Action No.: 1203 10620
E-File No.: EVQ13BANKOFAMERICA
Appeal No.: ____________________

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

BETWEEN:

1023926 ALBERTA LTD.

Plaintiff (Applicant)

and

BANK OF AMERICA CORPORATION, BMO FINANCIAL GROUP, BANK OF NOVA SCOTIA, CANADIAN IMPERIAL BANK OF COMMERCE, CAPITIAL ONE FINANCIAL CORPORATION, CITIGROUP INC., FEDERATION DES CAISSES DESJARDINS DU QUEBEC, MASTERCARD INTERNATIONAL INCORPORATED, NATIONAL BANK OF CANADA INC., ROYAL BANK OF CANADA, TORONTO-DOMINION BANK, and VISA CANADA CORPORATION

Defendants (Respondents)

P R O C E E D I N G S

Edmonton, Alberta
April 3, 2013
April 4, 2013

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta
2 ---
3 April 3, 2013 Morning Session
4
5 The Honourable Mr. Justice Rooke Court of Queen's Bench of Alberta
6
7 R. Mogerman / J. Winstanley For Macaronies Hair Club & Laser Centre Inc.,
8 operating as Fuze Salon
9 E.F.A. Merchant / G.K. Neill / J. Kadavil For 1023926 Alberta Ltd.
10 M.J. LaFleche For Bank of America Corporation
11 K.L. Kay For Canadian Imperial Bank of Commerce
12 B.W. Dixon For Bank of Nova Scotia
13 C. Hunter For Capital One Financial Corp.
14 M. Adlem For Citigroup Inc.
15 C. Chatelain For Federation des Caisses Desjardins du
16 Quebec
17 J.B. Simpson / J.B. Musgrove For Mastercard International Incorporated
18 A. Kuntz For National Bank of Canada Inc.
19 S. Smyth / J. Yates For Toronto-Dominion Bank
20 D.T. Neave For Visa Canada Corporation
21 N. Varevac Court Clerk
22 ---
23
24 **Discussion (Preliminary Matters)**
25
26 THE COURT: Please be seated. We are here in this
27 courtroom today because with this group, I figured I needed a lot of security, and so we
28 are highly secured. But Officer, except for Mr. Merchant, I do not need any protection,
29 and so I am going to release you. If we need you, we will call you.
30
31 THE SHERIFF: Thank you, sir.
32
33 THE COURT: I guess I want to start with any preliminary
34 matters. I am not going to go through a roll call of participants. If you rise to speak,
35 state your name for the record. Some of you I know, some of you I may not know, and
36 so tell me who you are for the record, but I do not propose to go through the roll call.
37 We have a list of people who are participating and we will go from there.
38
39 I have had a chance to do a review of the briefs. They are overlapping briefs in some
40 context, and there is lots of authorities. I have not been through the authorities. I have
41 relied upon the representations of what the authorities say, and we will go through them

1 as necessary.
2
3 Yesterday I received some material indicating that there were some issues with respect to
4 some Affidavits, so if there are preliminary matters in that regard or otherwise, we will
5 deal with them first, and then we will get into the substance. Once we get to the
6 substance and the application for the stay and the carriage, I will have some questions that
7 may be helpful in focussing where we are going.
8
9 So are there preliminary matters? Mr. Mogerman.
10
11 MR. MOGERMAN: My Lord, the first thing I thought might make
12 sense in terms of structuring the two days is just making sure that we have the order of
13 speaking lined up. What my proposal is, is that the moving parties go first and go back
14 to back so that I would go first, Ms. Kay would follow, that Mr. Merchant would respond
15 to both of those moving motions and that reply, if any, would bookend that. So that from
16 a structure point of view, that was my proposal.
17
18 It would be my suggestion that we deal with the Affidavit issues and there are Affidavit
19 issues in both directions. Ours were raised in our briefs and Mr. Merchant's were raised
20 recently, that we deal with them in the course of our submissions. I think it's probably
21 easiest to put them in context in that way, and that is how I would respectfully suggest
22 the days unfold. So that is the only preliminary point, if I can put it that way, that I
23 wanted to bring to the Court's attention, and then I will let my friends speak to that point,
24 and then I think I will take the first submission following that.
25
26 THE COURT: Well, I enjoy your company. You talk about
27 days. We booked days to accommodate all necessary arguments, but do not assume you
28 have to use all the available time.
29
30 MR. MOGERMAN: That was not my assumption. My plan was to
31 take about 90 minutes myself. I'm going to try and keep it under that, but that was the
32 plan. On the matters of substance, of course, subject to your questions, I would like to
33 see us get done today and I can be, again, guided by the questions, could probably be
34 briefer than that, but we do have the two days booked.
35
36 THE COURT: Okay. Mr. Merchant or anyone else on
37 preliminary issues?
38
39 MR. MERCHANT: My Lord, you mentioned the issue of counsels'
40 Affidavit. I would be happy to deal with that now, if that is the order that the Court
41 suggests.

1
2 THE COURT: Well, I do not suggest it. I have no
3 preconceived view of when we address it. It seems to me we address it as necessary, but
4 like many other things, you do not address it at all if it is not necessary. So if it becomes
5 an issue, then we should address it. If it is an issue now, let us address it now. If it is
6 not an issue now but may become an issue when it arises, then we can take a side bar and
7 deal with it.
8
9 MR. MERCHANT: My Lord, I didn't know the schedule that my
10 colleagues -- the order that my colleagues would suggest or that the Court would deem
11 appropriate. My guess was that the defendants' application for a stay would go first, and
12 then the application by the consortium would proceed, and that the defendants would
13 make their representations, the consortium would not make representations because it's
14 not their application, and that the issue of Ms. Brasil's Affidavits were a part of the
15 question of the Consortium's application for a stay.
16
17 Now, the first point that I was going to come to was are the stay applications, in
18 substance, different, and do you consider them together or not. So I am happy to enter
19 into that area of discussion, because it may affect Your Lordship's decision about the
20 order of hearing and that, in turn, might affect your decision about when you think it
21 appropriate to hear me on the Affidavits of Ms. Brasil.
22
23 THE COURT: Well, let me say that I am presuming that the
24 action that has been commenced in Alberta, the second action by -- just let me get the
25 right terminology here, just bear with me a minute --
26
27 MR. MOGERMAN: My Lord, you will find the two styles of cause
28 consolidated on the front of -- if you have red books of authority, or if you have joint
29 books of authority --
30
31 THE COURT: Thank you.
32
33 MR. MOGERMAN: -- on the cover of those, you should have the
34 two styles of cause, and the first --
35
36 THE COURT: Mine are blue, but --
37
38 MR. MOGERMAN: Yes.
39
40 THE COURT: I was looking -- and I am sorry for fumbling, I
41 was looking for the --

1
2 MR. MOGERMAN: The Macaronies Hair Club.
3
4 THE COURT: -- Macaronies action.
5
6 MR. MOGERMAN: That's right, it's the second action.
7
8 THE COURT: And just for the record, it is Number
9 1203-18531. That action was commenced, in part, for jurisdictional purposes, because
10 Mr. Merchant indirectly makes the point that the consortium has no standing in the
11 Alberta action, and by commencing this action, in addition to doing other things, it creates
12 standing in an action in Alberta, and that is the first thing.
13
14 I also assumed that while the defendants have standing in the numbered company action,
15 1023926, to bring the application for a stay and in that context, the consortium does not
16 have a specific interest. It seems to me that this proceedings by stay is led by the
17 consortium, directly or indirectly, so I am going to treat the consortium substantially as
18 the main applicant in both matters. I do not know that there is a difference.
19
20 I will be -- maybe I can do it now -- I am assuming that we are talking the same
21 substance, although there is a lot of duplication in material to maintain jurisdiction, that
22 what is being sought by the consortium and by the defendants is a stay of the Merchant
23 action and that the carriage issue, as raised in the Macaronies proceeding, is a carriage
24 plus stay, and that the Court does not need to determine carriage if the Court stays the
25 other action. So there is some overlap in that sense. If there is no stay, then the carriage
26 motion has legs at least for consideration.
27
28 So that is how I am working on it, and I think the defendants are taking a quick position
29 in support of the consortium, but the the consortium is the prime mover, and so there is
30 no sense in me hearing from the defendants who are me also type submissions, I suspect,
31 or not suspect, from their brief, they support the consortium's position, so we are going to
32 work in that fashion.
33
34 I think I do not need to hear much about carriage in the first instance, because it only
35 applies if the stay is not granted. So I think the focus should be on the stay. It is clear
36 that if the consortium does not intend to proceed with the Macaronies litigation if the
37 numbered company litigation is stayed. It would follow that that would be stayed as well.
38 If one is stayed, they will both be stayed. But that is the intent. So I do not know if that
39 clarifies anything, but that is how I intend to proceed.
40
41 MR. MERCHANT: My Lord, then it would seem to me that you

1 should hear first, if it pleases the Court, my submissions regarding counsels' Affidavits
2 and I could deal with that now. I indicated some cases, and I brought copies of the cases
3 and would take you through those issues.
4
5 THE COURT: Those Affidavits -- I take it is the Affidavits --
6 two Affidavits?
7
8 MR. MERCHANT: Yes, the principle issue is the Affidavit of
9 Luciana Brasil sworn December 4, 2012.
10
11 THE COURT: Yes, and that is filed in the numbered company
12 action. In fact, both Affidavits of the 4th and 6th are filed in that action. So is there any
13 submissions on Mr. Merchant's suggestion that this argument proceeds now?
14
15 MR. MOGERMAN: Yes, My Lord, you have framed the issues, in
16 my respectful view, almost bang on, and when I say almost bang on, the reason for that is
17 that the carriage issue is live in this sense. Given the Merchant action, and given this
18 Court now being engaged, we do not intend to simply stay Alberta and never talk to
19 Alberta again. The plan is to interlock Alberta into the national scheme that is currently
20 moving along with British Columbia taking the lead, Ontario and Quebec being informed
21 of what's happening, being able to move if they need to move, being engaged in the
22 national management. So it wasn't our intention at this stage, although it would be
23 possible, to stay and never report to this Court again --
24
25 THE COURT: No, I was not suggesting that.
26
27 MR. MOGERMAN: Yeah. So in that context, it does proceed as
28 both a carriage motion and a stay motion in this sense, that you will have class counsel,
29 the consortium, who have carriage of the Alberta proceedings. The Alberta proceedings
30 are then being managed in this wider context, and so the two paths to the stay are very
31 much alive. Either path will, in essence, take you to the same result. And the reason that
32 it will get a bit out of order and I think not be efficient if we start with the Affidavit
33 question is, until the Court has squarely in mind the legal tests that you are going to build
34 the facts into, it becomes difficult to decide on the admissibility of Affidavit evidence, and
35 the arguments that my friend makes about Affidavits are arguments that he has made and
36 had been rejected -- precisely the same arguments -- made and rejected in a number of
37 courts across the country. And so in the course of my submissions on both carriage and
38 stay, there will come a point where I will be in those cases framing the legal analysis, and
39 I will be able to say, look, here is this Affidavit point, here is how the Courts have dealt
40 with it, and that will, in my submission, make it easier for this Court to put the Affidavits
41 into boxes.

1
2 THE COURT: Okay. Well, let me just talk about this a little
3 bit. Do I take it implicit that the issue with respect to the Affidavits deals with carriage?
4 The objection deals with carriage issues?
5
6 MR. MERCHANT: No, My Lord. The Affidavit indeed says --
7 well, carriage and stay have a relationship, but the Affidavit says: (as read)
8
9 I make this Affidavit in support of an application to stay the
10 Merchant Alberta action and for no improper purpose.
11
12 So they don't frame the Affidavit as being in relation to their carriage motion, they frame
13 it as having to do with stay.
14
15 THE COURT: But the concerns that you wish to raise, are
16 they in relation to the stay or in relation to the carriage?
17
18 MR. MERCHANT: Well, the concerns are that the Court shouldn't
19 receive the Affidavit, but I am not suggesting that this is a decision that you should
20 necessarily make in a preliminary way. My suggestion is that we would argue, you will
21 have my submissions and cases, and then you deal with it when you decide whatever you
22 decide.
23
24 THE COURT: My view is that the carriage issue is a
25 secondary issue. It's an alternative issue, because if the application for stay in the
26 numbered company action is granted, then it would follow that not only is the numbered
27 company action stayed, but the Macaronies action is also stayed explicitly or implicitly,
28 and that does not stop the consortium under that scenario reporting to Alberta under
29 whatever action it wants as to what is happening in the other places, and it does not -- I
30 guess I am not inclined to decide the carriage action if the Alberta actions are stayed, and
31 we will let that sit stayed, and then if there is a stay of the Alberta action and B.C.
32 proceeds to certification, then upon seeing the B.C. decision and what is going on there or
33 some other activity, then we would determine where Alberta is in relation to the rest of
34 the country and proceed from there. If the action is not stayed, then we have to get into
35 the carriage action, because there is no sense in two actions proceeding in the same
36 jurisdiction involving the same issue, albeit with different plaintiffs, and there is, I am
37 sure, a thousand cases on that point alone.
38
39 So I think what we will do is that if and when we get to a point where the Brasil
40 Affidavits are being relied upon, either explicitly or implicitly, then we will get into that
41 argument as a side bar.

1
2 MR. MERCHANT: There is another issue that may be helpful.
3 Sometimes what Ms. Brasil does is she just exhibits the thing, which you would probably
4 be able to look at whether she had an Affidavit or not, so she says here is a transcript
5 from somewhere. So I just say that as an adjunct to the procedure that I think will work
6 that Your Lordship has just enunciated. You know, she exhibits a judgment, for example.
7 Well, she exhibits what Chief Justice Bauman did. Well, you don't need her Affidavit to
8 look at what Chief Justice Bauman did.
9
10 THE COURT: Yes. Okay. Then I think we will get right into
11 it, unless there is anything else that needs to arise. I want to raise some questions as soon
12 as we are into the substance.
13
14 MR. MOGERMAN: Then I think we're into the substance, and I'm
15 happy to answer some questions.
16
17 THE COURT: Okay. Well, let me see if I can focus this a
18 little bit and ask some perhaps dumb questions, maybe undoubtedly dumb questions, that
19 take us to some substance. And some of this I have not researched, so there may be
20 obvious answers to the questions. Let me just see if I can get my material organized here
21 a little better. Now, I do not purport to be an expert on the B.C. law, but let me just
22 clarify certain things and maybe you can answer them, so some of these questions will be
23 a little dumb, but let us get it on the record.
24
25 The B.C. action is not a national action.
26
27 MR. MOGERMAN: Correct.
28
29 THE COURT: It relates to B.C. residents only.
30
31 MR. MOGERMAN: Correct.
32
33 THE COURT: B.C. is an opt-out jurisdiction.
34
35 MR. MOGERMAN: Opt out within B.C., correct.
36
37 THE COURT: And people external to B.C. can opt in.
38
39 MR. MOGERMAN: If you have a class definition that is national,
40 then people external to B.C. can opt in. It requires a class definition that is national.
41

1 THE COURT: Right. National class actions are permitted
2 under B.C. legislation?
3
4 MR. MOGERMAN: They are permitted, but they are national opt-in
5 class actions.
6
7 THE COURT: Okay. Just let me make a note. And the action
8 as framed in B.C. is not a national action?
9
10 MR. MOGERMAN: That’s correct.
11
12 THE COURT: And I guess a question is, what is stopping it
13 from being amended to be a national opt-in action?
14
15 MR. MOGERMAN: From the point of view of efficiency in
16 certifying and managing a national case, if one were to attempt to certify and manage a
17 national opt-in case in these proceedings, it would not be as efficient as having an
18 interlocking British Columbia case that also has a national opt-out case behind it. So like
19 the Ontario case, or another national opt-out jurisdiction, because managing a national
20 opt-in case in a case of this nature would not be efficient.
21
22 THE COURT: So the bottom line is that an Albertan, the
23 numbered company, or Mr. Vlahos, if I am pronouncing his name correctly, could not opt
24 in into the B.C. action after certification because he would not meet the class definition?
25
26 MR. MOGERMAN: As currently framed, that is correct.
27
28 THE COURT: So what would you have to do to allow him to
29 opt in if there was certification?
30
31 MR. MOGERMAN: We could amend the B.C. class definition to
32 make it a national opt-in class definition, but I think that that is something that we
33 deliberately chose not to do in this case for the reasons that I articulated, that because of
34 the size and scope of the case, it would make your notice plan and your opt-in procedures
35 after class certification unnecessarily cumbersome. And there is no question about this,
36 there are advantages to a national opt-out class proceeding in a case like this, and the way
37 that our case was structured prior to the Merchant filing was to protect all Canadians
38 under the umbrella of the Ontario national -- sorry -- all Canadians except for Quebec and
39 British Columbia -- under the umbrella of the Ontario national case. And then let me just
40 articulate the primary reasons for doing that.
41

1 Quebec is a civil law jurisdiction. It has unique aspects to it. It is possible to cover
2 Quebec out of a national common law jurisdiction, but it is a -- I wanted to use the word
3 dangerous -- that's not the right word -- it is a complicated exercise. Therefore, it is often
4 wise to have your Quebec class covered by a Quebec action.
5
6 British Columbia, in a case like this, has the great advantage of being a no-costs
7 jurisdiction, so --
8
9 THE COURT: That is a prime motivation.
10
11 MR. MOGERMAN: -- that is the prime motivation for pushing
12 British Columbia out ahead. The costs in a case like this, disbursements for experts and
13 so on and so forth, will be massive. They will be -- if we're looking at trial -- likely in
14 the high hundreds of thousands, if not the millions of dollars. Being able to protect the
15 class from those costs is a rational way to test whether the case is certifiable and then to
16 test the common issues. What has been a successful approach in a number of cases is to
17 have British Columbia push out ahead with a British Columbia class, followed by a
18 national Ontario class and a Quebec class, and there are a couple of consequences that
19 flow from success in British Columbia. One is that the judgment, the certification
20 judgment, although not binding in the other provinces, has a profound effect on the need
21 for a contested certification in those other provinces. So sometimes there is a consent
22 certification in the other provinces, and if there is a contested certification, it very much
23 narrows those issues. So you are able to have a test run at certification, and indeed at the
24 common issues, in a no-costs jurisdiction, and you protect the rest of the country,
25 including Albertans, in a national case. In this instance, the national case prior to the
26 filing by Merchant was filed in Ontario.
27
28 THE COURT: Well, Alberta is protected now by two
29 additional actions.
30
31 MR. MOGERMAN: That's exactly right. So Alberta now has the
32 protection of two additional actions, and the question that one needs to ask there is, which
33 of those additional actions will be the operative, if I can put it that way, Alberta action
34 that interlocks with the national scheme. And that is, in part, why I pushed back a little
35 bit and it was, admittedly, a little bit on the framing question, because there is a decision
36 out of Ontario that's referred to in our materials and it's referred to in our reply and it's
37 interestingly absent from the survey of carriage decisions that my friend Mr. Merchant
38 went through. It's called the *McSherry* decision. In *McSherry*, Justice Perell dealt with a
39 set of circumstances that was similar, I won't say anywhere near identical, but similar to
40 the circumstances facing Your Lordship. What Justice Perell had was he had a British
41 Columbia -- for the reference for *McSherry*, it's at Tab 109 of the authorities. It's in

1 Volume 4.
2
3 What happened in that case was there was a certified British Columbia decision and the
4 British Columbia case, like in this case, was well out ahead of any of the other cases
5 across the country, so B.C. was out ahead, and a carriage fight, if I can put it that way, a
6 carriage fight, quite similar to the fight that is before Your Lordship, broke out in Ontario
7 between one firm that wanted to interlock the Ontario case with the British Columbia case
8 in the manner that I have just described, let British Columbia push out front for cost
9 reasons, use the British Columbia certification as a guide for the other courts, if need be.
10 So the one firm said, look, let's basically down tools in Ontario and let British Columbia
11 take the lead and use Ontario only if we need Ontario on a national basis. The other firm
12 said, no, let's drive Ontario ahead on an independent track. And Justice Perell went
13 through a number of the questions that you are asking. He did it in the context of
14 carriage, because at the end of the day, you need to have one firm who is class counsel.
15 There are two Alberta actions. You need class counsel, and you're going to need to
16 interface with class counsel. So Justice Perell did it in the context of carriage, and his
17 solution was very similar to the solution that we're proposing, that British Columbia take
18 the lead and that we have interlocking cases across the country. It's a very scholarly
19 discussion of the consequences of these multi-jurisdictional class proceedings and how
20 they fit together.
21
22 That's why I was pushing to reframe it a little bit as carriage. There is a way of saying,
23 look, the Merchant case is an abuse of process independent of all carriage concerns,
24 because it's duplicative, it's unnecessary, it has no legitimate purpose. So you could say
25 that, and that's a legitimate path. There's another path, that is the carriage path, that takes
26 you to the same place, and ultimately is live before you. I don't think we can -- as much
27 as I would like to, I don't think we can avoid the carriage question, because somebody
28 has to be class counsel in Alberta in these cases.
29
30 THE COURT: Well, if the B.C. case proceeds as you hope it
31 will, you will get certification and then all of the other jurisdictions or a national case will
32 come by consent or a narrow focus on certification and everybody will be in the tent. If
33 you lose the certification in B.C., you and Mr. Merchant will both be scampering to get
34 the hell out of Dodge, I presume, because there will be no merit to the proceeding.
35
36 MR. MOGERMAN: We will all be scampering to the Court of
37 Appeal, but I take your point.
38
39 THE COURT: In due course, yes. So that you envision if we
40 do not deal with carriage today, we will have to deal with it later?
41

1 MR. MOGERMAN: That's right. And I do think that the way that
2 Justice Perell framed carriage, what spat out of his decision in *McSherry* was a structure
3 that's similar to the structure that would be before you if you were to decide the case on
4 purely abuse of process grounds. If you were to stay the Merchant access as an abuse of
5 process, you would still say, okay, now, what do I do with the consortium action? It's
6 stayed in the manner of the Ontario case, it's stayed in the manner of the Quebec case.
7 It's then going to be interlocking. So there has to be class counsel to interface with, and
8 *McSherry* came to the conclusion through the vehicle of carriage.
9
10 THE COURT: Let me move on to another subject. I have
11 jurisdiction to control the process in Alberta and therefore to grant a stay, if appropriate.
12 I take it that everybody in the room acknowledges, although it is not in the briefs that I
13 can determine, that I have no jurisdiction under the CPA to stay the Alberta action.
14
15 MR. MOGERMAN: You could come to that conclusion, and there
16 are two British Columbia cases -- well, there are Alberta cases that discuss the Court's
17 ability to stay a class proceeding as an abuse of process at any point in time.
18
19 THE COURT: Do not have a problem with that.
20
21 MR. MOGERMAN: Yeah, so then we're talking about that funny
22 loop in the *Class Proceedings Act* that says class proceedings means a certified class
23 proceeding, and then when we look at those sections of the Act that talk about a Court
24 can stay a class proceeding, the question arises, well, can the Court stay a yet-to-be
25 certified class proceeding under those provisions?
26
27 THE COURT: It is even worse than that. Forgetting that
28 point --
29
30 MR. MOGERMAN: Right.
31
32 THE COURT: -- and assuming that is not a problem, I can
33 stay an Alberta proceeding if there is another multi-national --
34
35 MR. MOGERMAN: Right. Right. We're not into those provisions.
36 We're not into --
37
38 THE COURT: Because B.C. is not --
39
40 MR. MOGERMAN: That's right.
41

1 THE COURT: -- multi-jurisdictional.
2
3 MR. MOGERMAN: That's right. We're not relying on those
4 provisions, but there is a provision in the -- so let me just, in answering your question, be
5 clear about that. We are not relying on the provisions of the Act that specifically address
6 multi-jurisdictional cases. And the reason that we don't need to do that, on the one hand,
7 is that we have two competing Alberta cases to deal with, so we are dealing not with a
8 competition between an Ontario national case and an Alberta national case, we're dealing
9 with a competition between two Alberta cases on one level --
10
11 THE COURT: That are national.
12
13 MR. MOGERMAN: The two Alberta cases, one is national, that is
14 to say, Mr. Merchant has a proposed national case, which I should point out conflicts with
15 his proposed national case in Saskatchewan. So he's got two national cases going at the
16 same time, and that may be an abuse of process. The consortium Alberta case is not a
17 national case. It's an Alberta case that interlocks with the national umbrella in Ontario.
18
19 Sorry, but looping back -- so let me then loop back to the question that started the
20 analysis, which was what provisions of the *Class Proceedings Act* could be looked at, and
21 so I will start by saying we are not looking at or relying on the provisions that came into
22 force as part of the Uniform Law Reform Commission. And indeed, Justice Perell's
23 decision, again, quite scholarly on how those provisions work and on the powers that the
24 Court has outside of those provisions to manage multi-juris -- I will call it
25 multi-multi-jurisdictional class proceedings. So the Court has many powers.
26
27 The reason I was slowing down a little bit is that there is a provision -- there is the
28 provision of the *Class Proceedings Act* that says that -- I'm going to overstate it -- the
29 Court can do whatever it wants, whenever it wants. I think B.C. it's Section 12. Here I
30 think it might be Section 13.
31
32 THE COURT: Yes.
33
34 MR. MOGERMAN: And there's the provision of the class
35 proceedings that says the Court may stay any proceeding relating to a class proceeding.
36 Now, those are different provisions from the provisions Your Lordship is referring to, and
37 I would place some reliance on those provisions.
38
39 THE COURT: Yes, it was the 56579 --
40
41 MR. MOGERMAN: That's right.

1
2 THE COURT: -- that I was referring to, yes.
3
4 MR. MOGERMAN: So I'm with you on that point.
5
6 THE COURT: Okay. Just while I think of it, and
7 notwithstanding saying I wouldn't go there, why would I give carriage to counsel for an
8 Alberta-only action as opposed to give carriage in Alberta to a national action?
9
10 MR. MOGERMAN: A couple of reasons for that. Well, you would
11 ask that question in the context of this case, so it's not a question that gets asked in the
12 air. You asked the question why would I give carriage to the Merchant Law firm with
13 the Merchant representative plaintiff in a national case as framed by Mr. Merchant in the
14 manner that he has done it, or an Alberta case under the conduct of the consortium? But
15 let's take it to an academic level one above that. So that is the carriage question and that
16 is briefed extensively.
17
18 But let's ask the question, well, why wouldn't we say to the consortium if you said, look,
19 I agree with you that this is the right law firm, this is the right representative plaintiff, but
20 why do you have an Alberta-only case as opposed to a national case? Then you get chaos
21 because then you have multiple competing national and regional class proceedings, and I
22 believe that's what the Court in the *Englund* case found to be an abuse of process,
23 because then you are vexing both the classes and the defendants with the same case about
24 the same issues in purportedly the same place, because you have got Ontario saying I'm
25 looking after Ontario, and Saskatchewan is saying, I'm looking after Ontario, and Ontario
26 is saying, yeah, but I'm also looking after Saskatchewan about the same matters, and
27 that's what led to the chaos in the Vioxx litigation. So Vioxx is an excellent example of
28 why you don't do that.
29
30 THE COURT: So let me put it more bluntly. Let us assume
31 that there is certification in B.C. in a broad sense. Let us assume that the defendants are
32 prepared to consent to certification or some parts of certification in other Canadian
33 provinces. Why would the Court not then say, well, okay, an Albertan national action is
34 just as sensible as an Ontario national action, and we are not going to stay an national
35 Alberta action.
36
37 MR. MOGERMAN: The Court might do that. So in theory, a Court
38 could do that --
39
40 THE COURT: Yes.
41

1 MR. MOGERMAN: -- and that is where one needs to rely on
2 principles of comity and have the Judges communicating, as we have suggested that the
3 Judges do, so that amongst class counsel, defendants' counsel and the Judges, the best
4 jurisdiction for the problem is picked.
5
6 THE COURT: So taking that, then, that leaves the Macaronies
7 case out because it is not National.
8
9 MR. MOGERMAN: It doesn't leave it out because what you have --
10 if you were to have a national case stated now -- well, there's two things that go on. One
11 is that if that was a pivot point, the class definition could be easily amended. But there's
12 a more substantive -- there is a substantive reason that's not a pivot point. So if it were a
13 pivot point, class definition could be amended, but at this point in this case, we already
14 have extant for -- I don't have the date in my head, but I'm going to call it a year -- an
15 Ontario national case. So relying on principles of comity, this Court, in my respectful
16 submission, wouldn't say, well, I'm in a year later and I want to put my foot down to say
17 that I want the possibility of the national case to be here. And the reason for that -- I
18 mean, it doesn't yet become the abuse of process problem, but it gives rise to the
19 possibility, because what may happen then is that you have two Courts attempting to
20 actively manage two cases that cover the same people and the same defendants, and again,
21 that's the Saskatchewan Court of Appeal and indeed other Courts have said that is an
22 abuse of process. We want to avoid a multiplicity of proceedings. But the class
23 definitions can be amended at any time, and it's quite possible that if the right jurisdiction
24 was Alberta, following a B.C. certification, the case could be litigated in Alberta. We're
25 not there yet, but giving carriage of the Macaronies case to consortium counsel does not
26 foreclose that possibility.
27
28 But what must be avoided is multiple-national class proceedings that cover the same
29 defendants, the same class members and often the same counsel, because that is an abuse
30 of process. That is a multiplicity of proceedings that should not take place.
31
32 THE COURT: So you say to Mr. Vlahos and his company,
33 bear with us, we have got a strategy, we were going to get certification in B.C. with good
34 counsel and proper diligence. That is going to become a precedent, if you will, for
35 consent certification in Ontario and/or Alberta on a national basis, and you will be
36 covered either under Ontario or Alberta, and the cost to you is a delay for a year or two
37 while we go in front of the B.C. trial Court and then the Court of Appeal and then leave
38 to the Supreme Court, et cetera, and then when the dust is all cleared, we will come back
39 and you will be picked up and be part of it?
40
41 MR. MOGERMAN: The only nuance I would put on that is the

1 question of the cost of delay. If this case were to proceed in Alberta today, it would
2 consume those years of certification and appeal in Alberta before Mr. Vlahos had his
3 Alberta certification. And in fact, it would consume more time because the British
4 Columbia case is well further advanced. So there is actually -- the delay would play more
5 heavily if this case were to now commence active litigation in Alberta, and the reason for
6 that is you would run through the Alberta system in the same way that we are running
7 through the British Columbia system before you made it to certification, and in Alberta,
8 you are just starting as compared to in British Columbia where we have a certification
9 date April 22nd, I believe. The case is almost entirely briefed. All of the evidence is in.
10 Plaintiffs' argument is done, defendants' argument is coming. So you actually run a risk
11 of greater delay, possible cost exposure, if you go in Alberta. And so it would be quite
12 an irrational thing for Mr. Vlahos to say I want to push the Alberta case when he has the
13 potential for a faster risk-free resolution that takes him to the same spot.
14
15 THE COURT: Well, we can argue about risk, but I will not --
16
17 MR. MOGERMAN: Right.
18
19 THE COURT: -- do that now. Okay. I think are the questions
20 I want to start with and the discussion I wanted to start with to get a flavour of where we
21 are going, and I may interrupt you on areas that I do not need to hear you or have other
22 questions, but I will let you proceed with your argument. If you are referring to material,
23 take me to where you are referring --
24
25 MR. MOGERMAN: Right.
26
27 THE COURT: -- so I can follow.
28
29 **Submissions by Mr. Mogerman (Stay of Merchant Action)**
30
31 MR. MOGERMAN: So what I will be relying on, and I think it's
32 before you, you don't have to gather it now, is I have got as a starting point our
33 submissions in-chief. I'm not going to read them, but I'm going to use them as a guide.
34 And then the authorities and what we would in B.C. call the Chambers record, I think
35 here it's the application record, and the Affidavits in the application record. So that's the
36 material. And you have in your questions taken away most of the framing that I would
37 have done, and so where I would like to start is in Tab 99 of Volume 3 of the authorities.
38
39 THE COURT: When you say of the authorities, you are talking
40 about the --
41

1 MR. MOGERMAN: There should be something that's called --
2
3 THE COURT: -- consolidated authorities?
4
5 MR. MOGERMAN: That's right. And the reason that I'm in this
6 court is it's the latest and it's at appellate level, it's a Divisional Court decision, statement
7 of the carriage test. It's a case called *Armtec*.
8
9 THE COURT: The cite is *Locking v. Armtec*?
10
11 MR. MOGERMAN: That's the one. And I'm at paragraph 7 on
12 page 3. So it says: (as read)
13
14 The motion judge set out the test for determining carriage motions.
15
16
17 And you see in paragraph 16 there: (as read)
18
19 The court's primary concern on a class action carriage motion is to
20 determine which of the competing actions is more, or most, likely
21 to advance the interests of the class. The task, in other words is to
22 find a solution that is in the best interests of the putative class
23 members, promotes the objectives of the *Class Proceedings Act*,
24 and is fair to the defendants.
25
26 And I'm going to leave to the defendants what is fair to the defendants, and I'm going to
27 touch on the first two of those points.
28
29 And then the jurisdiction is set out in paragraph 17, and looking back to a question that
30 Your Lordship asked, in jurisdictions that have the funny definition of class proceeding
31 that requires it to be a certified class proceeding, the issue has arisen what is your
32 jurisdiction to issue a carriage order, and the Court said, well, we have an inherent
33 jurisdiction and we have got the *Law and Equity Act*, and I will walk you through those
34 decisions. But just so that we don't bleed too much of the Ontario law in, that said, this
35 test is a test that's used in all jurisdictions. (as read)
36
37 In determining which counsel group should have carriage of the
38 action, the court should engage in a qualitative as opposed to a
39 quantitative analysis. Specifically, the court should consider,
40 among other factors, the following:
41

1 (a) the nature and scope of the causes of action advanced;
2
3 (b) the presence --
4
5 And I will just touch down on each of these. It's interesting to note that, and this was the
6 first point that I made when I appeared before you, is that because of the
7 Tony-come-lately nature of the pleadings, because Mr. Merchant has copied, including
8 copying typos, the pleadings, at one level it's hard to draw a distinction between the
9 nature of the causes of action. That said, there are places where the Merchant pleadings
10 go off on their own, and those places show a profound misunderstanding about the nature
11 of the case.
12
13 And as just one example, is the idea that it is consumers who ultimately pay the price of
14 any alleged overcharge. And that point is enough, because Mr. Merchant's class and our
15 class are the merchants. If they have passed through to consumers, that is a complicating
16 issue both legally and factually, and his inability to understand that distinction shows a
17 real inability to litigate a case like this because, indeed, our view is on the law, that
18 pass-through is not a defence, and on the facts, it doesn't occur. It can't occur. But
19 that's an argument between us and the defendants. Mr. Merchant, in my respectful view,
20 has just misunderstood what's happening and is about to step on a landmine.
21
22 THE COURT: Well, help me, because I am a little dense. If
23 the cost to the merchant is higher than it arguably should be, the merchant is going to
24 pass that cost on to consumers, so therefore it becomes, indirectly or directly, maybe not
25 measurably, but a consumer cost.
26
27 MR. MOGERMAN: It does in this sense. So the first thing that one
28 needs to understand is what is it that is moving to the consumer, and as a matter of fact,
29 it's not the merchant fee because, by contract, the merchant is not allowed to pass the
30 merchant fee down to a consumer. So the merchant actually is contractually bound by the
31 system not to pass that fee onto a consumer. My friends the defendants are loaded for
32 bear on their push-back, but that's the reality.
33
34 So there will never be pass-through of the merchant fee that is paid. Whether or not there
35 is a cost increase to the merchant that leads to a general increase in the prices that the
36 merchant charges is a question that is legally irrelevant because if the merchant paid for
37 the merchant fee and couldn't pass on the merchant fee, then the merchant recovers from
38 the defendant the full overcharge on the merchant fee. So one should not be discussing
39 pass-through to consumers. It's legally irrelevant. And the Supreme Court of Canada is
40 going to hopefully give us a little bit of guidance on that question. But it would not --
41

1 THE COURT: In what case?
2
3 MR. MOGERMAN: In two cases. One is called -- well, three cases,
4 actually. One is called *Microsoft*. I think they are referred to in this material. The
5 second is a case called *Sun-Rype*. It has to do with high fructose corn syrup. And the
6 third is a case we call *DRAM*. It has to do with memory. It's a case out of Quebec. So
7 two British Columbia cases that our firm has --
8
9 THE COURT: I have heard of them, yes.
10
11 MR. MOGERMAN: Yeah. So those cases are delving into the legal
12 structure for direct and indirect purchases, a legal structure that we would say never arises
13 in this case because the good in issue, the merchant fee, cannot be resold. So the only
14 way you can recover anything is to sort of generally through the economy and that's a
15 different issue. But admitting that the consumers are the ones who are bearing the cost is
16 a puzzling thing when your clients are the merchants, and it's going to lead into a morass
17 because there's a lack of analytical clarity there.
18
19 THE COURT: Well, let me be the devil's advocate just for a
20 moment. I am not going to spend much time on it, because I do not think much turns on
21 it, but to the extent that credit card thieves are -- pick a number hypothetically -- are a
22 cost of 4 percent --
23
24 MR. MOGERMAN: Yeah.
25
26 THE COURT: -- and should be a cost of 2 percent, you are
27 saying the difference in the two you cannot pass on as a matter of contract?
28
29 MR. MOGERMAN: Correct.
30
31 THE COURT: But when the merchant looks at his total costs
32 of widgets and he's got a credit cost of 4 percent --
33
34 MR. MOGERMAN: Correct.
35
36 THE COURT: -- directly or indirectly, he is going to pass it on
37 to consumers. So ultimately, it is for the benefit of consumers if he passed it on. Now, if
38 the merchant decides he is going to eat that as part of business, then it is not a consumer
39 thing, it is a merchant thing.
40
41 MR. MOGERMAN: Correct. So correct as a matter of fact, subject

1 to some complicated economics as to when you can pass something through, because you
2 cannot always do it for various reasons. But as a matter of law, that is the type of
3 pass-through that would not be a defence, in our submission. That is the type of
4 pass-through that would never be appropriate to raise. And the defendants will say
5 otherwise, and we are about to moot that issue in a big way in British Columbia.
6
7 THE COURT: Okay. Let us move on.
8
9 MR. MOGERMAN: (as read)
10
11 (b) the presence of any conflicts of interest --
12
13 And here, and I am going to pick this up in a decision of Mr. Justice Hinkson, and I am
14 going to take the Court to --
15
16 THE COURT: I am sorry, let me go back to the nature and
17 scope. The nature and the scope would cover the national versus non-national aspect --
18
19 MR. MOGERMAN: Correct.
20
21 THE COURT: Yes.
22
23 MR. MERCHANT: Correct.
24
25 THE COURT: Go ahead.
26
27 MR. MOGERMAN: And that takes me to the second point.
28 Mr. Merchant actually has on the record a conflict with his own Alberta representative
29 plaintiff because his Alberta representative plaintiff has said, I only want an Alberta action
30 for Alberta residents. And Mr. Merchant has filed two national cases that each purport to
31 cover the whole country. So he appears to be in direct conflict with the instructions of
32 his client. His client has said give me an Alberta action for Albertans, and yet at the
33 same time, there is a filed national case in Saskatchewan and a filed national case in
34 Alberta by the same lawyer competing for the same clients and the same class members.
35
36 Then you have the class counsel factors where you have: (as read)
37
38 i) the theories advanced by counsel.
39
40 And to some extent, we have discussed that above. (as read)
41

1 ii) the status of each class action, including preparation;
2
3 And in our view, the consortium actions are well out ahead, and I discuss that in the
4 introduction question and answer. We are essentially at certification and in Alberta, you
5 would only be starting the process. Mr. Merchant has filed what he says is a certification
6 record, but the defendants haven't yet surfaced. They haven't yet filed their responding
7 material, cross-examinations, arguments, so on and so forth, pre-certification arguments.
8 The things we fought through in British Columbia would all arise in Alberta. So you are
9 at the beginning of a process that we are well into: (as read)
10
11 iii) the resources, experience and competence of counsel;
12
13 And then the next one is: (as read)
14
15 iv) the prior success of counsel in class actions, particularly,
16 similar class actions.
17
18 And this is covered off in the argument, and what I would focus on is that when it comes
19 to these complex national and indeed international class proceedings that have to do with
20 competition law, and they are very specialized, you have a real imbalance in experience.
21 The consortium lawyers have litigated and are litigating every major leading case in this
22 area. I shouldn't say every one. Let's take a step back from that and say many of the
23 leading cases in this area and many of the successful leading cases in this area, and
24 Mr. Merchant simply doesn't have experience of any meaningful amount in a competition
25 class action of this nature, these big international complicated competition cases. And
26 that's an easy pivot point.
27
28 I would say, and I say it with a bit of pause, but forcefully all the same, that there is also
29 the question of the record that Mr. Merchant has in the courts and in his discipline
30 proceedings dealing with the fallout of an inability to litigate cases of this size and nature.
31 There's an appendix that we put in the argument that shows a real lack of ability to
32 properly carry forward cases that are this complicated and that leads to or it's because
33 of -- and these are the Court's words and not my words -- ethical and competence
34 concerns that range from relatively minor to extremely serious, and there is a long list of
35 court decisions. So they're not in my submission, I would rely on simply what the Courts
36 say. And my submission, building on what the Courts say is, that at some point some
37 Court has to take a stand and say that in a case of this nature, this is not the right guy for
38 the job because his record is such that it's proven that he can't litigate a case like this.
39
40 In (d) you have a reference to: (as read)
41

1 (d) the number, size, and extent of involvement of the proposed
2 representative plaintiffs.
3
4 And this, on the surface, is relatively neutral. Each of the representative plaintiffs is a
5 small business. But if you dig a little bit deeper, it heavily favours the consortium. And
6 the reason for that is that behind the representative plaintiffs, and the consortium is the
7 Retail Council of Canada, which is a massive national organization of merchants who
8 have a depth of knowledge about the credit card fee issue, and there is no such entity in
9 the Merchant camp.
10
11 The other question again that is picked up by Justice Hinkson in the *Joel v. Menu Foods*
12 case that I'm going to take Your Lordship to, is that this representative plaintiff, in
13 swearing the Affidavit that they have sworn, has exhibited an inability to be a
14 representative plaintiff for two reasons. The first is that there's a conflict that I have
15 articulated between these two national Merchant cases, and the second is that the Affidavit
16 is inadmissible. It is speculation. It is essentially vexatious. It is not the kind of
17 Affidavit that a representative plaintiff should file, and again, I will take the Court briefly
18 through that.
19
20 And then in (e) you have: (as read)
21
22 (e) The relative priority of commencing the class actions.
23
24 And again, the consortium class actions were commenced well out ahead of the Alberta
25 action with the caveat that the Merchant Alberta action was commenced slightly before
26 the consortium Alberta action, but looked at it in its proper context, that also favours
27 granting carriage to the consortium.
28
29 So the next case that I would like to draw the Court into is -- actually, let me just set the
30 stage for these cases that I'm going to take the Court into. What you find in the carriage
31 cases, and many of them involve Mr. Merchant, are a pattern of submissions that are
32 made by Mr. Merchant, and he is making the same submissions before you, submissions
33 like carriage can't come before certification; that's litigation in slices. Submissions like
34 counsel can't swear their own Affidavit -- sorry -- counsel can't swear the Affidavit and
35 have someone else from the consortium speak to the Affidavit. Submissions like there's
36 no such thing as carriage. And you find that in his dense submissions that he put before
37 the Court, and what I wanted to do is go into some of the leading authorities and take the
38 Court through how they deal with those submissions. So the first one --
39
40 THE COURT: Well, before you get there, you are going down
41 the carriage trail and, to be blunt, you have not convinced me that you need to have

1 carriage determined. I know there is an argument there --
2
3 MR. MOGERMAN: Yes.
4
5 THE COURT: -- but you haven't convinced me of that, and it
6 seems to me as I tried to articulate in my view, if you disagree, and if you do tell me
7 why, but this is about a stay of the Alberta actions so that B.C. can proceed for the
8 reasons that you say, cost, and you are already there, and it can save Albertans cost and
9 time, et cetera, et cetera, et cetera. And so it seems to me you are putting the cart before
10 the horse here.
11
12 MR. MOGERMAN: I don't -- I understand that framing point, so
13 maybe what I will do, then, I will move and address the stay question and that gets picked
14 up in the brief --
15
16 THE COURT: Well, it is a little early for a break by ten
17 minutes or so, not that we are on a stopwatch, but let me take the break now and let you
18 think about my point and your focus and then continue on in 15 minutes.
19
20 MR. MOGERMAN: That works for me, My Lord.
21
22 THE COURT: Yes, okay.
23
24 (ADJOURNMENT)
25
26 THE COURT: Mr. Mogerman, to stay or not to stay? That is
27 the question.
28
29 MR. MOGERMAN: My Lord, to stay, but on what ground. The
30 answer is that there must be a stay. Mr. Merchant's case must be stayed.
31
32 THE COURT: So let me just add one factor, and I am sorry
33 for interrupting. I will apologize once.
34
35 MR. MOGERMAN: Yes.
36
37 THE COURT: I will not apologize every time, but a stay on
38 what ground and, if so, on what conditions?
39
40 MR. MOGERMAN: Correct. That's correct.
41

1 THE COURT: Because if there is going to be stay that you are
2 proposing, I will need to hear from you on the conditions of stay and how it might look.
3
4 MR. MOGERMAN: Right. And the reason that I'm -- there are
5 actually a couple of reasons that I'm holding onto the construct of carriage in relation --
6 or as a ground for stay, and that is that carriage does something more than stay. Carriage
7 tells you who the lawyers are who are acting for the class in Alberta. It tells you who the
8 Court turns to, to deal with in interfacing with other Courts. So there needs to be counsel
9 in charge of a case in Alberta because we presently have two cases in Alberta, and that is
10 in the best interests of the class. So in my respectful view, we can't avoid the carriage
11 question.
12
13 That is also, in my respectful view, the best and most comprehensive foundation for the
14 types of orders that we are seeking if there are appeals. So if the ground was only that
15 the Merchant case is an abuse of process and that, for principles of comity, I want to
16 interface with these other Courts, that would be not as profound as a ground that says in
17 addition to that, I have two cases before me and I must choose who the lawyers are who
18 will act for the Alberta class, and that entails a carriage analysis and, at the end of that
19 analysis, it is the consortium, who should be counsel.
20
21 I referred a couple of times to the *McSherry* decision and it might be helpful, My Lord, if
22 we go into *McSherry*, which is at Tab 109 in Volume 4. You will recall, I hope, from my
23 description that this is the case where there was a certified British Columbia case and that
24 is called *Jones*. This is set up in the introduction. I won't take Your Lordship through it.
25 So the *Jones* case was the British Columbia case. The *McSherry* case was the equivalent
26 Ontario case, and then there was a case called *Mets*, M-E-T-S, and a number of other
27 cases that were the competing cases across the country. So *McSherry* and *Jones* were the
28 same counsel team, and then *Mets* and a bunch of other cases were a different counsel
29 team, and the Court had to deal with the interplay between these regional and national
30 class proceedings. And if I could just pick up the analysis on page 14, in paragraph 92:
31 (as read)
32
33 There should not be two or more class actions in respect of the
34 same putative class asserting the same cause of action, and one
35 action must be selected.
36
37 So that's a situation where you have two cases in the same jurisdiction covering the same
38 class. And that's the *Vitapharm* test that I took Your Lordship through in the Amcam --
39 it's not Amcam -- I have forgotten the name of the case, the Divisional Court case I took
40 Your Lordship through. Then the Court goes on to say: (as read)
41

1 The commencement of multiple class actions in the same or other
2 jurisdictions may be an abuse of process, and a multiple class
3 action may be stayed as an abuse of process.
4
5 So there is a second ground for a stay articulated there. Then: (as read)
6
7 When counsel have not agreed to consolidate and coordinate their
8 actions, the courts will usually select one for carriage and stay the
9 other actions.
10
11 Then the Court goes on to talk about the powers that the Court has and in paragraph 95,
12 and I'm not going to read this, but it says: (as read)
13
14 The Ontario Legislature did not foresee the situation of the case at
15 bar, now common in Ontario and other provinces, where there are
16 multiple class actions across the country and the prospect of
17 claimants from many provinces being class members.
18
19 So then there's a fairly lengthy discussion of these issues, and I'm just going to draw the
20 Court over, if I could, to page 17, paragraph 101 -- sorry -- paragraph 104 is what I was
21 after: (as read)
22
23 Viewed globally, i.e., from a pan-Canadian perspective, fewer
24 class actions for the same relief may be better in terms of
25 efficiency, judicial economy, and fairness to defendants, but they
26 are not categorically better, because fewer class actions may not be
27 the best way to provide access to justice for the class members of
28 any particular province and the efficiencies of fewer class actions
29 will dissipate if individual issues trials are necessary throughout
30 the country or if different regions provide different remedies and
31 causes of action for a particular wrongdoing.
32
33 My main point here is that the circumstances of each class action
34 will be different, and the courts across the country may be in the
35 best position to decide what is in the best interests of those
36 litigants subject to the particular court's jurisdiction. I will return
37 to this point, which is really about comity between courts, when I
38 discuss the virtues respectively of *Jones* as a national opt-in class
39 action --
40
41 That was a B.C. national opt-in: (as read)

1
2 -- and *McSherry* as a regional opt-out class action, and *Mets* as a
3 national opt-out class action.
4
5 So then moving forward to Heading 4 on page 21: (as read)
6
7 Carriage and Stay Motions as Solutions for the Problematic of
8 Multiple Class Actions:
9
10 In my opinion, the above analysis yields three general conclusions
11 about the problematic of multiple class actions across the country.
12 First, if there are problems with multiple class actions, those
13 problems will be complex problems involving numerous factors,
14 forces, and variables that will have to be balanced to find a
15 solution. Second, the presence of multiple class actions is not
16 always a problem or a serious problem. Third, if multiple class
17 actions for a single wrongdoing are a problem, then the best and
18 perhaps only approach is the one that has already evolved; i.e. to
19 leave it to the courts to use carriage, stay, and certification
20 motions along with developed and developing principles of comity
21 to make decisions about what court is the appropriate venue for a
22 national or multi jurisdictional class proceeding.
23
24 Then paragraph 128: (as read)
25
26 The primary consideration on a class action carriage motion is
27 arriving at a solution that is in the best interests of all putative
28 class members, is fair to the defendants, and consistent with the
29 policy objectives of the *Class Proceedings Act*.
30
31 And then he outlines the test that I took Your Lordship through on 129. And then in
32 130, he says: (as read)
33
34 It is interesting and informative that in its report at para. 3, the
35 Uniform Law Conference of Canada Civil Law Section
36 recommended that in deciding whether a class action in another
37 jurisdiction might be preferable for the resolution of the claims of
38 all or some class members; i.e. in deciding whether to defer a
39 class action in one jurisdiction to another jurisdiction's class
40 action, the courts across the country should consider the list of
41 facts that had been developed for carriage motions --

And then he lists those factors. So that would be where you would have -- you don't have competing provincial class actions, but you have gone national, if I can put it that way. And then in 131 he says: (as read)

> It should be noted that all of the factors identified above are just manifestations of what might be relevant to what is the central question on a carriage motion or stay motion; i.e. what is in the best interests of the putative class members in the particular circumstances of each case.

Then he moves into an application of the law. So my point here is that we are in this multi-pronged jurisdiction of problem-solving: carriage, stay, certification, and the Court is using all of those tools to fashion a solution. (as read)

> Applying the above law to the facts of this case, I grant carriage to *McSherry* --

Which was the Ontario arm of the B.C. *Jones* action: (as read)

> -- and not to *Mets*.

Which was the national Ontario case: (as read)

> I do so because this choice is in his best interests of the class members, is fair to Zimmer, and is consistent with the policy objectives of the *Class Proceedings Act*.

Then he talks about the fact in 133 -- I won't read it -- that the *Jones* case, the B.C. case, was out ahead and that the national case was further behind so that made it easy for him because the B.C. certification process was advanced, and that gets picked up in paragraph 139. It says: (as read)

> Rochon Genova LLP submits that *Mets* --

And that is, again, the national case. (as read)

> -- is to be favoured because it is further advanced than *McSherry* --

Which is the Ontario regional case: (as read)

> -- and it submits that Mrs. McSherry is, in truth, not interested in advancing *McSherry* because of her allegiance and support of the *Jones* action in British Columbia.

So that's the kind of submission that Mr. Merchant is making. He's saying, look, these guys aren't going to press Alberta hard enough because they are deferring to British Columbia, and the Court says: (as read)

> I am not impressed by this submission.
>
> In my opinion, it was quite appropriate in the circumstances of this case for Klein Lyons to commence both *Jones* and *McSherry* and then to focus its attention on *Jones*. In my experience, this approach is not uncommon in class action practice where there are multiple class actions. It is frequently the situation that class actions are commenced in more than one jurisdiction and then class counsel and sometimes consortiums of class counsel agree to drive one of the class actions and park the others. This approach explains why it is common to see a series of consent certifications for settlement purposes involving one national class action and one or two regional class actions.

Then there's a discussion about an earlier Ontario case where the Court had said it's not okay to just park a case and do nothing with it, and Justice Perell in paragraph 143 says although the *Mets* people relied on that case, that's not what's happening because it's not that the Ontario case is being parked, it's that it's being interlocked with the national case.

And then moving on to 146 on page 25: (as read)

> In the circumstances of the case at bar, I do not regard the fact that *Jones* is an opt-in national class action as a reason for awarding carriage to *Mets*. The dangers of Ontario residents being left out of *Jones* are sufficiently addressed by the regional *McSherry*. The interests of Quebec residents are addressed by the regional *Wainberg* or *Brunet*. The interests of British Columbia residents are addressed by *Jones*, and the interests of class members in other provinces can be protected by a robust notice program in *Jones* or perhaps by the class actions that have been commenced in those other provinces.

1 In certifying national class actions, Ontario courts may be taken to
2 be concerned about the rights of residents of other provinces, but
3 in the circumstances of the case at bar, it would be narcissistic and
4 arrogant to think that an Ontario national opt-out class action is
5 better than *Jones* in protecting the class members of other
6 provinces.
7
8 And then in 150: (as read)
9
10 If it is true that some law firms file a class action lawsuit, do
11 nothing with it, and then purport to revive it when settlement talks
12 begin to cash in on the settlement, then the deterrent against the
13 poaching is to earn carriage by advancing the interests of the
14 putative class members and winning the carriage contest. The
15 "no-sweat-no-sweet" principle is already a factor in the calculus of
16 factors the courts may consider.
17
18 And then what he says is: (as read)
19
20 For the above Reasons, I grant carriage to Klein Lyons for the
21 *McSherry* action.
22
23 And what he does is he stays -- sorry -- it's in 152: (as read)
24
25 In all the circumstances, it is in the best interests of class members
26 to grant carriage to Klein Lyons for *McSherry*. I stay *Mets*,
27 *D'anna* and *Ducharme*. I declare that no other action may be
28 commenced in Ontario on behalf of individuals implanted with the
29 Durom Cup with respect to the subject matter of *McSherry* and
30 *Jones* without leave of the court.
31
32 So there is good reason to engage in the carriage analysis. It's one of the important tools
33 that gets used in sorting out which case goes forward and, in this case, it's another
34 profound ground to stay the Merchant action. I would even go so far as to say regardless
35 of all other grounds, on the traditional carriage test, given that there are two Alberta
36 proceedings and given the nature of those two cases and their counsel and the
37 representative plaintiffs, that Merchant proceeding needs to be stayed, and carriage of
38 whatever remains in Alberta, which will be interlocked with the other cases, needs to go
39 to the consortium.
40
41 THE COURT: But the two do not need to be lock-stepped, do

1 they?
2
3 MR. MOGERMAN: They don't need to be lock-stepped, except that
4 what happens is -- let me look back to the relief that's sought in this case, because it may
5 answer the question. What we have is an order -- sorry, I'm back at the first page of the
6 brief. So an order that the action commenced -- so the Merchant action --
7
8 THE COURT: First page of the brief. I am looking at the one
9 filed March 25th.
10
11 MR. MOGERMAN: Correct, it says: (as read)
12
13 Argument of the Applicants, Introduction.
14
15 This is an application brought by Macaronies.
16
17 THE COURT: Yes. Yes.
18
19 MR. MOGERMAN: Yeah. So 1(a) says: (as read)
20
21 Stay the Merchant action until the certification action in the
22 consortium Alberta action is decided.
23
24 And then there are grounds. Then it says: (as read)
25
26 An order that the law firm be granted carriage.
27
28 Then it says: (as read)
29
30 An order that the commencement of further class proceedings in
31 the Province of Alberta in respect of the credit card claim to be
32 prohibited.
33
34 Then: (as read)
35
36 An order that Macaronies shall be at liberty to apply for a
37 continuation of the order staying the Merchant Law Group action
38 if certification is granted in the consortium Alberta action.
39
40 An order that if certification is not granted in the consortium
41 Alberta action, the stay of the Merchant action and the prohibition

1 is lifted.
2
3 An order that the consortium plaintiffs shall report to this Court
4 regularly on the status of the British Columbia action and the
5 Ontario action and no less frequency than reported to in the
6 Ontario Superior Court and the Quebec Court.
7
8 Costs and other relief.
9
10 So what's happening there is that there is a period of time in which this case is effectively
11 at a standstill, that the Court knows who it's going to report to, the class members know
12 who is in charge of the Alberta case. Steps can only be taken in one of the cases.
13
14 THE COURT: No, but I guess the point I am making, not the
15 point I am going to decide in this way, but you raised carriage. You put carriage at risk.
16 I can stay the Alberta action, the Merchant action, and still make the Merchant Law
17 Group the carriage counsel.
18
19 MR. MOGERMAN: In theory, you could. It would be an error on
20 the principles of carriage, but in theory, yeah.
21
22 THE COURT: I understand your submissions, but --
23
24 MR. MOGERMAN: But in theory, yeah. In theory.
25
26 THE COURT: Yes. So they are not locked-stepped.
27
28 MR. MOGERMAN: That's correct. Well, it would be an interesting
29 decision to stay an action as an abuse of process, because that's the ground -- that's the
30 non-carriage stay ground. But to give to the counsel who commenced that abuse of
31 process carriage over the action that had been stayed because it was an abuse of process --
32
33 THE COURT: Well, the carriage would be deferred --
34
35 MR. MOGERMAN: Right.
36
37 THE COURT: -- under that scenario.
38
39 MR. MOGERMAN: Right. In theory -- and this is where Your
40 Lordship started, and I have reframed as much as I intend to, I have sort of pushed back
41 on it as much, but in theory -- moving back to the theory, you could say I stay both of

1 these actions. I want reports from British Columbia. The problem is, is that you would
2 create the issue of, well, reports from whom, who is in charge of the Alberta case. So if
3 a class member in Alberta was to say, well, what's happening, who do I contact, who is
4 in charge of this case, you have got those issues. And so you could, in a sense, put the
5 two cases on ice, but you have to appoint some counsel who is counsel for the case
6 until --
7
8 THE COURT: Well, why?
9
10 MR. MOGERMAN: Sorry?
11
12 THE COURT: Why? Why do I not just say they are both
13 stayed and the consortium will report as to what is happening in the other jurisdictions,
14 and when B.C. certifies or does not certify or does whatever B.C. does, then we will talk
15 about it again?
16
17 MR. MOGERMAN: You could do that. I'm not saying it's not
18 possible to do that. I'm just saying it's not the best basis on which to proceed. It's not
19 the most comprehensive and -- solid is the wrong word -- comprehensive is the right
20 word -- it is not the most comprehensive analysis, and it leaves some gaps in who is in
21 charge in Alberta because there are two cases out there. But it is --
22
23 THE COURT: But I guess it raises the issue, then, do you
24 have a stay application in Saskatchewan?
25
26 MR. MOGERMAN: It appears that if Mr. Merchant is moving, then
27 we will have a stay application in Saskatchewan. And that is the problem of repeated
28 multi-jurisdictional proceedings that are overlapping and interlocking, and it's why, at
29 some point, the Court needs to put its foot down on these type of pile-on class
30 proceedings in this manner, and I would say by this firm. And I say that based on what
31 Courts have said about it.
32
33 So subject to other carriage questions, that was going to move me -- because I'm now
34 going to move into the abuse of process cases and the sort of stay on other grounds, if I
35 can put it that way. And before I got there, I wanted to hit the Affidavits, because there
36 is going to be a question of, well, what evidence are we relying on in both carriage and
37 the non-carriage stay. This argument was raised by Mr. Merchant I think the night before
38 last, but yesterday was the first day I was able to turn my mind to it.
39
40 The first point that arises out of this argument is a point that arises out of many of the
41 cases. It's out of order. We actually set a schedule that followed our last appearance in

1 front of this Court, and that schedule had specific dates for when the moving parties
2 would file their carriage and supporting Affidavits, when Mr. Merchant would file his
3 material, when there would be reply Affidavits, when there would be cross-examination
4 on Affidavits, and that process was to take place between January 18th and February 25th.
5 Then there was also time set for serving briefs of authorities by the moving parties, by the
6 respondent, and reply. So we actually created a structure for all of this. There was no
7 cross-examination of Ms. Brasil, so her evidence was not put in issue. Mr. Merchant had
8 the opportunity to do that, there was a schedule for it, but he didn't put it in issue.
9 Instead, he shows up with a bunch of last-minute cases and last-minute arguments, and
10 that's what creates, I'm going to say, chaos specific to Mr. Merchant. So in that sense,
11 it's just out of order.
12
13 But what emerged when we turned our mind to the issue is that it's a hopeless position
14 that he's taking in any event. It's a position that has been specifically addressed and
15 rejected by a number of Courts.
16
17 THE COURT: Well, I am not going to have you refute his
18 application.
19
20 MR. MOGERMAN: There is no application to start with.
21
22 THE COURT: Well, he has given notice that he wishes to
23 apply to strike Affidavits and I should hear him first, if that is going to be the case, and
24 then hear you in response.
25
26 MR. MOGERMAN: That's fine.
27
28 THE COURT: You do not need to set up his arguments and
29 then knock them down. He can set up his own arguments and you can knock them down,
30 or try to, in any event.
31
32 MR. MOGERMAN: That works for me, My Lord. So then what I
33 would do is draw the Court, if I could, into the Vlahos Affidavit, which is in Volume 2.
34 I don't think you have volumes in your record.
35
36 THE COURT: I have volumes, but I do not know that they are
37 organized.
38
39 MR. MOGERMAN: So this is the Chris -- and I hope I'm saying his
40 name right -- Vlahos Affidavit.
41

1 THE COURT: I have it.
2
3 MR. MOGERMAN: And unlike Mr. Merchant, we did raise
4 objections to this Affidavit in our written argument, and I wanted to take you through the
5 Affidavit for that purpose and also for the purpose of explaining how it goes to the
6 carriage and stay question.
7
8 So in paragraph 1, you see Mr. Vlahos say that -- it's a standard paragraph. It's on
9 information and belief: (as read)
10
11 I have stated the source of my information and belief.
12
13 In paragraph 2, he then says: (as read)
14
15 By swearing this Affidavit, neither I nor the Alberta company
16 intend to and do not waive solicitor and client litigation or any
17 other privilege.
18
19 And then in paragraph 7, he says: (as read)
20
21 I have spoken to numerous lawyers and articling students working
22 at Merchant Law Group about the matter or other matters, which I
23 refer herein to.
24
25 Then he says: (as read)
26
27 I am informed by counsel --
28
29 THE COURT: I am sorry, paragraph 7?
30
31 MR. MOGERMAN: I'm in paragraph 9. That's my mistake.
32
33 THE COURT: Yes, okay.
34
35 MR. MOGERMAN: He says: (as read)
36
37 Although I have spoken to numerous lawyers and articling
38 students working at Merchant Law Group, when I refer to I'm
39 informed by counsel, I mean Messrs. Amery, Brar, Merchant,
40 Merchant and Ms. Khuu.
41

1 So just as a starting proposition, you have set up an Affidavit that's entirely inadmissible,
2 because what you have said is I'm going to state my source of belief, I'm not waiving
3 any privilege, and my source of belief is one of possibly five lawyers. So it's just not an
4 admissible Affidavit. It doesn't work in any way.
5
6 Then what happens, starting immediately thereafter on paragraph 10, and it happens many,
7 many, many times through this Affidavit, is the evidence is simply based on this "I'm
8 informed by counsel," 10, paragraph 15, paragraph 16, paragraph 17, 18, 19, 20 and so on
9 and so on and so on. The problem with that, and it's picked up -- I won't use this when I
10 respond to Mr. Merchant's submission, but it's a case called *Robe v. Canada*. It's picked
11 up in the *Robe* decision at paragraph 11 and it was another case that involved
12 Mr. Merchant. It was Justice T. McMahon, who was the Judge, and he says this in
13 paragraph 11: (as read)
14
15 Had a Merchant lawyer taken the affidavit rather than obliging an
16 employee to do so, he or she would have been subject to
17 cross-examination and could not have properly argued the motion
18 on his or her own behalf. In fact, the secretary was
19 cross-examined on her affidavit. The device of using a legal
20 secretary to depose to contentious facts or to relay information
21 received from a lawyer is to be discouraged. In fact it is seldom
22 done by competent and experienced lawyers in Alberta. The
23 usefulness of this affidavit is thus compromised.
24
25 So you have a situation where, as a starting proposition, you have undercut the basic
26 value of the Affidavit. It's essentially meaningless.
27
28 That, then, gets picked up in a case called *Joel*, which is at Tab 85 in Volume 3 of the
29 authorities, and this was another Merchant carriage case that involved the pet food
30 contamination case. It's called *Joel v. Menu Foods* and it's just --
31
32 THE COURT: All I have got is a memorandum.
33
34 MR. MOGERMAN: Do you have Tab 85 of the authorities?
35
36 THE COURT: The case is at 86, yes.
37
38 MR. MOGERMAN: There are two of them, unfortunately, so the
39 one deals with the timing of the carriage motion. That's 86, I think. It depends on
40 your --
41

1 THE COURT: All I have got is a Memorandum to Legal
2 Counsel from the Supreme Court Judgment Office showing some errata.
3
4 MR. MOGERMAN: Okay. That is 1248. There's one that should
5 be in the material that's at -- let me just see -- do you have any other *Joels* in your
6 material maybe after Tab 87? I'm looking for the one that is --
7
8 THE COURT: What happened is in 85, all I got is the errata,
9 not the case.
10
11 MR. MOGERMAN: Right. So then what I'm going to do, My Lord,
12 is I'm going to read to you, not with you, and I'm going to give you the citation for the
13 case. The citation I'm looking at is 2007 BCSC 1482, and it's a decision of Mr. Justice
14 Hinkson on carriage in the pet food contamination case, and it sets up and knocks down
15 many of the arguments that Mr. Merchant makes in his material, and in paragraph 44, it
16 starts saying this. It says: (as read)
17
18 Susil Chand, one of the individuals who wish to join the B.C.
19 class proposed in the Ewasew action --
20
21 And that was the Merchant action. (as read)
22
23 -- swore an affidavit dated July 6, 2007. The Chand affidavit
24 deposed that it was disclosed by an unspecified MLG counsel that
25 "22 MLG lawyers have performed work on the Menu Foods file".
26
27 The Chand affidavit further deposed (again by reference only to
28 MLG counsel, without specifying who) that: --
29
30 And then it sets out a bunch of stuff. Then moving forward to paragraph 86, you will
31 find this in paragraph 86 and 87: (as read)
32
33 The evidence of preparation offered by counsel in the Ewasew
34 action from Susil Chand is entirely hearsay, and the Chand
35 affidavit seems an odd way for counsel to establish a state of
36 readiness. The best evidence of the MLG's state of preparation
37 would preferably have come from a member of that firm.
38
39 So it's the same point that Justice McMahon was making. You can't try and feed your
40 evidence in through a witness who can't be cross-examined. (as read)
41

1 Chand's evidence is so vague and general that assuming, without
2 deciding that it is admissible on the point, I have concluded that
3 this factor favours Branch MacMaster.
4
5 And then what happens is in analyzing whether Chand is an appropriate representative
6 plaintiff for carriage reasons, and this is in paragraph 89 to 92, the Court says: (as read)
7
8 At first blush, this factor seems evenly weighted --
9
10 And then the Court says: (as read)
11
12 I have however come to the conclusion that the "involvement of
13 the proposed plaintiffs" must include their suitability as witnesses
14 in the event that the case proceeds to examinations for discovery.
15
16 The proposed representative plaintiff must satisfy the court that
17 they "would adequately and fairly the class.
18
19 And then in paragraph 92 it says: (as read)
20
21 Regrettably, Ms. Ewasew has potentially damaged her own
22 credibility by swearing in her affidavit that her claim and the
23 claim of the proposed B.C. class members should be determined
24 only in British Columbia.
25
26 So that's something that this representative plaintiff also did. And then: (as read)
27
28 Before the date of this affidavit, Ms. Ewasew had apparently given
29 her counsel instructions to commence proceedings in both Ontario
30 and Saskatchewan and name her as one of the proposed
31 representative plaintiffs.
32
33 So my point there, My Lord, is that this Affidavit doesn't have any weight, and it goes
34 further than that. It actually weighs against Mr. Merchant. This Affidavit goes further, at
35 least than what's on the surface of the Affidavit discussed in *Joel* because what happens,
36 and you can see this -- let me see if I can find a good example of it. There's a bunch of
37 them. If I could take you to page 12, so you get in paragraph 54: (as read)
38
39 I'm concerned that 1023926 Alberta Ltd.'s right to access to the
40 Court of Queen's Bench of Alberta is being curtailed by a
41 consortium of law firms who have come to an agreement with the

1 defendants whereby they maintain their right to advance their
2 interests in provinces where they have filed claims, such as
3 Ontario, and then act in concert to block attempts to certify similar
4 actions in provinces where a plaintiff files a similar action and
5 retains a law firm not affiliated with the consortium.
6
7 So that's wrong, but also it's evidence of what? It's speculation and conjecture. (as read)
8
9 1023926 Alberta does not want to be represented by law firms for
10 the within matter who are attempting to deny Alberta residents
11 access to their own courts --
12
13 Which is precisely what Mr. Merchant did when he filed his Saskatchewan case on behalf
14 of the Alberta residents. Then: (as read)
15
16 I'm informed by counsel and verily believe that the consortium
17 has entered into a consulting relationship with lead counsel in the
18 United states credit card proceeding.
19
20 Then this statement: (as read)
21
22 That leads me to the belief that the consortium will be satisfied
23 with the same conclusion of the Canadian proceedings as a
24 settlement in the United States.
25
26 So I mean, that's a bizarre statement. He then goes into an analysis of a $7.5 billion U.S.
27 settlement in paragraphs 58 and onward. He comes to a conclusion on what he thinks the
28 proper result is for the U.S. Court in a U.S. case that is hugely complicated. So he
29 purports to come to a conclusion. You can see at the bottom of paragraph 58 on page 13:
30 (as read)
31
32 I believe all these businesses and Wal-Mart oppose the U.S.
33 settlement for the same reasons as I would if I were in the United
34 States. I also oppose what appears to be the consortium approach
35 to certify to settle --
36
37 Again, I don't know where this is. It's sort of way out there: (as read)
38
39 -- that will not end the societal damages that are occurring due to
40 the defendants' unlawful practices, and I believe that the Merchant
41 Law Group and Tony Merchant are very determined in ending the

1 societal damage that is occurring.
2
3 Then, as I said, there's this lengthy discussion that includes paragraph 62: (as read)
4
5 I am suspicious of the fact that the defendants so vehemently
6 support the consortium who are now consulting with U.S. counsel,
7 who is a key participant in the above-mentioned U.S. settlement
8 negotiations.
9
10 And then it goes down and he says a few lines down: (as read)
11
12 And I am suspicious that the defendants prefer to deal with the
13 consortium in B.C. in order to make a deal or settlement along the
14 same lines as the settlement proposed in the U.S. while preserving
15 their options in other provincial jurisdictions engaging in delay
16 tactics with regard to allegations in other jurisdictions and
17 ultimately, if successful, never having to address their
18 wrongdoings at a common issues trial in Alberta.
19
20 I mean, that is out there. It's not the kind of evidence that an appropriate representative
21 plaintiff can give. It is conjecture on top of conjecture. It reflects poorly both on the
22 ability of counsel to do a case like this, but also on the ability of this person to be a
23 representative plaintiff in any case.
24
25 I mean, ultimately, if one were to attempt to settle the Canadian cases, they would do it
26 on the basis of Canadian law and Canadian facts and Canadian circumstances and
27 Canadian decisions. This plaintiff purports to have figured it all out based on his read of
28 a $7 billion U.S. settlement. It's out of bounds.
29
30 My Lord, that takes me to the abuse of process submission, which is in the written brief
31 at paragraph 82 and, again, I have covered off much of this in answering your questions,
32 and so I will move relatively quickly through it.
33
34 THE COURT: So abuse of process, just to get an
35 understanding, can be many things in many cases. In some cases, abuse of process is
36 akin to frivolous and vexatious. You or somebody makes reference to the *Onischuk* case,
37 if I am pronouncing that correctly --
38
39 MR. MOGERMAN: Right.
40
41 THE COURT: -- in Alberta, which is a different case, but the

1 abuse of process here means that the process chosen is an unwise process in the context
2 of the greater good as opposed to an abuse of process which is akin to vexatiousness,
3 frivolousness and the like.
4
5 MR. MOGERMAN: Unwise, and one could say vexatious in the
6 sense that it is unnecessary. It was a filing that was unnecessary for the purpose of
7 protecting Alberta residents who are already protected in a --
8
9 THE COURT: Well, your friend says they may not be
10 protected for limitation periods.
11
12 MR. MOGERMAN: And so on the limitation point, they either are,
13 in which case the Ontario action froze those limitations, or the limitation period has been
14 tolled by the filing of my friend's case and there would be no issue in granting -- if
15 carriage is granted to the consortium case, there's no difference in the limitation question.
16 But I take that point. It's also --
17
18 THE COURT: Well, it is a different thing to file an action to
19 maintain and to protect the limitation period and then to be active in the certification,
20 which is what you are --
21
22 MR. MOGERMAN: That's correct.
23
24 THE COURT: -- dealing with.
25
26 MR. MOGERMAN: And I think that the --
27
28 THE COURT: There is no motion to strike the actions --
29
30 MR. MOGERMAN: Correct.
31
32 THE COURT: -- so it still has its effect of to the extent that
33 there is a limitation issue, it stops that problem.
34
35 MR. MOGERMAN: Correct. It's really the *Englund* case that
36 provides a foundation for the abuse of process claim, and you can see that in paragraph
37 89 of the brief. Here we're talking about the Saskatchewan Court of Appeal case. It
38 says: (as read)
39
40 The Court of Appeal found that even though the actions were filed
41 by different plaintiffs in different jurisdictions, multiple actions

1 could be an abuse of process in cases where "there is no
2 suggestion that multiple claims serve any legitimate interests of the
3 plaintiffs."
4
5 And then this is quite unusual: (as read)
6
7 We would not suggest that it is always or necessarily an abuse of
8 process for a plaintiff to launch claims against the same defendant
9 and arising out of the same subject matter in more than one
10 jurisdiction. There will sometimes be entirely valid reasons for
11 such an approach. But whereas here, there is no suggestion that
12 multiple claims serve any legitimate interests of the plaintiffs. The
13 complexion of things change. In such circumstances, the Courts
14 are being used in a manner which serves no proper purpose or
15 which is vexatious or oppressive.
16
17 And I take Your Lordship's point that if there is some uncertainty about the tolling of a
18 limitation period in a national class, if there's uncertainty in that, that you can see that
19 there would be some legitimacy to filing a case for that purpose. But then in litigating
20 overlapping claims against the same defendants on behalf of the same class -- so take
21 Mr. Merchant's Saskatchewan and Alberta claims -- that would plainly be an abuse of
22 process on the *Englund* test. (as read)
23
24 A similar approach --
25
26 And I'm in paragraph 91 here. (as read)
27
28 -- was adopted by the Court in *Duzan v. GlaxoSmithKline* in
29 which Mr. Merchant was counsel for the plaintiff in actions filed
30 in Ontario, Saskatchewan and British Columbia. Mr. Merchant
31 had previously moved the active litigation from Ontario to
32 Saskatchewan only to then propose to move the active file to
33 British Columbia. After a thorough review of the Saskatchewan
34 Court of Appeal's decision in *Englund*, the Court concluded that
35 allowing the Saskatchewan action should be unconditionally stayed
36 as it constituted an abuse of process. In the course of reaching
37 this conclusion, the Court noted that multi-jurisdictional game of
38 class action whack-a-mole would, in itself, be a sufficient basis for
39 an unconditional stay on the basis of abuse of process.
40
41 The *Yee v. Aurelian Resources* case I think is an interesting case, because there --

1
2 THE COURT: I am going to bone up on my whack-a-mole
3 rules.
4
5 MR. MOGERMAN: It's a fun game. I play it with my son and
6 daughter. The mole pops up at some point. You have got to knock it down.
7
8 THE COURT: Yes, we call those opti-litigants in Alberta.
9
10 MR. MOGERMAN: The *Yee v. Aurelian Resources* case, My Lord,
11 was a case in which the Court declined to stay an Alberta case, and the reason for that
12 was the Court was not satisfied that the Ontario case would properly look after the
13 Alberta residents. What was interesting -- there's a bunch of analysis in the brief that
14 distinguishes it, but what's interesting about that case is that ultimately what happened is
15 that, by agreement, the Alberta action was stayed and the case was litigated on a national
16 basis out of Ontario. So Ontario was the proper forum for litigation on a national basis,
17 and the parties came to that conclusion, and the case doesn't help Mr. Merchant for the
18 reasons set out in the brief.
19
20 So what I'm thinking about right now before I conclude is the question of whether there's
21 some middle ground in the world of a stay -- which case, My Lord, are we after?
22
23 THE COURT: No, that is fine.
24
25 MR. MOGERMAN: Whether there's some middle ground in the
26 world of a stay between an abuse of process and a stay based on carriage where the Court
27 can say, look, I just want to -- I want to fairly and properly manage my process. I have
28 an inherent jurisdiction to do that. I have interlocking national and regional class actions.
29 The best thing to do with this case is to stay the Merchant action, to stay the consortium
30 action on the same basis as they are stayed in Ontario, and to have the consortium report
31 to me until we have a certification decision out of Mr. Justice Bauman, in which case all
32 of the parties can come back to me and address the case. From a jurisdiction point of
33 view, I think the Court has that jurisdiction, and the *McSherry* case provides more than
34 enough reference to that, and our brief provides a bunch of background jurisdiction for
35 that.
36
37 My point is simply that I don't think that is the best or proper outcome in the
38 circumstances. I think there are good and valid reasons to engage in the carriage analysis,
39 to bring some clarity to the situation where Mr. Merchant is filing his pile-on case and to
40 interlock Alberta on a rational basis with rational counsel and a rational representative
41 plaintiff.

1
2 So subject to your questions, those were my submissions.
3
4 THE COURT: Well, let me just make an observation. You
5 may or may not want to comment, but on the carriage side, if I do not make a carriage
6 decision and you go on to B.C. and are successful in a certification that has legs in other
7 jurisdictions, including Alberta, that gives you a higher basis of argument that you are the
8 right consortium for carriage. On the other hand, if you fall on your nose in B.C., maybe
9 somebody else needs a shot at it. So that is kind of the down side --
10
11 MR. MOGERMAN: Right.
12
13 THE COURT: -- or the flip side of making a decision now --
14
15 MR. MOGERMAN: Right.
16
17 THE COURT: -- verus making a decision later.
18
19 MR. MOGERMAN: Yeah. I would have sort of two responses to
20 that. The first is, following up on what Justice Perell said in *McSherry*, this isn't a close
21 call. So it's not a situation where you sort of have two firms and two cases that are close.
22 You have a copycat firm who doesn't really understand the case. You have a
23 representative plaintiff whose Affidavit is meaningless. You have got -- on every aspect
24 of the test, it heavily weighs in favour of the consortium. So the Court doesn't need to
25 wait and see. And this is looping back to a point that I made before, is that I do think
26 that there is some mischief in not having counsel who have carriage of the Alberta case
27 pending the next step. So if there was a halfway house, it would be a halfway house in
28 which counsel are appointed in Alberta and have carriage until the next step and that you
29 can revisit carriage at the next step. But I do think that a carriage analysis is a firm
30 foundation and provides extra ability for the Court to have the kind of flexibility that it
31 needs to manage the cases ala *McSherry*.
32
33 THE COURT: Well, it follows, I guess, if there is that stay
34 motion, that it would be the consortium that would be advising about what is happening
35 in British Columbia, and to the extent anything is happening, in Ontario. That doe not
36 necessarily mean carriage --
37
38 MR. MOGERMAN: Right.
39
40 THE COURT: -- it means advice. I mean, if I were granting
41 stay, I would not be asking Mr. Merchant to report on what is happening in B.C. where

1 he is not present.
2
3 MR. MOGERMAN: Right.
4
5 THE COURT: Okay. Then after lunch, who is next up?
6
7 MS. KAY: I guess I'm in your hands, My Lord.
8 Mr. Mogerman proposed a method -- I'm approaching this where I would go next. If you
9 want to hear from --
10
11 THE COURT: For the record, counsel's name?
12
13 MS. KAY: I'm sorry, Katherine Kay.
14
15 THE COURT: Yes.
16
17 MS. KAY: So in your hands. If you want to complete the
18 application brought by the consortium plaintiffs and then hear from us for the defendants,
19 happy to do that. But if you would like me on behalf of the defendants to make
20 submissions before Mr. Merchant speaks, happy to do that as well.
21
22 THE COURT: Yes, I think we should get all the submissions
23 before we hear from Mr. Merchant and -- no, that is fine. We will do that.
24
25 I have another proceeding at 1:00, which may or may not go a long time, I do not know.
26 So let us come back at two, but be patient with me if I am a few minutes late.
27 Mr. Merchant?
28
29 MR. MERCHANT: My Lord, I was only going to say, and I'm sure
30 Your Lordship is conscious of it, but to some extent, we are likely to need as much time
31 as collectively everybody else takes, and I'm sure my colleagues have organized
32 themselves not to have each of the defendants say the same things over and over again.
33
34 THE COURT: I would presume.
35
36 MS. KAY: If it helps everybody, My Lord, I think the
37 intention is that I would make submissions on behalf of the defendants. I doubt that any
38 of my colleagues on the defence side would have additional submissions.
39
40 THE COURT: Okay. So 2:00 or so soon thereafter as you
41 may be heard.

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3 PROCEEDINGS ADJOURNED UNTIL 2:00 P.M.
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1 **Certificate of Record**
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3 I, Natalija Varevac, certify that this recording is the record made of the evidence in the
4 proceedings in the Court of Queen's Bench held in Courtroom B201 at Edmonton, Alberta
5 on the 3rd day of April 2013, and I, Natalija Varevac was the court official in the charge
6 of the sound recording machine during the proceedings.
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1 **Certificate of Transcript**
2
3 I, Penny Vincent, certify that
4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript of
7 the contents of the record, and
8
9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in the transcript.
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13 Digitally Certified: 2013-04-10 13:40:52
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40 Digital Fingerprint: 833b185e7d034df4e68e45a878ffdb0fb295ba8ca1ef6de8a3e0ea8fbd94fd6d
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta
2 ———
3 April 3, 2013 Afternoon Session
4
5 The Honourable Court of Queen's Bench
6 Associate Chief Justice Rooke of Alberta
7
8 R. Mogerman and J.D. Winstanley For Macaronies Hair Club and Laser Centre
9 Inc., Operating as Fuze Salon
10 E.F.A. Merchant For 1023926 Alberta Ltd.
11 G.K. Neill For 1023926 Alberta Ltd.
12 J.W. Kadavil For 1023926 Alberta Ltd.
13 M.J. LaFleche For Bank of America
14 K.L. Kay For Canadian Imperial Bank of Commerce
15 B.W. Dixon For Bank of Nova Scotia
16 C.E. Hunter For Capital One Financial Corporation
17 M.D. Adlem For Citigroup Inc.
18 C. Chatelain For Federation des Caisses Desjardins du
19 Quebec
20 J.B. Simpson For MasterCard International Incorporated
21 J.B. Musgrove For MasterCard International Incorporated
22 A.G. Kuntz For National Bank of Canada Inc.
23 S.S. Smyth For Toronto-Dominion Bank
24 J.S. Yates For Toronto-Dominion Bank
25 D.T. Neave For Visa Canada Corporation
26 N. Varevac Court Clerk
27 ———
28
29 **Discussion**
30
31 THE COURT: Please be seated. So, Ms. Kay, as I understand
32 your position, you say we have got a grudge match with the consortium and its client in
33 BC and we are being persecuted by other plaintiffs in Ontario and Quebec and we agreed
34 to duke it out at the O.K. Corral in Vancouver and the other people held down their arms
35 and along comes what Mr. Mogerman called Tony-come-lately and wants to join the fray;
36 and not only has he come lately, he has done so in two provinces. And on the more
37 serious side, you are saying there is a forum, there is a process that has been endorsed by
38 those three provinces with the corporation of the judges to have this proceed in an orderly
39 fashion through BC where the risks to the plaintiff of costs are lower, and this new action
40 that adds nothing from a certification perspective. It may add something from a limitation
41 perspective.

1
2 So the total process is an abuse of the principle of duplicate procedures, it does not
3 provide any benefit, and it should be stayed while the order of proceedings has been
4 agreed to by the parties. Is it as simple as that?
5
6 MS. KAY: Yes, it is.
7
8 THE COURT: Okay. What do you have to add?
9
10 MS. KAY: Well, if you agree with that, probably nothing.
11 If --
12
13 THE COURT: I will take that.
14
15 MS. KAY: Okay.
16
17 THE COURT: No. Go ahead.
18
19 **Submissions by Ms. Kay (Stay)**
20
21 MS. KAY: No, I'm good with that. If you're good with
22 that, I'm good with that.
23
24 Look, in essence the defendants' interests is the same interests that I say, with respect, the
25 Court would have and all the courts across Canada have in dealing with these matters, and
26 that is how can we meet the objectives of the various class proceedings legislation of
27 judicial economy and manageability? And, yes, we are defendants, but we also have
28 some rights in connection with this, and a practise has developed of corporation between
29 counsel who are on the plaintiffs' side and with the defendants to deal with these
30 multi-jurisdictional class actions in --
31
32 THE COURT: On the cooperation on the procedure.
33
34 MS. KAY: Right. In an orderly, efficient, cost-effective
35 way that, as I say, respects the rights of the defendants, is fair to all of the class members,
36 and is fair and appropriate from a resource perspective for the courts. And that's the
37 track that we were on and are on with the consortium plaintiffs in the three provinces
38 where the cases were original commenced, and that's a path we were on with the express
39 approval of the judges in the three provinces where the cases were originally commenced.
40 And you've heard from Mr. Mogerman today and seen in the material that there's a
41 regular reporting and oversight regime with those courts where counsel to the consortium

1 plaintiffs report on what's going on in each of the proceedings, and there is oversight and
2 case management, if you will, from all three of the courts with the ability of the courts to
3 step in if there are issues that need to be addressed.
4
5 And the proposal here by the consortium plaintiffs is to loop Alberta into that process, to
6 use Mr. Mogerman's word, I think, to interlock it with the rest of the process. And in the
7 view of the defendants, that's entirely appropriate and that's fair for the defendants and is
8 the course, with respect, that we say this Court should adopt.
9
10 THE COURT: Okay.
11
12 MS. KAY: And it's all with a view, My Lord, to avoiding
13 the sort of mischief that was identified by the Canadian Bar Association and described in
14 their report of the task force on class actions.
15
16 And if you have, Sir, our brief. It's fairly thin. This is the --
17
18 THE COURT: Thin, but every page worth its weight in gold,
19 right?
20
21 MS. KAY: Without a doubt. If I could turn you to the
22 paragraph 31.
23
24 THE COURT: Yes?
25
26 MS. KAY: The report is also an exhibit to the affidavit that
27 was filed on behalf of the defendants, but it's easier to turn it up here.
28
29 So reading then from the report of the CBA task force, it says:
30
31 Overlapping, multi-jurisdictional (class actions, class actions
32 commenced in more than one jurisdiction, ostensibly covering
33 extra-jurisdictional claimants) impede access to justice. They
34 create confusion for members of the public who may be
35 presumptively included in more than one class action and subject
36 to conflicting court judgments. They also create uncertainly as to
37 the size and composition of class membership in a class action,
38 thereby increasing litigation costs, jeopardizing the viability of
39 existing class actions, and magnifying the risk to law firms
40 litigating such cases. They dissipate court resources, as different
41 courts in different jurisdictions might hear and issue decisions on

1 the same set of facts involving the same claimants. The public,
2 the judiciary, and litigation bar alike are frustrated by the existing
3 system.
4
5 And so the way to deal with that, My Lord, is through the kind of cooperation from a
6 procedural perspective that we see in this case between the consortium plaintiffs and the
7 defendants. And the kind of cooperation that Justice Perell referred to in that --
8 McSheedy, is it -- decision that Mr. Mogerman took -- *McSherry,* the decision that
9 Mr. Mogerman took you to this morning.
10
11 So it's a bit of a mess. It's a bit of a mess, I would say, for constitutional reasons, and
12 I'm not sure there's a fix to it on a national basis that would be imposed. Instead, we --
13 those who practise in this space and the judges who decide cases in this space -- need to
14 figure out a way to manage these things in an orderly way that avoids the mischief
15 identified by the CBA and certainly by others, and that shows comity between courts and
16 a careful analysis and recognition by each court of the stage that a particular action is at
17 in another court and what would make the most sense for the case overall.
18
19 And again that's what, in my submission, was being achieved and continues to be
20 achieved by the cooperation procedurally between the consortium plaintiffs and the
21 defendants. And then Mr. Merchant comes along and starts what appears to be a plainly
22 opportunistic action, first in Saskatchewan and the material indicates that he started it
23 right on the heels of U.S. media reports about the U.S. settlement, the same U.S.
24 settlement that his affiant trashes, and that proceeding in Saskatchewan gets started about
25 a year and a half after the consortium plaintiffs, the first of the consortium plaintiff action
26 started. And then a day after starting the Saskatchewan proceeding, he starts within
27 proceeding here in Alberta. And you have heard this before, all he did, in essence, was to
28 copy the claim from the consortium plaintiffs down to the typos.
29
30 So we are -- I forget the expression you used, but we have a scorched-earth battle on
31 certification in British Columbia scheduled to start in 2-and-a-half weeks before Chief
32 Justice Bauman. As Mr. Mogerman says, it's almost completely briefed -- although we
33 have a factum due any day now that we're working on -- and we have 2 weeks of court
34 time set aside to deal with this very complex case. And Mr. Merchant, in essence, wants
35 to ignore all of that and forge ahead, ignoring not only the cooperation between the
36 consortium plaintiffs and the defendants, but really ignoring the judicial coordination that
37 we've all been operating under. And in the respectful submission of the defendants, that's
38 not fair to the defendants, and it's not fair to this Court in the sense that we have a case
39 that is ready to go before a judge who has been case managing very activity for months,
40 and we should be awaiting the outcome of Chief Justice Bauman's determination on that
41 certification application, and the defendants should not be in a position where they need to

1 fight on two fronts at once in respect of the very same matter.
2
3 THE COURT: Okay.
4
5 MS. KAY: So the defendants seek a -- the relief sought by
6 the defendants is a bit different than the relief sought by Mr. Mogerman -- or the
7 consortium plaintiffs, I should say. At the end of the day, I'm not sure how much of a
8 distinction there is, and you have mused about what might be another way to come at it,
9 and obviously you're going to do what you're going to do, but to be clear, what the
10 defendants say is that Mr. Merchant's action, the numbered company action, should be
11 stayed effectively permanently because it is duplicative and an abuse of process, and I'll
12 come back to that point.
13
14 And we've also sought an order that no steps be taken in connection with any certification
15 application in this province until after Chief Justice Bauman rules in the British Columbia
16 case and then we would come back to you after that to address what would happen next.
17
18 THE COURT: What about the Macaronies action?
19
20 MS. KAY: So that's where the Macaronies action would in,
21 and this goes, My Lord, to the interplay that you and Mr. Mogerman had regarding the
22 carriage point because what -- the way we see it, Mr. Merchant's action should be stayed,
23 period. The Macaronies action can be formally stayed or informally stayed on the same
24 basis, for example, that Ontario has it. So Justice Horkins hasn't issued a formal stay
25 order in Ontario. She has said I am content that we hold the Ontario proceeding down
26 pending developments in British Columbia, and we report to her regularly and, as I say,
27 she has an active ongoing oversight role.
28
29 So to me, whether you issue a formal -- if you were to issue a formal order staying the
30 Macaronies proceeding, that's one option open to you, but I think if -- provided that
31 Mr. Merchant's action is stayed, then if we had the same understanding, the Court had the
32 same understanding with respect to the status of the Macaronies action in this province as
33 exists in Ontario, for example -- and exists in Quebec, although in Quebec there's a
34 formal stay order -- then we would be where we need to be.
35
36 And that's the approach the consortium plaintiffs would say. That's consistent with the
37 approach they've taken to the other cases, and in this country where they have said let's
38 do the battle first in British Columbia, see what happens, and then go from there, but
39 we're not going to battle on several fronts at the same time. And the defendants'
40 submission is that that's a sensible approach, which, as I say, meets the objectives of the
41 *Class Proceedings Act* and avoids the kind of mischief that we've been talking about.

1
2 Now on the question of staying the Merchant action, the law says, in essence, it's an
3 abuse of process to commence two proceedings that are the same, and the Court in
4 deciding whether or not two proceedings are the same, the Court looks at the substance of
5 the action and not the form. So, for example, the fact that there's a different
6 representative plaintiff is not the point. The point is what exactly is being claimed, and
7 this is developed in the argument of the consortium plaintiffs as well as in our brief.
8
9 I just wanted to take you briefly, if I might, to a couple of passages from the cases on this
10 point. The first is in volume two of the joint book of authorities at tab 47; tab 47, the
11 *Duzan* case from Saskatchewan, and if you could go to paragraph 33. So, again, the same
12 issue in this case, multiple claims and multiple jurisdictions and the Court determining
13 what the approach -- what approach might be taken. If you go to paragraph 33 --
14
15 THE COURT: Got it.
16
17 MS. KAY: -- the Saskatchewan Court says this:
18
19 Further, the ruling in *Englund* affirmed that, in assessing whether
20 the class actions are sufficiently similar to raise abuse of process
21 concerns, the focus is on the substance of the actions, including
22 the basis for the claims and definitions of the proposed classes.
23 Narrow technicalities and artificial distinctions, such as differences
24 between the representative plaintiffs or the distinction between
25 opt-in and opt-out jurisdictions, are ignored.
26
27 And then just looking over briefly at paragraph 36, it says:
28
29 However, it is not acceptable for plaintiffs to commence class
30 actions in multiple jurisdictions and then leave the courts and the
31 defendants guessing as to whether and where any particular action
32 will proceed. That is what has occurred here, and it is one factor
33 that distinguishes this case from the situation in *Englund.*
34
35 And then it goes on with the particular facts of the case and then concludes this part of
36 the discussion with the reference to, in paragraph 37, My Lord, to the multi-jurisdictional
37 game of class action Whac-A-Mole. And that strategy, which I would characterize as a
38 multi-jurisdictional game of class action Whac-A-Mole, is the strategy that Mr. Merchant
39 would like to pursue with this case, including in this court as well as in Saskatchewan,
40 and, in our submission, that should not be allowed to happen. And this Court in asking
41 itself what is the purpose of having a second set of -- another set of actions here, or have

1 the Merchant set of action here, should look at the substance and say, Is there anything
2 being advanced here?
3
4 To the same effect, My Lord, if you could turn up the volume three. This will be the last,
5 tab 94.
6
7 THE COURT: I seem to have every one except three. Well, I
8 do not have it at the moment, so just tell me what you were going to say, and I will go to
9 it later. I think madam clerk stole it over lunch. No, she just hid it on me. I have got it
10 here now.
11
12 MS. KAY: You've got there?
13
14 THE COURT: Yes. Ninety what?
15
16 MS. KAY: Ninety-four.
17
18 THE COURT: Okay. The *P.L.* case?
19
20 MS. KAY: *P.L.* or usually indexed *L.(P.)* --
21
22 THE COURT: Yes.
23
24 MS. KAY: -- just for maximum confusion. A decision of
25 this court, and if you turn to tab -- or, sorry, paragraph 20. So the Court's discretion here
26 relates to the allegations of abuse of process in overlapping proceedings, and the Court
27 says:
28
29 As to allegations of abuse of process relating to the overlap with
30 the *L.C.* action, *Boehringer* is instructive.
31
32 I just pause here to say *Boehringer* is the same case as the *Englund* case. It's just
33 annexed as *Boehringer* in the Saskatchewan Court of Appeal.
34
35 There, the Saskatchewan Court of Appeal held at paragraph 40.
36
37 And I think Mr. Mogerman read this quote to you but from somewhere else. But in any
38 event:
39
40 We would not suggest that it is always or necessarily an abuse of
41 process for a plaintiff to launch claims against the same defendant

1 and arising out of the same subject matter in more than one
2 jurisdiction. There will sometimes be entirely valid reasons for
3 such an approach. But where, as here, there is no suggestion that
4 multiple claims serve any legitimate interest of the plaintiffs, the
5 complexion of things changes. In such circumstances, the courts
6 are being used in a manner which serves no proper purpose or
7 which is vexatious or oppressive.
8
9 And in the defendants' submission, a copycat lawsuit -- plainly a copycat lawsuit down to
10 typos -- commenced in an opportunistic fashion with the timing we've discussed, making
11 precisely the same allegations, is in substance no different, Sir, does not protect or serve
12 any legitimate interest of the plaintiffs, to use the words from the Saskatchewan Court of
13 Appeal approved by this Court, and results in this Court being used in an manner which
14 would serve no proper purpose or which is vexatious or oppressive. And therefore, we
15 say, the Merchant action should be stayed as being an abuse of process.
16
17 Let me just pause while I am in the *L.(P.)* case or *P.L.* case to say this, and this may be
18 better dealt with in reply, but my friend Mr. Merchant in his material relies on the *Yee v.*
19 *Aurelian* case, which Mr. Mogerman spoke about, and it's dealt with at length in their
20 submissions, and so I won't cover that ground, but just to order ourselves, the decision in
21 the *Yee* case -- and you can see this, you don't need to go to it. It's (INDISCERNIBLE)
22 for your reference, it's at tab 190 in volume six of the joint book. And that's the case,
23 My Lord, you'll recall, that's the case where the Court expressed concern about protecting
24 the residents of Alberta and saying until a case has been certified -- until the other case
25 has been certified, you can't stay a case in Alberta, for example.
26
27 And you see at paragraph 18 of that decision that the Court in the *Yee* decision, the
28 decision of Madam Justice Martin, she relied -- I don't say almost entirely, but it appears
29 entirely on the decision of the Saskatchewan Queen's Bench in the *Englund* case, and she
30 cites from that decision, so this is the lower court decision, she cites from it and says:
31
32 A stay order in these circumstances would amount to an abdication
33 of this Court's responsibility to persons within its jurisdiction.
34
35 You may recall that. And then she says:
36
37 This is a sufficient and full answer and the application for a stay is
38 dismissed.
39
40 But the thing is that -- and the reason I draw your attention to it while I'm in that *L.(P.)*
41 case is the *Yee* decision is based on the Queen's Bench decision or the motion judge

1 decision in Saskatchewan, in the *Englund* case, and the Saskatchewan Court of Appeal
2 completely disagreed with what the motion's judge had done and completely overturned
3 it. And the quote that I took you to at paragraph 20 of the *L.(P.)* case is this court citing
4 the Saskatchewan Court of Appeal in the *Englund* case, *Boehringer* and *Englund* same
5 case, and approving that principle.
6
7 And so the *Yee* case is an outlier that relied on, as I say, the lower court's decision in the
8 *Englund* case, which was completely overruled, and the reasoning of the Saskatchewan
9 Court of Appeal has been cited with approval by this court when faced with the same
10 circumstances.
11
12 THE COURT: Okay. Anything further?
13
14 MS. KAY: So where we would be left, My Lord, if you
15 grant the relief that the defendants are seeking is that the residents of Alberta would be in
16 the same position as the residents in the rest of Canada, with the exception of British
17 Columbia. Actually, they're arguably in a better position. I'll come to that in just a
18 second.
19
20 There's an action that's been commenced here in Alberta, so that puts them in a slightly
21 different position than people in other provinces that are not BC, Ontario, or Quebec, and
22 so to the extent there was a limitation period concern, that's been addressed by virtue of
23 the actions that were commenced here. There is a national class in Ontario and that could
24 be enough, but we don't need to debate that point because there is a proceeding here
25 specifically for Alberta residents in the consortium plaintiffs' action.
26
27 So the Alberta residents are in the same position, as I say, as class members throughout
28 the country who are awaiting developments in the British Columbia action, and
29 Mr. Mogerman walked you through the reasoning of the consortium plaintiffs in pursuing
30 the case in British Columbia. It will have occurred to you that it's kind of annoying to
31 defendants that plaintiffs can go off to British Columbia where they have no cost exposure
32 and litigate cases there, but it is what it is, and we are where we are, and that's a decision
33 that the consortium plaintiffs have taken, and I can accept that that's a decision that
34 provides many benefits to class members across the country.
35
36 And insofar as that's part of the orderly process that both sides of this very hotly
37 contested piece of litigation -- both sides, the consortium plaintiffs and the defendants --
38 agree that that's the right way to go, and again, importantly, judges in three jurisdictions
39 have said --
40
41 THE COURT: All right. You are repeating yourself now.

1
2 MS. KAY: I would never do that.
3
4 THE COURT: You have done it, so -- yes, but only once.
5
6 MS. KAY: So I wanted to -- I just wanted to be sure, My
7 Lord, that the Court understood the distinction in the relief that we're seeking as opposed
8 to the relief that my friend is seeking. Other than that, I think you have our --
9
10 THE COURT: I do not see much distinction.
11
12 MS. KAY: I think it goes to the question that you were
13 musing about, about whether or not to determine carriage at this stage. We're not in the
14 carriage fight. We are in the stay fight, though, and we say you can decide and, with
15 respect, should decide today that Mr. Merchant's action should be stayed, period. And the
16 question of what happens to the consortium plaintiffs' action -- the consortium plaintiffs'
17 Alberta action should be addressed by this Court as it will be addressed by the other
18 Courts once we're done before Chief Justice Bauman in British Columbia.
19
20 THE COURT: Okay.
21
22 MS. KAY: Unless you have any other questions, those are
23 my submissions.
24
25 THE COURT: It sounds like a distinction without a difference,
26 but I will leave it at that.
27
28 MS. KAY: Okay. Thank you.
29
30 THE COURT: So are there any other parties on my right-hand
31 side that want to add anything further at this stage? If not, I will turn to Mr. Merchant
32 and his colleagues.
33
34 **Submissions by Mr. Merchant (Stay)**
35
36 MR. MERCHANT: My Lord, I propose to deal with matters
37 somewhat in a divided manner dealing with a stay, though I recognize that a stay is the
38 same as carriage, and then dealing with carriage, although I recognize that carriage is the
39 same as stay. And just synoptically, there are four questions: Are the stay applications in
40 substance different, and is the judicial mind to decide them separately or decide them as
41 one? Number two, what materials do I consider on each of these applications? Number

1 three, do I decide each of these stays because they're separate now or do I decide them at
2 certification as a part of certification, and I'll be submitting -- I do submit to you, you've
3 read, we say that's what the statute requires but -- and the case law invites. And, number
4 four, if it's appropriate for the Court to decide now, how do I decide each of these stay
5 applications, which they're not very different.
6
7 So the first issue is ought the Court to decide these issues together or are the applications
8 different? The applications are the same in terms of the result that each seeks, but the
9 applications are different in relation to why each is made. The companies say grant a stay
10 because a whole series of defendants have argued the same issue. So the companies will
11 go there, have unsuccessfully pursued this in the Baycol cases, *Yee v. Aurelian,* and in
12 two Quebec cases recently.
13
14 So they say we have a plan, they say we're working with some of the plaintiffs, other
15 plaintiffs may not interfere. They've also talked a lot about *Englund* and for whatever
16 reason, they didn't put the *Englund* Court of Appeal decision in the book of authorities.
17 I'll give it to you, but the *Englund* -- *Englund* stresses you are to look at these cases in
18 relation to plaintiffs. You don't think of cases as the Merchant case or the consortium
19 case. They say *Yee v. Aurelian* is different because there's a plan, we're going to work to
20 the plan. Well, that's not a difference that was unconsidered by the courts, and
21 incidentally the very case they reply on, *Englund* in the Court of Appeal, seemingly
22 approves one of the Baycol cases. They mention the case, and they certainly don't
23 disagree with the case. So that's where the defendants are.
24
25 The defendants say, we want to come back and argue all these same cases -- Baycol, *Yee*
26 *v. Aurelian* -- for different reasons, but it's still, in our submission, implicit in the
27 decisions those things were always considered. Judicial economy was considered. Judge
28 Kyle in the Saskatchewan Baycol case said, Essentially I've got sympathy for defendants
29 because they have to fight this case in every province.
30
31 The consortium argues they should get carriage and a stay should be granted because they
32 have a plan, and they call it a national plan, but the consortium, too, is faced with Baycol,
33 *Yee v. Aurelian.* They make the same argument, but from the other side of the coin. The
34 defendants say, Uphold our plan, save us from facing litigation again, and some of the
35 plaintiffs in different jurisdictions say, Uphold our plan because we're part of this process.
36 So it comes down rather simply to whether Albertans have access to the Alberta court or
37 whether Albertans are denied access to their Alberta court because others in other
38 jurisdictions say we have a plan.
39
40 The consortium argument, we say, is only different in relation to how they justify --
41

1 THE COURT: Well, let me stop you there for a second.
2
3 MR. MERCHANT: Yes.
4
5 THE COURT: I mean, you have got case management --
6 which reminds me, I do not think there has been a formal direction of case management
7 in the Macaronies one, but that is just a detail. It is being case managed, and I am it.
8 But the plaintiff has access to the Alberta courts through the case management process to
9 make certain that in whatever the plan is, whether proposed by the consortium or not,
10 adopted or otherwise, that the Court will be making certain that they have access to
11 justice directly or indirectly through the Alberta courts.
12
13 So, I mean, we can dance on the head of that pin, but it is not that they are just out there
14 on their own. If there is a stay, there will be a monitoring process, and depending what
15 everybody in this room convinces me, if there is a stay, all of the options will be opened
16 once we see what the BC trial court does with it.
17
18 MR. MERCHANT: Well, respectfully, My Lord, that's just
19 overruling the Baycol cases and *Yee* in a different way. So respectfully, that's just saying,
20 Well, I won't give a permanent stay, but I'll give a temporary stay while all of those other
21 courts said you can go ahead in our courts and two courts of appeal dealt with the issue.
22
23 So in Newfoundland and Labrador, the Court of Appeal heard the matter and said, No,
24 they can proceed in Newfoundland and Labrador. The defendants then sought leave to
25 appeal the Supreme Court of Canada. And in the Baycol cases, there were cases going on
26 all across Canada.
27
28 In Manitoba, by the time the Manitoba case was heard, there was a certified case in
29 British Columbia, and the defendants tried to stop the Manitoba court from proceeding.
30 They said, just as they say here, we can only proceed -- you can only proceed in one
31 place, and the Manitoba court said, No, they can -- by that time, they were up to a half a
32 dozen. The Manitoba court said, Yes, they can proceed, and the Manitoba Court of
33 Appeal refused to -- Mr. Justice McKenna (phonetic) said, Yes, they can proceed and in
34 the court appeal -- not the Court of Appeal deciding, but a judge of the Court of Appeal
35 refused leave.
36
37 So you have a Court of Appeal, a judge of a Court of Appeal in a different jurisdiction,
38 and the Supreme Court of Canada refusing leave, and that ended this defendant's
39 argument that we want a stay. We seek a stay in some jurisdiction, or we seek case
40 management in some jurisdiction, and then they tried it again in *Yee v. Aurelian.* So the
41 Baycol cases go back a bit. They tried it again in *Yee v. Aurelian,* they failed in *Yee v.*

1 *Aurelian,* and they've tried it again in two Quebec cases recently, and they failed in both
2 of those Quebec cases.
3
4 So we're still in my chart on issue one, are the applications different, and there are five
5 important questions here on this difference. The defendants reasonably will expect that if
6 they lose the BC certification -- this is number one -- if they lose the BC certification, if
7 they lose the appeal to the British Columbia Court of Appeal, they can appeal as of right
8 in British Columbia, we say you should logically think they believe they can settle with
9 the consortium along the lines of the U.S. settlement. The consortium lauds their
10 relationship with the U.S., the U.S./lawyer relationships. We say it is relevant that 11 of
11 the 19 litigants in the United States said that's a bad settlement. So the defendants on the
12 one side side with, the defendants side with the approach, which, in our submission, is
13 more likely for the defendants to get to a settlement. They're comfortable with the team
14 they're fighting against. They're comfortable with the enemy they've got now.
15
16 Second, you might ask yourself why are these very defendants who settled in the United
17 States going to certification in British Columbia? And they're hiding that record from
18 you. Now they'll say, Well, we entered into a confidentiality agreement, but they haven't
19 lifted the confidentiality agreement, so they hide the record from you, and they say
20 believe me -- believe us, believe me -- we've got a good record going there, but we won't
21 let you judge it while you have a record here that you can judge. You can in a
22 preliminary way say, Well, this case -- you wouldn't pre-judge it, but this case, I wouldn't
23 throw it out immediately. I think you'd have to say that. There's an expert's report,
24 there's evidence that's. . .
25
26 The defendants know -- knew, know -- that they're depriving you of seeing the British
27 Columbia record. They know they could have -- they've had 6 months to resolve that
28 issue. It made no effort to get that before you, so they say let us fight the battle in
29 British Columbia. We won't give -- we want a different result from Baycol and *Yee* and
30 the two Quebec cases, so you're asked, in a sense, to accept sort of a pig in a poke,
31 something you're not to know about.
32
33 Four, you are to consider what's best for Albertans, not what's best for Canadians. So
34 you have to decide what's best in terms of allowing Albertans access to Alberta courts.
35 Judges, in our submission, don't sort of enter into the area of managing. Judges allow the
36 cases that come before them to decide the cases. So an Alberta plaintiff says, I'm ready
37 and able and want to come before a judge, and they say, No, you should somehow
38 manage all this; you should buy into the management of the case that's going on between
39 the plaint -- between different plaintiffs and the defendants.
40
41 It ought to mean not a thing to you that the judges in Ontario and Quebec have gone

along with that. They've gone along with it because there was nobody arguing the contrary. So of course they haven't -- they've said, Fine, if that's -- Your Lordship must have done this. If that's what the parties want, I'm here to judge issues when parties can't get along on issues. Well, here Vlahos is at the Court saying we want an opportunity for an Alberta process to be heard by our Alberta courts.

The defendants say, We want judges to hear one team and only one fight. They say we want the experts' affidavits filed in British Columbia to be considered. We don't want an opportunity for a different expert's affidavit in Alberta to be considered or the ideas or the position that's being advanced on behalf of the plaintiff in Alberta. So they say, We only want to fight one team. Well, how is that any different from Baycol or *Yee v. Aurelian?* This issue has been asked and answered repeatedly by the Courts. So now they just come back and say, We'd like to do this in a slightly different way; we want to argue it in a different way.

Reasonable surmise might lead you to say that in part 2 years have gone by, they're comfortable with the way things have been going, the defendants don't want another team in the battle. Well, how is shielding the defendants from another team in the battle advantageous to the class? The worst that can happen for the class is the other team in the battle will proceed with a case here and lose, and the class will be benefited. The class can't be disadvantaged by another team coming into the battle. Only the defendants are disadvantaged by another team coming into the battle, and that question has been over and over and over again decided.

So there is a stark difference between all the Baycol cases, the Baycol, *Yee v. Aurelian,* and this case, and it's a difference that's of great advantage -- the Court should consider is of great advantage. The Baycol cases was the same law firm, Klein Lyons, going across the country in every jurisdiction, and the defendants in the Baycol cases said, We shouldn't have to fight this in every jurisdiction, just as they say it here. And they said, No, we shouldn't have to undergo the expense, just as they've submitted here. And I'm going to take you in a minute to some specific things that Ms. Kay had said.

But different from that. So all of those parallels are the same; there's no difference. There's no difference here. The defendants say, We shouldn't have to fight the same issues in Alberta. The defendants say, We have a plan. That's the same. The difference is actually a difference that advantages the class, and that is a second team coming into the battle, a second approach to the ideas. My colleague Ms. Kay actually said, used the words, a second front, shouldn't have to fight this on a second front, and it's a war analogy, and it's a good one. How does it benefit the class for the Court to say, No, you shouldn't have to fight this on a second front when the second front is different ideas, a different record, a different expert?

1
2 So we are really Baycol plus. We are *Yee v. Aurelian* plus, and the plus is that for the
3 benefit of the class, a second set of ideas, and you may get the sense a different view,
4 perhaps a more aggressive, perhaps we -- in our submission, we're more likely to take the
5 view that the position of the 11 in the United States is the right position, not the settling
6 position.
7
8 You ought to, in exercising reasonable surmise, justify that by noting that the defendants
9 have done the unique: Never in any class proceeding have defendants essentially taken a
10 position in carriage. Now my colleague Ms. Kay said, We don't -- we're not in the
11 carriage fight. Well, they're clearly in the carriage fight when they say, We want a stay
12 in Alberta so that we may continue with what's going on, our arrangements, that we've
13 made elsewhere. And going, you know, going back to the two fronts, I suppose if
14 Germany had had a choice, they would have said, No, we're not going to open up a
15 second -- you shouldn't open up a second front either. And Baycol, as I've said, was the
16 same across Canada.
17
18 I'm going to come back in probably 35 minutes to one of the preliminary points, but I
19 wanted --
20
21 THE COURT: Could you give me reference to the Baycol
22 before you go on.
23
24 MR. MERCHANT: To all the -- there are a whole series of cases.
25
26 THE COURT: Is this the Bayer and party cases that you are
27 referring to when you say Baycol?
28
29 MR. MERCHANT: Tab 177 is the Court of Appeal.
30
31 THE COURT: This is in the joint authorities?
32
33 UNIDENTIFIED COUNSEL: Yes.
34
35 MR. MERCHANT: Tab 178 is the Court of Queen's Bench. The
36 cases are all cited at page 24 of our brief. We put them in a footnote and then discuss
37 them in our brief. The Baycol cases were a series of cases in different jurisdictions across
38 Canada. *Lamb,* for example, was the decision in Saskatchewan.
39
40 That's the right tab, isn't it? And where it in our brief of law?
41

1 THE COURT: One seventy-seven is Manitoba. One
2 seventy-eight is Manitoba. One seventy. . .
3
4 MR. MERCHANT: I beg your pardon?
5
6 UNIDENTIFIED COUNSEL: The Manitoba cases are (INDISCERNIBLE).
7
8 MR. MERCHANT: My Lord, these are, in our submission -- I
9 mean, that's what you're -- this is what you're being asked to do. In our submission, this
10 case is simple. You're being asked to overrule *Yee v. Aurelian* and the Baycol cases, and
11 we start that argument in our brief at paragraph 56. So paragraph 56, and Madam Justice
12 Martin says the starting point is residents have a right of access --
13
14 THE COURT: I am sorry --
15
16 MR. MERCHANT: -- to the Alberta courts.
17
18 THE COURT: You say your brief, paragraph 56?
19
20 MR. MERCHANT: Yes.
21
22 UNIDENTIFIED COUNSEL: At brief two.
23
24 MR. MERCHANT: Brief two. The brief reply to application by the
25 Hair Club. So it's the 75-page brief.
26
27 THE COURT: Well, there is sufficient duplication. I am not
28 certain -- I have been reviewing your brief thinking it is the same throughout.
29
30 MR. MERCHANT: We filed two, My Lord. I'm sorry.
31
32 THE COURT: Well, it is book one of eight is what I have
33 reviewed.
34
35 MR. MERCHANT: I am on page 18, paragraph 56, says *Yee*
36 *v. Aurelian.*
37
38 THE COURT: Well, I do not have that. At least if I do, it
39 is -- I am not sure where it is. What does it look like? I have got book one of eight.
40 That is what I have reviewed is your 59-page, I think it is, brief. And if you have got
41 another one, I have not reviewed it.

1
2 MR. MERCHANT: My Lord, I hope it is there.
3
4 THE COURT: Just a minute. Maybe I have it here, but -- yes,
5 okay.
6
7 MR. MERCHANT: Do you have it, My Lord?
8
9 THE COURT: I made the mistake, I guess, of assuming it was
10 the same thing because they are both one of eight, and one is 75 pages and the one is a
11 mere 59 pages. So I have reviewed the 59-page one. I have not reviewed the 75-page
12 one.
13
14 MR. MERCHANT: I'm sorry, My Lord.
15
16 THE COURT: So there is 11 pages I have not read, and I
17 thought they were the same, and I did not look more carefully. So they are both styled in
18 this action. So you want me to go to paragraph 56 on page 18?
19
20 MR. MERCHANT: Yes.
21
22 THE COURT: Okay. So that refers to the *Yee* case. My
23 question to you was where are your cites for the Baycol case, and you tell me there is a
24 number of them, but --
25
26 MR. MERCHANT: Yeah. Well --
27
28 THE COURT: -- that does not mean anything.
29
30 MR. MERCHANT: -- paragraph 56 -- or 66. That's --
31
32 THE COURT: Those are the Newfoundland cases.
33
34 MR. MERCHANT: That's the Newfoundland cases. Then --
35
36 THE COURT: And those are in the authorities at -- referenced
37 in the beginning of the common book of authorities in the tabs 12 through 14 of five of --
38 well, sorry. I guess it would be one of six.
39
40 MR. MERCHANT: Party is tab 123, I believe.
41

1 MS. KAY: No. It's 11 and 12 -- or 12 and 13.
2
3 THE COURT: Well, of your authorities? I am referring to the
4 consolidated authorities. When I look at the list of consolidated authorities, my book is
5 blue. It seems that others are red, but I guess it is just that I am a gentler person. In tabs
6 12, 13, and 14 is the Newfoundland cases. Now, they may be somewhere else. Are they
7 in your books of authorities somewhere else?
8
9 MS. KAY: The books of the authority are meant to be
10 consolidated on behalf of everyone in the (INDISCERNIBLE).
11
12 THE COURT: Yes. Okay. So those are the cases plus you
13 now referred me to -- those are the Newfoundland cases. At 178 and 179 are the
14 Manitoba cases -- 177 and 178 more correctly.
15
16 UNIDENTIFIED COUNSEL: Yes.
17
18 MR. MERCHANT: The Saskatchewan case, which was mentioned
19 again in *Englund,* and, I would say, re-approved in a sense by the Court of Appeal, the
20 Saskatchewan case is mentioned at paragraph 68. This is *Lamb v. Bayer,* tab 96 of the
21 authorities. And what I found a bit interesting of the decision of Mr. Justice Kyle, who
22 tended to be pithy, but you could tell he had a lot of sympathy for the defendants but still
23 felt bound by not only established case law but also bound by the principle that
24 Saskatchewan people have access to the Saskatchewan courts.
25
26 THE COURT: Well, these are 2003 and 2005 cases. We are
27 now in 2013. We have moved a long ways --
28
29 MR. MERCHANT: Right.
30
31 THE COURT: -- in that period of time in terms of -- I mean,
32 you were there on the residential schools, which seems like a long time ago, but it is
33 certainly post 2003 and 2005 where there is a whole new attitude about
34 multi-jurisdictional conflict. So the principles may not change, but the attitude has
35 changed, and the attitude is let us litigate this in an reasonable way, let us protect valuable
36 resources, judicial and otherwise, let us get the decisions made in an orderly fashion. So
37 there is a whole policy change, if you will.
38
39 The CBA has been active, first of all, in cataloguing and categorizing it for those that
40 seem to follow it and some do not. The list of jurisdictions that have national lawsuits,
41 they have now dealt with some protocols. The courts are trying to work around it, and

1 you know them better than I that the courts did work through that in the residential
2 schools case. They worked through it -- cases -- worked through it in Hep-C, and those
3 were all as I recall, looking back at the dates, late 2000s. So there is a change in the
4 patience, if you will, with duplicate procedures, so that is something that has to be kept in
5 mind.
6
7 MR. MERCHANT: The Law Society/CBA protocol, it's a
8 settlement. It's a settlement protocol. They had some language about where they'd like to
9 go, but they can't go there because of the constitution, and they make clear this is a
10 settlement protocol. And I'll take you to it and show you. In our respectful submission,
11 there's no way out of the bind for the courts. This is good law, Baycol is good law, *Yee*
12 *v. Aurelian* is good law. There's no way out of the bind that it may be inconvenient, but
13 every province, if somebody's there asking to be heard, the courts should hear them. But
14 I also say of the Baycol -- well, *Yee v. Aurelian,* of course, is later than Baycol, but the
15 *Englund* case that --
16
17 THE COURT: *Yee* is 2007.
18
19 MR. MERCHANT: Yeah. The *Englund* case that my colleagues
20 rely upon is 2007, and in the Court of Appeal in paragraph 49, they say --
21
22 MS. KAY: Sorry to interrupt my friend. If it's of
23 assistance, my friend (INDISCERNIBLE) in the material is -- it's in volume one, tab 21.
24
25 THE COURT: Tab?
26
27 MS. KAY: Twenty-one.
28
29 MR. MERCHANT: So in paragraph 49, they say -- thank you,
30 Ms. Kay -- third, we also respectfully disagree with the case management judge's
31 suggestion that the circumstances of this appeal are akin to those in *Lamb v. Bayer,* and in
32 that case Judge Kyle was faced with a situation where the same law firm was acting
33 against Bayer and proposed class actions in Manitoba and Saskatchewan. Kyle, J.,
34 refused to accept the efforts of counsel to certify potentially overlapping classes was an
35 abuse of process and declined to stay the Saskatchewan litigation.
36
37 Now, they certainly didn't say *Lamb v. Bayer* is wrongly decided or the law has changed
38 since, and we will overturn *Lamb v. Bayer.* And additionally on this question that Your
39 Lordship raises of where has case law gone recently, at tab 111, you have the decision of
40 Mr. Justice Mayer. And if the Court would look at paragraph 13, it says:
41

1 It occurs where more than one motion for authorization to institute
2 a class action is brought successively against the same parties.
3
4 And then paragraph 15:
5
6 The purpose of lis pendens is to prevent a multiplicity of court
7 proceedings and the possibility of contradictory judgments.
8
9 Then 16, at the end of paragraph 16:
10
11 Finally, this other action must be likely to be recognized in
12 Quebec.
13
14 These are considerations. Then paragraph 36:
15
16 We believe the lack of a national rule to resolve international lis
17 pendens issues weighs in favour of exercising the Court's
18 discretion to refuse to stay the action brought in Quebec.
19
20 Then the heading at the bottom of the next page, you see 5.3 at the bottom:
21
22 Was there improper use of procedure in bringing several actions in
23 seven different provinces?
24
25 Paragraph 47:
26
27 Although we sincerely believe that it is too early to broach the
28 issue of improper use of procedure, we are of the opinion that this
29 case cannot be considered as such.
30
31 And then over the page they refer to *Englund v. Pfizer,* and put the quote:
32
33 We would not suggest that it is always or necessarily an abuse of
34 process for a plaintiff to launch claims against the same
35 defendants, and arising out of the same subject matter, in more
36 than one jurisdiction. They will sometimes be entirely valid
37 reasons for such an approach.
38
39 And then 53:
40
41 The issue of procedural impropriety does not arise as such an early

1 stage of proceedings.
2
3 And they would not, would not, do what the defendants are looking for here. In my
4 respectful submission, the law remains the same, and Your Lordship ought not to overturn
5 that law. One of the cases to which I'll refer you is the decision of -- it came in the new
6 cases, but a decision of Mr. Justice Wimmer who said if the law of judges of parallel
7 ought not to be changed, but, you know, that's for courts of appeal and cites all sort of
8 authority that say that.
9
10 So what did --
11
12 THE COURT: My experience is Courts of Appeal do not often
13 hear these things in the first instance. So. . .
14
15 MR. MERCHANT: Of course. But I think what His Lordship was
16 saying is the general rule is -- well, he discusses when one should diverge from the views
17 of other counsel --
18
19 THE COURT: What case was that?
20
21 MR. MERCHANT: Just give me a moment. It's *Wolverine,* and if I
22 could give to you, and I indicated to my friends and the Court that when the new cases
23 that I was relying on I would -- and so if you look at tab 12, so the new cases upon -- I
24 wanted to bring them in writing as well, and I was going to give you that at a different
25 place in our argument, but -- so if you -- you see paragraphs 5 and 6.
26
27 Mr. Justice Halvorson in an interesting decision involving the Royal Bank wrote and said,
28 Here's what the law is in Saskatchewan; I don't agree with it, but -- and said why he
29 didn't agree with it, but said that really should be for the Court of Appeal to decide not
30 for me.
31
32 THE COURT: Well, let us be clear. If there is decisions that
33 are binding upon a trial court, you are bound to follow them. You might suggest they are
34 not appropriate any longer and need to be reconsidered, but you are bound to follow them.
35 But absent that, Courts are encouraged to do what they think is appropriate at the trial
36 level. So I do not know what case you are referring to now from Halvorson and the
37 Royal Bank --
38
39 MR. MERCHANT: Yeah.
40
41 THE COURT: What is the cite for that?

1
2 MR. MERCHANT: I don't remember, My Lord.
3
4 THE COURT: All right. So --
5
6 MR. MERCHANT: Of course you're not bound -- there's nothing
7 of the Alberta Court of Appeal. There is something of the Newfoundland Court of
8 Appeal with leave to appeal Supreme Court refused. There is something -- there is a
9 judge of the Manitoba Court of Appeal, and it's all in these cases, and there is a decision
10 of a fellow judge of this court which, in our submission, follows that law, and so that's all
11 Judge Wimmer was talking about.
12
13 So I'd like to canvass some of the issues that were raised by the Court with my colleague
14 the consortium and -- before returning to some of the issues.
15
16 THE COURT: Well, let us use that occasion then to take a
17 break, maybe a little early by a few minutes. And I am reminded as I take the break that
18 there was one case that the consortium or somebody was going to provide me that all I
19 had was the erratum in mind. I forgot the tab now.
20
21 MR. MORGERMAN: It's the decision of Mr. Justice Hinkson in the
22 *Joel v. Menu Foods* case.
23
24 THE COURT: Okay. And that --
25
26 MR. MORGERMAN: I'll get you a copy of that.
27
28 THE COURT: So if you could make a note to provide me with
29 a copy of that for the binder. I forget which tab it was, but it is in my notes here
30 somewhere. So let us take 15 minutes, and I will come back and hear you on that.
31
32 (ADJOURNMENT)
33
34 THE COURT: Mr. Merchant.
35
36 MR. MORGERMAN: My Lord, before Mr. Merchant starts, you
37 should have on the rail in front of you the *Joel v. Menu Foods.*
38
39 THE COURT: Thank you.
40
41 MR. MORGERMAN: And there should be a tab reference on the case

1 as to where it is.
2
3 THE COURT: Eighty-five, yes. Thank you.
4
5 MR. MERCHANT: My Lord, out of order in the way I intended to
6 argue this afternoon, but Your Lordship's question really was is there any law new that
7 follows Baycol, and in the brief that -- the 75-page brief, we refer to the two Quebec
8 cases, and they're brand new. And in the *Sifneos* case, a British Columbia firm had filed
9 in British Columbia, it was certified in British Columbia, it was under appeal in British
10 Columbia, so they were way advanced. Merchant Law Group filed in Quebec, there was
11 an application for a stay in Quebec, and the Court would not grant the stay. And the
12 *Brooks* case that was decided, true 2009, but certainly important and new, and that was
13 decided by Mr. Justice Zarzeczny.
14
15 So if I could take you to paragraph 2 of that decision, and there His Lordship said:
16
17 The applicants submit that this action and these proceedings are an
18 abuse of the Court's process and that the Court has a statutory and
19 inherent jurisdiction to order the action stayed.
20
21 Paragraph 6:
22
23 The case most advanced is the Newfoundland and Labrador class
24 action which, after MLG was awarded carriage of the action
25 against the competing application of the Spalding Group, was
26 certified by the Newfoundland Court. The defendants appealed.
27 The Newfoundland Court of Appeal granted leave to appeal that
28 certification order. The appeal has not been perfected and not yet
29 scheduled for hearing.
30
31 Now in addition to that, by this time the Spalding Group had gone forward in New
32 Brunswick. And he calls it the Spalding Group, but it was a consortium that included
33 Clint Docken, QC, from Alberta and lawyers from Atlantic Canada and elsewhere. I
34 think there were four or five Queen's Counsel showed up on the carriage issue from their
35 side. So there'd been proceedings in Newfoundland and Labrador, there'd been
36 proceedings in New Brunswick, and there was a matter going on in the Court of Appeal.
37 Paragraph at 14:
38
39 The applicants have argued that these "tactical" decisions are and
40 do constitute an abuse of the process of the various courts
41 involved, in particular now Saskatchewan. They argue these

1 actions are duplicitous, duplicative of judicial resources, and,
2 perhaps of greatest concern to the applicants, a tremendous costly
3 expenditure of time and money. Their costly participation in the
4 certification process held to date in Newfoundland and New
5 Brunswick are illustrative, not to mention the doubtless cost
6 incurred with respect to the numerous collateral and procedural
7 motions that have been taken in the various jurisdictions (primarily
8 on the initiative of the applicants) including the motion presently
9 before this Court.
10
11 Next paragraph, the question:
12
13 Should the Saskatchewan action be stayed permanently or on an
14 interim basis with or without conditions on the basis of abuse of
15 process?
16
17 Now I've been talking to you about this case on the basis of Baycol, *Yee v. Aurelian,* are
18 they still good law? Well, this case says they are still good law, so do other cases, but
19 importantly there's a very important additional issue, which I regret to say I'm some
20 distance from getting to it, which is this is not an issue to be decided now. This
21 multi-jurisdictional issue may not, I say again in my respectful submission, may not be
22 decided by you now. The legislature has occupied the field. That's what Judge
23 Zarzeczny holds at paragraph 23. So the Saskatchewan legislation has been changed just
24 as the Alberta legislation has been changed. He says:
25
26 The Court has considered that when this new multi-jurisdictional
27 class action framework, especially section 6, is considered as a
28 whole, it is clear that the concerns raised by the applicants in
29 support of their stay application (being some of the same concerns
30 as were addressed by the Court of Appeal in *Englund*), have been
31 eclipsed. They are now specifically and legislatively required to
32 be addressed by the Court at the certification stage and after a
33 certification hearing has been considered. It is at that time when
34 the full and further information which the Court may require and
35 which it is mandated to consider under section 6.
36
37 Paragraph 28:
38
39 What Richards, J., observed in paragraph 31 the Court not being
40 required to consider in *Englund,* this Court is now required to
41 consider illustrated by the light of the 2007 multi-jurisdictional

1 class action amendments of the *Saskatchewan Act.*
2
3 Well, the Alberta amendments were 2010. And I really am moving around and I
4 apologize and I may repeat myself when I come back in the order that I wanted to present
5 these things, but if I could take you to the brief of law, the shorter brief of law, the
6 59-page brief of law -- our 59-page brief of law. Or, My Lord, you can just look in the
7 *Act* if you have a copy of the *Act* with you. I guess the *Act's* at tab 193.
8
9 They're not going to appoint judges to hear certification cases unless they have strong
10 arms and can carry the -- it's going to be a new rule that you'll bring down, My Lord.
11
12 THE COURT: They've just appointed a new one, so he will
13 pick it up.
14
15 MR. MERCHANT: If the Court would look at 5(6) first. So this
16 says:
17
18 If a multi-jurisdictional class proceeding or a proposed
19 multi-jurisdictional class proceeding has been proposed elsewhere
20 in Canada that involves subject matter that is the same as or
21 similar to that of a proceeding being considered in a certification
22 section, the Court must determine whether it would be preferable
23 for some or all of the claims or common issues raised to be
24 resolved in the proceeding commenced elsewhere.
25
26 Okay. So that statutorily says you should think about it. Now you go to 9.1 to find out
27 when you have to consider it, and 9.1(3):
28
29 The Court may refuse to certify a portion of a proposed class if
30 the portion contains members who may be included within a class
31 proceeding, or a proceeding that is the subject of a certification
32 application, in another jurisdiction.
33
34 Well, that's a certification question. This question, this stay application, I raised it with
35 the Court on December 11. You'll recall I said one of our submissions will be this is to
36 be decided at certification. This question is to be decided at certification. The statute
37 says so. The legislature has occupied the field. The Court may not, in our respectful
38 submission -- my friends are aware of this, that's why they use those old words of abuse
39 of process and control your own processes. And they say under the *Act* there's some
40 general sections; of course there are.
41

1 Of course there are, but when the legislature occupies the field, takes the position, says
2 this is the way it -- then the general provisions may not apply. That's what Judge
3 Zarzeczny decided. And in my respectful -- it's not for me to say who's right or wrong --
4 in my respectful submission he's right, but it's learned authority for the Court to consider.
5 And you consider that learned authority in relation to the fact that Baycol's still alive and
6 well, the Saskatchewan Court of Appeal just essentially re-approved the *Lamb* decision or
7 certainly took no disagreement with it, and the two cases from Quebec.
8
9 Now while I'm on the *Englund* decision --
10
11 THE COURT: Just before you leave 9.1, in this case you have
12 applied for certification.
13
14 MR. MERCHANT: Yes.
15
16 THE COURT: So there is an application before me reading
17 9.1(1) to certify an application as a multi-jurisdictional class proceeding.
18
19 MR. MERCHANT: Yes.
20
21 THE COURT: I have not heard it yet. I have not had all the
22 replies yet --
23
24 MR. MERCHANT: Right.
25
26 THE COURT: -- but there is an application before me to do it.
27
28 MR. MERCHANT: Yes.
29
30 THE COURT: So does that not give me jurisdiction under 9.1
31 to now stay? I do not have to hear it, do I? It is an application made.
32
33 MR. MERCHANT: Well, implicit and may refuse to certify isn't
34 may refuse to certify at first blush. May -- as soon as the certifica -- I agree with you
35 you're in the certification process, but implicit and Judge Zarzeczny found that means at
36 certification after I've heard all the arguments. It doesn't mean the application comes in,
37 and I say I'm refusing to certify. It means may refuse to certify as a part of certification.
38
39 I mean, you're not allowed by this to say, I refuse to certify now; I might certify later.
40 So if you said, Well, this, yeah, I agree with you I'm bound by this; that's what the
41 legislature said, I'm going to refuse to certify, well, gosh, that's I refuse to certify without

1 hearing anything and without just -- on a basis different from the certification basis.
2 That's a tough read, a tough conclusion to draw from these words, and, as I say, not the
3 conclusion that Judge Zarzeczny drew and importantly Judge Zarzeczny had -- Judge
4 Zarzeczny knew there had been the same issue in other places.
5
6 My Lord, since I've been there, could we talk about *Englund* for a moment. You will
7 find -- and if you could go to *Englund* at tab 21. Defendants try to twist *Englund* to say
8 something different from what it actually says, and I'll be quoting some of the things that
9 have been said even today that aren't an accurate reading of *Englund.*
10
11 If you went to paragraph 34:
12
13 > It is well established that the commencement by a plaintiff of
14 > more than one action in the same jurisdiction against a defendant
15 > in relation to the same dispute or matter is an abuse of process.
16
17 Plaintiff. And later the Court will put "plaintiff" in italics case. People then pick it up.
18 Paragraph 36:
19
20 > We believe the same concerns which motivate the courts to
21 > characterize the bringing of multiple actions in a single jurisdiction
22 > as an abuse of process can also apply, in appropriate
23 > circumstances, where the multiple actions have been brought in
24 > two or more jurisdictions.
25
26 Paragraph 38:
27
28 > We turn, therefore, to the circumstances at hand. As recounted
29 > above, the same respondents who commenced the Saskatchewan
30 > action through the same counsel --
31
32 Now same counsel doesn't matter. We saw that with Klein Lyons, and here you have
33 different counsel, but:
34
35 > -- through the same counsel, commenced the Ontario action one
36 > day after they launched the proceeding in this jurisdiction. (They
37 > were joined by two additional plaintiffs in the Ontario action).
38
39 So obviously the Court of Appeal was focused on plaintiffs, the same plaintiffs.
40 Paragraph 40:
41

1 This is all quite unusual. We would not suggest that it is always
2 or necessarily an abuse of process for a plaintiff to launch
3 claims --
4
5 For a plaintiff.
6
7 -- to launch claims against the same defendant, and arising out of
8 the same subject matter, in more than one jurisdiction.
9
10 THE COURT: That is the third time I have been quoted that.
11
12 MR. MERCHANT: Paragraph 49, and I quoted paragraph 49 to you
13 regarding *Lamb v. Bayer,* but I stopped reading, and if you look at the last four or five
14 lines:
15
16 The key consideration in the current proceedings, however, is not
17 that the same counsel acts in both the Saskatchewan and Ontario
18 actions. The point is that the same plaintiffs --
19
20 Now is "plaintiffs" in italics in your copy?
21
22 THE COURT: Yes.
23
24 MR. MERCHANT:
25
26 The same plaintiffs have initiated proceedings in both
27 jurisdictions.
28
29 So that same plaintiffs language, that came from the Court of Appeal. That is not our
30 emphasis:
31
32 Initiated proceedings in both jurisdictions, and they have without
33 any attempt to explain why.
34
35 Paragraph 51:
36
37 The particular problem faced by the respondents in this case might
38 have been avoided if the Ontario action had been brought by
39 different proposed representative plaintiffs. This does not,
40 however, mean there is no significance in the identity of the
41 individuals who commence litigation under class action legislation

1 or that the Court should proceed on the basis that law firms are
2 the real litigants and that the individuals named in the plaintiffs
3 are effectively irrelevant to the process. The identity of the
4 plaintiffs is a critical aspect of litigation proceedings, and the
5 identity of plaintiffs or class proceedings is particularly important
6 in class action.
7
8 Well, then they say here's our decision that says that. So try as they might, defendants
9 keep wanting judges to believe that this means the same cause of action. Well, how clear
10 does the Court of Appeal have to be? And then. . .
11
12 THE COURT: Keeping in mind that in each case it is on
13 behalf of the class.
14
15 MR. MERCHANT: Yeah, I know, but --
16
17 THE COURT: The class is the same.
18
19 MR. MERCHANT: The class is the same, but they don't say that.
20 They keep drawing the distinction. They keep saying you could do it. You can do it.
21 You can launch in various jurisdictions. The only mistake here was the same plaintiffs.
22 Then paragraph 54:
23
24 We conclude that the Saskatchewan action should be stayed on the
25 basis of abuse of process. However, we do not believe that the
26 stay should be unconditional. In other words, the respondents are
27 free to litigate in Saskatchewan if they choose.
28
29 So then they say -- what they're really saying is get rid of those plaintiffs, the same
30 plaintiffs can't proceed in Ontario. Now this, incidentally, was Mobicox, and the reason
31 it's in your brief or cited to you as *Boehringer* is because it was a *Boehringer* application.
32 Mobicox was the drug in question.
33
34 And one of the cases I've cited to you earlier understood *Englund* the way I'm suggesting
35 it to you. Mr. Justice Zarzeczny understood *Englund* the way I'm suggesting it to you.
36 Defendants keep arguing that *Englund* means the same class can't launch the same action,
37 yet all over the country, the same class from time to time is launching the same action
38 and it's permitted. Do the Courts like it? No.
39
40 And now we go again hopelessly out of the order of my intended presentation to schedule
41 'E' of the application by the defendants. This is the protocol. I'm not sure what colour

1 you'd be looking at it in. It's Exhibit 'E' to the affidavit of Andrea Catronio (phonetic).
2
3 THE COURT: Just bear with me a moment. I have got the
4 affidavit. I do not think I have got the attachments handy. I do not have the attachments
5 at my finger tips. I am sure they are in some material somewhere here.
6
7 Probably in the file, madam clerk.
8
9 THE COURT CLERK: What are we looking for, Sir, an affidavit?
10
11 THE COURT: Mr. Merchant has what I think you are looking
12 for, but look at the cover. Do you want --
13
14 MR. MERCHANT: Yeah. We may have done it differently, My
15 Lord. That's the defendant book, so it should be like that.
16
17 THE COURT: Is it in the box?
18
19 THE COURT CLERK: Same thing?
20
21 MR. MERCHANT: No, it's a defendant exhibit. I don't --
22
23 MS. KAY: I have it as just a fairly small affidavit that
24 has -- it's filed by us.
25
26 THE COURT CLERK: When was it filed?
27
28 MS. KAY: January 18th.
29
30 THE COURT CLERK: Okay. And it's affidavit by Andrea Catronio?
31
32 MS. KAY: That's it.
33
34 THE COURT CLERK: Thank you. Here you go.
35
36 THE COURT: Thank you. Okay. Exhibit 'E'?
37
38 UNIDENTIFIED COUNSEL: Yes, My Lord.
39
40 THE COURT: Oh, I have that in other places. So the
41 protocol. Okay.

1
2 MR. MERCHANT: Okay. So just before we talk about the
3 protocol, judges, particularly Ontario judges, have been concerned about -- they don't put
4 it this way, about Baycol and maybe even *Yee v. Aurelian* and order, can't we bring some
5 order? You may be concerned about that. Sounds like a reasonable proposition. Nova
6 Scotia Court of Appeal, *Bellefontaine,* said we're not deciding the national class, but then
7 they approved all the cases that say you can't run a national class, cases like *Hawking,*
8 (phonetic) that a national class just doesn't work. It's not constitutional.
9
10 So I don't know what goes on in the judge's corridor, in officer's country, but my
11 understanding is that regional senior Judge Winkler, now Chief Justice, got this class
12 action committee together. Chief Justice Lang, for example, was on the committee and
13 some people -- he got the CBA to look it into. Okay. So we know what everybody
14 wants; they'd like to have some order. Nova Scotia Court of Appeal seems to say you
15 can't; it's not constitutional. Peter Hogg writes you can't; it's not constitutional. A pretty
16 learned thinker about constitutional matters cover all this in the submissions that Your
17 Lordship has.
18
19 So then defendants point to this class action judicial protocols, and they point always to
20 the preambles, but the preambles are what we hope for, but they're not -- they're nothing.
21 And when you look at what it says, it says the only thing you can deal with: Settlement
22 approval. So if Your Lordship wants to read four pages of preamble, good. But on the
23 fifth page, it says settlement approval and now they can do something. Now there's
24 jurisdiction by agreement to do some things. So it says where there is a joint settlement
25 of the actions, the parties shall proceed by way of, et cetera. And then number 8, a
26 motion for multi-jurisdictional class settlement approval. That's all it is. It's a settlement
27 document. It doesn't have anything to do with the issue that's before Your Lordship,
28 except perhaps by way of a wish list.
29
30 And then it moves into some attempts to say that judges should be able to talk to each
31 other. Well, I guess that's a matter of personal choice, but I can't imagine that it's
32 appropriate that judges are talking about a case, off the record essentially, where the
33 parties don't have an opportunity. But on the face of it, this is nothing. It's of no
34 assistance to you, but defendants constantly raise the intention of trying to have some
35 order brought. Well, this doesn't change the cases that say in Alberta an Albertan is there
36 wanting access to Alberta courts. The Court in our respectful submission ought to, must,
37 must hear that matter.
38
39 So the nature of the consortium's submissions, they say, quotes -- or my friend said,
40 quotes, Which of the Alberta actions is the action which interlocks with the national
41 scheme. Well, interlocking with the national scheme is not an issue. That's not in any of

1 the cases, but it always existed. It was always a part of those cases. The very substance
2 of the other cases was these cases are going on in other courts. There's been certification
3 or certification is coming. That's what Baycol, *Yee,* and the two Quebec cases and Judge
4 Zarzeczny's case are all about.
5
6 My friend said, quotes -- for the consortium, quotes, Multiple competing national and
7 regional class proceedings, so -- and then it went on, so give us carriage. Well, that's not
8 in any of the -- that's not one of the acknowledged carriage issue. The issue is looked at
9 in terms of where is the process.
10
11 And my colleague talked about Vioxx. Well, what did the Ontario Court do in
12 *Setterington?* Certification had been heard before *Setterington.* Two weeks before
13 *Setterington* was decided, Judge Klebuc had taken certification on reserve in
14 Saskatchewan. Nonetheless, the Ontario Court looked at the issue in terms of what
15 counsel -- what should I do in Ontario? They didn't pay any attention to the fact that
16 certification had already been considered.
17
18 They didn't say, well, clearly the Merchant Law Group plaintiffs are ahead in terms --
19 and, incidentally, certification had been heard. And while it was overturned on appeal,
20 Mr. Justice Klebuc, as he then was and became chief justice of the Saskatchewan later,
21 but Mr. Justice Klebuc as -- as a matter of fact, he rendered his decision. He was the
22 chief justice when he rendered his certification decision, and so the Ontario Court in
23 *Setterington* looked at the issues from an Ontario perspective. That's what this Court
24 would do in carriage. They'd look at not a national perspective. *Setterington* wasn't
25 looking at a national perspective. *Setterington* was looking at an Ontario perspective, and
26 one of the important issues that you will read or have read in *Setterington* is they said
27 Merchant Law Group doesn't have an office in Ontario. They don't have any Ontario
28 presence. They don't have lawyers who are here.
29
30 Take the contrary case, which my colleagues say was an adoption of national thinking
31 when Klein Lyons on -- I can't remember the name of the case, the Klein Lyons case
32 with Joel Rochon. In that case, Klein Lyons had the *McSherry* case. So if I could take
33 you now to *McSherry* for a moment.
34
35 THE COURT: Tab again?
36
37 MR. MERCHANT: I don't know. One eleven -- 109, My Lord.
38
39 THE COURT: Thank you.
40
41 MR. MERCHANT: *McSherry* hurts the consortium case as much as

1 it helps the consortium case for these reasons, but just to highlight certain parts of it. So
2 you look at paragraph 21:
3
4 > Klein Lyons is a litigation firm focusing on class actions. The
5 > firm is based in Vancouver but also has a Toronto office.
6
7 Well, in *Setterington* having offices became an issue. My friends say the *Vitapharm*
8 principles, there are new *Vitapharm* principles. No, things emerge, the law emerges. So
9 that's why there's the mention of the Toronto office because in *Setterington* the fact that
10 Merchant Law Group had no Ontario offices or presences was significant. And then they
11 go on to say:
12
13 > It is one of the pioneers and veterans of class action litigation in
14 > Canada.
15
16 And then they say Rochon Genova, one of the pioneers. So this is Rochon Genova
17 seeking carriage over an action where Rochon Genova was working with us, but really
18 Rochon Genova was going to be handling it. So we then go forward to paragraph 137, I
19 agree that -- at the end of the paragraph:
20
21 > I agree that the omission of family member claims is an error, but
22 > this error can be fixed. Klein Lyons plans to do so, and it is in
23 > the best interests of the class members to allow it to do so.
24
25 Sort of like when you're hot, you're hot. This is a major issue, and the Court just said,
26 We'll let them fix that. If the Court had been going in a different direction, they might
27 have said, Wow, they've missed out on the whole family class, that I'm deciding on that
28 basis, wasn't prepared to do that. And then just before I say a few words about this
29 decision, you note at the very end of the case the convention is that costs are not awarded
30 in a carriage contest and *Locking* says the same.
31
32 Now if you look at *Locking,* which is the only case at an appeal level, albeit the
33 Divisional Court, but the only case at an appeal level, and my friends rely on this as well.
34 I'm not sure why, but let's look at just parts of it. Paragraph 2:
35
36 > It is common ground between the parties that only one action can
37 > proceed.
38
39 Ninety-nine, I understand.
40
41 > It is common ground between the parties that only one action can

1 proceed.
2
3 It's not common ground with us that only one action can proceed. That was by consent
4 in this case, that's the way they approached it. They don't decide that, they just say that
5 that's -- you know, you write judgments, I don't, but that's code for it might be different
6 if somebody opposed it. Well, in British Columbia, there have been occasions where six
7 attempts at certification have been allowed to proceed, so you can have a certif --
8 defendants don't like this at all, but you can have a certification and it fails or it succeeds,
9 and you can try again, and that -- Judge Zarzeczny was dealing with a third attempt at
10 certification.
11
12 Then paragraph 7, and they quote paragraph 16. And they say:
13
14 The Court's primary concern on a class action carriage motion is
15 to determine which of the competing actions is more, or most,
16 likely to advance the interests of the class.
17
18 The class is the class in the province. The class is the class in the province, we know,
19 because if the case they rely on, *Setterington* -- important principle there, we did not have,
20 Merchant Law Group did not have an office in Ontario. We were -- after certification,
21 they come here, and they're not yet to certification, certainly not on reserve, and don't
22 have an office in Alberta and say rely on *Setterington.* Well, we like what *Setterington*
23 says. Well, obviously *Setterington* would not have been saying it's significant that
24 Merchant Law Group doesn't have an office in Ontario if they were considering a class
25 that is beyond Ontario. The Courts are only deciding about the action for their
26 jurisdiction.
27
28 It is not, I say respectfully, for the Courts, for you, to think, well, let's talk about how we
29 nationally organize this. It's not possible to national organize. It's not constitutionally
30 possible. They took a cut at it, the CBA thing; you can't do it. It's not constitutionally
31 possible. Perhaps the -- lots of talk about multi-district legislation in the United States.
32 Multi-district legislation is over Federal matters, so they can deal with it. It's just not
33 possible here.
34
35 The bottom of the page:
36
37 The status of each class action, including preparation.
38
39 Well, that's the status of the class actions in that jurisdiction, but here there's a class
40 action ready to go. It's not a matter of looking at class actions everywhere else in
41 Canada. Then paragraph 35 (sic):

1
2 It is always preferable on a carriage motion to avoid any analysis
3 of the merits of including or excluding a particular claim or
4 defence and the strategy of counsel in doing so.
5
6 THE COURT: Sorry. What paragraph?
7
8 MR. MERCHANT: Twenty-five.
9
10 THE COURT: Yes.
11
12 MR. MERCHANT: It's always preferable, merits.
13
14 However, it is apparent from reviewing the authorities that some
15 carriage motions are incapable of being resolved by merely
16 considering whether claims have "glaring deficiencies" --
17
18 Well, Klein Lyons had a glaring deficiency; they hadn't put in the family class. The
19 judge just said solve it, solve the family class.
20
21 -- or can be said to be "frivolous." Sometimes it is necessary for
22 the motions judge to conduct a more detailed and nuanced analysis
23 because there is some way to properly distinguish between the
24 actions and choose the proceeding that is in the best interests of
25 the class.
26
27 And then even though this were -- and at the end, even though this was an appeal, there
28 were no costs. Additionally -- in addition on the -- this is the Court -- this is the
29 Manitoba Court of Appeal, and I take you to paragraphs 48 and 49.
30
31 THE COURT: On *Ward?*
32
33 MR. MERCHANT: Yes. So, again, here I submit this is where we
34 are. You know, Your Lordship inquired essentially saying, Well, the Baycol cases are
35 2003, that's 10 years ago, what's been happening? Well, paragraph 48. The government
36 in this case said of Agent Orange the problem at -- the wrong all occurred in New
37 Brunswick. They've got an action going in New Brunswick and the government said
38 they've got an action going in Newfoundland and Labrador and they've got actions going
39 in other jurisdictions, so they said the Barry Spalding and that consortium, as I said
40 including Mr. Docken and others, they had an action. We were competing, and we had
41 actions. The Court of Appeal, 48:

1
2 In these proceedings the Court of Queen's Bench of Manitoba has
3 jurisdiction simpliciter. The prospective addition of non-resident
4 plaintiffs to the class would only become relevant at certification.
5
6
7 So again the same as Judge Zarzeczny, they're saying this isn't something to be decided
8 now. This is something to be decided at certification, same as what the statute says,
9 except this predated the statute. And then paragraph 49:
10
11 Given that the Court has jurisdiction simpliciter --
12
13 Which clearly he does here.
14
15 -- should it nevertheless decline to exercise it? It should if there is
16 a forum that is more appropriate or convenient for the judicial
17 resolution of the claim. The standard to be met is quite high.
18
19 Quote the -- for declining, quote the Supreme Court:
20
21 The existence of a more appropriate forum that must be clearly
22 established to displace the forum selected by the plaintiff. The
23 doctrine of forum non conveniens is to be applied exceptionally.
24
25 And, again, they quote the Supreme Court. So here you have -- sorry -- here you have
26 the Manitoba Court of Appeal similar to *Brooks,* similar to *Yee,* saying people have the
27 right of access to their Manitoba courts. We say access to these courts.
28
29 To that my friends come forward and say we have, quotes, multiple competing national
30 and regional class proceedings, essentially they say, Believe me, we're going to do a good
31 job. They don't disclose what's going on, but none of that, in our submission, is a new
32 consideration. It's been considered over and over again by a whole series of courts
33 including Courts of Appeal and leave to appeal Supreme Court refused.
34
35 What the consortium is saying is allow counsel to get control of an action, and then once
36 they control it, the Courts have to hold on to, let them hold on to that action. Well,
37 judges decide the issues that come before them. Courts don't manage or control litigation,
38 denying Albertans access to the courts. *Englund* doesn't say that. None of these cases
39 say that.
40
41 The submission was, quotes, it would be quite an irrational thing for Mr. Vlahos -- and

1 then they went on to say to risk costs and proceed. Quotes, It would be quite an irrational
2 thing for Mr. Vlahos. Well, Mr. Vlahos gets to decide with the advice of counsel.
3 Mr. Vlahos is here. You can't, in my respectful submission, give credence to a
4 submission by the consortium to say don't let him do this. He should just wait to see
5 what happens in the -- at the trial level, to see what happens, the Court of Appeal level.
6
7 It's also critically significant that everybody goes out of their way to say Ontario is not
8 bound by British Columbia. Quebec is not bound by British Columbia. And I'm going
9 to take you to their websites of the consortium where they put that on their websites. It's
10 in the material. They put on their websites, you know, Caution: We're not bound. So
11 nobody is saying to you if we resolve things in British Columbia that will solve the
12 problem or that will be a resolution of anything or there can been then a common issues
13 trial in British Columbia and that will be -- so what are they asking of the Alberta courts
14 and of Mr. Vlahos? They're saying we want you to wait for a hearing. We want you to
15 wait for an appeal. We don't know what will happen in Ontario with certification. It will
16 be a different record, a different judge, different views.
17
18 Then we want you to wait for a common issues trial, but they're apparently afraid of a
19 common issues trial in Ontario because they're afraid of costs in Ontario. They've told
20 you that. So that leads back to why would the defendants do the unique and say we've
21 chosen the people we'll fight. We like the people. We don't -- like them, don't like
22 them, I don't mean it that way. We prefer the people we're fighting who've demonstrated
23 we're not prepared to go ahead in a cost jurisdiction, so reasonable surmise when the
24 defendants do the unique should be for you to say are they going to go ahead with a
25 common issues trial in a cost jurisdiction? Certification isn't a big leap, My Lord. No,
26 certification doesn't get you very far. Certification gets you to the first level.
27
28 So carriage here abuts the right of Albertans to have access to their courts. Hair Club has
29 clearly said through counsel, We're not going to go ahead in Alberta. The fact of filing
30 an Alberta-only class and defending it today says to you they never intend to go ahead in
31 Alberta. They're not going to have certification in British Columbia then certification in
32 Alberta then certification in an opt-out national jurisdiction. So *Locking* talks of look to
33 the benefit of the class, that's the Alberta class, that's where you carry responsibility.
34
35 In the cases, flowing from Baycol, we have three different results in Baycol. So there
36 was a settlement regarding rhabdomyolysis in Ontario, as I recall. That was one of the
37 things in Baycol. The results were different in different jurisdictions, and that again is
38 consistent with what I'm advancing to you, which is judges must deal with the issues that
39 are before them from their own jurisdiction.
40
41 THE COURT: So is this a good place to break for the day?

1
2 MR. MERCHANT: Yes, My Lord.
3
4 THE COURT: And you will be a while in the morning?
5
6 MR. MERCHANT: My Lord, I'm still on stay. Yeah, I'll be all
7 morning.
8
9 THE COURT: Okay.
10
11 MR. MERCHANT: And maybe some.
12
13 THE COURT: Okay. Ten o'clock it is.
14
15 MR. MERCHANT: My Lord.
16
17 ---
18 PROCEEDINGS ADJOURNED UNTIL 10:00 AM, APRIL 4, 2013
19 ---
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Certificate of Record

I, Natalija Varevac, certify that this recording is the record of the evidence in the proceedings in the Court of Queen's Bench held in courtroom B201 at Edmonton, Alberta, on the 3rd day of April, 2013, and I, Natalija Varevac, was the court official in charge of the sound-recording machine during the proceedings.

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I, Mona Fischer, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability, and the foregoing pages are a complete and accurate transcript of the contents of the record, and

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Calgary, Alberta
2 ———
3 April 4, 2013 Morning Session
4
5 The Honourable Court of Queen's Bench
6 Justice Rooke of Alberta
7
8 R. Mogerman/ J. Winstanley For Macaronies Hair Club & Laser Centre Inc.,
9 Operating as Fuze Salon
10 E.F.A. Merchant
11 G. Neill/ J. Kadavil For 1023926 Alberta Ltd.
12 M.J. LaFleche For Bank of America Corporation
13 K. Kay For Canadian Imperial Bank of Commerce
14 B.W. Dixon For Bank of Nova Scotia
15 C. Hunter For Capital One Financial Group
16 M. Adlem For Citigroup Inc.
17 C. Chatelain For Federation des Caisses Desjardins du
18 Quebec
19 J.B. Simpson/ J.B. Musgrove For MasterCard International Incorporated
20 A. Kuntz For National Bank of Canada Inc.
21 S. Smyth/ J. Yates For Toronto-Dominion Bank
22 D.T. Neave For Visa Canada Corporation
23 N. Varevac Court Clerk
24 ———
25
26 THE COURT: As I have said before, someone lied to me
27 when they said there was no heavy lifting in this job.
28
29 Mr. Merchant, I am going to give you back the case of Sur La Presidents (phonetic)
30 because my -- I am sorry. The Rosalind Siffennos (phonetic) case. It is all in French.
31 My French is not good enough to read it so it is useless to provide it to me. If you want
32 me to rely upon it you will have to provide me with a translation so --
33
34 MR. MERCHANT: My Lord --
35
36 THE COURT: I suspect it is not earth-shattering in the result.
37 Then I will take your comments on it as being what I should take from it, if anything.
38
39 MR. MERCHANT: Thank you, My Lord. My Lord, I'm --
40
41 MR. MOGERMAN: My Lord, I rise in hesitation because time is so

1 tight but I rise about time. I just want to make sure that we're on track. That I have a
2 sense of when my friend expects to end. I talked to my friend this morning. His best
3 guess was 3:00 but he wasn't committing to 3:00. If my friend can finish by 3:00 I can
4 do a tight reply and we can be done and so I'm going to ask that we all keep that in mind
5 and that at 3:00 I'll probably be standing up and I just wanted my friend to know that we
6 need to structure the time and make our points and be in and out.
7
8 THE COURT: Well, let me address that. First of all,
9 apologize that the system was not working this morning and we have been delayed 15
10 minutes and hopefully we can make that up. I have some other business to do during the
11 lunch hour so I cannot shorten that very much but do not -- do not book planes to get out
12 of here early today. I intend to give a decision at the end of this case and with reasons to
13 follow. So you will have a decision before you leave here unless you leave on your own.
14
15 MR. MERCHANT: My Lord, my friend is correct that I'm having
16 trouble getting from three days down to two. I'd like to take you first to the *Dousan*
17 case. It's four --
18
19 THE COURT: Well, we will continue Friday if necessary.
20
21 **Submissions by Mr. Merchant**
22
23 MR. MERCHANT: The *Dousan* case -- thank you, My Lord. The
24 *Dousan* case is at tab 47. And it's another case that the defendants submit. I want to
25 take you to it. It -- it does not -- it does not accept the defendants' submissions of what
26 *Englund* says and it is not a case where a judge found MLG at fault but the judge instead
27 emphasized that the client would not proceed and I'd like to take you to some of the
28 language. It's at tab 47, I believe.
29
30 THE COURT: It is easy to find if you have the right book.
31 Okay.
32
33 MR. MERCHANT: And first if you look at paragraph 7, they talk
34 about Rosenberg. And Rosenberg, that -- the case has been certified and British
35 Columbia. Rosenberg took -- took the case forward. And the nature of this case is that
36 Ms. Dousan's child is severely impaired. She's got -- she -- the child needs lifetime care.
37 Medical problems. Cases is of great sympathy. And plaintiffs in a case like this have to
38 allow medical disclosure, in -- in Saskatchewan at least. They -- they are examined on
39 more than one occasion, they swear affidavits, they have to be available. There's really a
40 considerable amount of pressure on plaintiffs and if you look at paragraph 13 in that
41 context, the third line down, the judge says that *GSK* sought a designation so this was

1 very, very unusual that it wasn't the plaintiffs moving forward but the -- but the company
2 seemed to sense, perhaps, that we were -- I don't want to disclose solicitor/client privilege
3 issues, but we were having trouble getting the client moving forward. Judge -- you can
4 sense that in the decision. There -- thereafter -- the next paragraph, *JSK* (sic) continued to
5 urge Merchant Law Group to agree to a schedule. Then you have paragraph 16. The
6 second sentence: However, the plaintiffs did not meet subsequent timelines set by the
7 Court. Then the middle of the next line: Which found that the plaintiffs had not offered
8 any satisfactory explanation for their failure to advance the litigation. Then paragraph 18.
9
10 THE COURT: Sorry. Where is that last reference?
11 Seventeen?
12
13 MR. MERCHANT: In paragraph 17, the second line. Which found
14 that the plaintiffs --
15
16 THE COURT: Yes. Okay.
17
18 MR. MERCHANT: -- had not offered -- then paragraph 18. Four
19 lines down. Merchant Law Group -- the letter stated Merchant Law Group had
20 encountered issues with their representative plaintiff in Saskatchewan and that they did not
21 intend to proceed with the action at this time and conceivably at no time. Case
22 conference -- next paragraph. A case conference was held, during which Mr. Merchant
23 informed the Court that although the plaintiff did not intend to proceed with the action
24 they would oppose an application for a permanent stay. Then the -- the quote paragraph
25 in the next paragraph: While I am unprepared -- this is an affidavit we were able to get
26 her to swear:
27
28 While I am unprepared to undertake the risk and suspense of
29 proceeding in Saskatchewan, including the risks of costs and the
30 expense -- the expense of experts, I oppose -- I oppose this action
31 being struck now for want of prosecution only 30 -- 31 months
32 since the claim was issued and I oppose this action being struck
33 because if that happens I fear the issues will apply for me against
34 my claim against *GSK* (INDISCERNIBLE).
35
36 Then the next paragraph, the fourth line, the judge says and he -- and he confirmed that
37 the plaintiffs did not intend to move the action forward. The fourth line of the next
38 paragraph: Another is that the plaintiffs' failure to comply with the courts scheduling
39 orders and confirmation that they -- now, may I say parenthetically we are proceeding
40 with this very same action before Madam Justice Strekaf in Alberta. It wasn't a matter
41 of -- of our law firm deciding we weren't going to go ahead. We went from a no-cost

1 jurisdiction to a costs jurisdiction because Merchant Law Group feels that strongly
2 about -- about this case. And we're -- we're in the process of moving that to certification.
3
4 THE COURT: Saskatchewan being the no-cost jurisdiction.
5
6 MR. MERCHANT: Yes. And Saskatchewan, of course --
7 Saskatchewan and Manitoba are ideal. They're no-costs national opt out while -- the
8 judge was seeing -- however -- this is paragraph 36: However, it is not acceptable for
9 plaintiffs to commence class actions in multiple jurisdictions and then leave the courts and
10 defendants guessing as to whether and when a particular action will proceed.
11
12 Now, he moves to the -- to the colourful language of Wackamow (phonetic) and that's --
13 and that's why the defendants like to quote this case but what Your Lordship has to do is
14 say, well, what did the judge really write. So he wrote -- well, he -- Wackamow, then the
15 next section he says: The plaintiffs' failure to adhere to the court scheduling 38, a class
16 action requires the presidence -- presence of a genuine plaintiff who is ready, willing, and
17 able to pursue an action individually and on behalf of the proposed class. He goes on to
18 say -- I -- this plaintiff just wasn't a genuine plaintiff. The next line: Between lawyers
19 and clients it is settled there must be a real plaintiff. The line below that: To give
20 instructions for the carriage of the proceedings. The obligations on the part of the
21 plaintiff. So the judge without -- without our saying things, I mean, we did say issues but
22 the judge perceived what was really happening. Paragraph 41, the -- he says again: The
23 requirement for a genuine representative plaintiff. Recognizing we had this problem.
24 Then paragraph 42: Merchant Law Group has confirmed that the plaintiffs are not willing
25 to proceed with this class. And then at the end of that paragraph: It also explains -- it
26 also explains why counsel for the plaintiff has resolved that he will not comply with the
27 court's scheduling directions by proceeding with this action. In addition to the manner in
28 which the claims have been pursued in multiple jurisdictions, these factors
29 (INDISCERNIBLE) the circumstances from *Englund.* Well, he's -- he's interpreting
30 *Englund* properly. And -- and he's saying you could -- it's different from *Englund* where
31 different plaintiffs can proceed in different jurisdictions. He's interpreting *Englund*
32 properly and -- and differently from the way they want you to interpret it.
33
34 Then paragraph 50. The third line at the end: While that may be the situation in other
35 jurisdictions -- it's very important on limitations here. While that may be the situation in
36 other jurisdictions, under the CAA a limitation period is suspended for potential class
37 members only when the action is certified for a class action. Effective as of the
38 commencement of the action. And he quotes the section. And -- and read the -- the --
39 they -- they didn't get a box of crackerjacks at legislative drafting for this section but
40 it's -- it's clear. But convoluted: Any limitation period applicable to a cause of action
41 asserted in an action that is certified as a class action is suspended in favour of the class

1 members on the commencement of the action and remains. Now, it's a bit convoluted to
2 say, 'on the commencement of the action' instead of saying, 'retroactive to the
3 commencement of the action' but that's what the judge is saying. And -- and in our
4 respectful submission the judge is correct in this interpretation. You'll find a contrary
5 interpretation of the Saskatchewan by -- by a different -- by a different judge in Alves.
6 So --
7
8 THE COURT: Which case is that?
9
10 MR. MERCHANT: Alves. A-L-V-E-S. Mr. Justice -- can't
11 remember what --
12
13 THE COURT: Do you have a cite for that? Is it in the
14 material?
15
16 MR. MERCHANT: No, I don't think it's in the material. It might
17 be -- it might be at tab -- at tab 5 but I'm not sure whether he covered it there. It may be
18 in -- so it was Mr. Justice Keene (phonetic).
19
20 So then he says in paragraph 15: In this case, no limitation period has been suspended and
21 with respect to proposed class members since there is no possibility the claim will be
22 certified as a class member, there is also no possibility the limitation period will be
23 suspended for potential class members.
24
25 This limitation issue is a significant issue. And I've -- I've lost both ends of that -- of
26 this argument. I think -- I think this judge is right. I've argued it both ways, lost both --
27 lost both times. Here I was arguing something different. Judge -- but what I think
28 doesn't -- doesn't matter but what judge is right is instructive.
29
30 So before I go back to where I was, could I address what Your Lordship raised with my
31 friend, which was --
32
33 THE COURT: Just give me a moment, please.
34
35 Yes. Alberta does not have that problem. In Section 40 on quick review. If a limitation
36 period is asserted, whether or not the proceeding is ultimately certified the limitation is
37 suspended. So it is not a problem in Alberta.
38
39 MR. MERCHANT: Next --
40
41 THE COURT: Or does not appear to be.

1
2 MR. MERCHANT: -- next if I could address a middle ground,
3 that -- the middle ground that you talked about. Which is to stay -- to stay both actions.
4 I don't know you used the word, 'middle ground' but that's really what it is. And that's
5 not in keeping with what I'm going to start calling the ten cases but let me tell you
6 why -- why it's the ten cases. You've got -- you've got the *Bakal* five cases or so,
7 you've got *Mailay.* (phonetic) You've got *Siffenos,* (phonetic) which you just gave back to
8 me. You've got *Ward* in the Manitoba Court of Appeal, *Brooks,* Mr. Justice Arzechney
9 (phonetic). And in the *Bakal* cases leave to appeal by the Manitoba Court of Appeal and
10 went to the Court of Appeal in Newfoundland. And leave to appeal Supreme Court. So
11 I'm going to be calling these the ten cases because I say they're -- they're -- they're
12 current -- they're current good law. While this middle ground doesn't address the ten
13 cases and it doesn't deal with -- it doesn't deal with the fact that the statute says you have
14 to decide these -- these -- this jurisdiction issue that they're raising. That's supposed to
15 be decided at certification. Their whole justification -- their whole argument is, We're
16 handling this on a national basis. Their whole argument is, Look at the other national
17 cases. Look at the fact that there's something going on in Ontario, something going on
18 here, something going on in Ontario. Let's run this dress rehearsal in British Columbia.
19 So if they say, That's our basis, well, then, you -- you're bound, I say, by the statute that
20 those are things to be considered at certification because 9 -- 9-3 says that's when
21 you're -- that's when you're to consider. But while -- while in our submission that's
22 where the law has to take you, I still want to talk a little bit about the practicalities of
23 what you said.
24
25 So you will recall when I took you to 9-3 yesterday, if I've got the section right, it says --
26
27 THE COURT: I am not sure you do so --
28
29 MR. MERCHANT: Okay.
30
31 THE COURT: -- get it right.
32
33 MR. MERCHANT: So I took you first as I -- took you first, as I
34 recall, to 5 -- to 5-6. But it's the -- yeah. It's -- it's 9 -- 9-1, orders in multi --
35
36 THE COURT: Go ahead. I am --
37
38 MR. MERCHANT: Yeah.
39
40 THE COURT: -- looking further but I am not sure which -- it
41 is 9, brackets, 1 -- well, tell me what it is and then I will respond but I have another

1 thought so --
2
3 13-1 is also irrelevant. 13-1 is broader. Because 9 is at the time of certification and 13 is
4 not. 13, bracket, 1.
5
6 MR. MERCHANT: Well, I'm not -- is it --
7
8 THE COURT: We are looking at the Alberta Act.
9
10 MR. MERCHANT: Yes. Well, I'm -- the Court may refuse to
11 certify a portion. I -- the -- well, 9 -- 9, dot, 1, round brackets, 3.
12
13 THE COURT: Well, that is the multi-jurisdictional certification
14 section.
15
16 MR. MERCHANT: Yes. And we -- and that's -- that's what --
17 where we say you are.
18
19 THE COURT: Well, I do not think I am there. I think I am in
20 13-1. 13, bracket, 1.
21
22 MR. MERCHANT: Oh, and -- and respectfully, as I said to you, a
23 general section. A general section, in our submission, can't overrule a specific section.
24 So the specific section, 9-3 --
25
26 THE COURT: (INDISCERNIBLE) --
27
28 MR. MERCHANT: -- 9, dot, 1 --
29
30 THE COURT: Bracket, 3.
31
32 MR. MERCHANT: -- bracket, 3. But -- but the Act that they -- I --
33 I'm --
34
35 THE COURT: No.
36
37 MR. MERCHANT: -- 9 -- 9, dot, 1, bracket, 3 reads: The Court
38 may refuse to certify a portion of a class action if that portion contains members who may
39 be included within a class proceeding and that's not what's in -- ah. Right. I'm looking
40 at the -- at -- there are two 9, dot -- there -- the bottom of page 11 is the section to which
41 I refer you. Not the prior 9-3.

1
2 THE COURT: It is 9.1, bracket, 3.
3
4 MR. MERCHANT: Yes. So my submission on this, My Lord, is
5 they say -- they say, Deal with this. You have -- you -- the national plan is we're going
6 to do a multi-jurisdictional decision or a wraparound in a different court. That's what
7 they say. So that's the issue they raise. For the Court's consideration. And 9, dot, 1,
8 brackets, 3 says that's a consideration to be heard at certification.
9
10 THE COURT: Well, that arises in some cases. Such as if you
11 were certifying your action in Alberta you might certify it excluding -- Alberta being an
12 opt-out jurisdiction. Let's assume you have got a national class, as yours proposes, you
13 might except out. BC residents. For example.
14
15 MR. MERCHANT: Mm-hm.
16
17 THE COURT: So they would do that at the certification stage.
18 While you have filed an application for certification, we are not dealing with the order yet
19 and so under 13-1: The court may at any time make any order it considers appropriate
20 respecting the conduct of the class proceedings. So that would be an order having regard
21 to sequence, having regard to stay, having regard to carriage, it seems to me. It is a very,
22 very broad section. One of which was the subject of some discussion in a province to the
23 west of us January -- on January the 25th, to be exact at a session that I was at so it is a
24 very broad section and so that is, I think, one that would be more pertinent here in this
25 context.
26
27 MR. MERCHANT: My Lord, you may --
28
29 THE COURT: I agree with your general proposition that a
30 specific overrules a general if they are on the same topic. No problem with that concept
31 but here we have got a specific that is tied in to a certification order and excepting
32 something out under sub 9.1, bracket, 3, whereas 13.1 a is a broad section that deals with
33 the conduct of a case.
34
35 MR. MERCHANT: The reason -- the reason that I submit 9 -- 9-1-3
36 governs is you go back to 5, round brackets, 6, so 5, round brackets, 6 says: In a
37 multi-jurisdictional class proceeding or a proposed -- or a proposed multi-jurisdictional
38 class proceeding has been commenced elsewhere that involves the subject matter that is
39 the same or similar to that of the proceeding being considered in the certification, the
40 court must determine whether it would be preferable. So we say 5, round bracket, 6
41 absolutely applies here.

1
2 THE COURT: Just let me just have a look at it for a moment.
3
4 MR. MERCHANT: See a proposed multi-jurisdictional. And
5 conjunctively we say this ousts 13.1 because it takes you -- it takes you out of the -- out
6 of the general.
7
8 Now, that -- that's what we say the law is but now I want to address the sort of
9 practicalities for a moment. So this middle ground, stay both. And Your Lordship said --
10 so what I've said is you can't do that and the case law says you can't do that because
11 that's opposed to the ten cases but let's suppose you think, Well, I might want to do that
12 and -- and your words to my friend, What if you fall on your nose in BC. Someone else
13 deserves a shot at it. And I guess there's merit in that. I have to say candidly there's
14 merit in that. It's that -- it's the -- it's the second -- the second approach, the second
15 army kind of thinking. I also -- though I'm not urging you to do this, I also in fairness to
16 the Court should advise you that that's really what happens in the United States and
17 where we have some angst about the way carriage has developed in Canada is that in the
18 United States in multidistrict decision-making about carriage they don't ever say, This
19 team is out of the group or that team, they say, One team is the lead now. And the other
20 team stays -- the other team stays -- stays -- stays in the mix and they stay in the mix
21 because the -- the team that was made lead can lose their position as lead. So for
22 example, you have the consortium saying, We're doing this in British Columbia because
23 we're trying to avoid costs and then they say, *Vlahos* shouldn't proceed. We're -- we're
24 anxious to proceed in a costs jurisdiction. So there might be reasons why the first team,
25 if -- if they weren't us, would falter so fall on your nose is exactly what the
26 multi-jurisdictional lead plaintiff system does.
27
28 Quickly I --
29
30 THE COURT: So forgetting the law for the moment, what
31 does that mean? That does not necessarily mean that it cannot be a stay. It means that if
32 they fall on their nose, maybe the stay is lifted. I --
33
34 MR. MERCHANT: That's right. It means exactly -- well,
35 actually -- but it means exactly what Your Lordship said. You stayed both actions. You
36 stayed both -- you stay both Alberta actions. You keep an eye on what's going on.
37 Maybe you -- of course you're interested in what's going on in British Columbia. You
38 don't know -- I've said and it's important they -- they want you to just believe them that
39 they've got something going. They -- they won't show you what's going on in British
40 Columbia. They could. They could have gone to the defendants and said, Look, we've
41 got to -- we've got to lift that, but they're not showing you. So just as you said, if you

1 stayed both you'd be hearing mostly from them. And you'd be kind of monitoring and
2 saying, Well, and it is the -- it is as you said. What if you fall on your nose or it also
3 then involves well, this is just taking too long. You -- you're taking too long and
4 Albertans have a right to get going. Or you want to do a settlement but the other team
5 doesn't want to do a settlement, for example. I mean, there are a whole lot of reasons
6 why the lead plaintiff system in the United States doesn't say, Head on home.
7
8 Moving to things said by Ms. Kay. She said, quotes:
9
10 The defendants should not be a position where they have to fight
11 on two fronts on the same matter, end quotes,
12
13 while the ten cases and three courts of appeal all said the contrary. She said, quotes:
14
15 The fact that there is a different representative plaintiff is not the
16 point.
17
18 Englund said repeatedly it is the point. The fact there's a different representative plaintiff
19 is the point, said *Englund.* They rely on *Englund.* She said -- she submitted, quotes:
20
21 Look at the substance to see if there is anything being advanced
22 here --
23
24 and it was -- in the context it was anything being advanced that's different. So look at
25 the substance to see if there's anything different being advanced here. Argued over and
26 over and over again. Ten cases, three courts of appeal. Because we -- we say when --
27 when the -- the third court of appeal is *Englund,* as I said to you, when they seemingly
28 re-approved the *Lamb* case so you've got the Manitoba Court of Appeal twice. Ward --
29 in Ward, refusing leave on *Bakal.* Newfoundland Court of Appeal.
30
31 THE COURT: Well, do not go too far on the refusing leave. I
32 have once learned that refusing leave does not give any higher status to the Court of
33 Appeal judgments than what it already has. It just means that it may not be convenient at
34 the time. Supreme Court sometimes waits for cases to come in bunches and they might
35 not do a one-off at this time so --
36
37 MR. MERCHANT: I --
38
39 THE COURT: -- you cannot read anything into leave being
40 denied.
41

1 MR. MERCHANT: I -- I agree with you, the Supreme Court level.
2 That's not the case at the Court of Appeal level. When they refuse leave, the Court of
3 Appeal, they -- write a decision and say, Here's why it's not being -- so you've got Ward
4 and one of the *Bakal* cases and it's just one judge refusing leave in Manitoba. But you
5 really had -- you still had three courts of appeal but *Englund* -- *Englund* in Saskatchewan,
6 all they did was write about and seemingly approve the *Lamb* decision. They didn't say
7 it's great law. But three courts of appeal, I say.
8
9 THE COURT: So back to your point and we got off track on
10 it. Maybe I took you off track but you said the defendants said that there -- what is
11 anything different being shown. And do you care to answer that? What is different?
12
13 MR. MERCHANT: From the ten cases, nothing. They -- they --
14
15 THE COURT: Okay. I thought it was in the context of what
16 your action brought that the other action did not.
17
18 MR. MERCHANT: No.
19
20 THE COURT: Some differences are -- okay.
21
22 MR. MERCHANT: Yeah. Well, I'll tell you the one thing that I
23 put it -- I put it yesterday that the *Bakal* cases all say no. So they all say -- the
24 defendants come forward and they say no to the defendants. You can't stop this from
25 going ahead. Because you -- because you don't want to face the same arguments again.
26 That's a no argument. What's unique in this case is there's a yes argument that's new
27 here. And the yes argument is a new -- a new team. So when -- when Ms. Kay used the
28 analogy of we shouldn't have to fight this war on two fronts, that -- that -- that's the same
29 thing that they said to Kline -- to Kline lions (phonetic) all over in the *Bakal* cases.
30 That's the same thing in *Yee.* We shouldn't have to fight on two fronts. The difference
31 here is that we are bringing in the Russians. Now, I made a deal with my friends. We're
32 going to call them the Russians and I'm going to be the British and the Americans. But
33 so the difference here is we're not just opening a second front but you're bringing in new
34 ideas and a different army which didn't exist in any of the other cases and that's why I
35 say --
36
37 THE COURT: So the new action, the new consortium action.
38
39 MR. MERCHANT: Yeah. The -- the action here brings a team of
40 lawyers with lawyers all across Canada. Offices -- offices in Alberta. And new ideas. A
41 different record. That may be certified. That's good for the class. It's very bad for the

1 defendants. The defendants -- now the defendant have a double problem. They're not
2 only fighting on two fronts but they're fighting perhaps slightly different concepts. We
3 don't think there's much that's different, but slightly different. But the defendants --
4 Ms. Kay said, quotes:
5
6 The residents of Alberta will be in the same position as residents
7 in the rest of Canada.
8
9 She said, quotes:
10
11 There is a national class in Ontario. That could be enough.
12
13 It was interesting she said, 'that could be enough', not, 'will be enough.' But that could
14 be enough. She said, The Alberta residents are in the same position as residents in
15 Canada and they await the litigation in British Columbia. Every one of these things was
16 said in the *Bakal* cases and in the other ten cases and rejected in all of those cases. And
17 as I said, here uniquely in addition, the -- the new -- another team coming.
18
19 Now, as frightening as this will sound, that means that I've now come to the end of the
20 first of the four things that I told you about, which was are the stay applications in
21 substance different and of course I've dealt with a whole lot of things and now are the --
22 Number 2, what materials do I consider on each of the applications. And this also inform
23 on whether they're decided together and in my submission you may -- you ought not to
24 decide one application based on the material from the other and -- but let's look first at
25 what you've got for consideration from the plaintiff's side. From the plaintiff's side in
26 addition to the *Vlahos* affidavit regarding the stay and carriage, you have the plaintiff's
27 certification materials. And you -- you should consider that because part of your question
28 is do I believe there's -- there -- there's an appropriate case to go forward here. Do I
29 believe -- do I believe these lawyers for *Vlahos* have the capacity to take the case
30 forward. Now, you have the advantage that you've just -- you've just spent -- well, you
31 spent a couple of days with us now. You've spent a week with us now and you've gone
32 through a certification. You have the advantage of knowing a good bit about Merchant
33 Law Group and about Branch MacMaster because you've got a case on reserve. So
34 unlike -- unlike other judges usually in carriage you've -- you're -- you're able to say,
35 Well, I -- I've got some sense of these people. I know what they can do and you look --
36 you look at other things as well. But the certification material that you have from *Vlahos*
37 is important to have that. The affidavit of the expert is important. And we submit you
38 ought to conclude, yes, I'm not prejudging but there's certainly an arguable case, a proper
39 case here. You're deprived of being able to see the British Columbia record.
40
41 The third question is do you decide the stay -- oh, and I'm going to -- on this what

1 material do you look at, I'm going to come back to the affidavit question. And -- and
2 challenge the affidavit. The third -- the third question that you ask is do you decide
3 this -- the stay now or do you decide the stay at certification. I talked about -- I talked
4 about what the -- what the statute says. *Brooks* -- *Brooks* interpreted the comparable
5 statute to say you have to wait. So you've got the thinking of -- to assist you in your
6 interpretation of 5-6 and 9-3 you've got Mr. Justice Arzechney saying that's -- that's an
7 issue that I -- that has to be decided. They raised exactly the same question over exactly
8 the same section. Or the -- not same section (INDISCERNIBLE) but -- so the statute
9 raises this issue. And if I could take the Court to paragraph 20 of the affidavit of Andrea
10 Contronio (phonetic). So on the evidence --
11
12 THE COURT: I have it.
13
14 MR. MERCHANT: So on the evidence, it's put before you attached
15 as Exhibit D as an expert from the -- excerpts from the CPA website summarizing some
16 of the ways in which multi-jurisdictional class actions can impede access to justice. So
17 this is this multi-jurisdictional issue. The evidence says this is the multi-jurisdictional
18 issue which Judge Arzechney says has to be decided at certification. He had the same
19 kind of application before him. Don't let them go ahead. He said, No, it has to be
20 decided at certification. And you go back in the motion, it's -- with me at least it's in the
21 same book in tab 1, and the motion by coincidence at paragraph 20 raises this specific
22 issue. It says the CDA --
23
24 THE COURT: Just -- just let me just find it.
25
26 MR. MERCHANT: Yeah.
27
28 THE COURT: Now, you say the application?
29
30 MR. MERCHANT: Yes. So in paragraph 20 they say -- they
31 submit the CPA specifically contemplates that the --
32
33 THE COURT: Got the right thing. I am looking at the
34 application by Macaronies? Macaronies? I have got the right one?
35
36 MR. MERCHANT: This is a -- yeah. I'm sorry. Application by
37 the defendants. The Stikeman Elliott application.
38
39 THE COURT: Not sure I have that right before me. I am sure
40 I have got it but I do not have it right before me.
41

1 Madam Clerk, can you assist?
2
3 THE COURT CLERK: With -- with the --
4
5 THE COURT: The application by Stikeman Elliott. It should
6 say application.
7
8 Have you got a date, a file date? Or is it in the -- is that the brief or the application?
9 January 18th?
10
11 MR. MERCHANT: I could just show you a copy if you prefer
12 but --
13
14 THE COURT: Well, if we do not find it in a second we will.
15 Okay. We will move on.
16
17 Madam Clerk, you can perhaps you can spend some time getting that in order so we can
18 find things quickly.
19
20 MR. MERCHANT: So that's just the way we assembled them, My
21 Lord.
22
23 THE COURT: Okay.
24
25 MR. MERCHANT: So as I said, by coincidence it's the same
26 paragraph 20 and so the very issue or one of the issues they raise is the CPA specifically
27 contemplates that it may be preferable for the claims of Albertans and other members of a
28 proposed class to be advanced by way of a class proceeding commenced in other
29 jurisdictions. While we agree that's -- that's the issue, but Judge Arzechney says and we
30 say the statute requires you to hold that -- that that is to be decided at -- at certification as
31 a part of certification.
32
33 Now, that affidavit also dealt with settlement protocols and we talked about settlement
34 protocols. I won't go there. I mean, we've had -- we understand in *Menu Foods* we had
35 a lawyer who had to fly from Montreal to St. John's and my friend, Mr. Branch, was sort
36 of the choreographer. We (INDISCERNIBLE) nine screens. We -- we did nine
37 certifications in Indians. There was four certifications in tainted blood. Our firm did --
38 did three certifications against Laura Black and Hollenger (phonetic). I think there were
39 four or five that our firm did with Winner's, Homesense. We understand the problem but
40 all the wanting in the world doesn't turn that protocol into anything more than a
41 settlement protocol.

1
2 If I could now take you to the Chris Vlahos affidavit sworn February 5.
3
4 THE COURT: I will give you this back so we do not lose it.
5
6 MR. MERCHANT: And the -- what's important is the exhibits, not
7 the -- I'm taking you to the exhibits, not the words of the affidavit.
8
9 THE COURT: Do you have the affidavit filed February 6,
10 Madam Clerk?
11
12 THE COURT CLERK: Sir, I have nothing that's later than January
13 2013 on this file.
14
15 THE COURT: Well, we now have the application so we are
16 ten minutes behind. I now want the *Vlahos* --
17
18 THE COURT CLERK: Okay.
19
20 THE COURT: -- affidavit filed February 6th.
21
22 MR. MERCHANT: It's large, My Lord. There are a lot of exhibits.
23
24 THE COURT CLERK: Exhibit?
25
26 THE COURT: I have read the affidavit. I have not looked at
27 the exhibits.
28
29 MR. MERCHANT: If I could take you first to Exhibit C. That's
30 the letter from Stikeman Elliott. And you see in the second paragraph on page 2.
31
32 THE COURT: Just let me --
33
34 MR. MERCHANT: We are advised that counsel will be taking steps
35 to seek a stay of your client's action. The defendants support this request. By plaintiff's
36 counsel. And subject to the Court's directions are instructed to bring their own stay so
37 it's really just the same thing. And then two paragraphs later: In any event, if the Alberta
38 action were to proceed without a formal or informal stay -- and then the next sentence.
39 The defendants have expended a great deal of resources responding to certification
40 application of British Columbia and additional steps are scheduled in order to be in a
41 position to proceed with the argument certification application in view of the very

1 significant resources required to address the British Columbia it would be unfair and
2 unworkable -- all I say is the ten cases cover that entirely. Same argument. They --
3 they've now dressed it up to make it a little different and say, We want to do this, so as a
4 national something, it's just the same argument, ten cases.
5
6 Exhibit D. This is a copy of an email send by Grant McMullen of Branch MacMaster on
7 December 6. And it -- it was serving an application from Hair Club -- well, they didn't
8 have any standing to do that but I guess it's clear they don't intend to proceed here
9 anyway. They want -- they want carriage to have a stay or they want a stay to have
10 carriage. But what flows from this exhibit is the first thing they started with was, Well,
11 we'll get a stay and then after December -- after the December 11 case management they
12 thought maybe they didn't like some of the things you said so they said, Well, let's --
13
14 THE COURT: They are not unique in having that view.
15
16 MR. MERCHANT: Then they said, We better -- we'll launch this --
17 we'll launch this action, which is really just carriage for a stay or stay for a carriage.
18
19 Exhibit E. This is a copy of the application by Hair Club. To stay within the matter.
20 And you look at one. An order that it be stayed until further order of the Court and the
21 inherent jurisdiction of the Court.
22
23 And then if -- then if you go to the last -- because what we're talking about now is
24 what -- what may you look at on stay and what may you look at on carriage and this
25 motion says all of these affidavits are filed on the stay. So the material filed and then
26 they've -- then on page 7 they say that's the purpose of filing them. We're filing them
27 for the stay. And I'll take you eventual --
28
29 THE COURT: Sorry, I do not -- where do you see that? I see
30 reference 34 to 37, the affidavits but --
31
32 MR. MERCHANT: Well, on page 7, material or evidence to be
33 relied on and then they say here are the affidavits and then just as an example, the
34 affidavit of Rene French. When you get to the end of it, it says: I make this affidavit in
35 support of an application to stir -- to stay the Merchant Alberta action and for no
36 improper purpose. All the affidavits -- all the affidavits that were filed by the other side
37 are limited not to carriage but to dealing with the stay. They all end by saying, I make
38 this in connection with the stay.
39
40 THE COURT: Well, that -- I am not certain anything was
41 intended by that. You know. It is redundant. The last clause of those affidavits, that is

1 the usual fashion. I do not think anyone pays much attention to it. It is whatever the
2 applications are that are come before. The applications are, in one case, at least, a joint
3 stay and carriage so the affidavits are in support of it so I would be surprised to interpret
4 them that they specifically made an informed decision that the affidavits were not in
5 favour of carriage when many of the provisions of some of them appear to deal with
6 carriage-type issues so I do not see that as binding on the parties. It is you know -- you
7 know, you have various ways of styles so I do not take that as being binding on them.
8
9 MR. MERCHANT: If -- if I were a judge I'd have said what you
10 just said but you'll also appreciate that if there are arguments to be made, counsel make
11 the arguments but since that's where you're going I have to tell you candidly I agree with
12 you.
13
14 THE COURT: Okay. Well, let's move onto one of the things
15 that --
16
17 MR. MERCHANT: Schedule F.
18
19 THE COURT: -- you do not agree on maybe.
20
21 MR. MERCHANT: Yeah. Schedule F, My Lord. So this is
22 important. Here is -- this is the consortium's website page. And you see the third
23 paragraph: We have proposed that the action go forward in BC with the Ontario action
24 and Quebec action to be held in abeyance pending the outcome of certification in BC.
25 While the BC action only provides -- includes residents of BC it is hoped that the result
26 will guide. This is not a guarantee, however; therefore our actions have been filed in
27 other provinces as discussed below. This is important. They can't even get a deal from
28 the defendants that anything will be binding so it's important for your consideration what
29 they're planning to do is have certification in British Columbia. I think they'll get
30 certified but what I think doesn't matter. I think the defendants will appeal. I don't know
31 what that outcome will be. And then the defendants are saying, Well, you know, then
32 bring it on. We'll see how we do in Ontario. So -- and on -- and the Ontario system is a
33 lot slower than the Alberta or Saskatchewan system and BC's -- BC's slow but Ontario is,
34 I'd say, the slowest. So you're being asked to stay this action for a long time on a sort of
35 a nefarious basis because they -- they come forward and say, Well, we've got this national
36 plan but it's not a national plan. It's just a -- it's just a BC plan. Then beneath it they
37 say the same thing. Ontario action. The second paragraph: Class members in Ontario
38 should be aware that the outcome in the BC action will not necessarily be the same as the
39 outcome in the Ontario action. Quebec. Quebec was launched 28 months ago. So they
40 say a similar action was filed in Quebec in December of 2010. Then at the bottom of the
41 page: Class members in Quebec should be aware that the outcome in the BC action will

1 not necessarily be the same as the outcome -- they just say, Believe me. Put your faith in
2 whatever we're doing. Abdicate -- abdicate, I say, your duty to Albertans by just saying,
3 Well, these counsel -- these counsel will just move forward with it and they -- and they
4 don't have any kind of a -- they don't have anything structured here.
5
6 Paragraph or Exhibit I. So this is a copy of the letter from Mr. Branch on behalf of the
7 consortium and there Mr. Branch states -- you note the date, note the date at the first
8 page, August 23, 2012. I say this is important, the date. That they've had all this time --
9
10 THE COURT: I thought it was quite unique that they would
11 send that letter on my wedding anniversary so I thought it was unique.
12
13 MR. MERCHANT: I've had -- they've had all this time to get their
14 record before you. To come forward with a better plan than just -- just believe me,
15 maybe we can work things out in Ontario after we fight the fight in British Columbia.
16 And what -- and what are they then going to say? Well, we have been to the Court of
17 Appeal of British Columbia. Now we're planning to go to a common issues trial. How
18 long -- how long would they have you wait? So the -- this bottom paragraph highlight
19 for you up from the second page, the bottom paragraph. The second paragraph. The long
20 paragraph: To the extent that an application for certification is made in any of the MLG
21 actions, we have instructions to appear on behalf of our clients and seek that such action
22 be stayed. Now, just because I'm -- I realize that for convenience they write MLG
23 actions and maybe a judge would say Merchant actions and we say -- we've said
24 consortium actions. No, these actions aren't Merchant Law Group actions. These are --
25 this is the *Vlahos* action. This is the -- this is the Hair Club action and it's important to
26 have some sense of -- of where Hair Club is. Hair Club, first they wanted a stay, then,
27 okay, fine. We'll go along with -- with -- pretend that we want certification to do
28 something when in fact it's certification to stay.
29
30 If I could take you now to our brief of law. For a moment.
31
32 THE COURT: Short one or the long one?
33
34 MR. MERCHANT: The --
35
36 THE COURT: Are we still on three or --
37
38 MR. MERCHANT: Yes.
39
40 THE COURT: Okay.
41

1 MR. MERCHANT: The short one.
2
3 THE COURT: Good. That is the one I have read. I have it --
4 when I have a chance to read a long document or a short document and they look the
5 same I will read the short one.
6
7 MR. MERCHANT: As the Queen Mother said, Never -- never walk
8 when you can sit. Never sit when you can lie down. Well, I have to say when I
9 thought -- when I thought the case was starting at 9:00 and I stood in front of the
10 scheduling clerk and I said it seemed kind of strange but this is the hardest working judge
11 in -- in the world and -- but that was mostly just (INDISCERNIBLE) judge because
12 probably you're only in the top 1 percent but that's -- that's how I came to the thing.
13
14 So if I could take you to page 4. And the bottom of page 4, a bit of a carriage issue but
15 this really a BC consortium. There's one lawyer from -- from Quebec. You can dress it
16 up and call it a consortium, sure; it's three law firms.
17
18 MR. MOGERMAN: My Lord, I stayed on my -- in my seat for the
19 purposes of time as I've been called nefarious and all sorts of things but my friend has
20 repeatedly referred to this office in Alberta question and is now talking about BC and
21 Quebec law firms. In the record on the evidence is a relationship that we have with the
22 JSS barristers firm in Alberta. Just didn't -- I'm sure my friend wasn't trying to pass over
23 that.
24
25 MR. MERCHANT: Oh, no. I -- they -- I see that as just sort of
26 hiring the -- hiring them. As I understand it. I -- it hasn't been advanced they've now
27 joined the consortium in some way so that's -- that -- that's not -- that doesn't get them
28 over the carriage issue. Of course you can have agents to show up. But they -- the
29 issue -- the issue of presence for carriage which they rely on *Setterington* (phonetic), it
30 was an important issue for the Court. They said Merchant Law Group doesn't have any
31 offices in Ontario. It's an important issue. Well, why is it an important issue? Albertans
32 want to look to Alberta lawyers. They'd want to look to the two Merchant Law Group
33 offices. Lots of lawyers here. More lawyers here, I think, than Saskatchewan. So they --
34 they'd want to have contact with their officers. They'd want -- they'd want to feel that
35 they were dealing with Alberta -- Alberta lawyers.
36
37 THE COURT: Well, that is a changing landscape as days go
38 by. I mean, it is a changing landscape with the law societies. Anybody can practice
39 anywhere. It is a changing landscape with the electronic communication. I do not
40 imagine there is anybody is Saskatchewan even knows where your office is unless they
41 physically go there. The communication is electronic so I guess I have stated a bias. It

1 may be -- it may be important. There has to be some substance, let's be clear but, you
2 know, whether you have an office in Edmonton or Saskatoon or Regina or only one of
3 those probably does not make a lot of difference to me, frankly.
4
5 MR. MERCHANT: I -- I only say it was an issue --
6
7 THE COURT: In 2013 so --
8
9 MR. MERCHANT: Yeah. It was an issue -- it was an issue in
10 *Setterington* and -- and it's a --
11
12 THE COURT: Well, Ontarians seem to have a different view
13 of what works in their jurisdiction as opposed to what works in other jurisdictions on
14 occasions so it is not reciprocity.
15
16 MR. MERCHANT: We talked about the issue and if -- and if the
17 Court would turn to paragraph 26 that we were talking about, 5 -- 5-6 and -- and Section
18 9, dot, 1-3. Starting at paragraph 26 you see our -- our argument on that issue and 5 --
19 5-7 and 5-8 are also -- are also relevant there. And then starting at page 16. Just a
20 reminder of some of the issues, *Yee, Yee* and *Aurelian*.
21
22 THE COURT: Sorry, which paragraph you referring to now?
23
24 MR. MERCHANT: *Yee* and *Aurelian* is at paragraph 33 but there's
25 some -- there's some lead-up paragraphs.
26
27 THE COURT: Yes. I have read it all. I have highlighted a
28 bunch of it.
29
30 MR. MERCHANT: Okay.
31
32 THE COURT: I presume everything you say here is things that
33 you have argued and do not need to argue again.
34
35 MR. MERCHANT: Right.
36
37 THE COURT: Unless you want to bring a specific --
38
39 MR. MERCHANT: No.
40
41 THE COURT: -- emphasis or something new to them.

1
2 MR. MERCHANT: No. And -- and as you can see, they -- the
3 *Bakal* cases start at paragraph -- paragraph 43 and continue for some -- for some pages.
4 And at paragraph 54 I mentioned to you yesterday so the -- the *Bouchian Skia* (phonetic)
5 case, this is where -- this is where the *Bakal* cases ended up in different results. In
6 different results. And -- and Ontario was different from other jurisdictions. In paragraph
7 56 has the Court in one of the *Bakal* cases saying, The two most important considerations
8 in determining whether -- and so on. So these cases, page 28, more on *Bakal.* And
9 they're -- they're extremely -- extremely important. And then --
10
11 THE COURT: I presumed that it was all important or you
12 would not have told me about it so --
13
14 MR. MERCHANT: Yeah. Nice to be heckled.
15
16 The bottom of page 29 talk about federalism because we say -- we say that *Bakal* cases in
17 *Caspian* and that -- and Morgard (phonetic), that they're all -- they all fit. Not a single
18 case -- not a single case has been given to you by the defendants that differs with *Brooks,*
19 *Ward, Bakal, Yee, and Aurelian.* Not a single case. Yet Ms. Kay says of *Yee* and
20 *Aurelian*, it's an outlier. You note -- now, I guess I don't understand outlier. I thought
21 outlier meant something different that was good and a leader but I perceived she was
22 saying it's an outlier as in it's just bad law. Well, *Yee* and *Aurelian* is -- fits that pattern.
23 The defendants know the case -- knew the case. They don't come before you and say,
24 Here's -- here's a judgment anywhere else or any inkling from any court of appeal that
25 they're backing away from these decisions. Instead they just say, Well, we want you to
26 decide all these issues again.
27
28 The -- I mentioned -- and it's at page 40 -- page 41, 42, 43. I mentioned the issue of the
29 national class. So all -- all the Ontario lawyers and all the Ontario judges think that the
30 national class is just -- it's obvious. To them. If -- if you -- if you go to court in
31 Toronto, of course, it covers all of Canada. What could be more -- what could be
32 simpler?
33
34 THE COURT: When you are in the center of Canada, of
35 course it does.
36
37 MR. MERCHANT: So -- so -- but there's considerable doubt about
38 this issue and *Bellefontaine,* (phonetic) a Nova Scotia Court of Appeal at paragraph 106.
39 They -- they said, We're not deciding the national issue, but then they relied on -- they
40 relied on cases that disagree with the -- with the national class. You look at paragraph
41 23, they're speaking with approval of what the judge did. He also quoted with approval

1 the Quebec Court of Appeal in *Hawking*. A class action is merely a procedural vehicle in
2 the constitutional principle of the territoriality of provincial laws and jurisdictions cannot
3 be ignored or bypassed in this result. So you have the Quebec Court of Appeal very
4 much wondering about the national class. The Nova Scotia Court of Appeal very much
5 wondering about the national class. And then page -- or paragraph 107, the article by
6 Peter -- Peter Hogue. Now, we don't ask you to decide this issue. We just say you
7 shouldn't take the risk. It's just another risk for Albertans. So you're asked -- by not
8 allowing things to proceed you're asked to take the risk of whatever the national -- or
9 whatever the -- whatever this national plan brings out and you're asked to take the risk
10 two years or four years from now that a national certification is -- will work. That it will
11 be approved by the Supreme Court or that somehow -- somehow a national class can -- so
12 there's no reason in our submission just to take that risk on behalf of Albertans. I said
13 the protocol has no change.
14
15 Now, I'd like you to go, if you would, to the -- to Exhibit I of the affidavit of Luciana
16 Brasil and I --
17
18 THE COURT: So let me -- we are going to take a morning
19 break. Let's take it now. And then we will go to Ms. Brasil. She has two affidavits.
20 Which one are we going to be referring to?
21
22 MR. MERCHANT: The -- the long one. Now, I'm only taking you
23 there for a judgment and that's not to say that I -- that I -- I'll be saying that you can't
24 look at the affidavit of Luciana Basil but as I said to you yesterday, of course you could
25 look at exhibits that -- that just -- that you could have looked at -- you could have looked
26 at any way.
27
28 THE COURT: This one sworn December 6?
29
30 MR. MERCHANT: Yes.
31
32 THE COURT: Okay. Okay, we will take a break then for 15.
33
34 (ADJOURNMENT)
35
36 THE COURT: Be seated.
37
38 Just for everybody's information I have detected that this room is quite cool this morning.
39 I do not know if anybody else noticed it. If you are in the heat of argument, maybe you
40 missed it but I have asked that some attention be paid to it and I will make certain that is
41 done over the lunch hour. If you --

1
2 MR. MERCHANT: My Lord --
3
4 THE COURT: -- run out of things to do at lunch hour,
5 everybody being interested in class actions, I have another one at 1:30 to decide some
6 issue on before 2 so come along.
7
8 MR. MERCHANT: I -- I was taking you to Exhibit I of -- of my --
9 but I could -- I could instead it's -- because it's the next place I'm going is take you to
10 the book that I gave to you yesterday, 'Hear Now, Decide Later'. Because the cases in
11 here is -- is in Hear Now, Decide Later.
12
13 THE COURT: Okay.
14
15 MR. MERCHANT: And it's at -- I'm going to come back to this
16 case as I discuss these cases but it's at tab 5. And the -- the simple point I want to make
17 is -- is you go into about three pages and you see counsel for the plaintiff, Mary Watson?
18 And you've got my -- my colleagues, three people. And then -- and then you have got --
19
20 THE COURT: I am sorry. Paragraph?
21
22 MR. MERCHANT: Not paragraph.
23
24 THE COURT: Oh.
25
26 MR. MERCHANT: It's the reasons for decision and the next page.
27
28 THE COURT: Oh, okay. I am sorry. I apologize.
29
30 MR. MERCHANT: So you got 21 lawyers there. It's I -- know
31 many of these names from conferences and readings. It's a -- it's a dream team. If I
32 could -- if -- if I -- if I could choose another five from the dark side who could join them,
33 it would move up to -- to the Olympics. I just -- I just make this point in relation to the
34 advantages of a second team. A second team doing something different and a second
35 team.
36
37 So Hear Now, Decide Later, you've heard me on --
38
39 THE COURT: Well, what does that tell me? Does that mean
40 that we should have co-carriage of the two Alberta actions?
41

1 MR. MERCHANT: No. No, that -- that tells you should let -- you
2 should let us go ahead in Alberta. So we bring our ideas -- we bring our ideas to bear in
3 the court in Alberta for a judge, presumably Your Lordship, to decide, a common issues
4 trial, some other judge. My friend is already pursuing matters in British Columbia and
5 Ontario and Quebec. They -- they've got -- they've got carriage in Quebec because
6 Mr. Arenstein issued two days after the competition bureau. He just copied everything
7 from the competition bureau. I'll give that you that. Show it to you. But so they've
8 got -- they -- so what it does -- it's -- it's better than putting us together. Because it -- it
9 allows -- it allows the two armies to fight -- to fight differently. To come forward with
10 the different ideas. This is -- this is the yes that I -- this is the benefit that -- that I've
11 been talking about. Get a second army into the field with our own bazookas and our
12 own -- and our own thoughts. Our own experts. Separate experts.
13
14 So this booklet, Hear Now, Decide Later, and the first case that you see is Judge Goryan
15 (phonetic) who did just that. So he says: On the hearing of several motions it was
16 suggested the decision be rendered in advance of the certification hearing. With some
17 hesitation I declined the suggestion. I'm now convinced I did the right thing.
18
19 THE COURT: It is better than the alternative.
20
21 MR. MERCHANT: Then -- and the reason -- the reason we
22 advanced that that should be done in -- this in the system access fee file, is to take away
23 from the defendants the opportunity of an appeal. Don't allow them to delay things by an
24 appeal. So if you grant -- if you don't grant a stay, they're -- they have an appeal. And
25 the second case is Judge Yakabouchi (phonetic), Litigation by Instalments.
26
27 THE COURT: Well, if I do grant a stay they have an appeal
28 you say. Or if I do not.
29
30 MR. MERCHANT: If you -- if you do either. If you do either,
31 there's -- if you just say, I've considered this and I'm going to decide it at certification
32 then I'm going ahead with certification. I -- I agree with Judge Arzechney. This is --
33 these -- these factors that they've raised, they're certification issues. I'm going to deal
34 with -- I'm going to deal with the issue at certification. Of course you can always try to
35 appeal anything, I suppose, but they'll never get a stay doing that. Pending -- pending the
36 appeal. And the case will be able to move forward. And very likely there wouldn't be an
37 application so when -- when Judge Goryan, for example, in *Frey* held I'm not going to
38 decide. So here he -- here is this decision where he says, I put it off, but when he said,
39 I'm not going to decide now, I'm going to decide at certification, the defendants didn't
40 think they could succeed with an appeal there and they didn't appeal. We say the same
41 thing would result here. So statute, we say, says you shouldn't decide it now but now

1 I'm dealing with why it's -- why it's a good idea. Good for this class and the system.
2 You -- you might still at certification or even if certification didn't go very quickly, you
3 might -- you've got it in case management. You'd always be at liberty to decide, I'm --
4 I'm going to -- I've changed my mind. I have seen what happened. This case hasn't
5 moved forward in Alberta or whatever. I'm now going to grant a stay. That would
6 always be open to you. That's what case management does.
7
8 So Number 2 -- there's --
9
10 THE COURT: Or alternatively, lift a stay.
11
12 MR. MERCHANT: Say again, please?
13
14 THE COURT: Or alternatively lift a stay if a stay is granted.
15
16 MR. MERCHANT: Yeah. And that's -- absolutely. That's the --
17 that's the issue that I raise with you where you stay them both and say I -- I don't think
18 the law allows you do that but practically that's a thing that you can think about and I
19 talked to you earlier about you might lift it because of delay or there are a whole lot of
20 reasons.
21
22 So Judge Yakabouchi -- and then because this is -- these cases are about trying to avoid
23 litigation by instalments so you have the -- the *Nette* (phonetic) case. From -- from the
24 Alberta Court of Queen's Bench: A factor militating against bifurcating application is the
25 potential for multiple appeals. Next case. *Clark.* These are all cases where they -- where
26 they wouldn't decide. They would -- they would not -- they said, We're going to deal
27 with all these things at certification. Next case, *Clark v. Energy Brands.* (phonetic) High
28 probability of an appeal. Said -- said the Court. Case after that. I'm not sure why that
29 sheet is in from Mr. Justice I think -- or from Vanhoven, J (phonetic) so ignore it. Where
30 it says 60, 61, don't know what that's about. But we now get to the decision of Chief
31 Justice Bowman in this case. In -- in -- at tab 5.
32
33 THE COURT: That is the -- just the tab is put in the wrong
34 place. It is part of the previous *Clark* decision.
35
36 MR. MERCHANT: Ah. Oh. Thank you, My Lord.
37
38 So the -- the chief justice there says in paragraph 61: A defendant must provide a
39 compelling reason to demonstrate exceptional circumstances. Now, I -- when this was
40 scheduled I said to you -- indeed, you said to me: I recognize you may be back arguing
41 that it ought not to be decided now but should be decided at certification. This is a -- this

1 is in keeping with -- with the better end of the law and in the middle of the page --
2
3 THE COURT: Sorry. What paragraph now? Tab 5?
4
5 MR. MERCHANT: Paragraph 61 but I'm just reading from my --
6
7 THE COURT: There is no paragraph 61 in my material. I do
8 not know what you are referring to. There is only 43 paragraphs in Bowman's decision.
9 This was an application before Chief Justice Bowman by the defendants to stay the -- in
10 effect, the proceeding in BC.
11
12 MR. MERCHANT: I think it -- it was a scheduling. It was a
13 scheduling motion, as I understand it.
14
15 THE COURT: In paragraph 2 he calls it a strike motion.
16
17 MR. MERCHANT: Yeah. But -- but this is -- this decision was
18 when will the -- when will I schedule the matter. And paragraph -- paragraph 22 of his
19 decision says: A scheduling issue of this nature is a matter that falls within the Court's
20 discretion, and then without being exhaustive some of the factors I consider relevant
21 include the likelihood of delays. And (d), whether the motion could give rise to an
22 interlocutory appeal and delays that would allow -- that would affect certification. Then
23 Justice Strathy -- he quotes Justice Strathy below, saying -- and the quote is:
24
25 Before employing an instalment approach it should be considered
26 whether there is potential for such a procedure to result in multiple
27 rounds of proceedings through various levels of court. Here the
28 strike motion is largely based on the premise of interchange --
29
30 and so on. So judges -- I'm going to take you to the end of this section. The judge is
31 saying, I did the contrary and I regret it now. I -- I regret what I did. Judge -- I --
32
33 THE COURT: Is (INDISCERNIBLE) one of them?
34
35 MR. MERCHANT: Not sure, My Lord.
36
37 THE COURT: Well, it is --
38
39 MR. MERCHANT: I'll get to it.
40
41 THE COURT: -- kind of where it started, I thought.

1
2 MR. MERCHANT: Then next you have *Stuart v. General Motors*
3 and you see the highlighted on -- on -- in paragraph 1 and the facing page has it
4 highlighted. With the benefit of hindsight I believe this was a mistake on my part. The
5 motions which were described as plaintiff's counsel as a tactical design to delay, well
6 although essentially procedurals motion to certify will ordinarily be given priority over
7 other motions. Tab -- tab 7. So this is Judge -- Judge Lang. In -- in the *Schneider* case
8 and he's talking about what he did -- what he did in *Holland.* And at paragraph 2, he --
9 he talks about -- he talks about what he did in *Holland.* He says -- he's talking about
10 *Holland,* a prior decision of his, that ended up going to the Supreme Court of Canada on
11 a preliminary decision that he made. He says: At the end of it as this decision represents
12 a change in result from what I ruled in *Holland,* an explanation is in order. And then he
13 goes onto talk about what -- what happened in -- in *Holland* and then he quotes
14 Ottenbreit, J, now of -- who is now in the -- he is now in the Court of Appeal, and he
15 says, You know, I'm explaining why I'm -- why I'm doing something different than I did
16 the last time and I regret -- and I regret what I did the last time.
17
18 THE COURT: Where is that? Paragraph 3, you said?
19
20 MR. MERCHANT: Can't -- can't find those words, My Lord.
21 Yeah, paragraph 3, at --
22
23 THE COURT: So that is all -- the whole --
24
25 MR. MERCHANT: -- at the bottom.
26
27 THE COURT: -- the whole series of cases are to the point that
28 the courts to be careful what you do that you do not create litigation by instalments of ten
29 trips to the Court of Appeal before you get to certification.
30
31 MR. MERCHANT: That's right. And if -- and -- and some very
32 senior judges, chief justice and next Collidy, J, doing the -- doing the same -- the same
33 thing. So Mr. Justice Collidy says at paragraph 12 --
34
35 THE COURT: This is in Martin?
36
37 MR. MERCHANT: Yes.
38
39 THE COURT: So I have the point. These are examples that
40 are illustrative.
41

1 MR. MERCHANT: Yes.
2
3 THE COURT: Okay.
4
5 MR. MERCHANT: Paragraph 9 is -- is judge --
6
7 THE COURT: Tab 9.
8
9 MR. MERCHANT: Tab 9. And this is -- this is the Court saying it
10 has to be exceptional. We say it isn't here. Tab 10, Bellos (phonetic). This was to strike
11 a -- to strike an affidavit. And paragraph 20 -- paragraph 26. Multiple rounds of
12 proceedings. He talks about -- he says *Garland* when it referred to multiple rounds of
13 proceedings. Paragraph -- paragraph 39. Then 11. Is just another example of a different
14 kind of subject because what -- what the defendants might -- defendants and -- and
15 consortium might say to you is, Well, this was -- this was for a stay and these other
16 things -- the other thing was for a strike motion or it was about affidavits or it was about
17 procedure or it was about examinations for discovery. Now, every time what judges have
18 done -- not every time, but what judges have done is they've -- particularly recently
19 because they've said it doesn't matter what it is, I want to get to certification. And so
20 *Anderson v. St. Jude*. It was about the nature of affidavits. No, I'm going to get to
21 certification. And then at -- at the end of this section is the *Wolverine* case that I
22 presented to you because -- because it's important, I say, in relation to *Yee* and *Aurelian*.
23
24 So this -- this whole thought concept is do what -- you -- you've had the hearing. You've
25 had the hearing and you should do what Mr. -- what chief justice then, he -- he remains
26 as -- on the court but stepped down as chief justice but then he was the chief justice.
27 What Chief Justice Goryan did. He scheduled things, just as you did. He heard our
28 objection that said you should decide that at certification. He said, You can argue that but
29 I'm going to -- I'm going to have a hearing. And then when he heard the argument he
30 said, Okay. I've got the point. I'm going to -- I'm going to decide this at certification
31 and by deciding that at certification he avoided what happened in *Holland* and other cases
32 where you have rounds of appeal.
33
34 Now, as far as the -- as far as which case goes forward, if you followed this process,
35 chief -- Mr. Justice Cledik (phonetic) had exactly the same circumstance before him
36 that -- that you have on *Vioxx*. So there were two actions in -- in Saskatchewan on *Vioxx*.
37 And the -- the consortium of lawyers -- I think it was 19 different law firms. My friend,
38 Mr. Branch, I think was a part and we ended up becoming a part of it when the case was
39 settled. He -- he -- we're -- I'm in three or four consortia with Mr. Branch and three or
40 four with Rochon Genova and Strassberg (phonetic), a half a dozen and three or four in --
41 I don't think they work very well and I'll explain why in a minute but we're in lots of

1 consortia for one reason or another.
2
3 So Judge Cledik had certification come forward. He was working on a certification path
4 and the consortium that also had a case came forward and he didn't decide carriage. He
5 didn't -- he didn't stay anything. He just said, I'm going to go ahead. I'm going ahead
6 with the -- with the claim that had been filed by -- by our law firm. He certified
7 incidentally. It was overturned on appeal.
8
9 THE COURT: What is the cite for that?
10
11 MR. MERCHANT: Where he says that's what I'm going to do?
12
13 THE COURT: Well, no. You are saying what he did and so I
14 am just --
15
16 MR. MERCHANT: Yeah, I can only --
17
18 THE COURT: (INDISCERNIBLE) in *Vioxx* said and I said,
19 Well, where did he said it? What cite?
20
21 MR. MERCHANT: Yeah. I can only give you the -- the
22 certification -- the certification decision. It just carried on with that result.
23
24 The -- you've heard me say they've got a national plan in the ten cases it's the national
25 plan is just the same thing over again. The ten cases apply. You've heard me say the ten
26 cases were -- gave the right of the Saskatchewan people, Manitoba people, Newfoundland
27 people. Our differences are stark on carriage. And the first stark difference that goes
28 way beyond anything that you've read on carriage is one side says, We're going to go
29 ahead, and the other says, We're not going to go ahead. In this -- this goes beyond the
30 pleadings are a little different or -- or which they aren't, but -- or -- or one -- one group
31 has a certain kind of experience. So --
32
33 THE COURT: So one wants to go ahead to pursue certification
34 and one wants to take carriage to stop certification.
35
36 MR. MERCHANT: Yeah. This is -- this is a stark difference. In --
37 in this court. And it -- it really says, You don't look at those other categories. I'm going
38 to talk about those other categories but you really don't look at those other categories.
39 Because this is the only case -- the only carriage case ever where one side has come
40 forward and said, Give us carriage to do nothing. Give us carriage. We're not going to
41 take the case forward. Give us carriage.

1
2 The second difference, not -- not stark but certainly more than sufficiently before you is
3 an apparent difference of determination about the settlement opposed by the 11 of the 19
4 plaintiffs in the United States action.
5
6 THE COURT: Say that again, please?
7
8 MR. MERCHANT: Well, we're -- we're more bellicose, I guess,
9 about if you could -- if you could put us in -- in a pew you'd say we're -- we're very
10 much in the pew of the 11, the 11 who have opposed.
11
12 THE COURT: I have your point.
13
14 MR. MERCHANT: My -- my friend argued that we don't
15 understand this action. Because we see it as -- as societal. Albertans are induced to use
16 credit cards by advertising campaignes, particularly to get aeroplan points, for example.
17 We got -- we got authorization against aeroplan about eight or -- six or eight so recently
18 so know a little bit about aeroplan. You get -- they -- they pay less -- they pay a lot less
19 to the air -- to the -- to the airline than -- than the customer pays to the business. So
20 the -- we see -- we see the societal impact to be a more significant issue than -- than the
21 consortium. Of course we see the same -- the same question of the money went to the
22 buyers. There's no -- there's no distinguishing it there. It's just perhaps are more
23 determined about ending the practice because we see -- we see the practice to be -- to be
24 bad -- bad for the Canadian -- bad for the Canadian economy. Where businesses, whether
25 it's Hudson's Bay or Mr. Vlahos have to absorb that extra cost and if they're going to
26 stay in business their costs become what they charge. It's just -- it's just more expensive.
27 My friend then says the criticism where we've enunciated that, well, they don't
28 understand the claim. I -- I just say that's not -- not a tenable -- not a tenable objection
29 by -- by my colleagues.
30
31 At bottom from the -- from the consortium and they -- they I -- I don't know. They can't
32 think that the businesses absorb it. They must think that if they ever speak realistically
33 about what actually happens it --
34
35 THE COURT: So let me ask you: Why are you taking me into
36 settlement? I understand you are saying you do not want to be -- you do not want your
37 client -- clients to be roped into some sort of settlement.
38
39 MR. MERCHANT: Mm-hm.
40
41 THE COURT: So we are not here talking about settlement.

1 Indeed, the contrary. I take it you have got a fear that out of the BC action there might
2 be a settlement which might be run across the country and binding on your people but
3 address me in the context of where we were today. I do not want to go down -- too far
4 down that settlement road. But what issues of settlement would cause me to grant a stay
5 or not grant a stay. That is what I need to have you focus me on.
6
7 MR. MERCHANT: All right. To put it -- to put in its simplest
8 terms, we say you should see us as a -- as a more determined, aggressive team. That's all.
9 And --
10
11 THE COURT: Yes, I got that point.
12
13 MR. MERCHANT: Yeah. That's it.
14
15 THE COURT: But that did not necessarily so --
16
17 MR. MERCHANT: So -- so --
18
19 THE COURT: You would be tougher on the defendants on the
20 settlement than your friends if they had carriage is what --
21
22 MR. MERCHANT: Yeah. We're --
23
24 THE COURT: -- is that the bottom line?
25
26 MR. MERCHANT: -- we're -- we're in for a -- we're in for a
27 common issues trial. We're -- we're funded for a common -- you know, we're a firm
28 with financial strength. We're larger than the consortiums so we can take those kinds of
29 blows. Consortia tend -- tend to grind down to the lowest -- to a settlement basis because
30 you just have -- you just have a team. It's hard -- it's hard to be brave when there's a
31 team of you. It's easier -- it's easier to be brave or silly, because I've certainly got a lot
32 of people around our firm who say I'm a little too brave about things. So --
33
34 THE COURT: You can be brave and silly.
35
36 MR. MERCHANT: Yeah.
37
38 THE COURT: Yes.
39
40 MR. MERCHANT: So I just say as you look at our law firm you
41 should say, Well, from 2004 to 2013 they've been battling system access fees and they've

1 done a -- they've done a great job. If you look at your law firm, you say from 2001 to
2 2006 we battled Indian residential, almost bankrupted the firm. And -- not me but close.
3 Pouring millions of dollars of my money back into the firm to keep things going. You --
4 you look -- you would be justified in looking on and saying, There -- there's a different
5 character in these two teams. I don't draw a long bow on it.
6
7 THE COURT: I have got the point.
8
9 MR. MERCHANT: Yeah.
10
11 THE COURT: As on a side bar then, then you all come to the
12 Court and say, This is a great deal. Please ratify it.
13
14 MR. MERCHANT: Yeah.
15
16 THE COURT: And there is nobody independent to say it is a
17 bad deal.
18
19 MR. MERCHANT: I know. It's terrible.
20
21 THE COURT: So --
22
23 MR. MERCHANT: Like I don't know how to get -- I don't know
24 how to get around it. The plaintiffs are there saying these scallywags from the defendants
25 were going to beat me up and the defendants are there saying the plaintiffs had us and
26 that's --
27
28 THE COURT: Well, you have been there too and --
29
30 MR. MERCHANT: Yeah.
31
32 THE COURT: -- but it leads me as an aside to appoint
33 independent counsel to advise the Court in those things. Take that as a warning. If you
34 want to settle, bring independent counsel. And give the Court advice on --
35
36 MR. MERCHANT: Incidentally, in fairness I said the national class
37 in trouble but I -- we succeeded in a contested certification over the national class and
38 that's *Thorpe v. Honda.*
39
40 THE COURT: Give me that again?
41

1 MR. MERCHANT: Thorpe, T-H-O-R-P-E, verses Honda. 2011.
2 SKQB 72. Chief Justice Popescul. So I'm -- I'm absolutely not suggesting there aren't
3 arguments on both sides. I just --
4
5 THE COURT: So what happened there? I am sorry? Give me
6 that again. What happened?
7
8 MR. MERCHANT: The judge certified for a national class out of
9 Saskatchewan. So it isn't -- it isn't just Ontario judges who think -- who think national
10 classes work. I -- I just say why -- why take the risk?
11
12 THE COURT: That your action application -- I am sorry.
13 Your action here is a national class.
14
15 MR. MERCHANT: It is. It is. And -- and I -- I may or may not.
16 It depends on if given the opportunity would depend on where the consortium were and
17 what they'd done. Of what -- of how large a class we -- we'd be asking for and because
18 I -- because I work for the Indians I can speak with a forked tongue. I might be saying
19 the national class works. Today I'm saying the national class maybe doesn't work and
20 I'm saying but -- but I say both things because -- because I'm an Indian -- or because I'm
21 a white man working (INDISCERNIBLE). Not that Indians speak with a forked tongue.
22 But --
23
24 THE COURT: So you are saying that you have got to look at
25 the circumstances.
26
27 MR. MERCHANT: Yes, but I'm -- but -- but what's important for
28 you is you should see this as there's big risk if I take a delay in -- in Alberta. If I delay
29 Alberta and you have got to see this as about a three or four year delay. Realistically
30 they're going to argue certification, they're going to have a decision in six months, they're
31 going to have an appeal a year and a quarter after that. Then maybe they're going to do
32 something in Ontario or maybe not. And maybe they're going to have -- go another
33 certification in Ontario. The defendants certainly aren't backing off. So as you look into
34 that future, one of the -- one of the angst you should have is will the national class stand
35 up. Because they -- they put everything on the idea that Alberta would be protected by
36 the national class. So they put all their -- all their eggs in the national class basket which
37 statute says you should decide at certification but we say what's more important on the
38 risk side is maybe Peter Hogue (phonetic) is right. Maybe the Nova Scotia Court of
39 Appeal is right, maybe the Quebec Court of Appeal is right. There is no national class.
40 What I think doesn't matter but I've got some very real doubts about the national class.
41 I -- very real doubts about how procedural law can advance into other jurisdictions. Huge

1 doubts -- huge doubts about how procedural law can toe the limitation period of
2 substantive law in other jurisdictions. It's just contrary to -- contrary to reason in my
3 mind.
4
5 In the -- in the brief you saw the US settlement discussed from pages 56 to 59. That --
6 that's a part of an understanding of we submit a difference, not a stark difference but a
7 difference is we -- we're -- we begin very suspicious of that settlement and they instead
8 came into this boasting about we're working with those very lawyers who entered into
9 that settlement.
10
11 I could take you onto the decision of Mr. Justice Barrie. I'm sorry, My Lord. Missed
12 two things in -- yeah, if I could take you to the decision of Mr. Justice Barrie. And I'm
13 not sure what tab it is. I have it --
14
15 THE COURT: What is the name of the case? Well, we are
16 at -- we are at the lunch break. If you find it, we can deal with it afterwards. Can you
17 give me, picking on up Mr. Mogerman's concern, where you are in the -- in the context
18 of your argument?
19
20 MR. MERCHANT: I -- I am having real trouble getting finished by
21 3:00, I can tell you. I don't know what time we're coming back.
22
23 THE COURT: We are coming back at two or as soon
24 thereafter as counsel may be heard.
25
26 MR. MERCHANT: It's a carriage -- the carriage decision of Barrie,
27 J and the --
28
29 THE COURT: I am going to give you the lunch hour to find
30 it. Let me give you a chance to do some work on both sides. I want to have each of you
31 address, if you will, your doomsday scenario. What happens, Mr. Merchant, I will put it
32 another way: What terms and conditions if the Court decides to, notwithstanding your
33 arguments, make a decision on stay today as opposed to during certification and grants a
34 stay of some type, what terms, what conditions would you argue for in that context?
35
36 The reverse side to the consortium and the defendants is a little more difficult. I guess it
37 is what happens if I do not grant a stay? Presumably it means that we schedule a
38 certification motion. For some time later in April. Just want to see if I got a reaction
39 with that. And you hire more lawyers and do more work and get ready to argue the same
40 issues as in BC. So I mean, that seems to follow. But is there some other scenario? So
41 I guess I say to the consortium of defendants that let's assume I am wearing my hat as

1 case manager with all of its omnipotence and continued conduct. What follows from that
2 doomsday scenario? What, if anything, should I do if I say the stay is denied? And then I
3 guess I get into carriage. And so, yes, you can carry but you have got to act. So I do not
4 want you to address it now. But I want you to --
5
6 UNIDENTIFIED SPEAKER: File the record tomorrow. If we wanted to have
7 that warfare. It's --
8
9 THE COURT: I want you to think about that so that I have got
10 an understanding of the options. Okay? So before the end of the day I want you to
11 address -- or before the end of whichever day we finish.
12
13 Ms. Kay?
14
15 MS. KAY: My Lord, I rise with hesitation but just to pick
16 up on that point because they're folks who have travel arrangements to make because
17 we're from the center of the universe. I had understood this --
18
19 THE COURT: The center has changed.
20
21 MS. KAY: Yeah. I know that.
22
23 I had understood we were sitting for two days. I had understood that was confirmed by
24 the Court. There is -- well, I'll leave it at that. There is a red eye at midnight which
25 would get us back to Toronto for tomorrow. There's a meeting in connection with the
26 British Columbia proceeding on the defendant's side that has been scheduled and that it
27 will be difficult for some of us to miss. We're in your hands, obviously. If you say
28 we're back tomorrow, we're back --
29
30 THE COURT: Well, let me say a couple of things. I urge all
31 parties and certainly Mr. Merchant not to tell me what you have told me. Tell me
32 something new. I am assuming that everything in your brief is what you have told me.
33 And that that is there. So in oral argument there are some things you want to emphasize,
34 emphasize them but you do not need to point to everything. If there is something that is
35 new that has arisen as a result of the arguments that you have not addressed in your brief
36 let me hear you on those but do not tell me again what you have told me in your brief.
37 So I think that might shorten it a little bit and not cause any prejudice. But I am not
38 going to be playing Court of Appeal and pushing a time button on people without some
39 reason. We work in our court is when you start something you go until it is finished.
40 Otherwise we adjourn it until I am available in September. And so it is going to be what
41 it is. But so I have said quite seriously, you know, have your plans flexible because I

1 intend to finish this and I intend to give a decision with reasons to follow. Is where my
2 mind is at the moment, unless somebody changes my mind.
3
4 So with those cautions and those arguments I invite Mr. Merchant, who in all of his
5 offices is in the center of the universe, apparently, which is now Saskatchewan, and so
6 maybe he is less concerned than others but so anyway.
7
8 Be efficient with your time. Do not take me again to things you have already argued.
9 Take me to new things and we will see if you can make some progress and get the matter
10 resolved.
11
12 So 2:00 or very shortly thereafter is my plan.
13
14 ---
15 PROCEEDINGS ADJOURNED UNTIL AFTERNOON SESSION
16 ---
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1 **Certificate of Record**
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3 I, Natalija Varevac, certify that this recording is the record of the evidence in the
4 proceedings in the Court of Queen's Bench held in Courtroom B201 at Edmonton, Alberta
5 on the 4th day of April, 2013 and I, Natalija Varevac, was the court official in charge of
6 the sound-recording machine during the proceedings.
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1 **Certificate of Transcript**
2
3 I, Christine Rees, certify that
4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record and,
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9 (b) the Certificate of Record for these proceedings was included orally on the record
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta
2 ———
3 April 4, 2013 | Afternoon Session
4
5 The Honourable | Court of Queen's Bench of Alberta
6 Justice Rooke
7

8 R. Mogerman	For Macaronies Hair Club & Laser Centre Inc.,
9	operating as Fuze Salon
10 J. Winstanley	For Macaronies Hair Club & Laser Centre Inc.,
11	operating as Fuze Salon
12 E.F.A. Merchant	For 1023926 Alberta Ltd.
13 G.K. Neill	For 1023926 Alberta Ltd.
14 J. Kadavil	For 1023926 Alberta Ltd.
15 M.J. LaFleche	For Bank of America Corporation
16 K. Kay	For Canadian Imperial Bank of Commerce
17 B.W. Dixon	For Bank of Nova Scotia
18 C. Hunter	For Capital One Financial Corporation
19 M. Adlem	For Citigroup Inc.
20 C. Chatelain	For Federation des Caisses Desjardins du
21	Quebec
22 J.B. Simpson	For MasterCard International Incorporated
23 J.B. Musgrove	For MasterCard International Incorporated
24 A. Kuntz	For National Bank of Canada Inc.
25 S. Smyth	For Toronto-Dominion Bank
26 J. Yates	For Toronto-Dominion Bank
27 D. Neave	For Visa Canada Corporation
28 B. Andrews	Court Clerk

29 ———
30
31 **Discussion**
32
33 THE COURT: I invited you to this other proceeding, but no
34 one came. And then now I am afraid to tell you the name because there will be competing
35 statements of claim issued before the end of the afternoon if I do, and we will have to do
36 this all over again in another context. He says tongue firmly in cheek.
37
38 Mr. Merchant.
39
40 **Submissions by Mr. Merchant**
41

1 MR. MERCHANT: My Lord, I had talked about the Vioxx case,
2 and Mr. Justice -- that is at tab 189. If I could take you to tab 188. So tab 188 is the
3 decision of Judge Barry, now J.A., on carriage. And what they say -- just in passing,
4 you'll also find it -- a longer version at tab -- at tab 9 of our submissions, and it looks
5 like this. I don't see you necessarily going there and reading the longer version. It's
6 schedule -- it's schedule 2, I'm informed, of our reply brief of law, our reply brief of law
7 to third party's application in schedule 2, and in that rendition it's in that kind of a
8 format.
9
10 So Judge Barry says:
11
12 Now turning to the substance of the matter --
13
14 This is the second paragraph on page 2.
15
16 -- of who should have carriage, that question can only be answered
17 by asking another question, which is how are the interests of the
18 potential class members best served?
19
20 And then he says first:
21
22 The nature and scope of the class action.
23
24 In the other version you'll find that there was a -- there was a diversion, a discussion of
25 involving or allowing the other -- the Barry group, Barry, Docken and some others to
26 remain in the peace, and that's why the other version is important, because I'll come back
27 to mentioning this allowing others to stay in the peace in a minute, but in -- on page 3 it
28 says:
29
30 Barry J., Going back to the six *Vitapharm* factors, I don't see the
31 first factor being very determinative with respect to the six factors
32 we saw both Mr. Stamp and Mr. Merchant take slices of each
33 other --
34
35 I don't know that we did that too much, not -- less than here, but -- and then at the
36 bottom of page 3:
37
38 The other factor, factor 5 of Vitapharm, the relative priority of
39 commencements, this favours Merchant Law Group, favours the
40 Williams, Ring as represented plaintiffs. I note that while I
41 understand we've come about --

I don’t believe the New Brunswick residences would be expected -- and this is part of why it’s important.

> I don’t believe the New Brunswick residents would be expected to wait for class action legislation in Newfoundland and Labrador before going on with their claim in the same way I don’t think that Newfoundland and Labrador residents from another province for that matter would have to wait for the proclamation of New Brunswick.

New Brunswick was just about to make the case possible, and this is another case similar to the ten cases where the judge says they’re entitled to access.

In terms of resources and experience, well, here we get into certain -- this is part of why this case is important. Mr. Branch said, you know, the discipline issue has been raised a couple of times and it’s time for a judge to decide it. Well, a couple of times it has been raised and judges have not -- have decided that it’s not an issue. And so he’s not saying this is a time for a judge to decide it, he’s saying this is a time for a judge to decide it differently from the way that the other two judges decided it.

So he says:

> We get into discipline matters raised with respect to Mr. Merchant. There has been some judicial criticism. I note here it’s not listed. Mr. Merchant has been referenced as the Merchant Law Group, or at least one case. I think it’s common in referring members of the group who were in that particular action because it would be strange if Mr. Merchant’s frailties were visited upon every counsel in his firm, a large firm, a lot of skilled lawyers. So I’m proceeding on the basis that there are other adequate counsel who might proceed with the matter after this week. As I said yesterday, Mr. Merchant --

And then he went on to say he had received me -- not withstanding the fact that I hadn’t had clearance from the Newfoundland Bar, then two paragraphs down, another important area, he said:

> I don’t agree with Mr. Stamp that it is my role to select the best of the two groups, as was set out in --

1 THE COURT: Sorry, let me -- okay. Go ahead.
2
3 MR. MERCHANT: Set out in *Dutton.* My responsibility is to ensure
4 that counsel representing the representative plaintiff can adequately represent the class
5 members.
6
7 Now, respectfully, I think that our firm brings more strength than this consortium, but
8 there was no doubt that consortium brought at least as much, if not greater strength, than
9 Merchant Law Group and an array of very well qualified lawyers, sort of the class action
10 cream from Atlantic Canada, plus Mr. Docken. And I weigh all of these factors -- he
11 says:
12
13 I weigh all of these factors, and I conclude that Merchant Law
14 Group should have carriage on this matter going into the
15 application for certification.
16
17 He wasn't giving carriage absolutely incidentally. Incidentally, I think the third and fifth
18 factor, the degree of preparation, the advanced state of the Williams litigation, the work
19 already done, the relative priority of the commencing class actions, and particularly I'm
20 satisfied I should pay attention to paragraph 22 of *Setterington* where the judge said:
21
22 If one of the actions was significantly more advanced than the
23 other, it would be construed as an advantage both in the
24 efficiencies that would be lost and potential unfairness to the
25 defendants should the other action be selected.
26
27 Well, *Setterington* was the case where we had been to certification in Saskatchewan, but
28 the Ontario Court said we're looking at who's ready to go in Ontario, not looking at the
29 level of preparation or wherever they were across Canada. So *Setterington,* the very case
30 that my colleagues want to rely on for certain things, here's Judge Barry saying, no, I'm
31 just going to look here and here they're ready to go, here they're wanting to go, and I'm
32 going to -- and I rely on *Setterington* in part for authority for doing that.
33
34 Then, interestingly, in the next -- at the end of the judgment, something I'm going to
35 discuss with you again later: Although -- we see in the last paragraph, sort of beginning
36 the second line, he says:
37
38 Although I decided that MLG should have carriage, I do grant you
39 leave should you wish to participate with the restrictions or
40 limitations of maintaining control.
41

1 This is to the other side. And he says:
2
3 > I suspect that common sense will prevail and input from both sides
4 > will be constructive rather than otherwise. My decision is that
5 > your application, Mr. Stamp, is dismissed and the application for a
6 > stay of the William, Rings matter is dismissed.
7
8 Did not stay them. Didn't stay them. Just said that we could go ahead, and didn't grant
9 their application for a stay of our motion but said our motion could go ahead.
10
11 Now, what my friend -- my friend Mr. Branch tried the same Law Society and then had a
12 then current case that didn't ever become a Law Society or anything issue. He tried -- he
13 tried the same thing before Mr. Justice Hinkson in the *Joel* decision. And putting it
14 synoptically in argument, Mr. Justice Hinkson said, well, that's not an issue for me, that's
15 for the Law Society. If the Law Society allows Mr. Merchant to appear before me, that's
16 the end of the issue.
17
18 So now they come and they say, well, I'd like to -- you know, somebody has to decide
19 this issue. No, what they really mean is somebody has to decide the issue differently
20 from the way that the two -- the two judges who have decided the issue have decided the
21 issue.
22
23 Now, that's -- that's an important carriage decision for the parallels that you have here,
24 which is where we're ready to go. And the idea that Your Lordship might say to my
25 friends, well -- I mean, it's not inconceivable that that -- the Court could say to my
26 friends I grant you carriage conditional upon you getting going, but that's certainly not --
27 that's certainly not what happened in *Setterington,* and that's certainly not what
28 happened -- not what happened in *Williams* before Mr. Justice Barry.
29
30 It would be a -- forgive me -- a pretty bizarre disposition to say you came here and you
31 told me and you told me and you told me you weren't going to go ahead but now I want
32 to make you go ahead, so I choose you and I want you to go ahead. So that -- that's
33 taking one of the most factors in deciding carriage in this case and turning it on its head.
34 That's saying it's not an important factor, but it was an important factor because I want
35 this to go ahead. So then you say, well, I'm not going to select the group that really want
36 to go ahead and are ready to go ahead. I'm going to -- that's important to me. You'd
37 have to be saying that's important to me. It's so important to me that I ought to be
38 granting carriage to Merchant Law Group, but instead I'm going to change that and say,
39 well, the other people I can -- I can force them to go ahead.
40
41 Now, you then have to ask yourself, well, how well is that going to work? Even if you

1 could force them, you're not in the conferences with -- between the consortium and the
2 defendants. You don't know how -- you know, one of them says I can't make it, I've
3 got -- I can't make it that week, I have a pedicure booked. So it -- if you can't -- you
4 know, herding lawyers to go forward just if they're not -- if they're not wanting to go
5 forward, that, in my respectful submission, just can't work, to say that's the important
6 issue but then I'm going to turn it around and make the other people do what they don't
7 want to do and what they've told me repeatedly that they don't want to do.
8
9 I mentioned in deciding carriage that an important issue is this believe me idea. So
10 believe me things are going well in British Columbia, and then you go to this new believe
11 me issue, which would -- believe me -- believe me, I'll go ahead, I'll go ahead with the
12 case. It -- if I may, it reminds me of a cartoon where they're outside the Kremlin and one
13 of the serfs is throwing a -- throwing a rock at some Americans, and around -- and around
14 the corner there's a guard with a gun on the serf, on the peasant. And he's saying, not
15 spontaneously enough, Komrad. So how do you -- how do you turn them into really
16 wanting to go ahead? Well, in my submission, you really can't.
17
18 My Lord, I'm sorry to say this out of order, but I thought that I would begin by
19 answering your question about the terms and conditions, if I may, and --
20
21 THE COURT: I thought you meant end by addressing terms
22 and conditions, but --
23
24 MR. MERCHANT: So I took your question to me to be I stay both
25 of these actions and how does that work? So if -- I didn't think that that left a lot of
26 terms and conditions for the Court. I thought it would be a report to me two months
27 hence, because you'd want to see what happens with what's going on in B.C., that that
28 would be -- if you decided that against the ten, implicitly it would be to wait for the B.C.
29 So report in two months and report every two months thereafter struck me as appropriate.
30 And so that's number one and number two. Number three, either counsel may ask for a
31 case management earlier than that, and, number four, the Court or any party may ask to
32 lift the stay on notice. Well, you don't exactly give notice in the usual way, but you
33 might say, look, I've had it and I'm going to hear you on notice. So the Court or any
34 party in our case may -- and I don't know what the word -- what the verb is for you --
35 ask to lift the stay.
36
37 There are a number of factors that I'd like to discuss that are raised by the defendants in
38 the consortium that are almost of no consequence in carriage fights and on our facts, but
39 let's try to tick them off quickly. The defendants raise that in a carriage issue that Vlahos
40 and a different plaintiff caused an action to be launched in Alberta and Saskatchewan.
41 The people they support caused an action to be launched in British Columbia, Ontario,

1 and Quebec, but with us they criticize launching in Saskatchewan and Alberta.
2
3 Second, I've mentioned in our submission that you ought to conclude that Chris Vlahos,
4 with Merchant Law Group as the counsel, is more determined about this and even to the
5 point of counsel saying why they didn't want to proceed here, because of costs issues. So
6 if somehow you said you have carriage but I want you to get on with it, you can imagine,
7 one, they're not going to go very quickly and, two, they're going to be dragging their feet
8 because they'd be afraid of costs.
9
10 Next, and rather importantly but not -- importantly but not, importantly because they put
11 so much effort into it, the consortium seems to claim ownership of the idea that the credit
12 card companies are taking advantage of businesses and, therefore, the Court should award
13 carriage to them and delay proceedings in Alberta because it's their action. They own
14 this action. We were here first. They copied our idea.
15
16 This is wrong in five ways. First, it's not their idea. The claim -- My Lord, if other --
17 there might -- there might be some benefit -- and the middle part I'm going to describe to
18 you in a minute. This is all on the record. There's nothing new here, but -- so this is the
19 two -- the two actions with the differences highlighted in yellow. There aren't very many
20 differences, but there are some differences, and that's certainly an issue. So you may
21 want to look at the differences.
22
23 In the middle -- in the middle is out of the record, but you have the motion to authorize
24 by -- launched in Quebec and the competition tribunal notice of application. Their first
25 claim is based on the application filed by the competition tribunal in December of 2010.
26 The consortium didn't think up this claim. The competition tribunal thought up this
27 claim, and either they thought it up or maybe they got it from the Attorneys General in
28 the United States.
29
30 Our file -- it's irrelevant because there's no ownership in ideas. Our file was open in
31 2005. We've been looking at the problem, saw that something was wrong --
32
33 MR. MOGERMAN: Where's the evidence of this on the record, and
34 how is it relevant?
35
36 MR. MERCHANT: Okay. Well, I agree it's not relevant. So the
37 consortium lawyers did not think up this claim, and the -- I say these are before you. The
38 exhibits of the affidavit of Chris Vlahos indicates the reply of the commissioner of
39 competition, and that's Exhibit H of Chris Vlahos' affidavit. And the action that was
40 launched by Mr. Orenstein -- he's a sole practitioner -- the commissioner of competition
41 notice of application pleading was first filed on December 15, 2010. The consortium's

1 claim was filed on December 17, 2010, and it's just -- it's just word-for-word.
2
3 And if I could take the Court there just for a moment. So you have the motion to
4 authorize the bringing, that's Mr. Orenstein's claim. So paragraph 4 is paragraph 3.
5 VISA and MasterCard have each implemented and continue to enforce, word-for-word.
6 Paragraph 5 just carries on word-for-word. Merchants typically passed some of the
7 increased costs resulting. Paragraph 6: Petitioners contend, except there they say the
8 commissioner brings this application. Then you go to overview. It's -- if you compare,
9 you'll find it is word-for-word, paragraph-for- paragraph. Paragraph 6 is paragraph 10:
10 Each of the respondents operates a network that provides infrastructure and services
11 enabling merchants to obtain authorization, clearance and settlements. Paragraph 11 is
12 paragraph 7: Credit cards offer a number of unique features. Paragraph 8 is paragraph 12:
13 Canadian merchants pay. You can go paragraph by paragraph. The order doesn't change
14 right to the end of the claim.
15
16 I don't know whether Nemo dat quod nan habet, but so they say -- they say somebody --
17 somebody stole our idea, wonderful. We didn't steal it from them, if they're correct
18 somebody stole our idea.
19
20 Second, this is just an unsustainable concept -- oh, the Ontario -- the Ontario and British
21 Columbia actions are different, somewhat different, lots of phrases, lots of phrases drawn.
22 This is the first claim. This was the idea, and then they just followed along with the idea.
23
24 Second, it's an unsustainable concept to say to the Courts we'll protect the idea of a
25 lawyer. Courts are serving the public. They're not protecting the idea of a lawyer.
26
27 Third, it's an unsustainable concept that Merchant Law Group should say to Chris Vlahos
28 we will not take your case forward because somebody else is taking a similar case
29 forward. So here they're trying to say to the Courts class actions are not actions of
30 parties. Right now this is the action of an individual, and if it's not certified, it continues
31 to be an action of an individual. So Chris Vlahos, with good reason, doubts -- you know,
32 he says this is wrong, I've travelled, I thought it was wrong from -- you know, I've come
33 from Greece. The concept that somebody comes forward with a tax initiative or a
34 contract idea or a family law notion or something and then you're supposed to say, I'm
35 sorry, that's somebody else's idea, it's forth. This is not about fairness to lawyers anyway.
36
37 Even if the consortium had thought this up instead of taking the idea for the competition
38 bureau, even if they'd thought it up, the issue is what's best for the public in Alberta.
39 And Your Lordship should pick up and think about the basis of this constant argument.
40 They've made it over and over again, joked about it, Johnny come lately, Tony come
41 lately. It's been a very important -- well, at the basis, the basis of the idea is this isn't

1 fair to us as consortium lawyers; we should get to control all of this. That's the basis of
2 it.
3
4 Well, the Court is not about -- the Court is not about what's fair to lawyers. It has no
5 place in carriage. Fifth, we have a plaintiff who's genuinely energized about the case,
6 genuinely willing to go ahead, and unlike -- unlike Hair Club, where Hair Club was
7 saying just recently I want a stay and yesterday was saying I want a stay but now -- but
8 now would say, well, if you give us carriage and the conditions are we go ahead, well,
9 then we'll go ahead.
10
11 I'd like, if I may, to take you --
12
13 THE COURT: I guess that is better the devil they know than
14 the devil they don't know. So if there is no stay, they would sooner they carried the can
15 rather than you.
16
17 MR. MERCHANT: Yeah. Certainly the defendants would say that.
18 The defendants would say the devil we're used to, the devil we've made accommodations
19 with.
20
21 The reply by opposing counsel, by the consortium, the consortium reply, if I could take
22 you with it -- if I could take you to it, I'd like to discuss certain parts of the reply
23 because, in my submission, it informs.
24
25 So paragraph -- if you're there, paragraph 2. There they -- they argue even in the face of
26 very strong written information that the consortium and the defendants are really saying
27 the same thing, but they argue, no, no, this -- that's -- this is plainly incorrect. While the
28 defendants have brought motions seeking a stay, they've also brought a motion for
29 carriage. Well, they -- it's carriage for a stay and a stay -- a stay creates carriage. Even
30 when faced with what's obvious, they're not prepared to say, well, yes, let's argue the real
31 issue but instead try to sort of quibble their way through -- through to say there's
32 something different.
33
34 Page 4, paragraph 14, at the bottom --
35
36 THE COURT: Now, I want to make sure I am following the
37 right document.
38
39 MR. MERCHANT: This is a document --
40
41 THE COURT: Oh, yes, the reply brief. Okay.

1
2 MR. MERCHANT: Yeah, March 22.
3
4 THE COURT: Yeah. Well, it is filed March 25 but then --
5
6 MR. MERCHANT: Yeah, dated March 22, nine pages long.
7
8 THE COURT: Yeah, I have got it. I was on the wrong one.
9 Go ahead, page 4.
10
11 MR. MERCHANT: Page 4, at the bottom, about five lines down,
12 the coordinated actions of the consortium are well ahead of the MLG action with a
13 finalized and organized evidentiary record, a certification hearing, the record -- well,
14 we're back to this problem that they -- that it's all about -- it's all about believe me
15 instead of here's the evidence or we'll put this before you. And judges -- there's a
16 whole -- a whole tenant of the law that says you can't be deciding case -- deciding things
17 based on what lawyers you believe, because then you don't know -- you know, sometimes
18 you wouldn't believe or you'd have a tendency not to believe. So it's this same issue.
19
20 Six months ago, they knew -- they knew but they didn't bring evidence before you. The
21 consortium plaintiffs say we could have a finalized certification record in Alberta
22 immediately, but you're supposed to just believe them.
23
24 Of course the issue is Alberta, not everywhere. Judge Barry said it's Alberta, not
25 everywhere. *Setterington* said it's Ontario, not everywhere. So but they say don't pay
26 attention to *Setterington* in this regard, don't pay attention to Williams in this regard, you
27 should look at the fact that we could have a good record because we've got a good record
28 somewhere else.
29
30 They say in paragraph 15, the fourth line, by comparison -- so they say the MLG plaintiff
31 is far from a certification hearing in Alberta. Well, we're farther than they are, but far
32 from it. And then, by comparison, the corporation's plaintiff -- or the consortium plaintiff
33 could file a finalized certification record in Alberta immediately. The problem with that
34 approach again -- so more of trust me, but we're not putting it forward. And could, but
35 how, komrad, do you get them to be interested in doing that?
36
37 Then in paragraph 15 they mention -- they mention Vioxx and just make a statement
38 about serious detriment to class members as though making the statement makes it so. So
39 this -- this confusion --
40
41 THE COURT: Paragraph which? I'm sorry?

1
2 MR. MERCHANT: In paragraph 15 they say Mr. -- it leads to the
3 kind of litigation chaos that Mr. Merchant created in the Vioxx litigation, to the serious
4 detriment of class members and all parties. Well, what -- what did I do? What did our
5 firm do? We applied for certification before a judge who granted the certification.
6 Difficult to visit chaos on us for that, and then that was overturned in the Court of
7 Appeal. We went in in *Setterington* and said -- just as if saying, here, we went in
8 *Setterington* and said we're way ahead of these people; gosh, we've had certification, give
9 us carriage in Ontario. The Court said, no, I won't give you carriage in Ontario because
10 we're going to look at who's better -- who's ready to go in Ontario.
11
12 And then, in addition to that, Vioxx couldn't be a better example of the bad of consortia.
13 So these are -- these are public numbers. The Vioxx settlement in the United States was
14 $4.85 billion. Canada has a larger drug use of Vioxx than the United States. Our
15 population is 10 percent of the United States, so you'd think a reasonable settlement in
16 Canada would have been 500 million. The consortium of lawyers settled Vioxx in
17 Canada for 36 million. The settlement is 13.88 percent on a per user basis of the
18 settlement in the United States.
19
20 Compare that to *Maple Leaf*. So in *Maple Leaf,* Merchant Law Group represented 26 of
21 the 29 dead, families of the dead, and 4,000 of the 5,000 who had been injured. There
22 were other lawyers who represented the scads that remained. So we were -- we were the
23 dominant. We were dominant. We didn't have to go along with sort of a lowest common
24 denominator kind of approach to settlement. We got -- we got every nickel that they
25 could possibly get. We got -- we were prepared to go to a class action to a common
26 issues trial.
27
28 You can't, as this reply does, just throw in -- throw in some words about creating Vioxx
29 chaos and then have a judge consider -- consider that kind of thing. In fact, Vioxx is a
30 good example -- in our submission, Vioxx is a good example of why consortium --
31 consortia don't work very well.
32
33 Paragraph 16, they say:
34
35 Because of the no-cost rule, it is often wise to use British
36 Columbia as the lead jurisdiction in high stakes class actions, and
37 there are numerous successful examples of British Columbia
38 taking the lead in national class actions.
39
40 My friend Mr. Beresh said this is a -- this is a well-known strategy to go ahead in British
41 Columbia and then elsewhere.

I invite them to show a single solitary case, single one -- and I say I invite them because I may have missed it or just don't know. A single case that they didn't take or we didn't take, that somebody took in British Columbia who wasn't a British Columbia law firm or didn't have a British Columbia connection so the lead were the British Columbia lawyers. They're proceeding first in British Columbia because this is a British Columbia consortium. We've got one person not from British Columbia, but to say -- I mean, what -- if lawyers were hunting around Canada to avoid costs, they'd go to a national jurisdiction like Saskatchewan or a national jurisdiction like Manitoba. These cases have gone forward in British Columbia because there are a number of class action law firms that pursue matters in British Columbia or reside in British Columbia.

Paragraph 17:

> MLG contends that its experts presents a broader theory of liability than an opinion.

Then they say:

> This statement is baseless and cannot be tested on the record --

Okay.

> -- because much of the consortium's British Columbia experts and cross-examinations aren't before you.

Well, why aren't they before you? So, you know, they take issue with you can look at -- you should look at our experts' report, you should look at our certification record, say is this -- is this the beginning? But, again, paragraph 17 is, believe me, believe me, if I could show you, I'd show you that I have a better case -- I have a better case than they do. I'd show you that our -- that our experts are better.

Then they also proffer this silly idea that the increasing cost, that somehow that would create an issue. That's just a common sense application.

Paragraph 18, the limitation period for all Alberta class members was either tolled by the filing of the Ontario national case, which is broader, while we say it wasn't, and that carries -- that carries a bit of -- a bit of risk.

Paragraph 19, they say the -- they say waiver of tort. And then they go on -- the cases that they present, paragraph 19, we just -- we just take a different read of the law, but the

1 cases they present are in many cases B.C. consumer protection law cases, and that
2 protection doesn't -- doesn't exist here.
3
4 Could I take you -- I'm not yet to challenging Luciana Brasil's affidavit, but could I take
5 you to paragraph 7.
6
7 THE COURT: So the second one?
8
9 MR. MERCHANT: Yes. Yeah, the big affidavit.
10
11 THE COURT: Madam Clerk, do you -- this is the December
12 8th?
13
14 MR. MERCHANT: Yes. Filed December 8th, sworn December 4.
15 Paragraph 7 says --
16
17 THE COURT: But it is for December 4. It is filed the 8th.
18 This is another one. This is a different one. Well, it is filed the 7th. You are looking for
19 the December 4th one?
20
21 MR. MERCHANT: Yes.
22
23 THE COURT: Okay. This is it, but I want the one with the
24 attachments. It is thick. It is thick.
25
26 THE COURT CLERK: (INDISCERNIBLE).
27
28 THE COURT: No, no. We are looking for the affidavit of this
29 lady dated December 4th. The one I just gave to you is the exact one. I want the
30 original of that. Let me see what you have got there. Maybe I am on the wrong one. It
31 is the original of this. Madam Clerk --
32
33 THE COURT CLERK: Sorry.
34
35 THE COURT: Original of this. No, no, that is not it.
36
37 THE COURT CLERK: Sorry, Your Honour.
38
39 THE COURT: Affidavit of Brasil, December 4. It is filed on
40 December 7th. Well, give me my copy back. Okay. Give me the copy there too, okay.
41 All right. I have got the original of December 4.

1
2 MR. MERCHANT: Would the Court like another copy just to
3 follow and give back or --
4
5 THE COURT: No. I --
6
7 MR. MERCHANT: Fair enough.
8
9 THE COURT: Oh, I see. There is a second piece to it, then.
10
11 MR. MERCHANT: I don't -- I'm not, right now at least, going to --
12 going to the exhibits. I don't know that I will, so maybe we're fine.
13
14 THE COURT: I have got the text, though.
15
16 MR. MERCHANT: Yeah, okay. So they say there, with respect --
17 look at the -- look at the websites with respect to the firm's expertise and class action
18 litigation. We can sort of look at -- look at our advertising flyers on our expert -- on our
19 expertise. So in a minute I guess I'll invite you to let me put my advertising flyer
20 forward from my website, our website. And then paragraph 22:
21
22 The consortium has entered into a strategic consulting relationship
23 with the co-league lawyers in the US proceedings. This
24 relationship is extremely valuable, as these lawyers have been
25 engaged in active litigation against the defendants.
26
27 Now, at this point I'd like to deal with the issue of receipt of the -- of the affidavit.
28
29 THE COURT: So is there some point you want to take me to
30 on paragraph 22, or did I miss it?
31
32 MR. MERCHANT: I'd like to take you to some cases first and
33 then -- and then come back to the paragraphs, if I may. So --
34
35 THE COURT: Are these cases you have given your friends
36 before today?
37
38 MR. MERCHANT: Yes, they -- well, only on Monday. The first
39 two cases I'd like to refer you to are cases that they presented to you. So the first case is
40 the decision of Mr. Justice McMahon in *Calf Robe.* So they presented *Calf Robe* to you.
41 This is a charging order. You didn't -- we didn't see eye-to-eye with Mr. Justice

1 McMahon. We were -- he locked us in case management, no -- this was an Indian
2 residential. No case ever got to trial in Alberta. No Indian residential school case got to
3 trial in Alberta, while Indian residential school cases went to trial in Manitoba, British
4 Columbia, Ontario, everywhere, but we were -- we were locked up in case management.
5 We didn't agree with that view. We tried to escape.
6
7 But paragraph 11, this is their case that they had relied on.
8
9 Had a Merchant lawyer taken the affidavit rather than obliging an
10 employee to do it, he or she would have been subject to
11 cross-examination and could not have properly argued the motion
12 on his or her behalf.
13
14 That's their case.
15
16 Second, *Joel.* So this is, again, their case, and the *Joel* to which I refer you is at tab 86.
17
18 THE COURT: I have it.
19
20 MR. MERCHANT: Now, before we go to *Joel,* across Canada --
21 well, I don't know about across Canada. I only know Ontario to B.C. in this regard -- the
22 rule is the same. They don't swear an affidavit and argue it's the same, but Ontario is lax
23 about enforcing that rule. British Columbia is lax about enforcing that rule. The cases
24 from the prairies are strong in enforcing the rule.
25
26 MR. MOGERMAN: Your Honour, where are the cases he's referring
27 to? On what basis is he saying it? What happens is we're just getting random statements
28 of counsel that are not organized, that are not going anywhere, and that are consuming a
29 bunch of time. And I may sound frustrated, probably because I am, but at some point
30 Mr. Merchant needs to hone down into the core points, make his submissions on those
31 core points, and be done with it.
32
33 MR. MERCHANT: So at tab 86, their case, paragraph 4, counsel
34 for Ms. Joel filed two affidavits sworn by Jay Strosberg, who's counsel for plaintiffs in
35 similar proceedings in Ontario but part of the same consortium and with whom counsel
36 for Ms. Joel are affiliated in the pursuit of damages for the defendants.
37
38 Then paragraph 7:
39
40 I rule that the affidavits could be relied upon by all counsel. I did
41 so because it is my view that the practice of not speaking to one's

1 affidavit does not extend to the situation where counsel in another
2 province wish to rely upon an affidavit from a member of even an
3 affiliated firm. My ruling was also based on the fact that counsel
4 referred to the affidavit in their submissions.
5
6 Well, what are they -- what's he saying there? He's saying if Ms. Brasil had sworn the
7 affidavit I wouldn't have allowed it. If Ms. Brasil had sworn the affidavit, come sat at
8 counsel table -- well, whether she sat at counsel table or not. So two cases that my
9 friends put forward, and both of them say she can't swear the affidavit and they can't then
10 argue. And it's a problem. It's a problem on carriage motions because if the lawyers
11 swear, they shouldn't be arguing and if the clients swear, it's a problem. I mean, how do
12 clients swear about concept?
13
14 THE COURT: Well, it goes to the weight, I guess, unless there
15 is a motion to strike it in a timely fashion. I don't see any motion to strike that has been
16 brought in a timely fashion, but I see your comments on weight, so --
17
18 MR. MERCHANT: So if you look at the submissions, the cases that
19 came, so tab 1 is the code, tab 2 is the code, tab 3 is Mr. Justice Veit --
20
21 THE COURT: Madam Justice Veit, yes.
22
23 MR. MERCHANT: A lawyer cannot, as a general rule -- Veit. You
24 see -- see the portions yellowed. Tab 4, the rule arises, again an Alberta case.
25
26 THE COURT: We spent a lot of time knocking lawyers out of
27 a box because they have done this, but -- even the Court of Appeal in Saskatchewan I see.
28
29 MR. MERCHANT: The Court of Appeal of Saskatchewan told
30 them to go out and get other counsel.
31
32 THE COURT: Yeah.
33
34 MR. MERCHANT: So Ms. Bilson was I think the dean of law at
35 the University of Saskatchewan at the time, and other counsel. Now --
36
37 THE COURT: So what do you want me to take from all that?
38
39 MR. MERCHANT: Say again?
40
41 THE COURT: What is the bottom line of your submissions in

1 this regard?
2
3 MR. MERCHANT: Well, I would have -- I would have said strike
4 the affidavit, but it didn't seem to me that was going too well. So let's look at the
5 affidavit, because -- let's talk about -- because I want to go through the affidavit in
6 relation to weight. So paragraph number 1, in one of the lawyer's information and belief,
7 paragraph 2 -- well, you didn't like that argument, that it's just sworn. The stay, the
8 claim advanced, the Merchant Alberta action are already advanced in proposed class
9 actions in Ontario. It's just --
10
11 THE COURT: I am sorry. I want to make sure I have got the
12 right one. I was looking at December 4. Is that the one you are referring --
13
14 MR. MERCHANT: Yes.
15
16 THE COURT: Okay.
17
18 MR. MERCHANT: So paragraph 3, she just says, here's my
19 opinion, we're more advanced. So you're just supposed to accept her opinion. She
20 doesn't put anything before you. She doesn't give you the exhibits. My opinion, more
21 advanced.
22
23 THE COURT: Let's be clear, she was subject to
24 cross-examination, had you wished to do so.
25
26 MR. MERCHANT: I understand. But that can't escape -- that can't
27 escape wrong and right. Paragraph 5 says the consortium action claims on behalf of all
28 persons in Canada --
29
30 THE COURT: Yes, I know what they say. I have read it.
31
32 MR. MERCHANT: Okay.
33
34 THE COURT: There probably wasn't anybody left in Alberta
35 that wasn't part of the -- or B.C. that wasn't part of the consortium that could swear an
36 affidavit on some of these things, so --
37
38 MR. MERCHANT: Well, let the client can swear that -- can
39 swear. That's -- we say the client has to swear. Then they criticize --
40
41 THE COURT: And then they criticize you because the client

1 doesn't know anything, he obviously got it from you.
2
3 MR. MERCHANT: That's right.
4
5 THE COURT: So --
6
7 MR. MERCHANT: That -- I agree. Paragraph 19:
8
9 Our firm has, since the commencement of these proceedings,
10 maintained information on the website. Similar information has
11 been available on the websites of the other consortium firms.
12
13 Then they put more of their website. Then 20:
14
15 All consortium firms are leading class action specialists --
16
17 Not bashful in this affidavit.
18
19 -- are leading class action specialists who have successfully tried
20 and resolved numerous class actions on behalf of their clients.
21
22 Then paragraph 21 she forms a conclusion.
23
24 THE COURT: You are saying they are opinions, not facts.
25
26 MR. MERCHANT: Correct. Paragraph 22 is opinion.
27
28 THE COURT: We strike those on a motion usually, but --
29
30 MR. MERCHANT: Paragraph 23, there are numerous public
31 reports, have reached a settlement -- he tells you -- doesn't tell you what the basis is.
32 She's not an expert. Paragraph 24 tells you. Paragraph 29 is really just an argument filed
33 in the Merchant Saskatchewan action was essentially identical to the notice of civil action.
34 Paragraph 33 -- 32, I mean, is just argument. I asked (INDISCERNIBLE) to create a
35 table. Merchant Alberta action seeks to advance claims on behalf of the proposed
36 national classes overlap, again argument. 34, it's already included. No class certification
37 has been given.
38
39 Just can't file this kind of affidavit in our -- in our respectful submission. And if filed,
40 and if the Court says, well, it's here and I'll make some use of it, that's a very bad
41 direction for -- and it's a tough one. I -- just as Your Lordship said, if -- when the

1 plaintiff files, which we always do, then you get this complaint about, well, what does the
2 plaintiff know about this action, they were told about it. And so --
3
4 THE COURT: Well, I have your points and I have their points,
5 and absent a motion to strike or redact, I take it to weight. If you were to bring a formal
6 motion in a timely fashion, or they, to strike, we would hear it, we would decide it, and I
7 would apply the law. If that has not been done, I am not going to do it in the context of
8 a hearing. I will take your points that go to weight and leave it at that. I am not here
9 to -- as a Law Society policeman to enforce the code, and so I take the evidence that is in
10 front of me. The primary presumption is that it is admissible unless challenged and
11 struck. Having been admissible because it hasn't been challenged and struck, it goes to
12 weight.
13
14 MR. MERCHANT: Paragraph 20 says, being busy, so it said, you
15 know, if you're just going to focus, you're going to focus on me. I've been a pretty
16 active lawyer. There are 1581 cases, there would be even more. It says busy doesn't
17 excuse court findings of incompetence and lack of ethics. It's not -- it's not being --
18 being busy isn't the issue. The issue --
19
20 THE COURT: Sorry, paragraph 20?
21
22 MR. MERCHANT: 20, yeah, the end of the paragraph. You see
23 my colleagues --
24
25 MR. MOGERMAN: My Lord, he's moved into our reply.
26
27 MR. MERCHANT: I'm sorry. I'm sorry. I'm talking about the
28 reply. Back to the reply, My Lord.
29
30 THE COURT: Oh, okay. I'm sorry.
31
32 MR. MERCHANT: So the second last sentence:
33
34 Being busy does not excuse court findings of incompetence and
35 lack of ethics.
36
37 That wasn't the point. The point isn't an issue of busy, the point is look at the full case
38 scenario.
39
40 Paragraph 22:
41

1 Further and critically, the consortium has substantial experience
2 leading the presentation of price fixing class actions at all levels of
3 courts, and the MLG plaintiff statement that it has scores of
4 successes and myriads of certifications --
5
6 So then -- so then they do -- they list five or six cases. So in argument they say -- in
7 argument by way of reply, they say here, here's some cases. So if this list are all -- are
8 all the cases at certification for Merchant -- for Merchant Law Group. So not very good
9 research -- not very good research to miss, for example, cases that -- we don't put --
10
11 THE COURT: Is this in the material?
12
13 MR. MERCHANT: It's -- yeah, it's just citations. It's new
14 material, My Lord. It's just -- it's just case names. Can't -- you know, this comes by
15 way of a reply that says those are the only cases, so --
16
17 THE COURT: So you have done a vanity search, and this is
18 what you got?
19
20 MR. MERCHANT: Yeah.
21
22 THE COURT: Okay.
23
24 MR. MERCHANT: Then carrying right along with trying to be --
25
26 MR. MOGERMAN: My Lord, it's not just case names, it's a bunch
27 of analysis and -- I don't know. I haven't seen it before.
28
29 MR. MERCHANT: Then -- well, it's case names. Yeah, okay. It's
30 case names, and it says things like certified overturned or -- then carrying on with Petty,
31 they say interestingly -- this is paragraph 23:
32
33 MLG only points to one lawyer in the MLG Alberta offices who
34 devotes more than 25 percent of her time to class actions. Jane
35 Ann Summers now practices in the British Columbia Surrey office.
36
37
38 They don't -- they don't say where there's any evidence of that. Her only -- the only
39 house she owns, she owns in Calgary.
40
41 THE COURT: Well, don't get me into the senate as to where

1 people live and where they send their expense accounts.
2
3 MR. MERCHANT: Yeah, right. And they say -- they draw -- in
4 paragraph 23, then they decide to draw in Jane Ann Summers regarding Mr. Justice
5 McMahon saying I didn't get much help. You're right. Well, see we just kept saying let
6 us -- let us escape, but pretty difficult -- I'm pleased that they would draw attention to
7 residential schools, one of our longest fights where we showed great resilience with
8 wonderful results. If the Court judged the strength and capacity of Merchant Law Group
9 on residential schools, we'd be more than delighted.
10
11 Incidentally, residential schools include -- include a case that Mr. Neill and I took to the
12 Supreme Court of Canada, an important case that was one of the two -- the two cases that
13 made the huge difference in residential schools. Judge Ball said there were 17 class
14 actions of relevance, 14 of those class actions were Merchant Law Group class actions.
15
16 One of the consortium submissions is that Mr. Vlahos has not brought an application to
17 stay the Hair Club claim. We don't need to do that. We don't think it's necessary. Other
18 judges have not thought it was necessary. There's no need to stay. Sometimes judges
19 grant a stay when there's a carriage motion. It would be open to you to do that. We don't
20 invite you to do that. You don't need to do that. We say let us go ahead and allow that
21 case to be available. Maybe we'll stub our toe at certification. Maybe on another record
22 they'll want to go forward.
23
24 That's what -- that's what Mr. Justice Barry decided in the case that I just read to you.
25 And Mr. Justice Klebuc in Vioxx went ahead, went ahead with our action. Our action got
26 certified, and it got overturned. Then in the settlement, it was the previous -- it was the
27 other action. He didn't stay the other action. The other action was still extant, and it was
28 that action which then formed -- in the settlement when the matter was settled, that action
29 became -- so there's nothing that -- there's nothing that necessitates that the Hair Club
30 action be stayed. We say it's the wrong -- the wrong direction.
31
32 THE COURT: But you do say if you are stayed you want
33 them stayed too?
34
35 MR. MERCHANT: Yes, because -- yes, because they're not going
36 to go forward anyway, but I thought that -- I thought that's what Your Lordship was
37 querying.
38
39 The first thing that they put in their reply was a decision of Mr. Justice Weatherill, and
40 the problem with raising a case like that is you have to hear -- you have to hear the
41 answer. So this was -- this was one of the telephones cases. We hadn't done anything on

1 telephone since 2004. Mr. Justice Weatherill appointed to the Bench 10 months ago, May
2 31, 2012. I don't think --
3
4 MR. MOGERMAN: My Lord, how is that relevant?
5
6 MR. MERCHANT: Don't --
7
8 MR. MOGERMAN: Where is he going with that?
9
10 MR. MERCHANT: Don't think he's had particular experience with
11 class actions --
12
13 THE COURT: There has been an objection, so let me hear
14 your objection, Mr. Mogerman.
15
16 MR. MOGERMAN: My Lord, when the judge was appointed is
17 irrelevant to the -- to the weight of the judgment. So I'm not sure what the point is of
18 telling the Court that, and it's those asides that are consuming time and they're leading to
19 the record being expanded and contracted. So I just don't know how that's relevant. I
20 don't think he should be speaking to that. He should be speaking to the relevant points.
21
22 THE COURT: Okay. I understand your objection. Make your
23 point, but I don't care when Justice Weatherill was appointed.
24
25 MR. MERCHANT: Mr. Justice Weatherill said:
26
27 To say that this was and has from the outset been a shoddy piece
28 of counsel work would be an understatement.
29
30 So I was there as counsel. The claim was not issued by me. I wasn't shown as the
31 responsible lawyer. The file overall within our system was opened in the Calgary system
32 of Easy Law. I've never opened a file in the Calgary system of -- well, I may have, but I
33 didn't open that in the Calgary system in Easy Law. I opened files in the Regina system.
34 I never talked with the plaintiffs in the British Columbia matter until speaking with one of
35 the plaintiffs recently because I -- end of trying --
36
37 THE COURT: So is this -- are you now giving me your
38 affidavit on this?
39
40 MR. MERCHANT: Well, sort of. Well, sort of. That's the
41 problem. The judge -- the judge acted ex mero motu. And *Polovnikoff v. Munro,* 2004

1 BCSC, you have to give notice if you're going to give costs.
2
3 They have a special rule in British Columbia that is more or less unique to British
4 Columbia, and it says that you can order costs against a lawyer even when there's no
5 reprehensible or grossly negligent conduct if the lawyer -- if you think the lawyer has
6 contributed to the delay.
7
8 So he was very clear. He said, to say that this was and has been from the outset and --
9 I'm sorry. And has from the outset been a shoddy piece of counsel work would be an
10 understatement. So I think he was confused with one of the other Mr. Merchants. There
11 are four of us in the firm, so I think he thought somehow I was doing everything.
12
13 There was a letter to -- from -- in the record from MTS, from counsel for MTS that said,
14 I take it --
15
16 THE COURT: I don't want you to be going and giving me
17 evidence. If you want to make the point that you think that this is not researched, not --
18 or if there was evidence not supportive of the conclusion that it should be attributed to
19 you, I have that point.
20
21 MR. MERCHANT: Okay.
22
23 THE COURT: But I'm not going to, at the end of an argument
24 on a reply brief, allow you to stand up and start providing evidence, so --
25
26 MR. MERCHANT: Fair enough. The case -- the case is under
27 appeal. Pretty clear case law, needed to have notice and goes back -- period. We say
28 carriage isn't about me. Luciana Brasil says look at -- look at our website. If that works
29 there, then I say it works here, and so I invite you to look at our website. And only about
30 me have I printed -- printed the website because --
31
32 THE COURT: So again you are providing evidence.
33
34 MR. MERCHANT: Well, how -- how is it any different --
35
36 THE COURT: Cross-examine her and provide a responding
37 affidavit. Ask that the case be delayed so you can do it.
38
39 MR. MERCHANT: Okay.
40
41 THE COURT: Now, the next thing I know is that we are going

1 to get -- without throwing stones, too many at you, but just in general I am trying to keep
2 it balanced. The next thing I know, I am going to have a carriage and stay motion, and
3 people are going to be standing up and saying, well, we have this on authority that it was
4 in front of Rooke on April 3rd and 4th how great we are. So I don't have a problem if
5 they put in the website you putting in yours, but not at this time. So let's have evidence
6 when I need it. If you want to have an adjournment, file more evidence, we will adjourn
7 it.
8
9 MR. MERCHANT: No.
10
11 THE COURT: Take the weekend off.
12
13 MR. MERCHANT: No, My Lord. The --
14
15 THE COURT: I could probably Google you and get
16 information too, but --
17
18 MR. MERCHANT: Yeah, particularly. Yeah. Very last word about
19 costs. So I pointed out to you the two -- in the two decisions no costs in carriage issues,
20 so -- but let me tell you the principle that I think ought to apply in a -- oh, and those are
21 both Ontario decisions, so this is the principle that ought to apply, in our submission, on
22 costs between -- in a costs jurisdiction. And those cases were from a costs jurisdiction. I
23 may be wrong, but Vlahos position on carriage we say is much stronger in terms of we're
24 actually prepared to go ahead, but we say we shouldn't get costs.
25
26 First, there are -- and least, there are unique carriage issues involved here. It's unique to
27 have carriage that doesn't knock the other -- the other team out of the box. This is rather
28 like what happens in the United States. If we receive carriage, they're still -- they're still
29 working for the plaintiffs. So in addition to the practice is no costs, what happens here --
30
31 THE COURT: On that point you are seeking carriage --
32 continued carriage of your own. You are not seeking carriage of theirs and you are happy
33 to let them continue with theirs?
34
35 MR. MERCHANT: Yes. I think -- I think that's to the benefit of
36 the class that they're available. They shouldn't be struck. So why shouldn't we get costs
37 if we succeeded? We shouldn't get costs --
38
39 THE COURT: Let's find out whether you succeeded. I usually
40 deal with costs after we know what the result is, not in anticipation, so this is a costs
41 jurisdictions. Costs can be opened. Whatever I decide, I'll say the parties can speak to

1 costs, so I don't need to hear you on that now. I don't want to hear you on that now.
2
3 MR. MERCHANT: Okay. I'd only be about two more minutes,
4 but --
5
6 THE COURT: You can save it. Does that conclude your
7 arguments, then?
8
9 MR. MERCHANT: Yes, My Lord.
10
11 THE COURT: Okay. Mr. Mogerman.
12
13 **Submissions by Mr. Mogerman**
14
15 MR. MOGERMAN: My Lord, the first thing that I wanted to do was
16 to answer the question that you put to us before I move into my reply as such. And there
17 are -- there are two scenarios, I'll call them sort of doomsday scenarios, but that's -- that's
18 not quite right. That's what you called them, but there are two scenarios that play out.
19 So the one is if there was a stay of the Merchant action and no carriage decision, no
20 formal carriage decision, what terms might be appropriate in that circumstance.
21
22 And the terms that came to mind to me over lunch, one was is that that actually means a
23 stay of the Merchant action, so there's no activity in the Merchant action and no activity
24 from the Merchant representative plaintiff during the pendency of that stay. There should
25 be reporting to this Court regularly and no less frequently than the reports that are being
26 given to the other Courts across the country. There should be a term that -- in my view
27 that says when Mr. Justice -- or Chief Justice Bauman issues reasons that there is a joint
28 or series of case management conferences with the relevant Courts to discuss the next
29 steps.
30
31 So, ideally, we would have at those -- or at that case management conference each of the
32 relevant Courts, consortium counsel, and the defendants. And at that point in time those
33 entities would address whether there will be a national certification order either by consent
34 or contested, out of which Court will there be certification orders or schedules, consent or
35 contested --
36
37 THE COURT: Can you say that again. You said national
38 order by consent or contested.
39
40 MR. MOGERMAN: That's right.
41

1 THE COURT: Out of what -- out of whatever Court, question
2 mark?
3
4 MR. MOGERMAN: That's right. Or a series of regional Court
5 decisions by consent or contested. So what we would have are all of the relevant Courts
6 and all of the relevant parties making a decision about --
7
8 THE COURT: Except Mr. Merchant.
9
10 MR. MOGERMAN: Except Mr. Merchant. And I have a term that
11 relates to Mr. Merchant, and that is that Mr. Merchant at that point, once Chief Justice
12 Bauman has issued his reasons for judgment, should be allowed to apply to lift the stay
13 and, if he thinks it appropriate, to seek carriage of some or all of the class proceedings.
14
15 So that's -- that's my response to the halfway place, and that is the -- that is if I wasn't
16 able to convince Your Lordship that the better and more comprehensive approach is to use
17 the carriage tools in addition to pure stay tools.
18
19 Now, Your Lordship also asked me to address the doomsday side of things, and that
20 would be what if there is no stay issued in either -- well, let me start with -- I'll start with
21 this scenario. What if there is no stay issued in either the consortium Alberta case or the
22 Merchant Alberta case? Then what would happen is the consortium would file a
23 certification record with an appropriate protective order that, in my submission, would be
24 the entire certification record from the British Columbia proceedings modified for Alberta
25 purposes, and the parties, Mr. Merchant, the consortium, and the defendants, would appear
26 before the Court to set a certification schedule that included a carriage motion. And the
27 reason I say that is then you would be in the position of having two certification motions
28 afoot. One of them would be complete. That would be the consortium record would be
29 complete. The Merchant record would be just at its beginnings because the defendants
30 would still have to reply and respond to that Merchant record. And the Court would have
31 to ask the question, well, what do I do now? Which certification motion do I hear?
32 When do I hear it? Who is going to be in charge in Alberta of that certification process?
33 And then carriage is front and centre.
34
35 There is a more extreme doomsday scenario from the consortium's perspective, and that is
36 the opposite of what we are asking be done with the Merchant action. So what we are
37 saying should be done is that the Merchant action should be stayed and that the
38 consortium should be given carriage. If the opposite of that was to happen, if Your
39 Lordship was to somehow decide that the consortium action should be stayed in Alberta
40 and the Merchant action should go ahead in Alberta, we would be left in a position where
41 our only option would be to appeal in the sense that we would be out of the pool, if I

1 could put it that way, in terms of the proceedings before Your Lordship.
2
3 And the final scenario, if I can put it that way, is if stay and carriage go to the consortium
4 but the Court was to say I'm not prepared to have Alberta sit around and wait for Chief
5 Justice Bauman -- and I should say that I'm just setting out scenarios. These are -- these
6 are not scenarios that I think are appropriate, in my submission, and you'll have that in
7 both chief and reply, but let's assume that was the order.
8
9 THE COURT: That is the nature I want.
10
11 MR. MOGERMAN: That's right. If that were the order, I think we
12 would be into the same process where if the Court said, look, Consortium, yes, you
13 should be running the Alberta case but get on with the Alberta case, we file a record here.
14 We set a certification schedule here, and we go to a certification hearing in Alberta as
15 soon as is reasonably possible. And then you would have duelling certification decisions
16 out of British Columbia and Alberta, and who knows what that would spur the other
17 Courts to do. But if that was the will of the Court, our view is that it could be scheduled,
18 it can be implemented.
19
20 So that, My Lord, takes me to the actual reply points. And I am well aware of the time,
21 and so I'm going to try to do this at a high level and try and stay out of the material as
22 best I can, but -- so the first overarching point is -- and you can sense my frustration as
23 my learned friend's submission played out, and that is that one could not simply take a
24 note of what Mr. Merchant said and be secure in the idea that that note was representative
25 of something that was in the record or an accurate analysis of a case. And so at one level
26 I could go through each point that he made and unpackage it. So the big point is just a
27 credibility point, and an example of that -- both a credibility on the law and a credibility
28 on the facts.
29
30 An example of that is that you, for example, would get the statement that, well, Bayer --
31 Bayer is a full answr to this. The Bayer 5, those are a full --
32
33 THE COURT: Baycol.
34
35 MR. MOGERMAN: Baycol, sorry. When I actually went through
36 the material, I found Baycol cases at tabs 12, 13, 14, 36, 37, 100, 101, 96, and 123. Only
37 three of those cases -- and that's the case at 123, the case at 96, and the case at 14 --
38 relate to the issues that are before the Court. The other cases are about certification or
39 they're about an appeal from certification, or indeed they're about leave to appeal to the
40 Supreme Court of Canada of the certification decision. The only three that were -- had
41 anything to do with the issues before the Court were at 123, 96, and 14.

1
2 And when you go to 123, which is I think the active decision that my friend is referring
3 to -- and I say I think because he doesn't really pin it down -- the Court expressly
4 distinguishes the situation where, as in this case, and in Vitamins you have two cases filed
5 in one jurisdiction. So here we have two Alberta cases. The Court expressly says that is
6 not the situation that I am dealing with in Baycol.
7
8 THE COURT: So let me take you -- ask for reference.
9
10 MR. MOGERMAN: That's at tab 123. I should have my volumes
11 organized. I believe that's in volume 4.
12
13 THE COURT: Yes. I don't need you to read it to me, just
14 give me the reference.
15
16 MR. MOGERMAN: It's at -- it's on page 4, and it's at paragraph 12
17 and 13. And in paragraph 13 -- I won't take you there to make you read it, but in
18 paragraph 13 the Court says:
19
20 In Vitapharm Cumming J. was addressing the situation of
21 competing class actions within a single province, and his statement
22 in paragraph 14 of Vitapharm must be understood in that context.
23
24
25 The difference is in Baycol and indeed in every one of the ten decisions my friend refers
26 to, every single one of them, there isn't a competing local class proceeding.
27
28 My friend made reference to the idea -- a number of times of the idea of a second front or
29 a second team being beneficial in this litigation, sort of implying that class members
30 might be better off if there was a second front. And the problem with that is that class
31 action litigation is not physical warfare. And in the circumstances of this case, fighting
32 on two fronts with one of the fronts having Mr. Merchant as the leader -- I won't give
33 him the military designation, but just as the leader of that team, it will result in increased
34 expense, delay, weakening of legal arguments, inconsistency, incoherence, and a weaker
35 position for the class members because if there is going to be a second front, the class
36 members need that front to be strategically created by counsel who know what they're
37 doing in an organized fashion.
38
39 You know, my friend has himself as the allies in the second world war, and I have him as
40 Don Quixote without -- without the humorous reference on his donkey chasing windmills.
41 We can all come up with analogies. The point is that class proceedings must be managed

1 in a strategic and thoughtful and meaningful way, and you can't have two generals in one
2 province running in two different directions.
3
4 THE COURT: So you are saying, in effect, the benefit is not
5 cumulative --
6
7 MR. MOGERMAN: That's right. It can be beneficial in certain
8 circumstances to whip saw a defendant in two different jurisdictions. I've been involved
9 in litigation where we've made a strategic decision to try that, and defendants fight back,
10 and Baycol is a good example of that sort of strategic decision, but it is not always a
11 good idea and it is never a good idea to have on the one hand the Merchant Law Group
12 with its own ideas heading off in its own direction, not strategically connected to the
13 consortium for good and valid reasons and, on the other hand, the consortium making its
14 own strategic decisions. It actually weakens the overall position of the case if you're in
15 that situation.
16
17 There was reference to a case, it was a loose case out of Saskatchewan. It was called
18 *Brooks* that my friend handed up to you, and he handed it up to you to read provisions
19 that relate to the Saskatchewan multi-jurisdictional sections of the *Class Proceedings Act.*
20 So it was the equivalent of section 9.1 in the Alberta Act. And he didn't take Your
21 Lordship to paragraph 24. He read you paragraph 23, or some of it. In paragraph 24, the
22 Court made it clear that its power to step in and stay for abuse of process was not
23 restricted by the class proceedings legislation and that, in appropriate cases, it was the
24 right thing to do to stay a case for abuse of process.
25
26 So *Brooks,* contrary to what my friend was saying, does not create a comprehensive code,
27 and the carriage decisions -- and those decisions you'll find in, for example, *Grassby,*
28 which is at tab 71 of volume 3. You'll find it in *Joel,* both at tab 86 and tab 85 of
29 volume 3, and you'll find it in *Setterington* at volume 5, tab 155 -- sorry, one more
30 reference, *Nelson v. Merck,* volume 4, tab 117.
31
32 What those cases say -- crystal clear and rejecting the very arguments that Mr. Merchant
33 made, what those cases say is the Court has either a statutory or an inherent, or both,
34 jurisdiction to control its process, and, in exercising that jurisdiction, it will decide issues
35 between competing provincial class actions before certification. And that has to be that
36 way because think of the -- think of the position that Mr. Merchant, without any authority,
37 says the Court should accept. You brief up two entirely independent certification records,
38 and then you argue them, I don't know, independently or at the same time, and then you
39 figure out which one was the right one. And that is precisely why carriage motions came
40 to be, to avoid that problem.
41

1 And in that puzzling world of Mr. Merchant's references to the case law, at one point in
2 time he said, well, that's what we did in Vioxx in Saskatchewan, and the Court said, can
3 you give me a reference to that case. And Mr. Merchant said, I'll do it after I have lunch
4 or the break, I can't remember which, and he came back with *Wuttunee* at tab -- I think it
5 was 111. The case he gave you a reference to did not contain any discussion of the
6 principle he told you had been put into effect. The case he gave you a reference to was
7 the certification decision in Saskatchewan in the Vioxx litigation. So it actually doesn't
8 discuss the point that he was discussing. It's a certification decision. It happens to be a
9 certification decision that was reversed on appeal, and there is also -- and this is, again, in
10 the material that the -- the reference to it is -- you'll find it at, if you want to reference it,
11 page 8, paragraph 21 of schedule A.
12
13 THE COURT: Sorry, now I have lost you. Page -- what is at
14 page 8 at paragraph 21?
15
16 MR. MOGERMAN: Sorry. That was my fault, My Lord. This is
17 the -- this is the brief of the consortium, schedule A, and this is the schedule that contains
18 reference to a number of Mr. Merchant's decisions. And in that schedule there's a case
19 called *Bayer v. Merck Frosst.* I don't need Your Lordship to go to it, but it is a decision
20 in which the Saskatchewan Court of Appeal -- having reversed the decision that he put in
21 front of you for a proposition that it didn't contain, Mr. Merchant then tried to reformulate
22 the case. And the Saskatchewan Court of Appeal said his reformulation is an abuse of
23 process and it's an abuse of process which was part of a common effort effectively piloted
24 and coordinated by the Merchant Law Group to certify a Vioxx class action against
25 Merck. So it was -- it was in a world of litigation and relitigation and failure that didn't
26 touch the issue that he said it stood for.
27
28 So that's argument of the applicants Macaronies Hair Club. There's a -- there should be a
29 schedule A to that argument.
30
31 THE COURT: Yeah.
32
33 MR. MOGERMAN: And it's the case at page 8.
34
35 THE COURT: Yeah.
36
37 MR. MOGERMAN: I'm -- in the circumstances of the carriage
38 motion, one of the decisions -- I think it was Justice Winkler in *Setterington,* says one of
39 the jobs of counsel was to -- is to make points that might be good or might be bad but to
40 make sure the judge has full information. So it's a less adversarial process in a certain
41 way. And one of the things that I wanted to make sure the Court was careful with is the

1 general provisions of the *Class Proceedings Act* that -- in Alberta I think it's section 13
2 and 14, so the one that gives the Court very broad powers to manage its own process and
3 the provision that says the Court can stay any proceeding relating to the class proceeding.
4
5 There is some authority that loops those sections into a certified class proceeding because
6 of the definitions of class proceeding. It's a contested issue. In some provinces the
7 Courts say, look, we have to use our inherent jurisdiction pre-contested certification. And
8 so if you have the class proceedings up there, I can take you through the wrinkle --
9
10 THE COURT: Well, and I think some of them are worded
11 different. Like, Alberta's in section 13 may at any time --
12
13 MR. MOGERMAN: Right.
14
15 THE COURT: -- make any order it considers appropriate.
16
17 MR. MOGERMAN: Right. So I think Alberta's --
18
19 THE COURT: Some are more tied to certification.
20
21 MR. MOGERMAN: That's right. I think Alberta's okay, but I
22 wanted to make sure that you were alive to that debate so that -- so that when you're
23 locating jurisdiction -- because what the Courts have said is -- and they've said this in
24 British Columbia where we have a more -- where we have a narrower statute. What they
25 said in British Columbia is the fact that we can't rely on those sections does not stop us
26 from managing our process. And we have all of the powers required to manage the
27 process in our inherent jurisdiction and under the *Law and Equity Act.*
28
29 So I think in Alberta you have the full range, but I wanted to touch down on the point
30 that there may be some debate in that interpretation.
31
32 THE COURT: Well, there is some debate because if you have
33 got a general proposition, inherent jurisdiction, you can control your own process.
34
35 MR. MOGERMAN: Right.
36
37 THE COURT: And then you have a statute that says you can
38 control your process in this specific way and this type of action.
39
40 MR. MOGERMAN: Right.
41

1 THE COURT: There is an argument that specific overrules the
2 general. That is the basic proposition of law.
3
4 MR. MOGERMAN: Yeah. Yeah.
5
6 THE COURT: And so there is some -- you know, you got to
7 work through that, but at the same time -- sorry, Chief Justice says common sense isn't
8 too common. You have to apply common sense to get there.
9
10 MR. MOGERMAN: Right. And --
11
12 THE COURT: So if you had ten actions in Alberta, are you
13 going to have ten certification proceedings to make the decision?
14
15 MR. MOGERMAN: That's right.
16
17 THE COURT: You made that a minute ago. So, you know --
18
19 MR. MOGERMAN: My only point is that --
20
21 THE COURT: -- you can put a lot of --
22
23 MR. MOGERMAN: Yeah.
24
25 THE COURT: -- angels on the head of a pin, but at the end of
26 the day you have got to say, does this make any sense in terms of case managing a class
27 proceeding.
28
29 MR. MOGERMAN: That's right. My only point was that regardless
30 of how one interprets the statute, the power is there. And that is stated in the cases that I
31 referred you to, in *Nelson* and *Joel*. And so I just -- I just didn't want too narrow a
32 ground for that.
33
34 THE COURT: Well, you got to be careful on which sections
35 you read because --
36
37 MR. MOGERMAN: That's right.
38
39 THE COURT: -- you just made the point.
40
41 MR. MOGERMAN: That's right. There is -- to some extent my

1 friend -- it's hard to extract the point, but let me put it this way: Insorfar as my friend is
2 saying that these two teams can work together --
3
4 MR. MERCHANT: I didn't say that.
5
6 MR. MOGERMAN: Okay. If he didn't say that, then I don't have
7 to respond to it. The --
8
9 MR. MERCHANT: I mean I've worked -- worked with these
10 people. I just didn't say that here. Indeed I said --
11
12 MR. MOGERMAN: That's fine.
13
14 MR. MERCHANT: -- that it should be an independent. . .
15
16 MR. MOGERMAN: There were a number of statements my friend
17 made where he said things like it is not possible to nationally organize class proceedings.
18 He effectively was an agent for chaos. He was saying you might want to. In fact, he
19 said, I think it might be a good idea, but you just can't do it. It's not possible to
20 nationally organize class proceedings. He never addressed the fact that in *McSherry* that
21 is precisely what Justice Perell did. So it must be possible because Justice Perell did it in
22 *McSherry*.
23
24 At one point my friend said something to the effect of -- and this was after a submission
25 of mine that -- to the effect that the Vlahos affidavit was irrational in a number of
26 respects. He said, look, this guy has the right to be irrational. He wants to go forward in
27 Alberta and bring his case forward, and he has the right to be irrational. And if this were
28 individual litigation, subject to not filing a frivolous case, that's true, but in a class
29 proceeding, it is not true, because you don't have a right to be irrational on behalf of the
30 class.
31
32 My friend at some point said that our whole argument on carriage was that -- was based
33 on the idea that this is a national case and a national structure, and I just wanted to touch
34 down and say that's not the case. On any carriage test, on any aspect of the carriage test,
35 if this case proceeds full ahead in Alberta interlocked with other cases, partially proceeds
36 in one jurisdiction or the other, on any carriage test the consortium should have carriage
37 of this case, in my respectful submission.
38
39 I'm not sure how far I need to go down this path, but my friend referred a few times to
40 the US MBL system, and I think there is some material on the MBL system in the record.
41 He was making stuff up about the US MBL system. He was simply making stuff up.

1 What happens in the United States is that if multiple cases are filed and of a certain
2 nature, they go to something called an MBL panel, and the MBL panel picks lead
3 counsel, stays all of the other actions, picks lead counsel, structures and organizes the
4 litigation, and that lead counsel is in charge of everything. So certain counsel are stayed
5 out, certain counsel become part of a consortium of lawyers that runs the case, and that's
6 how the MBL system works. So it's just -- it's not correct.
7
8 MR. MERCHANT: Well, easy. They're not stayed out. They still
9 are entitled to be paid. They still -- they're still a part of the process. They're still --
10 certainly lead takes over, but, you know, if we're --
11
12 THE COURT: Well, I don't think we are going to get into --
13
14 MR. MOGERMAN: I think that's right.
15
16 THE COURT: -- Canadianizing the MBL in this proceeding,
17 although there may be some --
18
19 MR. MOGERMAN: There may be some --
20
21 THE COURT: And some detriments, but there -- it says there
22 are Constitutional issues, which is always an excuse for not doing anything.
23
24 MR. MOGERMAN: My friend referred to this national class risk
25 because of the Constitutional issue, and that risk evaporates when one understands that
26 there is an Alberta case filed. So regardless of whether an Ontario national class is
27 Constitutional or not, there is an Alberta case filed.
28
29 THE COURT: Two of them.
30
31 MR. MOGERMAN: Two of them, indeed. So that's just a
32 non-issue. Now, my friend I think tried to re-characterize his own evidence on the US
33 settlement. He said that his side was very suspicious of that settlement. That's not the
34 evidence of his representative plaintiff. His representative plaintiff says that he has come
35 to a conclusion. He would reject the, what he calls, "bad for society settlement". So it's
36 not a question of being suspicious, it's a question of being wrong headed and making up
37 your mind too soon, which disentitles you to be class counsel.
38
39 THE COURT: Or represent a plaintiff.
40
41 MR. MOGERMAN: Sorry. Disentitles you to be -- to be the

1 representative of a plaintiff, that's right. I'm sorry, My Lord.
2
3 THE COURT: Well, whatever the US did, that may or may
4 not ever be what might happen here so --
5
6 MR. MOGERMAN: Who knows. Who knows what will happen
7 here. The case is at its beginning and it's going to be viciously litigated, and we think to
8 success and the defendants think otherwise. We'll see where that takes us.
9
10 THE COURT: Why settle when you can win it all, or lose it
11 all.
12
13 MR. MOGERMAN: That's right.
14
15 THE COURT: Put Mr. Adams out of work.
16
17 MR. MOGERMAN: He'll be expanding soon. My friend took you
18 to the *Williams* case at tab 188, which was a carriage decision, and I would add that to
19 the list of decisions that says the carriage decision comes first and the Court has an
20 inherent jurisdiction to manage its process, that *Williams* says that. But what my friend
21 didn't go on to point out is that in that case he ultimately went off and had the case
22 certified and then lost the case in the Newfoundland Court of Appeal, and that case is
23 over.
24
25 And I think -- my friend talked about this idea that somehow the consortium was claiming
26 ownership over the idea of a case like this, and that really shows a lack of understanding
27 of the process that we are currently engaged in. There's no ownership over the -- he said,
28 I think, the issue is what is best for the public in Alberta. So let's start by properly
29 framing the issue, and the issue is what is best for the class, it's not what is best for the
30 public in Alberta but what is best for the class.
31
32 And when we have questions of how developed the thinking is of two competing sets of
33 lawyers, when we have questions of the competence of those two lawyers, which are
34 relevant to carriage and stay, the fact that one set of lawyers entirely copied the pleadings
35 of the other set of lawyers, including the typos, and when they strayed from those
36 pleadings drafted pleadings that are essentially nonsensical or counterproductive, that is
37 relevant to those issues because the best interests of the class are not served by that
38 counsel running the case.
39
40 And the same can be said of the issue of disciplinary action taken by the Law Society
41 against my friend and, I would say more importantly, the statements that Courts have

1 made about my friend in their decisions. My friend had referred you to a 2007 decision,
2 saying that at that point in time there was a question of his conduct. And the Court said,
3 look, I'm not going to get into that, and he said -- he said, I'm asking the Court to get
4 into that. Well, a lot has happened since 2007, and in that appendix, in schedule A of the
5 brief, is an outline of case after case after case, including cases where superior Courts and
6 appellate Courts have labelled the Merchant Law Group's conduct as malicious,
7 oppressive, and high-handed.
8
9 And, you know, our Court of Appeal -- and I'm not going to read it to you. It's in that --
10 it's in that material.
11
12 THE COURT: Who is our?
13
14 MR. MOGERMAN: The British Columbia Court of Appeal, I'm
15 sorry.
16
17 THE COURT: That one.
18
19 MR. MOGERMAN: Good point. The British Columbia Court of
20 Appeal --
21
22 THE COURT: Soon under new leadership.
23
24 MR. MOGERMAN: Soon under new leadership. That's going to be
25 a good party, and I will be sad to see the Chief go.
26
27 The British Columbia Court of Appeal in 2009 issued a very pointed and very scathing
28 decision that ended with having said all sorts of things about incompetence and being --
29 providing false evidence and making a specious application and so on and so forth. They
30 said:
31
32 Finally, of most significance, Mr. Merchant offered evidence at
33 trial that the trial judge determined was false and misleading.
34
35 And you can't -- one can't close their eyes to the reality when it comes to selecting
36 counsel -- and the question is the ability of that counsel to run that case. One can't close
37 one's eyes to this. And there comes to be an air of surreality when you're simply saying,
38 look, you have two law firms and they're each on one -- no, one is one side and one is on
39 the other side, and so I'm just going to hear them out and make the call. At some point
40 we actually do have to drill down because there is a public confidence question. There is
41 a justice perception question, and the common sense public needs to look in on these

1 proceedings and says, what's going on, does this make any sense?
2
3 And given that record, it does not make any sense for that counsel and that firm to run a
4 case like this.
5
6 I have only one more point, I think, subject to checking briefly with my colleague, and
7 that is on the admissibility of the affidavit point. I take Your Lordship's point, but what I
8 wanted to point out is that in *Grassby,* which I've given Your Lordship the reference to,
9 it's tab 71 volume 3, and in *Joel,* which was the case my friend took you to, the Court
10 actually made it clear that there isn't an issue at all with the kind of evidence that's before
11 Your Lordship.
12
13 There is no issue. The reason that there is no issue is I am not a member of Ms. Brasil's
14 firm. We are in separate law firms. The rule says that she can't speak to her own
15 affidavit, and that has been extended to say that in certain circumstances the firm can't
16 speak to a lawyer's affidavit. But in the cases I've just referred you to, the Court said
17 that does not prohibit a number -- another member of the consortium from speaking to an
18 affidavit, so long as they're not the same person and they're not in the same firm.
19
20 Subject to your questions, My Lord, those are my submissions.
21
22 THE COURT: My questions will be when you are not around,
23 I'm afraid. Okay. Do you have anything to add in reply?
24
25 **Submissions by Ms. Kay**
26
27 MS. KAY: I'll start with a couple of reply points, and then
28 I'll answer your request for the doomsday scenario, as you put it. The first point with
29 respect to the US settlement, Your Lordship's already made the point that -- as has
30 Mr. Mogerman, that no one knows what's going to happen. And in the Canadian
31 proceedings Mr. Mogerman has made the point that the Canadian proceedings will be
32 determined by Canadian law and the Canadian record.
33
34 My friend Mr. Merchant kept saying when he made his submissions about the US
35 settlement that these very same defendants were parties in the US and are parties here.
36 That's wrong. The defendants in this case are Canadian banks as well as the networks,
37 and there are a couple of US banks named, but the -- but the Canadian banks which are
38 defendants to these proceedings were not defendants in the US proceedings.
39
40 THE COURT: Some different defendants.
41

1 MS. KAY: Well, all the Canadian defendants were not
2 defendants to the US proceeding, and the Canadian defendant --
3
4 THE COURT: It would be parent or other relationships, I take
5 it.
6
7 MS. KAY: Correct. Not through parent or other
8 relationships. With respect to the networks VISA and MasterCard there's a parent or
9 other relationship, but with respect to the Canadian banks, they had no part of the US
10 litigation.
11
12 The second point, my friend Mr. Merchant said on more than one occasion that we're
13 hiding the record from you, the British Columbia record's hidden from you, and he tried
14 to make that sound like it was something nefarious. Your Lordship will be well aware of
15 the fact that there's -- in court proceedings there are appropriate confidentiality orders that
16 get made where highly sensitive commercial -- commercially sensitive information is
17 produced in a court proceeding, and so there are redactions that have been made as
18 appropriate to take account of that. That's the reason that parts of the record are not
19 available. There's nothing wrong with that. We would indeed follow the same drill in this
20 Court if we proceed in this Court, so I just wanted to be sure that you weren't left with a
21 misimpression in respect of that.
22
23 THE COURT: I surmised that.
24
25 MS. KAY: The next -- the next point that I would make by
26 way of reply is the point about -- to respond to -- to respond to what Mr. Merchant
27 characterizes as the ten cases. So leaving aside the fact that there aren't ten cases, and
28 Mr. Mogerman has adverted to that, I take his submission, My Lord, in essence to be
29 saying this is a big mess and there's nothing you can do about it. And with the greatest
30 respect, that's just wrong. It's wrong as a matter of jurisdiction, and Mr. Mogerman has
31 taken you to the series of cases where they've addressed the issue, and it's wrong as a
32 matter of policy, if I may, from the perspective of Courts controlling their own process.
33
34 And as this Court has pointed out through the course of two days of argument, our
35 thinking has advanced on this front since the *Baycol* decisions, for example. We need to
36 figure this out, because otherwise -- to borrow Mr. Mogerman's word, otherwise we just
37 have chaos. And Mr. Merchant, in effect, is advocating for chaos, which clearly cannot
38 be countenanced by this Court, I say respectfully.
39
40 THE COURT: I don't know if he is advocating chaos, but I
41 have an aversion to chaos.

1
2 MS. KAY: The point about different fronts, I'll leave the
3 military analogies to someone else, but the point about different fronts and different minds
4 and someone might stub their toe and so someone else should take another crack it at,
5 you'll appreciate from a defendant's perspective, My Lord, that's difficult to understand
6 why that is an argument that would gain any traction. And I say that because in any
7 piece of litigation, whether class action or individual action, one could always say, well,
8 some fresh pair of eyes as counsel for a plaintiff might come up with a different theory or
9 a different attack. But we have consistently said in Courts throughout the country and in
10 several cases that you've already been taken to in this Court, we've said two proceedings
11 about the same thing in one province is an abuse of process.
12
13 And so the idea that Mr. Merchant may have a somewhat different --
14
15 THE COURT: Well, be careful there because we know who
16 was here first.
17
18 MS. KAY: Right, but this is not a -- this is not a
19 jurisdiction that says you win because you were first. This is a jurisdiction that says I
20 need to decide who should go forward with their case at the time I think it's appropriate
21 to decide that. So the fact that Mr. Merchant may or may not have a different theory and
22 that Mr. Mogerman may or may not stub his toe in British Columbia or elsewhere doesn't
23 change the fact that having two sets -- two cases addressing the same issue in substance is
24 an abuse of process.
25
26 And there's nothing about the class actions context that changes that. So the idea that
27 these defendants could successfully fend off certification in any jurisdiction and have
28 another set of plaintiff's counsel come along and take a different crack at it, in my
29 submission, that would be an abuse of process. And what Mr. Merchant is asking you to
30 do is approve of that in advance, in effect, and that's not -- if that worked, My Lord, with
31 respect, then you'd never have a carriage motion or you'd never make a carriage
32 determination, because somebody might always build a better mouse trap.
33
34 What the Court does in a carriage context is decide who should go forward, and then the
35 defendants -- and this the only perspective I'm giving you here. The defendants are then
36 not subject to attack after attack after attack, which would constitute an abuse of process.
37 And we're in the class action world, I get that, but access to justice includes access to
38 justice for defendants, as Court after Court has said, and that, in my respectful submission,
39 is an important point not to be lost in this.
40
41 The last point I would make in reply, and then I'll turn to your question, is that my

1 friend -- in response to my friend Mr. Merchant's submission that the *Baycol* cases and
2 *Yee v. Aurelian* is good -- remains good law. And I can give you the references --
3
4 THE COURT: Yeah, I have them. Looking at some of them,
5 certainly at *Yee,* for example, it was looking at the factual situation there and making a
6 determination. I did not see a risk of not remembering what I read from my colleague
7 Justice Martin, who has a pretty good head on her shoulders, that there was some doctrine
8 error statements of principle. She was trying to make certain that Alberta litigants had
9 access to the Courts for the litigation and give -- I am adding my own take on it -- if
10 there wasn't appropriate potential remedies somewhere else. And when she didn't have
11 that assurance, she let the Alberta action proceed. I didn't see her say that this is some
12 massive point of law. It was an exercising in discretion under general certification
13 principles, so --
14
15 MS. KAY: I would agree with that, My Lord. In addition
16 to that, I'd just highlight that, to the extent she was talking about any aspect of doctrine,
17 if you will, she was relying -- and said it was a complete answer. She was relying on the
18 Saskatchewan Queen's Bench decision in *Englund* and said that's a complete answer. And
19 of course that decision was overturned by the Saskatchewan Court of Appeal. That's that
20 *Boehringer* case at tab 21. And then the Saskatchewan Court of Appeal in *Englund* or
21 *Boehringer* was quoted with -- sorry, quoted with approval by this Court in the *L.P.* case
22 that I referred you to in my submission in chief.
23
24 THE COURT: By Justice Graesser.
25
26 MS. KAY: Correct. So that's what I had in reply.
27
28 Now, you asked me -- or you asked us about what we would say if there weren't a stay,
29 and I think there might be some points on which I might wish to engage in further
30 discussion with Mr. Mogerman. And I should also make the point, My Lord, that, to at
31 least a different extent than the other counsel in the room that were on the plaintiff's side,
32 we on the defendants side need to take instructions in respect of this stuff. So I'll give
33 you my impressions, if you will, but understand that this is a complicated interlocking
34 matter and at the end of the day what exactly would happen as the next step in case
35 management would be something that --
36
37 THE COURT: If we ever get to the end of the day.
38
39 MS. KAY: Right. Okay. So I'll get there. So if there
40 isn't a stay, which I think is what you were asking about, then the next step, in my
41 submission, is that we would schedule a case management conference to address what

1 happens next. And I say that not because I am looking for another attendance for the
2 sake of another attendance, but I would ask you to give all of us a breath --
3
4 THE COURT: Edmonton's hotels appreciate it.
5
6 MS. KAY: Right. I'd ask you to give us a breath so that
7 we can head off to British Columbia and fight hammer and tong there for a couple of
8 weeks and then come back and address before Your Lordship what -- what should happen
9 with respect to certification. But I do get to the same place, I think, as Mr. Mogerman, in
10 this sense. The first thing you're going to have to do in connection with that, I think,
11 respectfully, is decide carriage, because, otherwise, I am not sure which certification
12 application we'd be responding to.
13
14 Mr. Mogerman has said to you, if you tell me to do it --
15
16 THE COURT: I don't need to hear you on that. I think that is
17 trite.
18
19 MS. KAY: Okay. So we'd have to address that and set a
20 schedule for -- presumably for the exchange of material in respect of that. If there's to be
21 additional material or to simply schedule the actual hearing of that or perhaps re-argument
22 of that, and then following that, again in a case management role, we'd address -- if Your
23 Lordship's inclined to say let's move forward with certification in this jurisdiction, then
24 we need to set a schedule for responding material.
25
26 Where I might depart from my friend Mr. Mogerman is I don't think it's -- I don't think I
27 would say, well, we'll just file everything from British Columbia and we're good to go. I
28 think that's an issue that would require further consideration certainly on the defendant's
29 side, but that is something that we'll have to address, in my respectful submission, in an
30 orderly process once we know what's happening today and thereafter.
31
32 I hope that answers your question on what you wanted to know if there weren't a stay. If
33 there's anything else, I'm happy to take a crack at it.
34
35 THE COURT: I take it -- I take what you give me, and I will
36 tell you why in a few minutes.
37
38 MS. KAY: Right. Thank you, My Lord.
39
40 MR. MERCHANT: My Lord, may I say 63 words on what they've
41 said about the questions you've posed?

1
2 THE COURT: Yes.
3
4 **Further Submissions by Mr. Merchant**
5
6 MR. MERCHANT: So the consortium says not stay both, really
7 saying keep us out of any reporting by not -- by just staying us. They keep us out of the
8 process. They are just saying give us carriage and we will stay everything, and that's not
9 a halfway place, as he put it, that's they've succeeded. We will know nothing about --
10 we will know nothing about the action in circumstances where in British Columbia, for
11 example, the *Money Mart* cases there were six attempts to certify different applications.
12
13 Then, number two, the consortium said the second doomsday, well, the second doomsday
14 was just that they get ordered to go ahead in Alberta. That didn't seem to be a doomsday
15 for them.
16
17 **Submissions by Mr. Neave**
18
19 MR. NEAVE: My Lord, David Neave for VISA. I only rise
20 in response to my friend's last comments about the *Money Mart* litigation. That's simply
21 incorrect. What happened in *Money Mart* was that the first industry-wide litigation was
22 not certified. Then there were successive defendant by defendant certifications. There
23 were six of them, but they were not serial. Or, excuse me, they were serial, separte.
24
25 MR. MERCHANT: I kind of thought that's what I said.
26
27 THE COURT: No, it sounded like you said that they -- it was
28 the same defendants, and I take it one was an industry wide, as your friend has said.
29
30 MR. MERCHANT: Yeah.
31
32 THE COURT: And then the rest were individual companies.
33 And we had the same thing here, individual companies. They were called Money Mart,
34 that is one of them, but that is the generic term as was used in the litigation, but there
35 was Cash Cow, whatever, you know, were the other ones.
36
37 We are going to adjourn until 4:45 for our afternoon break, and then I am going to give
38 you a decision. And my reading in this case and in hearing you, in contemplating where
39 this goes and knowing that there are 400 cases in front of me that get to kind of heads of
40 pins and angels and all those sort of things that need to be dealt with, I can reserve now
41 in the traditional sense and you will get a decision sometime around Christmas some year.

1 I do not think that is in the interest in general or of this case, and so I am going to give
2 you my decision that I have been contemplating throughout your discussions, so don't
3 think I am going to go away and start writing something new. I have been writing it and
4 thinking about it over the last number of days. And subject to some nuances that we will
5 discuss, hopefully it will allow you to take the next step.
6
7 The reason I asked you the various questions is that, without disclosing my thinking
8 completely because I wanted to hear you full arguments and make sure that nothing -- no
9 flaws in my thinking. I wanted to check out certain scenarios and get your views in an
10 abstract sense. And when I give you my decision, I may get more views from you in a
11 specific sense.
12
13 So enjoy your afternoon break. You don't have to work.
14
15 (ADJOURNMENT)
16
17 Editorial note: This oral decision has been edited in accord with the practice of the Court
18 and the right reserved
19
20 **Decision**
21
22 THE COURT: I am here to provide my bare decision in the
23 arguments that are before me.
24
25 I should, before I get into it, say a number of things. Number one, hopefully the decision
26 will make sense to everyone in the room but read out of context will probably make no
27 sense.
28
29 I reserve the right to edit this bare decision. Indeed, I reserve the right to rearticulate it
30 when I provide the reasons for it. But I want you to have the essence of it now, and it
31 will get articulated in the formal order that Counsel will provide. We will assign
32 somebody to prepare the order and then to follow the Alberta Rules to prepare it. So with
33 those caveats and some others, I am going to give you the substance of it. Reasons will
34 follow in due course, heavy emphasis under due, which is another word for a long time
35 from now. So with those caveats, here is the result.
36
37 The matters before me with respect to stay and carriage of two Alberta class proceedings
38 against the same Defendants on the same subject matter represent a challenge to balance a
39 number, indeed a myriad, of conflicting principles. Such a challenge is able to be
40 accomplished by what I hope is prudent case management; that is, in class proceedings
41 the Court must actively case manage those proceedings to resolve conflicts and procedures

1 which the parties cannot or will not resolve on their own. In the litigation to date against
2 these Defendants by the so-called Consortium, those procedures, with the aid of Chief
3 Justice Bauman in British Columbia and two other Justices, one in Ontario, Madam
4 Justice Horkins, and one in Quebec, Madam Justice Corriveau, have resolved those
5 procedures, but that is not the case here.
6
7 Therefore, subject to a specific prerequisite, there will be a limited stay on both the
8 Merchant Law Group and Consortium class proceedings in Alberta and, to the extent that
9 I have jurisdiction (it was not fully argued to be fair), a prohibition on the filing of any
10 other class proceeding without Court leave with respect to these Defendants; a stay that
11 will take place on a limited time basis and subject to certain other conditions, some of
12 which I will specify and some of which I will hear the parties on further.
13
14 The prerequisite is that the Consortium must amend its application in B.C. to create an
15 opt-in class such that Albertans are able to opt in. It would be preferable, in my view, for
16 it to be a national opt-in class, but I have serious doubts about my jurisdiction to impose
17 that. Thus, it must at least be an opt-in class that would accommodate Albertans with
18 otherwise identical rights to the B.C. class. If that is not accomplished by the
19 commencement of the certification proceedings in B.C., scheduled for later this month,
20 there will be no stay granted, i.e., that is a prerequisite to the stay being granted. In that
21 event I will proceed to determine the carriage issue on the current record, but the carriage
22 issue will be a carriage for an active pursuit of the Alberta litigation, not a stay, and there
23 will be forthwith case management meetings to set deadlines.
24
25 The limited stay that will be granted, subject to that prerequisite, will have the following
26 further conditions, and I am going to name some and I am going to open the floor to add
27 others as appropriate -- and, indeed, it does not have to all be done today. In the course
28 of drafting, if there are other appropriate conditions that the Court considers advisable, we
29 will allow those.
30
31 The stay will be until further court order, either by consent or by further application or
32 indeed on the Court's own motion, although the latter is not contemplated, but with some
33 anticipated potential termination times of the stay, including the following: First, 30 days
34 after the certification decision by Chief Justice Bauman in the B.C. class proceeding, not
35 appeals from that decision, but the decision itself. Indeed, to be clear, I do not
36 contemplate a stay during time of appeal, and I will tell you why in a moment.
37
38 Secondly, upon the current informal stay of the Ontario action being lifted. And I am
39 open to adding the Quebec action being lifted, but I think it is a one-off. I may be wrong
40 in that, so it could be both. If either of them are lifted that have consequences, that would
41 be a basis to apply to terminate the stay.

1
2 The next one, the third one, is kind of a catch-all and may be out of order, but, three,
3 other significant events or non-events, i.e., delay, for example, that do not now exist or
4 cannot now be fully contemplated but might, on motion, justify the stay being lifted. And
5 there will be another condition regarding carriage that I will mention momentarily.
6
7 I think that is three. I will go to four. These may be out of order, but the numbering is
8 not too important and they are in random order. A further potential for lifting of the stay
9 would be a consent certification in B.C., a settlement of the action, or other activity in
10 B.C. that might affect Albertans opting in.
11
12 I have lost track of the numbers, but the next one - I guess, the fifth one - is that the
13 Consortium counsel will report to the Court and to MLG in the same manner it does now
14 to the other Courts, Ontario and Quebec, on the earlier of: (1) a significant event in the
15 class proceedings in B.C., and I emphasize significant -- I am not talking about "we have
16 changed the filing date from Tuesday to Thursday", but a significant event; or any event
17 that happens in Ontario or Quebec; (2) I have already dealt with the stay being lifted, but
18 there will be a report if there is anything in Ontario or Quebec on the now stayed actions
19 that are relevant, if any, having regard to their being stayed; (3) or a calendar quarterly;
20 (4) or at the time reports are sent to the other two Courts, Ontario and Quebec. So the
21 earlier of any of those, and I guess it is, and each of those.
22
23 Case management in these actions will be held in abeyance except on motion or request
24 of the parties in the two actions or on the Court’s own motion or initiative; that is, the
25 stay of taking active steps in the proceedings does not stay an opportunity for the parties
26 to speak to the Court regarding any aspect of case management, if there is one. I do not
27 contemplate any, but there may be something.
28
29 The next one will be the so-called drop-dead rule in Alberta, Rule 433, is suspended as of
30 the effective date of the stay, which will be upon the prerequisite being met.
31
32 Then the last is other terms and conditions that may be acceptable to the Court on the
33 suggestion of the parties either today or between now and the time the Order is
34 formalized.
35
36 Now, with the stay having been granted in both Alberta proceedings, there is nothing to
37 be "carried", and, therefore, subject to the prerequisite being fulfilled, the motion for
38 carriage which has been argued up until earlier today is adjourned sine die as currently
39 being moot. The application for carriage may be continued, indeed it shall be continued
40 at such time as the stay is lifted on the basis of the current record on that issue, plus any
41 supplemental record and submissions permitted by the Court. To be very clear, it will be

1 a condition of the future lifting of the stay that carriage be determined by consent or on
2 application; that is, the sine die nature of the adjournment of the carriage matter must be
3 brought forward for resolution before or contemporaneously with the Order by which the
4 stay is lifted.
5
6 I don't know what this does to costs because it is somewhere in the middle, to use the
7 term, but let me merely say now costs may be spoken to at an appropriate time if the
8 parties wish costs. Otherwise, they are reserved -- i.e., left open -- for future application.
9
10 That basically is the end of the decision.
11
12 Let me say a couple of words about the process and why I have done this. I want the
13 parties to know what is going on. I want Albertans to know that under this they will have
14 an avenue for participation if something positive happens for the class in B.C., albeit on
15 an opt-in basis. I want the parties in the B.C. litigation to know -- and I will say more
16 about this in my written reasons -- there are great expectations that this may break up a
17 log jam either to a settlement or to a consent certification on a broader basis or to
18 narrowed arguments, assuming that the certification has some success. If the certification
19 does not have some success, then presumably the stay may be lifted and others can take
20 the risks where there is some costs. The fact that there are no costs in B.C. is a positive
21 thing, and that is part of the motivation.
22
23 I will speak to this more, but the fact that other Courts have approved this sort of process,
24 I want my process in this jurisdiction not to be incompatible with that, but to have some
25 expectations.
26
27 Now, the other part is either good for me and bad for you or otherwise. I have had the
28 bad experience of making a decision like this with reasons to follow only to have the
29 matter not only be the subject of an appeal but the subject of argument of appeal and a
30 judgment on appeal. If you do that, then you can get your reasons in the Court of
31 Appeal -- I will not be issuing reasons, or may not be issuing reasons.
32
33 I expect it is going to take some time for Reasons because Mr. Merchant is waiting for a
34 decision for me, others are waiting for decisions from me, and so I will get to it when I
35 get to it, but it is not going to be soon.
36
37 At the risk of saying something about it now, I am confident I have the jurisdiction to do
38 what I just did. I want to balance the interests of the parties on all sides and the process
39 to a rational process and yet leave open the expectation/risk. If the current plan by the
40 Consortium, with the approval of Courts, does not provide justice, there will be a way in
41 which to obtain it.

1
2 So subject to any further conditions you want to add today -- and I make it again clear I
3 am happy to consider conditions as you draft the Order -- Mr. Mogerman, you will have
4 that responsibility in the first instance -- that is the end of the proceedings.
5
6 Are there any further representations?
7
8 MR. MERCHANT: Thanks, My Lord.
9
10 MR. MOGERMAN: None from me, My Lord.
11
12 THE COURT: Okay. So you can prepare the Order,
13 Mr. Mogerman. You can then distribute it among your friends, among Mr. Merchant. If
14 in that process any of you come up with reasonable conditions that should be added or
15 slightly changed or modified or worded, I will leave that to you. If you come up with a
16 consent as to the terms, you will likely get my signature pretty quickly. If you do not,
17 then you will have a short appearance in person or by telephone to work out those terms.
18
19 MR. MOGERMAN: That makes sense. Thank you, My Lord.
20
21 THE COURT: Okay.
22
23 MR. MOGERMAN: Thank you for sitting late.
24
25 THE COURT: We are adjourned.
26
27 ---
28 PROCEEDINGS ADJOURNED
29 ---
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1 **Certificate of Record**
2
3 I, Barb Andrews, certify that this recording is the record of the evidence in the
4 proceedings in the Court of Queen's Bench, held in courtroom B201 at Edmonton, Alberta
5 on the 4th of April, 2013, and that I and Nataliya Varevac were the court officials in
6 charge of the sound-recording machine during the proceedings.
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1 **Certificate of Transcript**
2
3 I, Brandy Coyes, certify that
4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript of
7 the contents of the record, and
8
9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in the transcript.
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