff does not allege the products were unsafe for any purpose; the plaintiff pleads the defect affected persons using the product perineally. The defendants contend that lacking essential elements necessary for a cause of negligent design, the plaintiff's claims are deficient and should be struck.

[151] As also noted in *Martin*, pleadings concerning negligent testing must contain proper factual assertions:

> [138] Liability for negligent "development" and "testing" also requires the plaintiff to plead that a safer alternative to Seroquel would have resulted but for the defendants' negligence. However, no such facts are pled in the statement of claim. This point is stated in *Baker v. Suzuki Motor Co*., [1993] A.J. No. 605 (Q.B.) at para. 75 as follows:
>
> > However, the absence of testing alone cannot be proof of negligence unless the tests, had they been done, would have enabled the manufacturer to design the motorcycle in such a way that the fire would not have occurred. Without this type of evidence, this allegation of negligence must fail.

[152] The plaintiff did not plead that the defendants' products should not have been sold for any purpose; her issues are only with perineal use of the products and ovarian cysts (or cancer). Further, the plaintiff did not identify the alleged design failure, if any, in her pleadings.

[153] Overall, the plaintiff's claims of a negligent design and negligent testing in this case do not disclose sufficient facts concerning the design flaws. The claimant did plead that cornstarch is an organic carbohydrate and that cornstarch powders have been sold or marketed for the same uses as the defendants' talc products with nearly the same effectiveness. Thus there were safer and economically more feasible alternatives to support a cause of action in negligent design.

[154] However, the ANOCC does not plead any facts regarding the alleged negligent design or testing of the product and in particular did not address Valeant's

role in the design and testing of the product. I find the claim under that head of negligence is bound to fail and the pleading should be struck from the ANOCC.

[155] A plaintiff alleging negligent manufacture must plead:

- the product was defective in that it was not manufactured in accordance with the specifications intended by the manufacturer;
- the defect resulted from the manufacturer's failure to take reasonable care in manufacturing the product; and
- the plaintiffs sustained harm caused by the defective condition.

[156] The contents of the current pleadings do not allege any facts about the manufacturing process nor does it identify any defect resulting from that process [as opposed to the design] and does not address the specifications.

[157] The pleadings do not identify any information about the defendants' negligence in the manufacturing process. They do not identify defects that allegedly resulted in the manufacturing process, nor do the plaintiffs allege the defendants failed to manufacture their products in accordance any specifications.

[158] There is no allegation of fact setting out the negligence in the manufacturing process. The plaintiff contends that the ingredients of talc cause harm but nothing in the manufacturing process created the harm: see *Martin* at para. 146.

[159] I find that the plaintiff's claim concerning negligent manufacture is, on the basis of the current pleadings, bound to fail.

[160] The portion of the ANOCC regarding negligent design, testing, and manufacture will be struck out.

d. Civil Conspiracy

[161] Although the plaintiff refers to a claim in conspiracy in the ANOCC, she did not seek to certify the conspiracy claim in her notice of application. Further she did

not allege that a predominant purpose conspiracy of the defendants was to injure the plaintiff. Last, she did not address the conspiracy claim in argument.

[162] The defendants made considerable comment in reply to this aspect of the claim and I will review those submissions.

[163] Civil conspiracies in Canada are actionable if either:

a) the predominant purpose was to cause harm to a victim; or

b) there is an unlawful conspiracy where the plaintiff proves that defendants acted in combination and that unlawful conduct was directed toward the plaintiffs.

[164] In *Harris v. Glaxosmithkline Inc*., 2010 ONCA 872 the court summarized the requirement to plead a predominant purpose to cause harm to a plaintiff:

> [39] To make out a conspiracy to injure, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent [page672] of the defendants and not on the consequences that the defendants either realized or should have realized would follow.

(See also: *Watson v. Bank of America Corporation*, 2015 BCCA at para. 56)

[165] The defendants argue the pleadings lacked sufficient material facts to establish an unlawful means conspiracy. Conspiracy pleadings require allegations:

a) the defendants acted in combination or in concert by agreement or with common design;

b) the conduct of the defendants was unlawful;

c) the defendants know that injury to the plaintiff was a likely result; and

d) injury to the plaintiff occurs in fact.

[166] Claims of conspiracy that are “bald, overly speculative, or simply restated legal principles rather than pleaded material facts” were rejected by the court in *Martin*, at para. 168.

[167] The defendants contend that the ANOCC includes an allegation of “overt acts” performed by the defendants in furtherance of the conspiracy but does not assert that these acts were “unlawful” or that they constituted “unlawful” conduct for the purposes of the tort conspiracy. Plaintiffs must set out the specific legal breaches alleged by the defendants as part of the conspiracy in order to establish that this conduct was “unlawful”.

[168] The defendants contend that the absence of this detail from the claim is crucial and the plaintiffs are bound to fail; the conspiracy pleading should be ignored and struck.

[169] Further, the uncontradicted evidence indicated that the defendant Valeant was not associated with the products until October 2012.

[170] Overall, the plaintiff did not adequately advance or plead a claim in conspiracy.

e. Medical Monitoring

[171] In the ANOCC the plaintiff asserts that class members “incurred costs related to treating serious side effects and diseases that were caused by using” the defendants’ products. They contend that some members of the class will require surgical or medical monitoring. The defendants contend there is no recognized cause of action for medical monitoring in Canada and no basis for an order requiring a medical monitoring regime.

[172] Rejection of this type of claim is based on the exclusionary principle that claims for contingent, future pure economic loss are by their very nature indeterminate contingent and speculative and cannot be included in a class proceeding claim: See *Winnipeg Condominium Corporation No. 36 v. Bird*

Construction Co., [1995] 1 S.C.R. 85, 1995 CanLII 146 [*Winnipeg Condominium Corporation*] and *Brooks v. Canada*, 2009 SKQB 509 at para. 114; *Ring v Canada (A.G.),* 2010 NL's the 20 at paras. 56-59, leave to appeal to the SCC refused [2010] S.C.C.A. No 187.

[173] In *Winnipeg Condominium Corporation*, the Court allowed recovery for economic loss to repair dangerous products creating risks of harm already remediated but disallowed for recovery of future economic loss, that is for repairs not yet completed.

[174] I am satisfied that the claim advanced by the plaintiff respecting future medical monitoring or medication costs cannot be certified based on the authorities including *Brooks v. Canada*, 2009 SKQB 509 at para. 114, leave to appeal refused, 2010 SKCA. Claims for past expenses and losses are recoverable.

f. Waiver of Tort

[175] The plaintiffs concede that a remedy of waiver of tort as an independent cause of action cannot be substantiated in Canadian law. See: *Atlantic Lottery Corporation Inc. v. Babstock*, 2020 SCC 19 [*Babstock*] at para. 76.

[176] While accepting the *Babstock* result, the plaintiff contends that disgorgement remains an available remedy in the circumstances of this case based on the comments at para. 24. She contends that disgorgement for the defendants' tortious wrongdoing has not been foreclosed and there may be a remedy:

> [36] The Court of Appeal majority concluded that, even if disgorgement for wrongdoing is not an independent cause of action, the plaintiffs have adequately pleaded the elements of the tort of negligence, and may therefore seek disgorgement for tortious wrongdoing on that basis. While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century (*Martin*, at pp. 505-6). It has even been suggested that disgorgement may be available for negligence in certain circumstances, and the issue remains unsettled (*Edelman*, at pp. 129-30; C.-M. O'Hagan, "Remedies", in L. N. Klar et al., ed., *Remedies in Tort* (loose-leaf), vol. 4, at §200). While that may have to be decided in an appropriate case, as I will explain the plaintiffs have not adequately pleaded a claim in negligence, and it is unnecessary to resolve the question here.

[177] As Brown J. explained:

> [27] As I will explain, disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action. This view follows naturally from the historical origins of unjust enrichment and gain-based remedies more generally.

[178] In *Babstock*, Brown J. concluded that the pleadings in negligence were inadequate and the disgorgement remedy was denied.

[179] Disgorgement is not an independent cause of action; it is an alternative remedy for certain wrongs. I accept the defendants' argument that it would not be proper to certify a claim for disgorgement absent proper pleadings and after the determination of the individual issues. Thus, the claim for waiver of tort is struck and will not be certified.

Conclusion: S. 4(1)(a)

[180] In conclusion the following claims may be certified:

- The claims for breach of the BC *Consumer Protection Act;*
- The claims under the *Competition Act*; and
- The claims concerning negligent failure to warn.

[181] The following claims cannot be certified:

- The claims for breach of consumer protection legislation in other provinces;
- The claim concerning negligent design, testing, and manufacture;
- The claims for civil conspiracy;
- The claims for medical monitoring; and
- The claim for waiver of tort.

CPA s. 4(1)(b): Is there an identifiable class of two or more persons?

[182] The plaintiff must establish that there is an identifiable class of two persons to achieve the purposes of class proceedings. Members of the class must be identified by objective criteria rationally connected to the claims pleaded and the common issues: see *Dutton* at para. 38; *Hollick* at paras 20-21.

[183] The plaintiffs seek certification of multiple subclasses described in the ANOCC as follows:

> a) this action is brought under the Class Proceedings Act on behalf of all persons of British Columbia and Canada who have purchased or used Johnson's® Baby Powder or Shower to Shower® (of the Products), including their estates, executors, personal representatives, corporations, or other entities, and third parties who have a right to make a claim in relation to said purchase or use of the products, including those who have use the products and as a result are deceased, or have been diagnosed with ovarian cysts are ovarian cancer ("injury subclass")
>
> b) those who have use the products and in so doing have been exposed to a material and otherwise avoidable risk to their health ("user subclass")
>
> c) those who have purchased the products and in so doing have been exposed to a material and otherwise avoidable risk to their health ("purchaser subclass");
>
> d) those, who by reason of the relationship to a member of injury subclass, user subclass, or purchaser subclass, are entitled to make claims in respect of the harm to the said member(s) of the other subclasses ("family subclass");
>
> e) those who are entitled to make claims in respect of expenses, costs, or losses incurred resulting from the harm of the said member(s) of the other subclasses, including but not limited to:
>
> vi. provincial and federal governments and health departments;
>
> vii. provincial health insurance plans (including the Québec health insurance plan) and other public health entities;
>
> viii. various employers and employee health insurance plans;
>
> ix. any other subrogated claims of members of the class; and
>
> x. all other persons and entities that have and will suffer losses as a result of the acts and omissions of the defendants ("resulting losses subclass");
>
> and
>
> f) any other subclasses that this court finds appropriate.

[184] The challenge is to ensure the class is "not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue": *Hollick* at para. 21. The court may disallow certification or require an amended definition of the class.

[185] The defendants argue that since the decisions in *Microsoft* and *Hollick*, British Columbia cases suggest class definitions should avoid overly broad definitions and concentrate on a narrow scope of class members: see *Benning v. Volkswagen Canada Inc. et al*., 2006 BCSC 1292 [*Benning*], at paras. 80-81; *Unlu v. Air Canada*, 2015 BCSC 1453 at paras. 80-85, aff'd 2017 BCCA 316.

[186] An example cited by the defendants for the importance of a narrow class was *Benning* where the defect in the defendants' vehicles was alleged to make those cars more susceptible to break-ins. The proposed class included owners who had not experienced break-ins; in that case the broadly defined class was deemed impermissible.

[187] In the instant case, the defence says the plaintiff's inclusion of an overly broad class of potential members is not rationally connected to the proposed common issues arising out of the negligence claim for failure to warn of alleged risks.

i. Inclusion of Any Person Who Purchased the Products

[188] The proposed class includes persons who have not suffered ovarian cancer or ovarian cysts and includes every person in British Columbia and Canada who purchased or used the defendants' products. The defendants contend that this pleading would include women who did not use the products perineally, women who have not been diagnosed with ovarian cancer or ovarian cysts, and men who purchased products. Many of these proposed class members do not share in the causes of action asserted as required of an identifiable class: see *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, leave to appeal to SCC refused, at paras. 128-129 [*Wuttunee*].

[189] The plaintiff's pleading does not allege that any of these individuals has suffered loss or harm and their inclusion in the class is not supportable by any sustainable cause of action or prospect of recovery. The pleadings do not describe a cause of action for persons who purchased talc products but did not use them. Those persons suffered no loss or harm and should not be included in a subclass: see *Parker v. Pfizer Canada Inc*., 2012 ONSC 3681 at paras. 70-72.

[190] The plaintiff's proposed subclass includes persons who had purchased or otherwise acquired the products regardless of whether those persons developed ovarian cancer. On this basis, and relying on *Tiboni v. Merck Frosst Canada Ltd.,* 2008 CanLII 37911 (ONSC), and *Jones* at para. 42 the plaintiff contends that any person who had purchased or used talc should be included.

[191] They argue that when a restitutionary claim is made proof of loss is unnecessary because the claim is a "wrong–based disgorgement" remedy. It is not necessary to demonstrate that everyone in the class has suffered harm.

[192] They argue that when certifying actions the court understands that all individuals may not have claims but those questions are not to be resolved at the certification hearing.

[193] The defendants contend the plaintiffs have not pled that purchasers of the talc products who did not use the products suffered any loss or harm. There is no evidence that purchasers, other than those that also used the product suffered harm and to include other purchasers (including men) in a subclass is overbroad and should not be certified.

[194] In the circumstances, I accept that the purchaser subclass and user subclass can include those persons who have used the products perineally. However, in light of the principles articulated in *Babstock*, I am satisfied that the purchaser subclass cannot include persons who have not suffered loss or damage.

[195] The issues in this case in regard to non-user purchasers is different than discussed in *Jones* and *Tiboni*; the discussion in each of those cases focused on

damage suffered by plaintiffs. Users of the products were included in the class because "merits–based class definitions are precluded": see *Tiboni* at para. 78. There must be an evidential basis providing for the existence of class members claims that raise common issues. The question is not addressed on a merits based analysis but, in this case, the absence of any pleading to support claims for non-users would be simply overbroad to include those parties.

[196] The plaintiff is granted leave to articulate a narrower class of purchasers that might be certified.

ii Whether to Include Any Person Who Used the Products

[197] The defendants argue that including men who have used talc products, women who have used talc products but did not use them perineally, women who have used talc products but have not been diagnosed with ovarian cancer or ovarian cysts, and women who used corn starch-based products means that the subclass is overbroad. The pleadings do not allege that these individuals suffered loss or harm and their inclusion in the class is not supported by a sustainable cause of action or prospect of recovery.

[198] The plaintiff contends that it is not necessary to prove that each class member has a claim or will be entitled to recovery before inclusion in the class for the proceeding. Persons who do not have a claim may be included in the class if it is not possible to differentiate between those who will ultimately succeed and those who will not.

[199] The plaintiff argued that cases in British Columbia overwhelmingly approved certification and can resort to reformulation of the class description in order to satisfy s. 4(1)(b).

[200] The plaintiff stresses that the challenge is to include all persons with potential claims and avoid excluding potential class members from the litigation: see *Attis v. Canada (Minister of Health)*, 46 C.P.C. (6th) 129, [2007] O. J. No. 1744 (ON Sup Ct) at para. 52, aff'd 2008 ONCA 660, leave to appeal to SCC refused [*Attis*]. In *Attis* the

court observed that individual class members may not yet have suffered the harms described in the claims but the mere fact those persons were exposed to "an allegedly defective device" did not preclude their inclusion in the class.

[201] Overall, I am satisfied that the plaintiff's description of the classes that should be certified is overbroad to the extent it includes men and women who did not use the products perineally, as well as women with diagnoses of ovarian cysts; there is no basis in fact to include those persons in the class.

[202] I am also satisfied that at this stage, it would not be appropriate to exclude persons who have, or might have ovarian cancer without addressing the distinctions between the different types of those cancers described by Dr. Stuart.

iii Inclusion of Any Type of Injury (Ovarian Cancers or Cysts)

[203] The plaintiff claims that any person deceased or diagnosed with ovarian cysts or ovarian cancer be included in the injury subclass. The defendants contend this is overbroad and not rationally connected to the issues. I find that there is no evidence or basis in fact to support a connection or link between talc and ovarian cysts or non-epithelial ovarian cancer.

[204] In Dr. Heroux's evidence tendered by the plaintiffs she expressly limited her review to the topic of persons suffering epithelial ovarian cancer associated with perineal use of talc products.

[205] The defendants claim that the uncontradicted evidence of their experts' highlights that there are many different types of ovarian cancer and no evidence in relation to ovarian cysts. Ovarian cancers comprise very different diseases and there is no basis in fact to support inclusion of a subclass including all victims of ovarian cancer or any type of ovarian cyst.

[206] The defendants point out that each of the three proposed representative plaintiffs experienced separate diagnoses highlighting the problem with the proposed overbroad injury class. In particular, the defence stressed that none of the three

proposed plaintiffs suffered from epithelial ovarian cancer; this is the only cancer identified by the plaintiff's expert evidence as a cause of the class cancers at issue.

[207] Therefore, they argue, there is no evidence or basis in fact to conclude that a link exists between ovarian cysts and the use of talcum powder nor is there any evidence that non-epithelial ovarian cancer is connected, in any way, to the use of talcum powder. In my view the defendants contention stems from an effort to perform a merits based analysis based on the affidavit evidence from various doctors.

[208] In the plaintiff's submissions, she conceded the fact that there is no basis in fact to include certification for persons experiencing ovarian cysts.

[209] Further, the evidence of an association between ovarian cancer and talc as described in the Health Canada Letter and *Gazette* publication does not discriminate between different types of ovarian cancer. Thus, I am satisfied that it would not otherwise be appropriate to limit or attempt to limit the class at this stage.

iv Inclusion of Family Claims

[210] The defendants contend that the "family class" is overbroad and there is no basis in the ANOCC supporting entitlements by family members for compensation or recovery from the defendants. Derivative claims for family members injured but not killed by third-party negligence is precluded in several provinces, except Ontario. Finally, there are no persons who are family members of plaintiffs or class members who have a "colourable claim to recover": see *Hollick* at para. 19 and *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 [*Singer*] at paras. 128-130, 136.

[211] The plaintiff contends that family subclasses have been certified in other consumer product liability actions: see *Heward v. Eli Lilly & Co*. (2007), 39 C.P.C. (6th) 153, [2007] O.J. No. 404 [*Heward*] at para. 75.

[212] The defendants stress that the proposed family class is not connected to any claims or causes of action pleaded. The ANOCC does not address entitlements by

family members to compensation and no derivative claims exist for family members of those injured but not killed by third-party negligence in a number of provinces.

[213] Thus the definition of family subclass is overbroad because most family members in provinces other than Ontario will have no claim. Absent evidence or any basis in fact that two or more family members will have a relevant claim, no claim can be asserted: see *Hollick* at para. 19; *Singer* at paras. 128-130, 136.

[214] First, I accept the defendant's criticism of the pleadings on the attempt to include a subclass of persons who, "by reason of the relationship to a member of an injury subclass… Are entitled to make claims in respect of the harm to the said members…". There is no basis in fact for the claim that two or more people who are family members of the plaintiff or class members would have a colourable claim to recover.

[215] Second, the claims in *Heward* were advanced under the *Ontario Family Law Act*, RSO 1990, c F-3.

[216] In *Heward* the Court said:

> [75] If the derivative claims of persons within the secondary class are intended to be limited to valid claims, the description of that class obviously begs the merits of the issues that will determine whether the claims will be sustained. If, however, the description is intended - or is amended - to refer to those who would have standing to assert derivative claims under the relevant legislation if the defendants' liability to members of the primary class is established, I do not consider that it is, or would be, objectionable. Similar descriptions have been accepted in numerous cases that have been certified.
>
> [76] Finally, in the context of the class definition, I should mention defendants' counsel's objection to the uncertainty in the reference, in the definition of the secondary class, to persons who have a derivative claim for damages equivalent to a FLA claim in Ontario. They queried also the status of claims that plaintiffs' counsel indicated were intended to be made on behalf of the authority in Alberta that pays, or reimburses, patients for prescription drugs and medical expenses. Uncertainty on the first point arises because - I was informed - only Alberta has statutory provisions that are closely comparable to those of section 61 of the *Family Law Act* and the only analogous provisions in the other provinces and territories are to be found in their fatal accidents legislation. The other uncertainty exists because, as I have indicated above, while health insurers in Ontario and elsewhere in Canada other than Alberta, have subrogated claims, my understanding is that legislation in Alberta provides the relevant authority with a direct action. Each

> of these points will need to be clarified before any final order certifying the proceedings is made.

[217] I find the plaintiffs must be given opportunity to clarify the category of persons entitled to make claims by reason of their status as "family members for any compensation or recovery from the defendants." It is important to address the fact that derivative claims for family members cannot be made for injuries to subclass members not killed by third-party negligence in other provinces. Thus, certification of this class will not be ordered unless the plaintiff clarifies the basis for the claims and pleadings in support.

v. Inclusion of Subrogated Claims

[218] Last, the plaintiff includes a proposed subclass designed to capture subrogated claims of other entities who did not purchase the product or use the product including the British Columbia Ministry of Health, among others. The only viable subrogated claims described in the pleadings concern the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [the *HCRA*].

[219] The defendants contend that entities such as the British Columbia Ministry of Health cannot be class members: see s. 2 of the *CPA*. The plaintiff has not pleaded in the ANOCC statutes similar to the British Columbia the *HCRA* from other provinces.

[220] The defendants contend no representative plaintiff represents the interests of this subclass as proposed; it is important to note that reference to claims on behalf of Minister of Health of British Columbia are not properly described; under the *HCRA*, Government is the body entitled to reimbursement or a subrogated claim; the proper party would be the Crown and not the Ministry of Health.

[221] Section 2 of *HCRA* permits plaintiffs to recover directly from wrongdoers for past and future cost of healthcare services. Under s. 3, if a claim is made under the *CPA*, the beneficiaries are obliged to include claims for healthcare services and under s. 7.

[222] Government is subrogated to any claims by beneficiaries for past and future care costs. In this case, claims are advanced by the plaintiff's and any benefits recovered are by them are subrogated to the Crown under the *HCRA.*

[223] Government is entitled under s. 8 of *HCRA* to recover directly from wrongdoers for past and future health cost claims independent of its subrogated interest or the right of the person injured. However, under s. 2(1) the *CPA* qualifies a member of a class to commence action on behalf of other class members and government is not a member a certifiable class for the *Act*. I also accept, there is no representative plaintiff purporting to represent those interests of Government as a subclass.

[224] I am satisfied that it is inappropriate and unnecessary to certify government or any person other than those injured by the torts of the defendants because those injured persons have the statutory obligation to reimburse government and other insurers after obtaining judgment against the defendants.

[225] Overall the defendants contend that this proposed class definition cannot reasonably be formulated on the evidence to warrant certification of the class or subclasses.

[226] I find that the claim to include the Ministry of Health for British Columbia as a subclass for health care costs described in 2(e) of the Notice of Application is neither possible nor appropriate.

Class Using Valeant's Shower to Shower"

[227] As noted in these reasons, there is no evidence or basis in fact to conclude that any of the proposed plaintiffs ever used or purchased Valeant's product. The evidence indicates "Shower to Shower" is less than 50% talc based and experienced limited sales in Canada.

[228] Valeant's product is substantially different than "Baby Powder" produced by the Johnson defendants. There is no evidence of a class of persons who applied shower to shower to the perineum.

[229] In *Lee v. Georgia Properties Partnership,* 2012 BCSC 1484, Savage J. (as he then was) concluded that there must be more than one person in a proposed class with a complaint. I accept that if no potential class member has a complaint because there is no evidence of perineal use of the product described in the evidence, the claims of the class members would not raise a common issue and should not be certified; see *Harrison v. Afexa Life Sciences Inc.,* 2016 BC SC 2123 at para 47-48.

[230] In this case, there is no basis to show that one or more persons fit into the class definition that engages consideration of "Shower to Shower" products produced by Valeant.

[231] I am satisfied that no one has provided evidence concerning the purchase or use of Valeant's product. Class definitions will be overbroad where there is no basis in fact connecting the proposed class to the causes of action pleaded.

Conclusion: S. 4(1)(b) of the *CPA*

[232] I am satisfied that in regard to Valeant, requirements of s. 4(1)(b) have not been met.

[233] The plaintiff has not provided any basis in fact for certifying some of the subclasses because they are not rationally related to the proposed common issues. I do not accept the defendants' contention that there is no basis in fact for certifying any of the class or subclasses proposed.

[234] I accept that the purchaser and user subclass are rationally connected, insofar as those persons used talc perineally. I accept that the injury subclass is rationally connected, so long as it is narrowed to only those who have suffered ovarian cancers.

[235] I accept that there is no pleading supporting the claims of family subclass members save and except where those persons may be representatives of the estate of a class member and parties incurring expenses, costs or losses resulting from the harm to class members. I do not accept the subrogated claims subclass.

[236] Due to the varying difficulties I have had with the proposed class descriptions, outlined above, it will be necessary for the plaintiff to amend further the ANOCC.

CPA s. 4(1)(c): are the common issues requirements met?

[237] The plaintiffs must establish that claims of class members raise common issues founded on a commonality between the claims and the proposed representative plaintiffs and the class members. They identified six common issues:

1. Did the defendants' talcum products pose an unreasonable risk of serious injury, death and other side effects?

2. Did the defendants' talc products have any benefits that were unique or that exceeded the benefits of other similar products?

3. Having regard to the answers to common issues No. 1 and 2 did the defendants breach the standard of care by distributing talc products for sale in Canada?

4. If the answer to the common question no. 3 is no, and having regard to the answer to common question no. 1,

    a) Did the defendants' talc products directions for use provide reasonable instructions for using talc products and managing the risks of death, serious injury and other side effects?

    b) Did the defendants' talc products directions for use provide a current clear and complete warning of the risks of death, serious injury, and other side effects?

5. Should the defendants account for and disgorge all or any of their revenues from selling talc products in Canada? If so, to whom for what period, in what amount and, if distributed in the aggregate, on what basis?

6. Does the manner in which the defendants marketed the talc products in Canada warrant an award of punitive damages, and if so how much should be awarded to whom and on what basis should they be distributed?

[238] The defendants argue there must first be a determination of whether the defendants' products are defective under ordinary use, or although not defective, still constitute a propensity to injure. This is the general causation issue. Second, the state of the manufacturer's knowledge of dangerousness of its product and whether it had a duty to avoid manufacture and distribution of a dangerous product is essential to the claim. Third, the court must look at the value of the product and whether its good uses outweighed the propensity to injure such that distribution with a warning was appropriate. Once these three considerations have been addressed, the final step is determining individual causation issues and damages. See *Harrington v. Dow Corning Corp*., 2000 BCCA 605 at paras. 42-46.

[239] Under this subsection, claims of class members must raise common issues. The essential elements of a common issue are derived from paras. 106 to 108 in *Microsoft* and include:

a) The commonality question is approached purposively.

b) An issue will be "common" only where it's resolution is necessary to the resolution of each class members' claim.

c) It is not essential that class members be identically situated *vis-à-vis* the opposing party.

d) It is not necessary that common issues predominate over non-common issues, but all class members must share a substantial common ingredient to

justify a class action. The significance of common issues is examined in relation to individual issues.

e) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[240] There must be some evidence of a basis in fact for each of the proposed common issues that the plaintiff seeks to have certified. Absent such evidence, the defendants contend there is no basis in fact to find that resolving the proposed common issue would avoid duplication, or that one class member's success will mean success for all. Lastly, the defence points out that the common issue must exclude inquiries into facts with respect to each individual claimant: see *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 at paras. 103-104, 125, 128 and 132.

[241] The Court of Appeal in *Charlton v. Abbott Laboratories, Ltd.,* 2015 BCCA 26 [*Charlton*] at para. 85 reviewed the evidentiary requirements for certification described by Strathy J. in *Singer* at para. 140:

> [140] The following general propositions, which are by no means exhaustive, are supported by the authorities:
>
> A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.
>
> B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.
>
> C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce,* above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City),* above, at para. 18.

F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, 1996 CanLII 3118 (BC SC), [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605,, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 2000 CanLII 22704 (ON SC), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd 2003 CanLII 48334 (ON CA), [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.

J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to

> certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.
>
> [Emphasis added.]

[242] Common issues must not be framed in overly broad terms. Common issues must be capable of class wide resolutions on the basis of common evidence applicable class wide. see: *Rumley v. British Columbia*, 2001 SCC 69 [*Rumley*] at para. 29.

[243] Sufficient commonality is a key component and precondition to invoking the class proceeding machinery. Common issues must be capable of significantly advancing litigation as required under s. 4(1)(c) of the *CPA*.

Common Issues Regarding General Causation

(i) Unreasonable Risks of Serious Injury as a Common Issue

[244] The defendants argue the question as framed by the plaintiff as to whether talc products pose an "unreasonable risk of serious injury, death and other side effects" is not supported in this case because:

a. The question is too general and nebulous to constitute a common issue because it extends to diseases beyond the subject of the pleadings. The ANOCC refers only to health conditions connected with ovarian cancer and ovarian cysts; no evidence constituting a "basis in fact" exists linking talc to "unreasonable risk of serious injury, death and other side effects."

b. The question posed does not advance the claims of each class member and does not address answers that would advance the claims of all of the proposed class.

[245] The defendants refer to *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, rev'd on appeal 2020 ONSC 913 (Div. Ct.) [*Price*] for the proposition that absent common etiological factors explaining the causes of multiple congenital malformations with inherently unique etiological bases, commonality did not exist over a broad range of dangers.

[246] However, in *Price*, Perell J. observed that an association between use of a product and a dangerous condition may give rise to a duty to warn even if the association cannot be characterized as a causal association: *Price* at para. 128.

[247] The defendant contends that ovarian cancers and ovarian cysts are distinct diseases and there are different types of epithelial and non-epithelial ovarian cancers. None of the evidence supports a link or association between perineal talc use and any condition aside from epithelial cancers. They contend that the question of whether talc causes one type of epithelial cancer or separate types of epithelial cancers is not a common issue on the evidence presented on this application.

[248] The absence of evidence confirming talc causes ovarian cancer or ovarian cysts is significant. Thus, the proposed issue of "serious injury, death and other side effects" are much broader than the descriptive terms ovarian cancer and ovarian cysts set out in the ANOCC. The defendants contend this distinction demonstrates that no common issue as required by the *CPA* has been proposed: see *Wuttunee* at para. 152.

[249] The plaintiff argued that the burden for a proposed plaintiff is only to show some basis in fact of an increased risk of ovarian cancer associated with exposure to talc; it was not necessary to tender evidence of causation of cancer at this stage. They argue the failure to warn would be a sufficient common issue, common to all class members, and justifies certification of its issue.

[250] Certification of common issues takes into account whether or not common issues predominate over issues affecting individual members. The issue of fact or

law to be resolved must be common to all claims and resolving that question will move the litigation along: see *Jones* at para. 4.

[251] If the proposed issues include a wide diversity of complaints, it may not be possible to certify a common issue. The defendants in this case rely on the court's comments in *Wuttunee* at para. 145:

> However, the wide diversity of complaints to which this issue is addressed was not considered below. In my respectful view, the diversity is fatal to the consideration of this issue as a "common" issue. Clearly it is not susceptible to a single answer that would apply to all the claims of all members of the class. Thus, while it is conceivable that proof that Vioxx significantly increased the risk of, for example, high blood pressure, might support the claims of the intended or purchaser subclasses (and I am not by no means certain that it would), it would be irrelevant to those who claim other unrelated adverse conditions or injuries.

[252] In my view, the plaintiff's proposed common issue concerning "risk of serious injury, death and other side effects" is overbroad and would not serve the ends of fairness or efficiency in this proceeding. Stated this way, the issues are common only in the most general terms whereas the pleadings and evidence focus on ovarian cancer and ovarian cysts without regard to any other injuries or other side effects.

[253] I conclude that the proper approach to certification of the common issue should restrict the issue to ovarian cancer or death and other causes related to ovarian cancer as pleaded. This approach was adopted by Cullity J. in *Heward* at para. 82.

[254] Perell J. said that in some circumstances "something less than association such as adverse event reports or other indications that something is amiss in the use of the drug may be enough to trigger a duty to warn including taking steps to change the warnings in the product monograph": see *Price* at para. 128.

[255] I accept the defendants' submissions that ovarian cancers can include different types of cancer including epithelial and non-epithelial ovarian cancer and that epithelial cancers include several different diseases. This view is underscored

by the comments of Dr. Heroux who confined her report and considerations only to epithelial cancers. I am satisfied the inquiry into persons who suffered non-epithelial cancers or different types of epithelia cancers will resolve those issues in the individual assessments.

[256] Overall, the pleadings are based on assertions that talc use causes ovarian cancer; the pleadings do not allege any other serious injury or side effects. I specifically exclude consideration of the issue relating to ovarian cysts; there is no basis in fact or evidence tendered by the plaintiff supporting that as a common issue.

[257] The evidence contained in the Health Canada Letter and *Gazette* publication supporting the claim is not strong; it indicates a possible causal link between talc and ovarian cancer that might be proved with further study and analysis. However, I am satisfied that a "basis in fact" exists to conclude there is a reasonable prospect that resolving the proposed common issue concerning the risk of ovarian cancer posed by the use of talc will: see *Charlton* at para 110-112. On this finding, there is a basis to move the litigation forward.

[258] In view of the Health Canada evidence and Dr. Heroux's summary of studies indicating a possible connection between talc and ovarian cancer, it remains necessary that to certify the common issue, there must be evidence of a methodology enabling the plaintiffs to prove causation on a classwide basis is necessary.

[259] Subject to my following comments, I am satisfied this issue is common to all members in the class and will advance the litigation forward and, subject to a variation in the description of the proposed common issue I have expressed above, the claim can be certified.

[260] Valeant contends that there is no evidence or basis in fact to support the proposition that "Shower to Shower" was associated with ovarian cancer or ovarian cysts.

(ii) Is there a Methodology to Prove General Causation for Ovarian Cancer or Ovarian Cysts

[261] The plaintiff argued that, while recognizing that methodology may be important for some common issues, the nature of a claim involving negligence in manufacturing and distributing talc without warnings obviated the requirement to establish a methodology to prove general causation.

[262] Alternatively, the plaintiff contends that Health Canada and Environment Canada have conducted independent screening assessments and propose that after completion of its screening process talc be reclassified as a toxic substance because of its potential to harm human health, specifically linking Baby Powder products to perineal exposure talc and ovarian cancer.

[263] The plaintiff contends the methodology for establishing general causation of whether perineal use of talc poses an unreasonable risk of ovarian cancer will be evident from the screening assessment as referenced in the *Gazette* and the Health Canada Letter. The plaintiff submits that once talc is added to the list of toxic substances in 2020, the common issue becomes almost certain to succeed at a common issues trial.

[264] The defence contends the plaintiff must show some basis in fact that the question whether a product or agent such as talc can cause a particular side effect or adverse event can be determined on a class wide basis at a common issues trial. The plaintiff's own evidence acknowledges that more research is necessary to establish causation and the plaintiff has not identified any methodology for approving an answer to that question at a common issues trial.

[265] A common issue trial cannot be certified for class wide damages or causation where expert evidence is required to establish commonality of the common issue unless there is evidence demonstrating a plausible and credible methodology capable of answering the question on a class-wide basis: see *Microsoft* at paras. 114-119 and *Charlton* at para. 84.

[266] It is the plaintiff's burden to show this evidence of a plausible and workable methodology to resolve the common issue on a class wide basis: see *Charlton* at paras. 89-92.

[267] The Court of Appeal in *Miller* concluded the plaintiff must demonstrate a methodology that only discloses a realistic way to prove the common issue at trial:

> [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.
>
> [Emphasis added.]

[268] Overall, the plaintiff's contention on the methodology issue is flawed. In substance, the plaintiff contends on a "wait and see" basis that if talc is added to the toxic substances list, then it becomes almost certain to succeed at a common issue trial. In my view, the plaintiff has failed to adduce evidence of a methodology or realistic way to prove that the class as a whole has been affected or put at risk by use of talc.

[269] In Dr. Heroux's affidavit, her comments and opinions were limited to epithelial ovarian cancers and to those who used talc perineally. She acknowledged that current data and scientific evidence are insufficient to confirm that talc can cause epithelial ovarian cancers or any specific type of epithelial ovarian cancer. The plaintiff has adduced no evidence concerning other types of ovarian cancer or ovarian cysts.

[270] The plaintiff argued that talc products increase the risk of ovarian cancer and ovarian cysts to users but did not address the fact that ovarian cancer is not a single disease; Dr. Heroux acknowledged on cross-examination that there are different types of ovarian cancer; she was informed of these distinctions from literature reviewed in preparation for her report. She does not address the plaintiff's challenge of showing a causal link between talc use and types of epithelial ovarian cancer and

does not provide an opinion or suggestion on a method to prove the common issue at trial.

[271] In fact, Dr. Heroux reflected on the existing literature concerning an association between talc and ovarian cancer and said there is:

> A lack of any known biological mechanism through which talc particles could induce ovarian tumors. Unfortunately, there is a paucity of research directly investigating the possible mechanisms by which talc may affect the ovaries leading to ovarian cancer.

[272] She went on to say that further research was necessary to address the issue of causation. Although there is no obligation, at this stage, for the plaintiff to prove any causation issues, some facts or data are necessary to implement the plaintiff's proposed methodology. There is a low threshold to be met by the plaintiff; in this case no evidence was tendered concerning how causation might be established at a common issues trial.

[273] Having analyzed the evidence, I find that plaintiff's reliance on future events concerning the possibility of a Health Canada decision is not sufficient to meet the requirement that a credible methodology or mechanism establish the general causation question or capable of proving that talc may be the cause of ovarian cancer. It also does not address the question of the relationship between talc use and non-epithelial cancer or ovarian cysts.

[274] In the result, I will not certify the first common issue in the absence of a methodology and an evidentiary basis for that requirement. The plaintiff may advance further evidence on this point if that information can be adduced.

(iii) Will the Proposed Issue Significantly Advance Individual Claims

[275] The defendants contend that certification of a common issue of general causation will not significantly advance the class members' claims because of the need to distinguish between specific types of epithelial ovarian cancers.

[276] The defence argued that it is not possible to accept the overly broad allegations in the ANOCC and relate those claims to outcomes for women diagnosed with a particular form of ovarian cancer or an ovarian cyst. The defendants argued that resolution of the proposed common issue would not move the litigation forward because any risks posed by talc exposure are relatively low and the emphasis will be on other issues pertinent to causation.

[277] The defendants argue that the plaintiff's evidence estimating an increased risk of epithelial ovarian cancer due to the use of talc is in the order of 22% to 36%. Referring to comments by Lax J. in *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 at paras. 556-557, this indicates that class members face even greater evidentiary hurdles when the risk ratio for any complication is measured in the range of 20% as opposed to 100% being presumptive proof of causation.

[278] Thus, the defendants contend that certification of the general causation issue will be of no use to class members at the individual stages as individual causation will not have been presumptively proven.

[279] To be clear, weighing of evidence is not appropriate at this stage in the certification process. This is not an instance where the Court can compare or weigh differing expert opinions.

[280] In this case, the defendant contends that resolving the common issue will not move the litigation forward because duplication of fact-finding and legal analysis measured against the low risk of exposure, will result in the other issues overwhelming the common issue. Thus, the defendants allege that the proposed common issue will not significantly advance the individual claims because of the minimal impact on the overall assessment of both general and specific causes.

[281] In *Stanway*, the court concluded that there was evidence at the certification hearing that might answer the causal connection question between hormone therapy and breast cancer. If the common issue in this case was an association between talc and development of ovarian cancer, the result should reflect the result in *Stanway*.

[282] However, in the instant case, the *Gazette* publication and Health Canada Letter and Dr. Heroux's findings reflect the concerns in the literature and scientific analysis all of which suggests an association between talc and the development of ovarian cancer. None of the evidence suggests any association between the use of talc and ovarian cysts. None of the evidence suggests a distinction or association between talc use and non-epithelial ovarian cancer. The latter issues can be decided at the stage of individual trials.

[283] I conclude that the general question the plaintiff wishes to certify as common issue No.1, whether the use of the defendants' products poses "an unreasonable risk of serious injury (ovarian cancer), and (related deaths) death and other (related) side effects" will advance the individual class members claims.

Are the proposed common issues overly broad, interdependent and otherwise not certifiable

(i) Common Issues no. 2, 3 and 4

[284] The defendants contend that common issues 2, 3, and 4 cannot be addressed in a class proceeding in the absence of a finding of an appropriate general causation common issue. In the absence of general causation, questions concerning the benefits of talc, standard of care and labelling will not meaningfully advance an action: see *Charlton* at paras. 115-116.

[285] In *Price*, the court said that a common issue concerning a duty to warn, even resolved in favour of class members, will not be a substantial part of the class members case because individual inquiries will be necessary for each members' claims.

[286] Finally, the defence contends that issue number 4 dealing with labelling and directions do not need to be certified because it is conceded no warnings of cancer, death or injury were included in the labelling of the products: see *Clark v. Energy Brands Inc*., 2014 BCSC 1891 [*Clark*] at paras. 137-139.

[287] I am satisfied the plaintiff has adequately pleaded that the defendants failed to warn the plaintiff and class of the hazards associated with the use of the products.

[288] The plaintiff contends that the common issue specifically focuses on the warnings provided by the defendants and their knowledge about the risks of using talc. This is a suitable common issue despite the changes in warnings and existence of other intermediaries: see *Heward* at paras. 88-90.

[289] A similar conclusion was reached by Punnett J. in *Miller BCSC* at para. 187 where he considered that a breach of a duty to warn can be decided on the defendants conduct alone and applied commonly to members of the class.

[290] Insofar as the plaintiff has demonstrated a common causation issue, I will certify common issues 2 and 3. The Johnson defendants concede that the there was no warning of cancer, death or injury at any time on the talc products; thus it is unnecessary to certify question no. 4 as a common cause because it will not meaningfully advance the action: see *Clark* at paras. 137-139.

[291] A different position is taken by Valeant. The plaintiff's proposed common issues (d) and (f) referred to directions for use and marketing of products; however there is no evidence concerning directions for use or marketing materials.

[292] Valeant contends the pleadings present" bald assertions and speculations unsupported by any evidence." Absent a basis in fact concerning Valeant's directions for use or marketing, there is insufficient evidence on the duty to warn issue.

[293] It may be the plaintiff did not consider differences between Valeant's role after 2012 and the Johnson & Johnson defendants throughout. Nonetheless, the evidentiary vacuum presented by the plaintiff's is fatal to its inclusion of a duty to warn issue against Valeant.

(ii) Common Issue no. 5

[294] Proposed common issue number 5 deals with an accounting for a disgorgement of revenues arising from waiver of tort. As discussed above, this issue has been resolved and common issue number 5 cannot be certified.

(iii) Proposed common issue no. 6 in the Absence of Other common Issues and Punitive Damages

[295] The defendants argue that punitive damages cannot, standing alone, warrant a certification of a class action and common issue absent certification of other common issues: see *Kuiper v. Cook (Canada) Inc*., 2018 ONSC 6487 at para. 157, rev'd in part on other grounds, 2020 ONSC 128.

[296] The defendants argue that certification of punitive damages claims at this hearing is premature, and whether an award of punitive damages serves a rational purpose cannot be determined until after the individual issues of causation and compensatory damages are resolved.

[297] This is consistent with the Court of Appeal's approach in *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111, which focused on the conduct of the defendants rather than the effect of the conduct on the plaintiffs.

[298] In this case, I am satisfied that the pleadings allege the type of conduct that could be characterized as a marked departure from ordinary standards of decent behaviour on a broad basis. The allegations describe deliberate efforts alleged to have been committed by the defendants in deceitfully withholding information that could have been important in informing users of the risks inherent in using the products.

[299] Assuming that facts alleged can be proven, the cause of action for punitive damages can be addressed; this issue will be certified.

Conclusion: S. 4(1)(c)

[300] In summary, subject to my following comments I will certify common issue 1 on a narrower question limited to the question of risks of ovarian cancers posed by talc use. I am unable to certify common issue 1 at this time because there is insufficient evidence of a methodology to prove general causation of ovarian cancer. As it is framed it will not advance significantly the claims of the class members as a whole.

[301] Common issues 2 and 3 will be certified insofar as the general causation issue is certified. Common issue 4 was conceded to be a non-issue by the defence. Common issue 5 cannot be certified. Common issue 6 will be certified.

CPA* s. *4(1)(d): Is a class action a preferable procedure

Principles

[302] The preferable procedure analysis takes into account the principal purposes of class proceedings including judicial economy, access to justice and behaviour modification: see *Microsoft* at para. 137.

[303] This must take place in the context of the common issues analysis and the circumstances of the particular claim and includes consideration of the importance of the common issues in relation to the claims as a whole.

[304] The plaintiff bears the burden of establishing that the class proceedings would be the preferable procedure to resolve claims.

[305] The plaintiff contends that products liability cases are uniquely suited for class action resolution because the common issues focus on the product and the defendants' knowledge. They are preferable proceedings because medical complexities invite the expenditure of significant resources for the inquiry; those resources are not customarily available to individuals. The cases are replete with comments underscoring the financial reality that individual plaintiffs are usually unable to bear the cost of litigating complex issues of science or medicine.

[306] The plaintiff underscored the requirements of s. 4(2) of the *CPA* including:

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

b) whether a significant number of 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 other proceedings;

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

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.

[307] The defendants argue that the preferability analysis must "take into account the importance of the common issues in relation to the claims as a whole": *Hollick* at para. 28-30.

Do Individual Issues Overwhelm Common Issues

[308] The defendants contend that a class proceeding is not the preferable procedure in that findings on common issues will not significantly advance individual claims. They argue there will be no judicial economy or improvement in access to justice.

[309] The defendants refer to s. 4(2)(a) and (e) of the *CPA* requiring the courts to consider whether common issues predominate over individual issues and whether the class action would be manageable or involve greater procedural difficulties: see *Dutton* at para. 39; and *Singer* at paras. 204-205.

[310] Overall the defendants contend that the common issues in this case would be overcome by the individual issues and each case would involve litigation of the

claims of class members independently: see *Hollick* at para. 32; *Microsoft* at para. 139.

[311] The defendants say the uncontradicted evidence establishes there are multiple types of ovarian cancers and ovarian cysts with a single common feature; the ovaries are involved. Ovarian cancers are different diseases with different causes, genetics, and clinical outcomes. Further, each claimant will be examined for different factors that can result in ovarian cancers.

[312] They argue that the number of relevant risk factors vary from one type of cancer to another and the "general causation" issues will be revisited in individual trials notwithstanding the outcome of a common issue trial regarding the association of talc with ovarian cancer or epithelial ovarian cancer. The defendants point to the conclusions in *Price*, at para. 156, for guidance on the question of whether individual issues overwhelm the common issues trial. In that case, the court concluded that general causation issues dealing with numerous congenital malformations:

> "… had no methodology other than the idea that the congenital malformations could be connected to the discrete groups of body parts or body systems. That methodology however, would not have produced a common issues trial but rather a grouping of trials tied to one after another while the class members waited for an individual determination of whether their child's congenital malformation was caused by ingesting citalopram. A class proceeding would not be the preferable procedure in the circumstances.

[313] Unavoidable duplication inherent in the proposed class proceeding is a reason the procedure is not preferable. In *Kumar v. Mutual Life Assurance Company of Canada*, 226 D.L.R. (4th) 112, 2003 CanLII 48334 (O.N.C.A.), the Court said:

> [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
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> [Emphasis added.]

[314] The plaintiff relies on s. 4(1)(c) of the *CPA* stipulating that if common issues are raised, certification must be made whether or not common issues predominate over individual members' issues.

[315] The plaintiff contends there is no evidence that a significant portion of the class members would have any interest in controlling their own individual actions. They argue there is no other class proceeding is more advanced than the instant case.

[316] The plaintiff says that once the main issue is resolved, the balance of the individual issues will be a routine assessment of causation and other personal injury questions: see *Bouchanskaia v. Bayer*, 2003 BCSC 1306 at para. 143.

[317] The advantages of class proceedings were enumerated in *Bouchanskaia*:

> [150] There are numerous advantages to class actions for plaintiffs. Mr. Branch suggested that they include the following:
>
> (a) Whatever limitation period is found to be applicable to the claim is tolled for the entire class (s. 39);
>
> (b) A formal notice program is created which will alert all interested persons to the status of the litigation (s. 19);
>
> (c) The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements (s. 38);

> (d) A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;
>
> (e) Class members are given the ability to apply to participate in the litigation if desired (s. 15);
>
> (g) The action is case managed by a single judge (s. 14);
>
> (h) The court is given a number of powers designed to protect the interests of absent class members (s. 12);
>
> (i) Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding (s. 37);
>
> (j) In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures (s. 27);
>
> (k) Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel (ss. 26 & 35).

[318] The plaintiff contends there are no other means of resolving the claims that are more practical or more efficient. They point to the fact that the defendants do not have a compensation program.

[319] The absence of a compensation program or that individual actions would be less practical is not determinative of the preferability analysis.

[320] As noted above, I am satisfied that consideration of the question whether the defendants products pose unreasonable risks of ovarian cancer, related deaths and other related side effects will be an issue requiring resolution at a common issues trial and will impact all proposed class members. The plaintiff's evidence on this question is extremely limited. The uncontroverted evidence informs the court ovarian cancer includes multiple diseases and is likely restricted to epithelial ovarian cancer when considered in the context a causation relationship with talc. The issue will be complicated by the importance of individual circumstances and characteristics that will be inherent in determining the individual causation issues. The inquiry into the common question will be limited to whether "talc poses a risk" of ovarian cancer. Posing a risk is a different matter than causing a disease.

[321] I am satisfied that once a methodology for addressing the causation issue is presented, the court might be better equipped to determine the suitability of this claim to a class proceeding.

[322] At this stage, I am satisfied that the overwhelming cost of litigating the common complex scientific and legal issues would not be economically viable for most class members. I accept there will be a number of individual issues that may arise, however this Court retains considerable discretion and power to manage individual issues.

[323] Other than the defendants' arguments concerning the multiple factors involved in determining the causation of ovarian cancer, nothing in the evidence indicates a class proceeding would create any greater difficulties than might likely be experienced if the claims were made by other means.

Is there another practical procedure preferable to an unworkable class proceeding

[324] The defence challenges the plaintiff's claim that a class action suit is the only practical way for the potential class members to exercise their rights.

[325] The defence contends that engaging this dispute in a class proceeding process could only move the litigation forward in a minimal way. It is not the only practical procedure available and should not result in certification of an unworkable or unmanageable proceeding: see *Marshall v. United Furniture Warehouse Limited Partnership,* 2013 BCSC 2050 at para. 235, aff'd 2015 BCCA 252, leave to appeal to SCC refused, 2016 CanLII 13743.

[326] The court must strike a balance between fairness and efficiency: see *Dutton* at para. 45.

[327] I am satisfied the balance can be achieved in a class proceeding on the issue an associated between talc and the risk of ovarian cancer and resolving this issue will move this litigation forward.

The proposed class proceedings and the proceedings in the province of Québec

[328] The defendants say that there is a class action proceeding in the province of Québec that was certified in May 2018. They argue there will be significant duplication in a class proceeding and that this is not a preferable procedure in the instant case.

[329] The defendant contends that under s. 4.1(1)(c) of the *CPA*, the court may exclude participants from class of members who are included in a class proceeding in another jurisdiction.

[330] I find the evidence does not inform the court of the status of the Québec class proceeding and whether it is in any more advanced stage than this case (except for certification), and judicial economy can be achieved by these proceedings continuing as a class action.

[331] However, in my view, certification of this class proceeding should exclude potential class members in the province of Québec.

Conclusion: S. 4(1)(d)

[332] In conclusion, I agree that it is preferable for this claim to continue as a class action, although I would exclude members from the province of Quebec.

***CPA* s. 4(1)(e): is the plaintiff an appropriate representative?**

[333] The plaintiff has proposed three representative plaintiffs: Ms. Williamson, Ms. Guerra, and Ms. Jenks. Ms. Williamson is now deceased although there was some indication her executrix may choose to assume her role. I was told that Ms. Robertson has not yet been appointed executrix of her mother's estate.

[334] Nevertheless, I was asked to certify Ms. Robertson as representative for her mother as a representative plaintiff. Each proposed representative has provided an affidavit affirming their willingness to participate as a representative plaintiff alone or with others.

[335] Under s. 4(1)(e) of the *CPA* a proposed representative:

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

[336] In *Cantlie v. Canadian Heating Products Inc*., 2017 BCSC 286 at para. 358, Madam Justice Harris summarized the requirements of a proposed representative:

> [358] I was directed to several judgments outlining the general requirements and principles to be applied under this section including *Watson v. Bank of America Corp.,* 2014 BCSC 532 at paras. 71-75*; Campbell v. Flexwatt Corp.* (1997), 1997 CanLII 4111 (BC CA), 44 B.C.L.R. (3d) 343 (B.C.C.A.) at para. 75*; Fakhri v. Alfalfa's Canada Inc.,* 2003 BCSC 1717, aff'd 2004 BCCA 549 at para. 77*; Infineon* at para. 79*; Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 41*; Finkel* at para. 123. These raised the following principles:
>
> - The plaintiff must fairly and accurately represent the interests of the class. In making this assessment, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).
>
> - The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that they have a common interest with the class members and that the proposed representative will vigorously and capably prosecute the interests of the class.
>
> - The plaintiff must have a litigation plan with a workable method of advancing the proceeding and of notifying the class members to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them.
>
> - The plaintiff must not have a conflict of interest with other class members on the common issues. In some cases opt-out provisions may be relied on, or subclasses may be created, to alleviate any conflicts of interest.

[337] The defendants contend the plaintiff has not met the burden of the requirements under s. 4(1)(e) that the plaintiffs in this proceeding are appropriate representatives. They highlight several issues that I will discuss in turn.

[338] It is important to note that none of the proposed plaintiffs have used “Shower to Shower”; this is the only product sold by the defendant Valeant. Further, there was no evidence or” basis in fact” that shower to shower was the cause or contributing factor to any cancer diagnosis from 2012 until 2019.

Are the proposed representative plaintiffs members of the proposed class?

[339] The defendants contend that none of the proposed plaintiffs have been diagnosed with epithelial ovarian cancer. Ms. Williamson was diagnosed with an ovarian cyst. Ms. Guerra was diagnosed with tumors that the defendants argue are not a form of cancer, but which I find were borderline cancerous conditions. Ms. Jenks was diagnosed with a cancerous tumor of the left ovary arising from stroma cells that is not a form of epithelial ovarian cancer.

[340] They contend that the plaintiffs have not identified any evidence linking perineal talc use to conditions other than epithelial ovarian cancer. Thus, absent evidence of the potential links between non-epithelial ovarian cancer or ovarian cysts and talc use, the defendants argue that none of the proposed plaintiffs is a suitable representative, and that there is no basis in fact that these women are a member of the class.

[341] However, as discussed above, I find that there is a basis in fact that talc is associated with ovarian cancer generally. I find that the common issue is framed in terms that may include two of the proposed representative plaintiffs: Ms. Guerra, whose condition was near to cancer, and Ms. Jenks, who had ovarian cancer. At this stage, while accepting the opinions of the defendants’ experts, the actual diagnoses of the plaintiffs and the causation issues can move this proceeding forward.

[342] As discussed by Madam Justice Gerow in *MacLean et al. v. Telus Corporation and Telus Communications Inc.* 2006 BCSC 766, it is still possible to find that the representative plaintiff will adequately and fairly represent the class where the representative plaintiff in the proposed class have differences, so long as there is no impact on the common issues:

> 53 The inquiries about whether the representative plaintiff adequately and appropriately represents class members and whether the representative plaintiff has potential conflicts of interest are focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest: *Hoy v. Medtronic Inc*., 2001 BCSC 1343, aff'd 2003 BCCA 316, at paras 83-85; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (B.C. S.C.) at para 66.

[343] I find that although the defendants' evidence shows that Ms. Guerra and Ms. Jenks do not have epithelial ovarian cancer, their respective cancers and conditions have not been conclusively excluded from the class either. It is conceivable that in the position as representative, they will vigorously advocate on the point of causation for all types of ovarian cancers and related diseases.

Do the representative plaintiffs have conflicts with class members?

[344] The defendants suggest that the proposed representative plaintiffs would prefer their own interests and be unwilling to act in the best interests of the class to continue as representative plaintiffs. The defendants contend that the potential conflicts between Ms. Williamson, Ms. Jenks and Ms. Guerra and the class was revealed in cross-examination on their respective affidavits:

- Ms. Williamson testified that she did not want to be a representative plaintiff if settlement were proposed to one part of a class suffering ovarian cancer but not other class members who had suffered ovarian cysts.

- Ms. Jenks said she did not know if she wanted to be a representative plaintiff if the potential existed for settlement of claims of those with certain types of

ovarian cancer but not other types of ovarian cancer as Ms. Jenks had suffered.

- Ms. Guerra testified that she did not know if she had the same interests as persons who used talc products but had not been diagnosed with ovarian cysts or ovarian cancer, and did not know whether there was a similarity in the interests of men based on possibly developing cancer another way. This possibility is not mentioned in the ANOCC. Also, based on her evidence Ms. Guerra did not understand the question posed to her regarding possible settlement.

[345] On the whole of the evidence on this point, it is clear that Ms. Jenks and Ms. Guerra are at worst uncertain about whether conflicts exists, and in my view, misunderstood the foundation of the conflicts questions. However, I cannot find evidence that there is any obvious conflicts issue worthy of concern at this stage of the proceeding. In the event this concern materializes, it might be reconsidered later.

Are the representative plaintiffs informed and engaged?

[346] The defendants also suggest the proposed plaintiffs lack sufficient understanding to adequately represent the interests of the class members. Answers given by them on cross-examination demonstrate their lack of understanding of the fundamental aspects of the class action. They argue that Ms. Williamson did not know if Ms. Guerra and Ms. Jenks had provided instructions to counsel, and that Ms. Jenks did not know if she had given instructions to counsel herself.

[347] Overall the defence claims the proposed plaintiffs were unsuitable representatives because each was unaware of the time commitment in fulfilling the role as representative plaintiff, erroneously believed they could all opt out of their role at any time, and had not been informed of their role in the event settlement prospects are discussed.

[348] The defendants also contend that Ms. Williamson, Ms. Jenks and Ms. Guerra do not have sufficient understanding or information about the procedural aspects of

the litigation. Ms. Guerra did not know what a litigation plan was, the purpose of a litigation plan or the purposes of notice to class members.

[349] The defendants point out several problems with the proposed plaintiffs' affidavits all indicating a lack of reliability and understanding of the engagement in the litigation.

[350] The defendant's highlighted these flaws in the affidavits; their affirmations were framed in nearly identical terms including the same typographical errors and other errors. In the case of Ms. Williamson, in her first affidavit she said she was diagnosed with cancer; this was not true. She was unable to explain why her affidavit erroneously asserted that she had suffered cancer.

[351] I do have some doubts concerning the skills and abilities of Ms. Jenks and Ms. Guerra to perform the role of representative plaintiffs because they do not appear to fully grasp basic knowledge of the relevant issues or understanding of the proceedings and their role. I have little evidence concerning Ms. Robertson's capacity to function as representative plaintiff and I doubt that she meets the requirements to be a representative plaintiff because she is not yet representative of her mother's estate. At this point, because Ms. Robertson has not been appointed executrix of her mother's estate and is not a member of the proposed class I am satisfied she is not a suitable representative plaintiff.

[352] However, although each of Ms. Jenks and Ms. Guerra share many flaws, I am satisfied that with proper and competent legal advice either of them will be able to discharge their duties as representative plaintiffs.

Is there a suitable litigation plan?

[353] Finally, the plaintiffs recognize the need to provide a satisfactory litigation plan that includes evidence that some attention had been paid to how the action will progress if certified, and each of the proposed plaintiffs included an initial litigation plan in their affidavits.

[354] The defendants contend that the litigation plans are “rudimentary, vague and formulaic”. They argue that any acceptable litigation plan must comprehensively set out a workable framework for the proceeding including indications that the plaintiffs or their counsel have adequately considered the complexities involved in the litigation: see *Koubi* at para. 195.

[355] They contend the proposed plan only set out usual steps that occur in litigation and because it lacks important detail, it is not acceptable: see *Martin* at paras. 370-371. The defendants contend that notwithstanding the low bar for a litigation plan to include a reasonable framework, the proposed plan does not address resolution of individual and common issues.

[356] The defence contends that some deficiencies in the proposed litigation plan might be addressed through case management, but the more fundamental shortcoming in the plaintiff’s plan is the lack of detail to demonstrate the plan is workable as a class action and should not be certified at all.

[357] The plaintiff’s litigation plan is noteworthy in that it does not address how experts are to be identified or what resources counsel will require to manage the litigation of the scope involved: see *Koubi* at para. 196. This latter point is significant in that the plaintiff has not provided any basis for a methodology that might be used in proving the facts essential to the common issues trial.

[358] I accept that, at this stage some level of attention has been given to how the action will progress if certified. In some cases, determination of the common issues framed by the plaintiff must be resolved before the balance of a litigation plan can be crafted.

[359] In *Bellaire v. Independent Order of Foresters,* [2004] O.J. No. 2242, 5 CPC (6th) 68 (Ont Sup Ct), the court set out a non-exhaustive framework for assessing a litigation plan. It included steps necessary to identify witnesses and obtain their evidence; collect relevant documents from class members; exchange and management of documents; report to the class; mechanisms for responding to class member inquiries; discovery of individual class members; the need for experts and

retention of experts; assessment of individual issues remaining after determination of common issues and how those issues might be resolved; and a plan for how damages might be assessed. The court said any litigation plan is a work in progress and will need to be adjusted as an action proceeds.

[360] In this case, the plaintiff has provided a litigation plan that addresses a number of issues such as notice to the class and publication of notices; discoveries; case management and interlocutory issues; resolution of common issues; resolution of individual issues; communication with class members; and ongoing reviews. The plan does not address issues such as retention of experts, funding of the litigation, or how damages might be assessed.

[361] I accept the defendants' criticism that the plaintiff's litigation plan is somewhat lacking in detail. Taking into account the overall goals of class proceedings, I am satisfied that the litigation plan meets the minimal requirements to achieve certification at this stage.

Summary and Conclusion

[362] Subject to the conditions noted above, this class proceeding will be certified for the causes of action, common issues, proposed class, and representative plaintiffs as noted above.

[363] The claims concerning Valeant will not be certified.

"Armstrong J."