CITATION: Strathdee v. Johnson & Johnson Inc., 2025 ONSC 3738
COURT FILE NO.: CV-16-553046-00CP
DATE: 20250625

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CINDY LOU STRATHDEE, MARIO NUNZIATO, MATTHEW STRATHDEE, SHAEDA BEGUM FAROOQI-WILLISON, GERALD DOUGLAS WILLISON, THÉRÈSE BERNIER, by her Estate Representative MARILYNE BERNIER, MARILYNE BERNIER, JANET HEATON and BARRY HEATON	)	*Joel Rochon, Annelis K. Thorsen, Golnaz Nayerahmadi, and Jessica Marshall*, (Rochon Genova) and *Paul Miller, Victoria L.W. Lang* (Howie, Sacks & Henry), lawyers for the Plaintiffs
Plaintiffs	)	
– and –	)	*S. Gordon McKee, Jessica Lam, and Leah Kelley*, Lawyers for the Defendants
JOHNSON & JOHNSON INC., JOHNSON & JOHNSON and JOHNSON & JOHNSON CONSUMER COMPANIES, INC.	)	*Kelly Ennis and Rosemary Kramar: Casey R. Churko, Steven J. Roxborough and Chanpreet Pabla* (Merchant Law Group, Lawyers for the Interveners
Defendants	)	
	)	**HEARD**: May 27-30, 2025 at Toronto

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Leiper, J.:

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Introduction and Overview

[1] The plaintiffs in this proposed class action claim that the defendants, Johnson & Johnson Inc., Johnson & Johnson, and Johnson and Johnson Consumer Companies Inc. (collectively, "Johnson" or "the defendants"), failed to warn individuals who used its baby powder of the risk of contracting epithelial ovarian cancer ("EOC") associated with repeated use in the female perineal (genital) area.

[2] The plaintiffs seek damages from the defendants in negligence, for breach of the *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sch. A, and related provincial and territorial legislation, and for breach of the *Competition Act,* R.S.C. 1985, c. C-34.

[3] The plaintiffs brought a motion to certify the action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

[4] The defendants resist certification on a variety of grounds. They have also moved to stay these proceedings as an abuse of process. The stay motion turns on two grounds: delay, and duplication of other certified actions involving the same cause of action in negligence.

[5] The interveners are the parties in related actions in British Columbia (the "B.C. action") and Quebec (the "Quebec action"). They submitted that I should adjourn or stay these proceedings or decline to certify this action because it is duplicative of those actions. [1]

[6] I heard the certification and stay motions at the same time. In the reasons below, I begin by deciding the certification requirements that are independent of the B.C. and Quebec actions. Then, at the stage where those actions affect the stay motion and the preferability step of the certification analysis, I consider whether it is appropriate to postpone those steps.

[7] To summarize my findings, I conclude that the plaintiffs have met four of the five criteria for certification pursuant to s. 5 of the *CPA* for their action in negligence and damages arising from breaches of the *Competition Act,* as well as under consumer protection legislation in B.C., Alberta, Manitoba, Saskatchewan, Quebec, and Newfoundland & Labrador. I find that they have not done so for the cause of action pleaded under the *Consumer Protection Act, 2002* in Ontario and Prince Edward Island because both provinces require privity of contract. I will permit, if requested, supplementary submissions regarding the New Brunswick and Yukon consumer protection legislation.

[8] As a result of these findings, this action is poised to become a national class proceeding. Assuming I were to certify it as of the date of these reasons, this proceeding would overlap with the B.C. and Quebec class proceedings and would be less advanced. The B.C. action has been certified and is proceeding to appeal. The Quebec action is authorized and has been upheld on appeal.

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[1] Counsel to the plaintiffs in BC and Quebec also commenced an action in Alberta on August 22, 2019. That action has not moved to certification thus I do not refer to it in the balance of these reasons.

[9] Accordingly, I adjourn my final consideration of the motion to stay this action based on duplication, and depending on that decision, my final consideration of the preferability requirement until there is an outcome in the B.C. appeal.

[10] I dismiss the motion to stay based on delay. I find that the delay has been explained satisfactorily and any prejudice arising from the delay does not justify the serious remedy of staying the proceedings.

[11] The reasons for these findings follow.

Baby Powder, Talc and Ovarian Cancer

[12] Since the early twentieth century, Johnson manufactured and/or distributed a talc-based "baby powder" product in Canada.

[13] The plaintiffs have pleaded and tendered expert evidence to establish that there is a body of scientific literature, which dates back decades and was apparently known to the defendants, that connects the repeated female perineal application of talc-based powder to an increased risk of ovarian cancer.

[14] The plaintiffs allege that Johnson was aware of these elevated risks, but minimized the studies, concealed the threat to female health, and continued to market its product without warning users of the elevated risk of ovarian cancer.

[15] In the affidavit of the proposed representative plaintiff, Kristin Baker which was sworn shortly before her death, she describes Johnson's representations, namely that the baby powder product was "clinically proven" and "hypoallergenic, dermatologist and allergy-tested". The plaintiffs plead that they relied on these representations as assurances that the product was safe for external use, including in the female perineal area.

[16] Talc is a soft inorganic mineral which is mined from the earth and composed of hydrated magnesium silicate. Johnson's Baby Powder is composed almost entirely of talc and fragrance chemicals.

[17] Epithelial ovarian cancer (EOC) is the most common type of ovarian cancer. It develops in tissue within the ovaries, the fallopian tubes, or the abdomen. There are various subtypes of EOC depending on each cancer's "histology", that is its microscopic structure. The most common subtype of EOC cancer is high grade serous carcinoma. This is the subtype which Kristin Baker, the proposed representative plaintiff, suffered until her untimely death at the age of 43.

[18] EOCs account for more than 90% of all ovarian cancers. They have a high mortality rate because there are few or no symptoms in the early stages. At diagnosis, almost 75% of patients have an advanced form of the disease, often with the cancer spreading throughout the abdominal cavity, lymph nodes, and into the lungs. Many of those affected, like Kristin Baker, endure surgery and chemotherapy to attempt to treat this disease. They and their families suffer.

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[19] In 2020, Johnson pulled its talc-based baby powder product from the Canadian market. It continues to offer a cornstarch-based baby powder product in Canada and the U.S.

[20] In April 2021, Health Canada published a screening assessment which discussed decades of literature on the health impacts on humans from talc use. With respect to perineal use, the screening assessment reads, in part, "analyses of the available human studies in the peer reviewed literature indicate a consistent and statistically significant positive association between perineal exposure to talc and ovarian cancer. The available data are indicative of a causal effect": Environment and Climate Change Canada, *Screening Assessments-Talc-Mg3H2(SiO3)4* (Health Canada. April 2021), at p. iii (emphasis added).

The Tort and Statutory Claims Against Johnson

[21] The plaintiffs' claim from their fresh as amended statement of claim of May 23, 2025 (the "Fresh Claim") pleads three causes of action: negligence, breaches of consumer protection legislation, and breaches of the *Competition Act*. This action is one of thousands of actions in what has become known as the "talc litigation' across North America.

[22] In Canada, there are over 80 individual actions against Johnson from women who have either been exposed to the risk of ovarian cancer, or who have been diagnosed with ovarian cancer. As noted above, four Canadian class actions have been launched in B.C., Quebec, Alberta, and Ontario.

Issues

[23] The parties have defined the issues raised on the motion to certify as follows:

Have the plaintiffs established under s. 5 of the *CPA*, that:

- The pleadings disclose a cause of action?
- There is an identifiable class of two or more persons that would be represented by the representative plaintiffs?
- The claim of the class members raises common issues?
- That a class proceeding is the preferable procedure for the resolution of the common issues?
- There is a representative plaintiff who:

  i) would fairly and adequately represent the interests of the class?

  ii) has produced a plan that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

  iii) does not have on the common issues of the class, an interest in conflict with the interests of the class members?

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[24] The issues on the motion to stay these proceedings are:

- Should this action be stayed or dismissed because it is duplicative of other similar class proceedings certified in Canada?
- Should this action be stayed or dismissed due to inordinate delay?

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Certification Motions –Purpose and Approach

[25] The certification stage of class proceedings is meant to screen out inappropriate or unmeritorious claims. It begins with the principle that a pleading should not be struck unless it is "plain and obvious" that there is no claim on the face of the pleading: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25.

[26] Once the plaintiffs satisfy the pleadings hurdle, their task is then to show "some basis in fact" that the remaining certification requirements are met: *Hollick* at para. 25; *McCracken v. Canadian National Railway*, 2012 ONCA 445, 111 O.R. (3d) 745, at para. 75.

[27] At this stage, the plaintiff need not establish its claim on a balance of probabilities. The plaintiffs need not file an exhaustive record nor must they defeat any possible defences: *McCracken,* at para. 76.

[28] At certification, the court makes a procedural, rather than a substantive decision. The question at trial is: has the plaintiff proved the claim on a balance of probabilities?

[29] At certification the question is different: have the plaintiffs shown that the preferred forum for the action is with a representative plaintiff on behalf of several claimants because they have common questions to be determined in the litigation? See *Hollick,* at para. 16.

[30] The court acts as a "modest gatekeeper" on certification. This drives the approach to the evidence on certification, as described in Warren K. Winkler et al., *The Law of Class Actions in Canada* (Toronto: Thomson Reuters Canada, 2014), at pp. 29-30:

> The evidentiary threshold of some basis in fact is an elastic concept, but it is not a requirement that (a) the action will probably or possibly succeed; (b) a prima facie case has been made out; or (c) there is a genuine issue for trial. The evidentiary threshold for certification is not onerous, and the court must not impose undue technical requirements on plaintiffs.

[31] That said, the court at the certification stage must engage in more than a "superficial level of analysis into the sufficiency of the evidence" in support of the certification requirements: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99, 102-105.

[32] Where the court receives evidence of competing expert views on the merits of the case, it is not for the certification judge to weigh and decide as between those differences in opinion:

Stanway v. Wyeth Canada Inc., 2012 BCCA 260, 34 B.C.L.R. (5th) 85, at para. 47; *Wright Medical Technology Canada Ltd. v. Taylor,* 2015 NSCA 68, at para. 47.

[33] For example, in *Stanway*, the plaintiffs alleged a causal connection between hormone replacement therapy and an increased risk of breast cancer. The court decided that at certification, the plaintiffs did not have to prove that hormone therapy caused breast cancer. That was a trial issue. Instead, on certification, the plaintiffs' task was to show proof of a "methodology," to resolve the causation question at trial: *Stanway*, at para. 58. "Methodology" in this context does not mean a scientific methodology, rather it means a plausible pathway or route to proof of causation at trial: *Miller v. Merck,* 2015 BCCA 353, 81 B.C.L.R. (5th) 33, at paras. 24-38, 49 and 58.

[34] With this overview, I turn to the elements required for certification under the *CPA* and whether the plaintiffs have met those requirements.

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Analysis of the Certification Requirements

Section 5(1)(a) – Do the pleadings disclose a cause of action?

[35] The plaintiffs must establish that its pleadings disclose a cause of action. I assume that the acts pleaded are true and ask if it is plain and obvious that the plaintiff's claim cannot succeed: *Pro-Sys,* at para. 63; *Anderson v. Wilson*, 1999 CanLII 3753, 44 O.R. (3rd) 673 (C.A.), at p. 679, leave to appeal refused, [1999] S.C.C.A. No. 476.

[36] There are three causes of action to consider in the case at bar: negligence, breach of provincial consumer protection legislation, and breach of the *Competition Act.*

[37] The plaintiffs' action in negligence pleads a duty of care, a breach of the duty and damages arising from the breach. The defendants do not challenge that the pleading in negligence discloses a cause of action.

[38] The plaintiffs plead a breach of consumer protection legislation including breaches of section 14 and 15 of Ontario's *Consumer Protection Act* and analogous legislation across Canada.

[39] The plaintiffs plead consumer protection legislation from several provinces and one territory in Canada:

- British Columbia: *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2;
- Manitoba: *Consumer Protection Act*, C.C.S.M. c. C200;
- Alberta: *Consumer Protection Act*, R.S.A. 2000, c. C-26.3;
- Prince Edward Island (PEI): *Consumer Protection Act*, R.S.P.E.I. 1988, c. C-19;
- Yukon: *Consumers Protection Act*, R.S.Y. 2002, c. 40;

- New Brunswick: *Consumer Protection Act*, S.N.B. 2024, c.1;
- Ontario: *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A;
- Newfoundland and Labrador: *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1;
- Quebec: *Consumer Protection Act*, C.Q.L.R., c. P-40.1.

[40] The plaintiffs also allege that the defendants breached the *Competition Act,* R.S.C. 1985, c. C-34. Section 52(1) of the *Act* prohibits "knowingly or recklessly" making a false or misleading representation to the public. The plaintiffs rely on s. 52(4) which applies both to the representation's literal meaning and to the general impression it conveys. The plaintiffs seek damages under s. 36(1) of the *Act.*

[41] For the purposes of the statutory claims pleadings analysis, I use the proposed Fresh Claim which alleges as follows:

> 96. The defendants made false, misleading, deceptive and unconscionable representations to Kristin and the Class Members to the effect that Baby Powder was safe for external use, including in the perineal and genital area. As pleaded herein, the defendants wilfully concealed the serious risk of EOC associated with the use of Baby Powder, thus exposing Kristin and other Class Members to the risk of illness, complications, and death. Kristin relied on the Defendants' representations of the safety of Baby Powder when she chose to use the product. Kristin and other Class Members would not have used Baby Powder if they had been warned that it could cause and/or materially contribute to the development of EOC and if they had known that the implied representation that it was safe for external use was false.
>
> 97. The defendants' representations regarding the safety of Baby Powder and their omissions regarding its risks, as pleaded herein, were unconscionable, driven by the objective of maximizing revenue and profits at the expense of the health of Kristin and other Class Members, and constitutes a breach of the Ontario *Consumer Protection Act* and analogous provincial and territorial legislation and the *Competition Act*, RSC 1985, c. C-34.
>
> 98. These false, misleading, deceptive and unconscionable representations by the defendants amount to unfair practices under ss. 14 and 15 of the Ontario *Consumer Protection Act* and analogous provincial and territorial legislation and contravene s. 17 of the Ontario *Consumer Protection Act* and analogous provincial and territorial legislation which prohibit these practices. As recission is no longer possible, the plaintiffs and other Class Members seek restitution of the purchase cost of the Baby Powder as well as damages for injury caused by Baby Powder, pursuant to s. 18 of the Ontario *Consumer Protection Act* and analogous provincial and territorial legislation, and in addition to, if necessary, a waiver of any notice requirements under the Ontario *Consumer Protection* and analogous provincial and territorial legislation.

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99. Further, the Defendants' representations and omissions about the risks posed by Baby Powder breached s. 52 of the *Competition Act* and constituted unlawful acts because their representations and omissions were:

a) made for the purpose of promoting, directly or indirectly, the use of Baby Powder;

b) made for the purpose of promoting indirect or directly, any business interests of the Defendants;

c) made to the public;

d) made knowingly and recklessly; and

e) false and misleading in a material respect.

100. The plaintiffs and other Class Members seek damages under s. 36 of the *Competition Act.* The defendants' false and misleading representations that Baby Powder was safe caused Kristin and other Class Members to buy a product that was less valuable than expected. Instead of purchasing Baby Powder that was safe, Kristin and other Class Members purchased a product that had a risk of causing them significant harm, namely the risk of developing EOC. As set out below, the Class Members all suffered damages as a result of the Defendants' representations and omissions.

101. The plaintiffs and Class Members also seek their costs of investigation, pursuant to section 36 of the *Competition Act.*

The issue of privity of contract in Ontario and PEI

[42] The defendants submit that the misrepresentation claims under Ontario and PEI consumer protection legislation in Ontario require privity of contract and thus are "bound to fail."

[43] I agree. Ontario's consumer protection legislation requires an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment: *Consumer Protection Act, 2002*, s.1. In other words, there must be "privity of contract."

[44] In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276, at para. 87, Strathy, J. (as he then was) found that a remedy under s. 18 for recission or damages concerns the relationship between the "supplier" and the purchaser. Thus, there is no agreement to rescind and no money to refund as between the manufacturer and the consumer. Akbarali J. also comprehensively discussed the privity requirement in *Mackinnon v. Volkswagen Group Canada Inc., et al.*, 2024 ONSC 4988, at paras. 93-119; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, at para. 206; *Hoy v. Expedia Group Inc.,* 2022 ONSC 6650, 171 O.R. (3d) 114, at para. 132; *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180, at para. 145; *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690, at para. 248, aff'd 2024 ONCA 220; *Richardson v. Samsung*, 2018 ONSC 6130, at para. 36, aff'd 2019 ONSC 6845, at para. 11.

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[45] In the B.C. action, Armstrong J. found that in Ontario and PEI, there must be "contractual privity" between a supplier and a purchaser. He declined to certify this portion of the action on that basis: *Williamson v. Johnson & Johnson*, 2020 BCSC 1746, at para. 131.

[46] The plaintiffs have not pleaded that the defendants sold the baby powder products directly to the public. The consumer protection laws in Ontario and in Prince Edward Island require privity of contract.

[47] I find that it is "plain and obvious" that the plaintiff's consumer protection claims cannot succeed in Ontario and Prince Edward Island.

Consumer protection law claims in New Brunswick and Yukon Territory

[48] The defendants submit that the claims under New Brunswick and Yukon's consumer protection legislation are also bound to fail because those statutes do not prohibit deceptive trade practices: *Consumer Protection Act*, S.N.B. 2024, c. 1; *Consumers Protection Act*, R.S.Y. 2002, c. 40.

[49] The plaintiffs did not address this argument in their materials. The defendants did not provide any analysis of either of these statutes other than to assert that neither piece of legislation prohibits deceptive trade practices.

[50] A search of the *Consumer Protection Act,* S.N.B. 2024, c. 1 on the CanLII site notifies the reader that, "This statute has not come into force." The New Brunswick provincial website contains the full text of the statute and the date on which this statute received royal assent (June 7, 2024). It is unclear from the defendants' submissions if they are referring to a statute that is not yet in force, or its predecessor legislation.

[51] Given my decision to adjourn the motion to stay this action and final consideration of preferability, if necessary, the parties may make further submissions about the New Brunswick consumer protection legislation.

[52] As for the Yukon *Consumers Protection Act,* I agree with the defendants that this legislation does not appear to provide for deceptive trade practices. Subject to any further submissions to the contrary from the plaintiffs, I would find that this claim is bound to fail.

The consumer protection claims in the remaining provinces: Alberta, BC, Manitoba, Newfoundland & Labrador and Saskatchewan

[53] There are important differences among consumer protection legislation across Canada: *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650, at paras. 131-139, aff'd 2024 ONSC 1462. As discussed above, in Ontario and PEI there must be privity of contract. This was formerly the case in Newfoundland & Labrador, although amendments to the legislation appear to eliminate the need for privity of contract: see *Mackinnon v. Volkswagen Group Canada Inc., et al.,* 2024 ONSC 4988, at paras. 121-131.

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[54] The defendants submit that consumer protection legislation in Alberta, B.C., Manitoba, Newfoundland & Labrador, and Saskatchewan require the plaintiffs to establish reliance on the representations.

[55] The Fresh Claim pleads that the plaintiffs relied on the defendants' representations as to the safety of the baby powder product. It is not "plain and obvious" that those claims cannot succeed because the plaintiffs have pleaded reliance. I will revisit the question of reliance required by those statutes in the common issue section of these reasons, based on the defendants' alternative submission that reliance is an individual, not a common issue.

The Competition Act pleading

[56] Turning to the plaintiffs' claim of breaches under the *Competition Act,* the defendants raise two issues. They submit that this part of the claim should be dismissed as being out of time. Alternatively, the defendants submit that there must be evidence of an active misrepresentation, rather than simply an omission to reveal information for a claim to succeed under the *Competition Act*. I address these arguments below as part of the common issue analysis.

[57] I find the *Competition Act* claim discloses a cause of action.

Section 5(1)(b) – is there an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant?

[58] The plaintiffs propose a class of purchaser/users of the baby powder product and a subclass of those users who went on to develop EOC after perineal use of baby powder. The proposed definition is:

a) All women resident in Canada who purchased for perineal use and/or used perineally JOHNSON'S® baby powder containing talc ("Baby Powder") and their estates, administrators, or legal representatives, heirs or beneficiaries (the "Class" or "Class Members"); and

b) All Class Members who developed EOC subsequent to their perineal use of Baby Powder (the "EOC Class" or "EOC Class Members"); and

c) All persons who, on account of a personal relationship to a Class Member, are entitled to assert a derivative claim for damages pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c.F.3, as amended and comparable provincial and territorial legislation (the "Family Class" or "Family Class Members").

[59] An "identifiable" class means its members can be determined by objective criteria. The class should not be unlimited or unnecessarily broad and it should relate to the common issues: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 57; *Hollick*, at para. 17; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38.

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[60] The class definition must identify those who may have a claim, those who will be bound by the result of the litigation, and those who are entitled to notice: *Bywater Toronto Transit Commission* (1999), 43 O.R. (3d) 367 (Gen. Div.). Defining the class is a technical, rather than a substantive challenge: *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138, 99 C.P.R. (4th) 303, at para. 122.

[61] The plaintiffs are not required to show that everyone in the class shares the same interest in the resolution of the asserted common issue, but only that each member has an interest in the resolution of the common issue: *Sankar v. Bell Mobility,* 2013 ONSC 5916, 52 C.P.C. (7th) 75, at para. 57.

[62] Johnson submits that the class definition is overbroad and should not be approved as proposed because:

a) It includes persons with no plausible claim— purchasers of the product for perineal use who did not use it, users who did not contract the specific subtypes of EOC and purchasers who did not use it in the perineal area

b) it is not limited by a threshold of use, and

c) it is not limited in time.

[63] I find below that there are common issues on the issues of causation, duty of care, and related negligence issues for those with EOC. I also find common issues which involve purchasers and users under the *Competition Act* aspect of the claim, who may have purchased a hazardous product for a use that put their health at risk. I mention those findings here in brief because they inform the definition of the class members. I have also found common issues relating to several provincial consumer protection statutes, which findings inform this stage of the analysis.

[64] Class members who were purchasers for female perineal use or perineal users who did not contract EOC are properly included in the broader class by virtue of plausible *Competition Act* and consumer protection statutory claims. There are objective criteria for their inclusion: these class members purchased and/or used a product for which there is some basis in fact that a method exists to connect female perineal use to an increased risk of contracting EOC, a serious, often-terminal illness. These consumers were not warned about those risks prior to purchase and/or use. There is evidence from the affidavit of Kristin Baker that the product was marketed as being "clinically proven", "hypoallergenic, dermatologist and allergy tested".

[65] The defendants oppose the class definition for those who contracted EOC because it is not limited further by either a threshold of use or by diagnosis of specific subtypes of EOC. This was done for the class membership in the B.C. action. I have found that on the record before me, both questions are live issues for trial and I need not narrow the class at this stage in the action. The expert evidence tendered on this certification motion does not set a bright line for threshold of use to establish a causal link to EOC. There is a sufficient rational connection between an EOC diagnosis and perineal use of baby powder on the evidence, focussing on the conduct of the

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defendants. All members of the subclass, as defined will benefit from the court resolving those questions at trial, including the question of threshold use.

[66] As for the subtypes of EOC and whether to limit the class to only those diagnosed with a subtype of EOC currently linked to talc use, I disagree that this should be done here. That is a question for the damages phase of the trial. All users of the product, and those who are diagnosed with EOC may be found to be owed a duty to be warned by the defendants. Whether or not a class member is diagnosed with a subtype that is not connected to talc use would impact that individual's damages. Nevertheless that class member can be said to objectively have an interest in the common question and should form part of the common class. The fact that different members may have different interests or claims does not mean that the class should be narrowed arbitrarily at this stage: *Sankar,* at para. 57.

[67] As the British Columbia Court of Appeal ("BCCA") observed on the question of individual claims in the context of a common issue in *Stanway,* at para. 55:

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

[68] This observation applies to the possible outcomes in the case at bar. Epidemiologist Dr. Siemiatycki gave evidence that measuring the "dose" of talc used by an individual can be difficult because it depends on recall by the individual. Further, the "dose-response" is not always linear. The common question of what that threshold is, based on the science available at trial, can be expected to inform the individual questions for class members following the common issues trial.

[69] For these reasons, I decline to limit the class definition by setting a minimum threshold of use, or diagnosis with a particular sub-type of EOC as a prerequisite for class membership. These are issues for trial. This proceeding is still at the pre-discovery stage. Johnson has not delivered a statement of defence. The evidence does not support these limits at certification.

[70] Finally, Johnson objects that there are no time limits bounding the class definition. I disagree. The fact that the defendants removed the baby powder product from the market in 2020 will serve as a time limit boundary on the class definition. This means that the class is not open-ended.

[71] The defendants submit that if the class is certified, the date of certification should be the end date of entry into the sub-class of those diagnosed with EOC. I would not do so in this case. This is because there is evidence of latency in diagnosis, meaning that a user of the baby powder product ending in 2020 when the product was no longer being sent to market, may plausibly receive an EOC diagnosis years later.

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[72] In the expert report filed on this motion by gynecologist-oncologist, Dr. Clarke-Pearson wrote: "In many cancers where there are identified etiologic agents (smoking and lung cancer, HPV infection and cervical cancer) there is a latency period (time from exposure to the onset of the cancer) that can extend over decades. (Nadler and Zurbenko 2014) This concept applies to the latency period of talcum powder use before a woman develops ovarian cancer..."

[73] The Health Canada Screening Assessment, at p. 31, reports that "ovarian cancer is expected to have a long latency period, with estimates of 15 to 40 years (Purdie et al. 2003; Gonzalez et al 2016; Tran et al 2019)."

[74] I find that the proposed class definition does not arbitrarily over-broaden the class, given the evidence of latency and the temporal limit set by the date that Johnson no longer offered its baby powder for sale in Canada. The Quebec Court of Appeal affirmed such an approach in class proceedings dealing with tobacco litigation: see *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, 55 C.C.L.T. (4th) 1, at para. 1022.

[75] The evidence of latency tendered on the motion persuades me that I should adopt a similar approach and not impose an end date based on date of certification.

[76] In *Williamson,* at paras. 96-97, Armstrong, J. replaced the identifier "women" with "persons" to be inclusive of all persons who could be diagnosed with EOC but might not identify as "women." I raised this question with plaintiff counsel during oral argument, who took no position on such a modification.

The Class Size and the Disputed Late Affidavit

[77] On the first day of the certification motion, the plaintiffs tendered an updated affidavit as to the number of putative class members as of May 2025. Section 4(1)(b) of the *CPA* requires the plaintiffs to demonstrate that the proposed class is composed of "two or more persons."

[78] The defendants objected to the admissibility of that affidavit because it was served after the parties had finished cross-examinations and exchanged factums.

[79] The plaintiffs explain the delay as being the result of other commitments.

[80] In *G.C. v. Jugenburg*, 2021 ONSC 3115, a case dealing with virtually the same circumstances, Perell J. found that permitting an affidavit at that late stage, as an "update" on evidence touching on a known issue in the certification proceedings, would be unfair to the defendant. Perell J. did not grant leave to file the late affidavit under r. 39.03 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194.

[81] Although the evidence of greater numbers in the Ontario class is relevant, the proffered evidence is not determinative of that issue. The affidavit of Vincent Genova of March 27, 2024, provides evidence of the class numbers as of 2024. The content of the late affidavit does not relate to an issue raised on cross-examination. The criteria of "two or more persons" to form a class is

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well-known. The explanation for the delay was general: that plaintiff's counsel had been busy attending to other matters. All parties were otherwise prepared to proceed on the four days set aside for these motions, thus an adjournment for cross-examination was not a tenable choice.

[82] In these circumstances I deny leave under r. 39.03 for the late filing of the plaintiffs' supplementary affidavit.

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Findings on Class Definition under s. 5(1)(b)

[83] To conclude, I find that a class definition which reflects the common issues as discussed in these reasons and meets the criteria under s. 5(1)(b) is:

(a) All persons resident in Canada who purchased for their female perineal use and/or used JOHNSON'S® baby powder containing talc ("Baby Powder") on their female perineum and their estates, administrators, or legal representatives, heirs or beneficiaries (the "Class" or "Class Members"); and

(b) All Class Members who developed EOC subsequent to their perineal use of Baby Powder (the "EOC Class" or "EOC Class Members"); and

(c) All persons who, on account of a personal relationship to a Class Member, are entitled to assert a derivative claim for damages pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c.F.3, as amended and comparable provincial and territorial legislation (the "Family Class" or "Family Class Members").

Section 5(1)(c) – Does the claim of the class members raise common issues?

The Legal Framework

[84] The *CPA* defines "common issues" as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

[85] At certification, the plaintiff must show there is "some basis in fact" to find that the claims of the class members raise common issues. Common litigation concerns are at the heart of class proceedings: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 106; *Simpson v. Facebook,* 2021 ONSC 968, 469 D.L.R. (4th) 699, at para. 43; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 105; *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, at para. 162, aff'd 2017 ONSC 6098 (Div. Ct.), leave to appeal refused, (28 February 2018), M48535 (Ont. C.A.).

[86] In *Western Canadian Shopping Centres Inc. v. Dutton,* at paras. 39-40, McLachlin, CJC listed several considerations to guide the commonality analysis:

- The court should approach the question of commonality in a purposive way;

- A common issue means its resolution is needed to resolve each class member's claim;
- The class members need not be identical in their relationship to the opposing party;
- The common issues need not pre-dominate over the non-common issues. Class claims must share a "substantial" common ingredient to justify a class action. The court will look at the relative significance of the common issues relative to the individual issues.
- All members of the class must benefit from a successful prosecution of the action, although the benefit to each member need not be identical.

[87] Where the plaintiff proposes to use expert evidence of causation at trial to connect the impugned actions by the defendant to the plaintiff's injury, the proposed "methodology" must:

- Be grounded in the facts of the case;
- Be sufficiently "credible or plausible";
- Not be purely theoretical or hypothetical.

Pro-Sys, at para. 118.

[88] Further, the plaintiff must show there is some evidence that there is data available to apply the methodology: *Pro-Sys,* at para. 118. This phrasing of the task at certification is important. It sets out a framework for how to measure relevance of evidence at certification. Methodology evidence is not tendered on the ultimate trial issue, rather it is tendered to show that a credible mechanism of evidence exists which justifies the matter proceeding to trial as a class proceeding. I return to this question below when discussing a hearsay-based challenge to studies and reports discussed by one of the plaintiff's experts concerning allegations of other contaminants in the baby powder product, and the defendants' knowledge of risk of cancer from its product.

[89] The court does not resolve conflicts in the expert evidence at certification. The Supreme Court of Canda has recognized that holding the plaintiff to a higher standard at certification prior to discovery is unfair: *Pro-Sys,* at para. 119. At certification, a defendant enjoys an "enormous informational advantage" over the plaintiff: *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353, 81 B.C.L.R. (5th) 33, at para. 52.

[90] Further, where the plaintiff proposes a "methodology" to establish the common issues at trial, this does not mean it must meet the highest scientific standard. The plaintiff need only demonstrate a "workable methodology" that can be said to be a "plausible way" to establish the general causation issue embedded in the claim: *Miller,* at paras 24-38, 49 and 58. In *Miller,* at para. 59, the BCCA wrote:

> Legal degrees of proof are not mathematical probabilities but legal or epistemic likelihoods. There are no hard and fast rules for inferring causation in any given case. Of the Bradford-Hill factors only one is, in my view, necessary (temporal precedence) and none is, of itself, sufficient to "establish" causation. In any given case evidence on some of the factors, if sufficiently persuasive, may satisfy a court as to the validity of an inference of causation.

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[91] The plaintiff in *Miller* alleged that the defendant manufactured medications to treat prostate issues and hair loss in men, but negligently failed to warn men who used their drugs of the risk that this could lead to persistent sexual dysfunction.

[92] The BCCA found that a "methodology" to establish that the medication caused the alleged impairment could be inferred from the evidence at certification which included:

- The growing class of plaintiffs;
- The labelling and monograph materials which changed to warn users of a risk of sexual dysfunction;
- Expert opinion evidence that there was a plausible biological mechanism to support an argument that the medication can cause sexual dysfunction by inhibiting the body's production of dihydrotestosterone.

Miller, at para. 53.

[93] Finally, to be certified as a common issue, an issue cannot be common only when stated in overly broad terms. "Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29; *Broutzas v. Rouge Valley Health System*, 2018 ONSC 6315, 302 D.L.R. (4th) 751, at para. 270.

[94] With that overview of the task on certification, I list next the proposed common issues.

The proposed common issues

[95] The plaintiffs propose the following common issues:

1. Did the Defendants, or any of them, owe a duty of care to the Class Members, and if so, who, when and how?

2. Does, or did, JOHNSON'S® baby powder (the "Baby Powder"), cause or materially contribute to the development of epithelial ovarian cancer ("EOC") when applied to the perineal area? If so, is a minimum consistent period of usage required for Baby Powder to cause EOC?

3. If the answer to question (2) is "yes", did the Defendants, or any of them, know or ought they to have known, that the Baby Powder caused and/or materially contributed to the development of EOC ovarian cancer when applied to the perineal area and if so, who and when?

4. If the answer to question (2) is "yes", did the Defendants, or any of them, have a duty to warn the Class Members of the risk of developing EOC ovarian cancer associated with the perineal use of the Baby Powder?

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5. If the answer to question (2) is "yes", did the Defendants, or any of them, breach their duty to warn the Class Members of the risk of developing EOC ovarian cancer associated with the perineal use of the Baby Powder?

6. If the answer to question (5) is "yes", how long did that breach continue?

7. If the answer to question (2) is "yes", were the Defendants, or any of them, negligent in failing to conduct any or any reasonable research, investigation and/or testing of the Baby Powder in relation to the risk of developing EOC ovarian cancer?

8. If the answer to question (2) is "yes", did the risk of developing EOC ovarian cancer associated with the Baby Powder arise due to any of the Defendants' negligent design, and/or manufacture, testing, post-market surveillance and/or monitoring, marketing and/or distribution of the Baby Powder?

9. If the answer to question (2) is "yes", did the Defendants, or any of them, breach their duty to Class Members in their design, manufacture, testing post-market surveillance and/or monitoring, marketing and/or distribution of the Baby Powder?

10. Is or was the Baby Powder unfit for its intended use? If so, when did the Defendants, or any of them, know or ought to have known, and when should the Defendants have removed the Baby Powder from the Canadian market?

11. Did the Defendants' representations of the Baby Powder as safe for its intended use constitute false, misleading or deceptive representations, pursuant to section 14 of the Consumer Protection Act, 2002, S. 2002, c. 30 ("Consumer Protection Act") Sch. A and/or equivalent analogous provincial and territorial legislation?

12. Did the Defendants, or any of them, make false and misleading misrepresentations about Baby Powder, contrary to s. 52 of the *Competition Act*, R.S.C. 1985, c.34 (the "*Competition Act*"), and if so, who, when and how?

13. If the answer to question (11) is "yes", are the Class Members entitled to recover damages pursuant to section 18(2) of the *Consumer Protection Act*, 2002, S. 2002, c. 30 Sch. A, and/or equivalent analogous provincial and territorial legislation?

14. If the answer to question (12) is "yes", are the Class Members entitled to recover damages pursuant to s. 36(1) of the *Competition Act*?

15. If the answer to questions (13) and/or (14) are yes, can these damages be assessed on an aggregate basis?

16. Does the conduct of the Defendants, or any of them, justify an award of punitive damages?

17. In addition, or in the alternative, does the high-handed and profit-driven conduct of the Defendants, or any of them, entitle the Class Members to recover under restitutionary

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principles and if so, should the Defendants be required to disgorge all or part of the revenue received from the sale of Baby Powder in Canada?

Overview of the defendants' submissions on the proposed common issues

The defendants submit that action should not be certified because the plaintiffs have:

a) failed to demonstrate a workable methodology for proving causation in negligence or for assessing damages in the aggregate.

b) failed to support the proposed common issues for negligent design and manufacturing with admissible evidence.

c) failed to establish there are common issues under provincial consumer protection legislation because of the reliance requirements.

d) failed to establish that the *Competition Act* claim meets the commonality requirements because it is statute-barred under s. 36(4) of the *Competition Act* and because there is no admissible evidence that there were false or misleading positive representations regarding baby powder;

e) failed to show that the various proposed damages issues are common across the class.

[96] I address these submissions on the disputed common issues next.

The Common Issues in Negligence (Questions 1-7): Does Question 2 fail to meet the commonality requirement?

[97] Question 1 is not controversial. It inquires into the existence of a duty of care owed to the class by the defendants.

[98] Question 2 is the causation question and the linchpin of the negligence portion of the claim. It reads:

> "Does, or did, JOHNSON'S® baby powder (the "Baby Powder"), cause or materially contribute to the development of epithelial ovarian cancer ("EOC") when applied to the perineal area? If so, is a minimum consistent period of usage required for Baby Powder to cause EOC?"

[99] The defendants submit that while there is some basis in fact for the causation question as between the use of baby powder and the development of EOC, the plaintiffs have not established a sufficient methodology for proving this connection at trial.

[100] The defendants submit that because both plaintiff and defence experts agree there are subtypes of EOC, "more is required" to prove class-wide causation at trial. They submit that the current question is framed too broadly to amount to a common issue.

[101] I disagree. The context of the claim in negligence is whether the defendants ought to have warned consumers and users of the baby powder product of the risks associated with female

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perineal use and the baby powder product. The common question is whether a user of the product should have been warned of the worst-case scenario associated with using the product in the female perineal area.

[102] The plaintiffs have provided an overview of scientific literature which establishes a basis in fact for the common causation question. These include, among other studies:

- A 1971 study in which Dr. W. J. Henderson and others suggested there was a link between perineal talc use and ovarian cancer. The research team used an extraction-replication technique to examine tissue from patients with ovarian and cervical tumours. In both conditions, talc particles were found deeply embedded within the tumour tissue.
- A 1979 publication of letters and editorial in the British medical journal The Lancet discussing the link between perineal talc use and ovarian cancer. In an August 1979 editorial Dr. D.L. Longo et al, suggested that ovarian cancer could be caused by talc fibres passing directly through the female reproductive tract to the ovarian surface.
- An epidemiological study published in 1982, by Cramer et al. on the association between cosmetic talcum powder use in the perineal area and ovarian cancer. This study found that women who had regularly dusted their perineum with talc and had used it on sanitary napkins were more than three times more likely to develop ovarian cancer than women with neither kind of exposure to talc.
- A report that after this study was published, Dr. Bruce Semple, an employee of the defendants, visited Dr. Cramer to discuss his study. Dr. Cramer advised Dr. Semple that the defendants should place a warning on their baby powder packaging, regarding the link between perineal talc use and ovarian cancer, so that users of the product could make informed decisions about their health.
- In 1997, a study published by the American Cancer Society found that exposure to talc, via sanitary napkins, direct application to the perineum, or both, was significantly associated with risk of ovarian carcinoma. A study published in the American Journal of Epidemiology the same year made similar findings.
- In 2000, a prospective cohort study found a 40% increase in invasive serous cancers (a subtype of EOCs) from women who applied talcum powder to their perineum.
- In approximately 2006, the Canadian federal government classified non-asbestiform talc as a "D2A" carcinogen under its Workplace Hazardous Materials Information System (WHMIS). Asbestos is also classified as "D2A". Talc is described in the WHMIS as "very toxic" and "causes damage to organs through prolonged or repeated exposure".
- In 2006, Luzenac, the defendants bulk talc supplier, began placing a warning on the safety data sheet included with the 2,000-pound bags of talcum powder it supplied to the defendants. That warning stated that perineal use of talcum powder could cause ovarian cancer. These warnings advised of the IARC classification as well as the

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> Canadian government's D2A classification of talc. The defendants did not pass this warning on to Canadian consumers.

[103] The plaintiffs' proposed methodology at trial is to call expert evidence on the issue of causation. They filed reports from three experts to establish that there is some basis in fact that this is a plausible methodology.

[104] Dr. Clarke-Pearson with the University of North Carolina, is a specialist in gynecological oncology. His report filed on this motion finds "to a reasonable degree of medical and scientific certainty, that the use of talcum powder products, including Johnson's Baby Powder and Shower to Shower, applied to the perineum of women, is a causative factor in the development of EOC."

[105] Dr. Clarke-Pearson's opinion was based on research from the medical and scientific literature as well as his knowledge and experience as an obstetrician-gynecologist and as a subspecialist in gynecologic oncology for over 40 years.

[106] Dr. Clarke-Pearson cited "credible scientific research" and an "extensive body of literature" as support for his opinion. He weighed the data and information using concepts that have been applied to questions of causation for decades. These concepts include the strength of association, consistency, specificity, temporality, biologic gradient, biologic plausibility, coherence, experiment, and analogy.[2]

[107] Dr. Clarke-Pearson described his causation methodology in detail in his expert report (beginning at paragraph 50), as:

> **CAUSATION ANALYSIS**
>
> In my opinion, genital application of talcum powder is a significant risk factor for all users and can cause EOC in some women by an accepted mechanism. As an academic and practicing physician, I made this determination in the context of Bradford Hill considerations as follow:
>
> - **Strength and consistency**: This opinion is supported by overwhelming epidemiologic evidence showing that the use of talcum powder statistically increases a woman's risk of developing EOC by approximately 30 percent (Odds ratio 1.31 Penninkilampi 2018; OR 1.28 Taher 2019). Every meta-analysis before 2019 also reported similar increase in the risk of developing EOC with the use of talcum powder. In my view, especially when considering the severity and frequency of ovarian cancer and the preventable nature of talcum powder usage, this finding is critically important and consistently supported by numerous studies.
> - **Specificity:** Based on the epidemiologic studies cited in this report, there appears to be a specific ovarian cancer caused by talcum powder: epithelial ovarian cancer (EOC). This

[2] These concepts are referred to in the case law and epidemiology literature as the "Bradford Hill" factors for the English scientist who articulated these causation concepts in 1965.

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association satisfies this consideration, although I did not weigh this factor to be as important as strength and consistency.

- **Temporality:** In many cancers where there are identified etiologic agents (smoking and lung cancer, HPV infection and cervical cancer) there is a latency period (time from exposure to the onset of the cancer) that can extend over decades. (Nadler and Zurbenko 2014) This concept applies to the latency period of talcum powder use before a woman develops ovarian cancer, thus fulfilling this consideration.
- **Biologic Gradient/Dose-response:** Measuring the "dose" of talcum powder used by an individual woman is difficult to ascertain and has been dependent on recall by the woman. In general, studies have attempted to capture the application "frequency" (daily? Only used on perineal pads during menstrual cycle?) or duration of use (how many years?). In addition, biologic gradient or dose-response is not always linear (e.g., asbestos exposure and mesothelioma is generally thought to have a "threshold response"). A number of studies have demonstrated an association between "dose" and the occurrence of EOC (response). (Terry et al. 2013; Schildkraut et al. 2016; Daniel W. Cramer et al. 2016; Penninkilampi and Eslick 2018). In modern times, molecular research is often used to elucidate this factor. I anticipate that this will occur as more *in vitro* studies are performed with talcum powder.
- **Plausibility:** This is obviously a critical factor when forming opinions on causation of a risk factor. Evidence shows that talcum powder ascends from the perineum through the vagina, cervix and uterus into the fallopian tubes and onto the ovary. Talcum powder is known to be an agent that causes inflammation. An inflammatory reaction caused by talcum powder on the tube and surface of the ovary results in genetic mutations and carcinogenesis. Talcum powder causes ovarian cancer through this mechanism. The "talcum powder agent" includes numerous constituents such as platy talc, asbestos, fibrous talc, heavy metals and/or chemicals contained in fragrances added to talcum powder, all of which cause an inflammatory reaction leading to carcinogenesis.
- **Coherence:** Epidemiological data, *in vitro* and *in vivo* research are consistent in explaining the pathogenesis of EOC through the inflammatory mechanisms described above. (Saed, Diamond, and Fletcher 2017). Further, this is consistent with the causes of other cancers.
- **Experiment:** There are no randomized trials comparing outcomes of women who use or who do not use talcum powder in their perineal hygiene. Further, such a trial at this point in time would be unethical. How could we expose women to talcum powder when the existing evidence supports causation of EOC? Laboratory research (*in vitro*) present evidence to support the biologic, genetic, epigenetic and neoplastic consequence to ovarian epithelium when exposed to talcum powder. (Shukla et al. 2009; Fletcher 2019; Harper & Saed abstract 2020).
- **Analogy:** There are numerous reports in the medical literature of minerals similar to talc causing cancer. Probably the most significant example is asbestos and lung cancer (mesothelioma).

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[108] The defendants submit that Dr. Clarke-Pearson's original report does not discuss the sub-types of EOC. They point out that Dr. Clarke-Pearson agreed on cross-examination that some risk factors differ by subtype and the risk factors that affect all subtypes, affect each in different ways. The defendants also submit that Dr. Clarke-Pearson does not have comparable experience to the defendant expert, Dr. Longacre, a gynecologic pathologist who co-edited the World Health Organization Classification of Female Genital Tumours. This suggests that the defendants seek to have the court prefer Dr. Longacre's opinion at this stage, which is that there is no correlation between talc use and ovarian cancer.

[109] The defendants critique the use of the various criteria listed by Dr. Clarke-Pearson. They submit that this is not a methodology for establishing causation at trial. Rather, they characterize the criteria applied as "simply a list of factors to consider in assessing whether an association seen in epidemiological studies between an agent and a disease is casual in nature". This submission sounds like a simple rephrasing of what Dr. Clarke-Pearson said he was doing. I find that it is a "methodology" in the sense used on certification and applied from the perspective of a "modest gatekeeper."

[110] The plaintiffs also tendered the expert opinion of epidemiologist Dr. Jack Siemiatycki of the Université de Montréal/Research Center of CHUM, on trial methodology.

[111] Dr. Siemiatycki has an extensive background in statistics and in epidemiology, He has devoted most of his research career to "investigating links between environmental, occupational and lifestyle factors and various types of cancer." Importantly, for questions of methodology at trial, his research includes both substantive and methodological components. Of his 300 or so research publications, about 25% of those have a methodological focus, meaning these pieces of research explore "how to evaluate and enhance the validity of epidemiologic research through various prisms: study design, data collection methods and statistical analysis."

[112] Dr. Siemiatycki applied the criteria on the question of causation that is described in the Reference Guide on Epidemiology in the Manual on Scientific Evidence (2011). The authors of the Reference Guide note, "There is no formula or algorithm that can be used to assess whether a causal inference is appropriate based on these guidelines." Thus, Dr. Siemiatycki described the criteria he applied as "aspects that might be considered in assessing causality."

[113] Based on those criteria, Dr. Siemiatycki listed the most important features in the assessment of general causation to be strength of association (including magnitude and statistical significance of RR), dose-response, consideration of biases, and consistency of finding.

[114] His findings on those aspects can be summarized as:

a. **Strength of association** – the meta-RR estimate was found to be 1.30, meaning that the evidence from the epidemiological literature demonstrated that women who regularly used talcum powder products in the genital area had a 30% higher risk of ovarian cancer than women who did not, an increase that is statistically significant, could not have occurred by chance and is in line with many recognized risk factors for other cancers;

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b. **Dose-response relationship** – when relative risk increases with increased exposure, the likelihood that there is a causal association is enhanced. The evidence here indicated increased risk with increased cumulative exposure to talc;

c. **Consideration of alternative explanations – absence of bias** – Dr. Siemiatycki conducted an analysis of the potential role of biases and error and found that none could have caused the apparent association;

d. **Consistency of findings between studies (replication of findings)** – similar results were found in different studies that include different study populations in different communities. This was found to add to the credibility of an inference of a causal relationship;

e. **Temporal relationship** – all studies reviewed confirmed talc exposure prior to cancer onset; and

f. **Biological plausibility** – Two plausible routes were described, including migration from the vaginal area to the fallopian rubes and ovaries and via inhalation and translocation. Once in the ovaries, carcinogenesis can be triggered by the particles triggering inflammation, talc induced oxidative stress and genotoxicity.

[115] The defendants critique the opinion of Dr. Siemiatycki for suggesting that the highest risk subtype of EOC should serve as the starting point of the analysis as a matter of "public health." In their submission, the defendants submit that this is not how the court should approach the question of causation at a trial of common issues. They rely on their cross-examination in which Dr. Siemiatycki agreed there are different levels of risk for sub-types of EOC.

[116] I disagree. This line of thinking obscures the larger picture. There is credible evidence of a high-water mark of statistically significant increased risk for perineal talc users of contracting the most common type of potentially lethal EOC from a product that has no therapeutic value and was marketed to users as "hypoallergenic" and "dermatologist tested." This evidence flows from accepted criteria used in the study of epidemiology and applied to the information on this question by accepted experts.

[117] It would be cold comfort to a user of a product marketed as benign to be told that of the several subtypes of cancer she might be more prone to contracting from that product, some subtypes present a lower risk than others. Any warning label on such a product would not distinguish among subtypes. That would be meaningless to the consumer. The duty to warn and the common issue to discover is whether the plaintiffs can prove such a duty existed. It will necessarily revolve around the highest level of risk to assess a breach of such a duty. This is clearly a common issue, not only to the class of those who are diagnosed with EOC but to the purchaser class.

[118] Both Dr. Clarke-Pearson and Dr. Siemiatycki have demonstrated a credible, plausible methodology, grounded in the facts, for approaching association and causation. Their conclusions in applying that methodology to the decades of study and research are consistent.

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[119] I accept that the defendants' experts disagree that there is a causal relationship between the use of talc and any EOCs. That is a trial issue. At this stage there is a plausible route to proof at trial based on the expert reports of Dr. Clarke-Pearson and Dr. Siemiatycki.

[120] An alternatively framed method, which similarly finds a causal link between talc use and ovarian cancer was presented in the expert opinion of Dr. Laura Plunkett, a pharmacologist, toxicologist, and regulatory expert for cosmetics.

[121] Dr. Plunkett employed the "human health risk assessment", a generally accepted methodology used to evaluate the safety of chemicals to identify the potential adverse health effects from exposure. Dr. Plunkett supported her conclusions with data reflecting: a) the known toxic effects of talc and other components of baby powder; b) the biologically plausible mechanisms for talc causing ovarian cancer; c) the likelihood that talc particles can reach the ovaries; d) a dose-response relationship for toxicity, including the risk of cancer; and e) the body of scientific literature spanning 40 years that shows a consistent "signal" for EOC in women exposed to talcum powder products

[122] The findings of the three plaintiffs' experts are fortified by the Canadian government's Screening Assessment for talc, filed on the motion, which also found a consistent and statistically significant positive association between perineal exposure to talc and ovarian cancer.

[123] I reject the submissions of the defendants that the expert evidence does not amount to "some basis in fact" that a methodology exists for establishing causation on a balance of probabilities. This is a question in common across the class and will advance the litigation.

[124] Further, commonality can be found even where there are underlying harms that have not been experienced by every member of the subclass who were diagnosed with EOC. As Cullity, J. put it, "the focus at a trial of the common issues will be on the adequacy of the measures taken by the defendants to prevent adverse consequences": *Andersen et al. v. St. Jude Medical Inc. et al.*, 2003 CanLII 5686, 67 O.R. (3d) 136, at para. 40.

[125] While there are differences in opinion as between the experts for the plaintiffs and the defendants, the law is clear that it is not the role of the certification judge to resolve those differences, to weigh the evidence, nor to require that the plaintiffs establish a *prima facie* case. The plaintiffs need only show a plausible route to establishing causation. I find that the expert evidence meets the test under s. 5(1)(c).

[126] As the British Columbia Court of Appeal observed in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 82 B.C.L.R. (3d) 1, at para. 40:

> When a plaintiff produces epidemiological studies that treat products of all defendants as generic, it behooves any defendant who is of a contrary view to produce evidence supporting its view. As Professor Boodman noted in an article entitled *The Malaise of Mass Torts*, (1994) 20 Queen's Law J. 213 at 242, modern methods of mass production and distribution often make it difficult or impossible to identify the exact source or sources of injury, to link a particular victim to a particular

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> defendant, and to demonstrate accurately the harmful effects of a defendant's act other than on the basis of epidemiological studies and statistical probabilities. Class proceedings were designed with precisely these uncertainties in mind.

[127] I find that Question 2 as framed may be certified, including the second question which seeks to determine threshold of use. Given the evidence that there is a relationship between dose and response, this will be an important question in common that will be applied to the individual stage of the trial. At this stage, prior to discovery, and based on the expert evidence heard, it would be premature to determine the threshold of use.

[128] Based on these findings, Questions 3-9, which depend on certification of Question 2, shall also be certified. However, certification is subject to my findings on the issues specific to the allegations of negligent manufacturing and design, which I consider next.

The Common Issue in Negligent Manufacturing and Design (Questions 8-10)

Issue 1: Is the evidence of negligent manufacturing inadmissible?

[129] In an action for negligent manufacturing, the plaintiff must plead and prove at trial that there is something present in the product which should not be there and is below the standard set by the manufacturer: *Rowe v. Raleigh Industries of Canada Ltd.*, 2005 NLCA 65, 251 Nfld. & P.E.I.R. 246, at paras. 19-21.

[130] As part of the Fresh Claim, the plaintiffs plead negligent manufacturing based on the presence of toxic, carcinogenic chemicals such as asbestos in baby powder. The pleading alleges:

> The defendants knew or ought to have known of the presence of asbestos and other chemical impurities being introduced to their talcum powder during the manufacturing process. By allowing their talcum powder to become contaminated, the defendants failed to take reasonable care in manufacturing Baby Powder. Given the widespread knowledge that asbestos is a carcinogen, the defendants knew or ought to have known that their deficient manufacturing process directly exposed consumers to harm, including cancer. Well after the 1970s, the defendants falsely represented that asbestos had been eliminated from their talcum powder products and that Baby Powder was safe to use despite studies continuing to find asbestos in the defendants' Baby Powder.

[131] The plaintiffs allege negligent manufacturing based on the opinion and studies cited by Dr. Plunkett, that the defendants allowed Canadian baby powder products to be manufactured, processed and distributed in Canada knowing that it was contaminated with known carcinogens, including asbestos, several heavy metals and multiple chemicals. They plead that the defendants represented that their baby powder was free of impurities, despite studies showing the opposite.

[132] Dr. Plunkett's report discusses reports on the presence of asbestos (a generic term for fibrous silicate particles in nature) in talcum powder and in US products sold by the Johnson defendants. This portion of the report lists documents produced by Johnson in other litigation

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showing that it was aware that "asbestos or asbestiform fibers were present in talc that was mined for talcum powder products." It lists analyses finding that the talc powder products contained fibers "stated to be" asbestos" and refuting claims by the defendants that these products were not free from asbestos after the 1970s.

[133] At para. 29 of her expert report, Dr. Plunkett lists studies, test results, and Johnson internal documents on the question of asbestos in talc powder products:

> These published scientific studies, internal testing documents, and testing results by Longo and Rigler, show that asbestos has been consistently present in Johnson & Johnson's talcum powder products since the mid-1950's and certainly after the 1970's when the defendants represented that asbestos had been eliminated from talcum powder products (additional support found within the exhibits and deposition testimony of Ms. Julie Pier, dated September 12, 2018; and Dr. John Hopkins, dated August 16 & 17, 2018; October 17, 2018, and November 5, 2018). The presence of asbestos was evidenced before the 1970's and continues to be found in test results. It is important to note that talc containing asbestiform fibers was classified in 1986 as a known human carcinogen (IARC, 1987, 2010, 2012).

[134] Dr. Plunkett cites studies which confirm that products manufactured for Johnson contained "detectable levels of heavy metals, including chromium, cobalt ant nickel which are "known to be toxic to human cells and tissues" and some of which are known to be carcinogenic in animals or humans.

[135] The defendants object to the admission of this evidence to show that its baby powder product was not manufactured in accordance with specifications, specifically that it was manufactured without reasonable care to avoid it being contaminated with asbestos or other metals toxic to humans.

[136] The defendants submit that the studies cited in the Plunkett report amount to inadmissible hearsay evidence because they are out of court, third party statements tendered to prove that there is asbestos and other harmful constituents in talc-based baby powder. The plaintiffs do not dispute that Dr. Plunkett has done no independent testing of samples and cannot speak to the truth of the studies reviewed for her expert report. The defendants submit that without admissible evidence of the underlying facts at this stage, this aspect of the claim should not be certified.

[137] I disagree. The issue on certification is not proof of the presence of asbestos or heavy metals in Johnson's product. The question on certification is whether the plaintiffs have demonstrated the existence of a plausible method of proof at trial to support the pleading in negligence manufacturing and the presence of asbestos in the baby powder product. This flows from the nature of a certification hearing, reviewed above.

[138] Proof of a contested fact at trial requires admissible, relevant, direct or circumstantial evidence, that is not otherwise subject to exclusion on policy grounds such as privilege. On certification the issues are one step removed from the proof of trial facts, such as whether there is asbestos in talc powder products. The question is whether there is "some basis in fact" to show

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there is evidence that would support proof of common issues, such as whether there is asbestos in talc. It is important not to convert a certification motion into a "mini trial" of the issues. This is a procedural step in the process, and that context drives the question of the use to be made of the evidence.

[139] The admissibility of the tendered evidence rests on how material it is to the certification criteria: Winkler, at pp. 32-33.

[140] This approach was adopted by Grace J. in *Johnson v. Ontario,* 2016 ONSC 5314, 364 C.R.R. (2d) 17 in a case alleging maltreatment, lack of access to health care, overcrowding, unsanitary conditions, and violence at the Elgin-Middlesex Detention Centre in southwestern Ontario. The defendant sought to exclude evidence of jury verdicts in coroner's inquests after the death of inmates, articles and an editorial published in the London Free Press between 2011-2014, an Ombudsman Ontario's report on its investigation into excessive use of force against inmates, and the reasons for sentence in the 2012 cases of *R. v. Tachbauer* and *R. v. Boucher.*

[141] Grace J. observed that the impugned evidence was accompanied by other admissible evidence and could be admitted for the purposes of the motion to certify. At para. 67, Grace J. wrote:

> The evidence in question is not admissible for the truth of its contents. However, that does not mean it is wholly inadmissible on a motion for certification: *Ewert v. Canada (Attorney General)*, supra at paras. 39 and 40. It may be considered and assessed, along with the frailties it may contain, to determine whether the moving party has met the onus of establishing some basis in fact for the certification requirements found in s. 5(1)(b) through (e) of the *CPA*.

[142] I find that the information cited by Dr. Plunkett is admissible to certify the question of negligent manufacturing based on the presence of asbestos and other toxic substances in Baby Powder. The studies establish that there is some basis in fact that the plaintiffs will have available to them, a credible method of proof, either by way of authenticating documents at trial, calling the authors of those studies, tendering admissions by the defendants or by producing as exceptions to the hearsay rule, government documents as to testing of talc-based products which are admissible.

[143] The admissible opinion of Dr. Plunkett, which relies on research and studies, is some evidence that these sources of evidence exist and can form evidence at trial through the appropriate witnesses at that time. This is not a hearsay use, given the issues at certification and the distinction between trial questions and certification questions.

[144] I find that the evidence is sufficient to show some basis in fact that the pleading of negligent manufacturing is a legitimate common question for trial. The references to manufacturing within Questions 8-10 may be certified.

Issue 2: Does the design defect pleading fail to present a common issue?

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[145] The defendants submit that the plaintiffs have not shown any basis in fact to support certifying the common issues concerning negligent design. They submit there is no evidence that the baby powder product was inherently defective for all purposes because the claim focuses on a particular risk associated with female perineal use.

[146] The defendants rely, in part, on Armstrong J.'s decision in the B.C. action to strike out the portions of that claim which alleged negligent design: *Williamson,* at para. 152.

[147] In allegations of negligent design, the trier of fact looks to: "the utility of the product, the nature of the product in terms of the likelihood it will cause injury, the availability of a safer design, the potential for designing and manufacturing the product so it is safer but remains functional and reasonably priced, the ability of the plaintiff to have avoided injury with careful use of the product, the degree of awareness of the potential danger that can be attributed to the plaintiff and the manufacturer's ability to spread any costs related to improving the safely of the design": *Daishowa-Marubeni International Ltd. v. Toshiba International Corp.*, 2010 ABQB 627, 501 A.R. 178, at paras. 37-40.

[148] Thus, for actions in negligent design, the court balances factors specific to the product and the producer considering its use and risks. This approach has been applied to fentanyl for pain relief, prosthetic heart valves, and silicone breast implants: *Player v. Janssen Ortho,* 2014 BCSC 1122, at para. 212; *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660; *Harrington*, at para. 43.

[149] The plaintiffs submit that the use of talc, and its association with ovarian cancer, which was known to the defendants for years before they pulled the product from the market, was a significant design defect, in a product that has no medical or therapeutic purpose. Their pleading includes detailed facts in support of the allegations of negligent design:

> 88. It was reasonably foreseeable that a failure by one or more of the defendants to design and develop a reasonably safe product, and to test and/or monitor its performance and safety following market introduction (and to take corrective measures when required) would cause, materially contribute to, or materially increase the risk of harm to the plaintiffs and the other members of the Classes. The Class Members used Baby Powder in their perineal area, which was a reasonably foreseeable use of Baby Powder.
>
> 89. The defendants designed and developed a defective and dangerous product that contained a mineral that was known to cause, and/or materially contributed to the development of, EOC in the plaintiff and other Class Members. They knew or ought to have known that designing a talcum-based powder to be applied in the perineal area could cause a substantial likelihood of harm to the plaintiff and other Class Members.
>
> 90. The defendants were negligent in their design, development, and/or testing of Baby Powder and breached their duty of care to the plaintiffs and other Class Members. Particulars of the defendants' acts of negligent design, development and/or

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testing and their breach of their duty of care include, but are not limited to the following:

a) they failed to adequately test the safety and efficacy of Baby Powder before marketing and distributing it;

b) they failed to conduct any or adequate follow-up studies on the efficacy and safety of Baby Powder;

c) they failed to adequately design, develop and/or test Baby Powder to ensure that it was safe and free from defects prior to marketing, promoting, selling or distributing it;

d) they knew or ought to have known that Baby Powder was defective and that Baby Powder would not properly perform the functions or purposes for which it was intended without exposing class members to serious harm;

e) they failed to withdraw Baby Powder from the Canadian market or include clear warnings of the risk of harm, including EOC; instead, they continued to promote and market the product as safe for external use;

f) they concealed adverse information regarding the testing and safety of Baby Powder from the public and the regulatory authorities, including the FDA and Health Canada;

g) they failed to monitor and follow up on reports of adverse reactions to Baby Powder; and

h) such further and other particulars of negligence within the knowledge of the defendants.

91. Although the defendants knew, or ought to have known, about the risks associated with talc-based Baby Powder, they failed to replace it with a safer alternative, namely cornstarch-based baby powder until 2020. Considering the defendants themselves market JOHNSON'S® pure cornstarch baby powder and have been investigating its use since at least the 1970s, the defendants knew or ought to have known that cornstarch-based baby powder had a similar effectiveness and did not pose the same risks of ovarian cancer as talc-based Baby Powder.

92. Despite the defendants' knowledge of the risks of talc-based Baby Powder when used for hygienic purposes and the availability of a cornstarch-based powder as a safer and economically feasible alternative, the defendants continued to design and develop

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> defective and unsafe Baby Powder. In May 2020, the defendants announced that all talc-based Baby Powder marketed in North America would be replaced with a cornstarch-based alternative. Kristin and other Class Members would have switched to cornstarch-based baby powder if they had been aware of the defective and unsafe nature of talc-based Baby Powder.

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[150] The defendants seek to have this aspect of the claim struck out because there is no allegation that the product was wholly defective, for any use. This submission sets the bar too high for what is required to certify a common issue in negligent design. Proof of negligent design is not absolute; it weighs the risk of harm against the benefit of the product along with the other factors discussed in the case law. The plaintiffs have pleaded the details of why the baby powder product was negligently designed in the context of the nature of the risks, the common use of the product, and its benefits as a cosmetic product.

[151] The plaintiffs have pleaded a design defect, a substantial likelihood of harm created by the defect, and that the defendants could (and did) design the product in a safer manner, in this case by using cornstarch instead of talc. I conclude that these satisfy the elements required for a tort of negligent design: *Player*, at para. 211.

[152] While Armstrong J. declined to certify negligent design in *Williamson*, this decision was made in the context of the plaintiff's pleadings issues. As outlined in the defendants' submissions, the pleadings were "muddled", "vague" and failed to plead any facts as to how the products were defective: *Williamson,* at paras. 145-153. Armstrong J. found that "[o]verall, the plaintiff's claims of a negligent design and negligent testing in this case do not disclose sufficient facts concerning the design flaws": *Williamson,* at para. 153.

[153] As detailed above, the plaintiffs' proposed Fresh Claim does not suffer from similar pleading defects, nor did the defendants contend, as they did in the B.C. action, that the plaintiffs made only "bald allegations" of design negligence.

[154] On that basis, I distinguish the submissions and the pleading in design negligence before me from that in the B.C. action. I find that there is some basis in fact to include the common issue question on negligent design.

Should the remaining consumer protection common issues be approved? (Questions 11, 13 and 15)

[155] The defendants submit that there are no common issues to be certified under the consumer protection claims brought under legislation in Alberta, B.C., Manitoba, Newfoundland & Labrador, and Saskatchewan because those statutes require proof of reliance on the misrepresentation. They have made no specific submissions about the pleaded claim for consumer protection legislation in Quebec.

[156] In *Williamson*, the defendants submitted that failure to plead reliance under the B.C. consumer protection statute meant that the action was bound to fail. Armstrong J. rejected that

submission on the basis that although the plaintiff there did not use the term, "reliance", Ms. Williamson had pleaded what amounted to "reliance": *Williamson,* at paras. 129-132.

[157] Armstrong J. approved the claim under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. In his final order of January 23, 2025, he approved the claims brought within the amended pleadings in the B.C. action in several other provinces, namely, Alberta, Saskatchewan, Manitoba, and New Brunswick.

[158] It is not apparent from the reasons for decision that the defendants argued before Armstrong J. that reliance is an individual issue and should not be certified for those provinces.

[159] I agree that there will be cases in which a misrepresentation about a product will require individual determinations of reliance. For example, Akbarali J. found in *Mackinnon v. Volkswagen,* at para. 198, that absent a "core misrepresentation" which would render the product worthless for its use, each member of the class would have to establish a reliance on the representation by the defendant (in this case, the low emissions features of the Volkswagen TDI vehicle).

[160] However, here there is arguably a core alleged misrepresentation concerning the safety of the product. It arises from the product being marketed for external use, that it was "hypoallergenic" and "dermatologist tested", not to mention its association with purity by virtue of being branded as "baby" powder. Whether or not the plaintiffs are able to establish that the product was worthless will be a matter for trial. If a judge determines after trial that this product should never have been distributed, there is a reasonable likelihood that the purchaser class from the provinces in which those claims are certified could be found to be entitled to a remedy, including punitive damages.

[161] Additionally, there are other issues in common among the remaining provincial claims under consumer protection law. For example, the B.C. Supreme Court concluded that the question of whether representations were "deceptive acts or practices", according to the *Business Practices and Consumer Protection Act* are suitable common issues: *Seidel v. Telus Communications Inc.,* 2016 BCSC 114, at paras. 151, 155-165; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, 2 B.C.L.R. (6th) 300, at paras. 47, 95-97; *Krishnan v Jamieson Laboratories Inc.*, 2021 BCSC 1396, 60 B.C.L.R. (6th) 369, at para. 193.

[162] In Alberta, the courts apply a "reasonable consumer" standard to the conduct or representations under the *Alberta Consumer Protection Act*: *Alberta (Director of Trade Practices) v. Edanver Consulting Ltd.*, 1993 CanLII 7092, 10 Alta. L.R. (3d) 433, at para. 21; *R. v. 954355 Alberta Inc. (The Fast Lane)*, 2016 ABPC 229, at paras. 14, 18; *Krishnan,* at para. 194.

[163] I find that the consumer protection claims in the provinces of B.C., Alberta, Saskatchewan, Manitoba, Quebec, and Newfoundland & Labrador raise common issues.

[164] While the defendants submit that the determination of aggregate damages will depend on individualized claims from class members who developed EOC, that is not the function of aggregate damages for losses that are common to all class members. As the BCCA said in

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Insurance Corporation of British Columbia v. Ari, 2025 BCCA 131, at para. 28, in the context of a breach of the *Privacy Act*:

> At the aggregate phase of assessing damages in a class proceeding, the specific losses suffered by individual class members are not at issue. In other words, aggregate damages must correspond to proven harms or losses common to all class members: *Pioneer Corp v. Godfrey*, 2019 SCC 42 at para. 118. The individual phase of assessing damages in a class proceeding is reserved for any other damages corresponding to harms that can be proven by individual class members.

[165] Similarly, I find that the common issue of available damages under these consumer protection statutes gives rise to an ability to determine a common set of aggregate damages across the class, depending on the findings of liability. The individualized damages flowing from the subclass of those who developed EOC are not capable of being assessed in the aggregate.

[166] Finally, to be clear the question is asked in this way: "If the answer to questions (13) and/or (14) are yes, can these damages be assessed on an aggregate basis?" The common question does not ask what those damages should be, only whether if the liability findings are made, whether damages in the aggregate can be assessed.

Should the *Competition Act* claims be struck? (Question 12, 14 and 15)

[167] The defendants raise two issues in support of their submission that the *Competition Act* claims are not amenable to being treated as common issues.

[168] The first is that the claim is clearly outside the 2-year limitation period for relief under the *Competition Act* because it was discoverable when the B.C. action was commenced in 2016 and included such a claim.

[169] I do not agree. Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 4th ed. (Toronto: LexisNexis Canada, 2020), at pp. 220-21, provides the following guidance:

> A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon [which] the original right of action is based.

[170] Here the pleadings remain open, and it is arguable that the underlying factual matrix to the *Competition Act* claim was pleaded in the original statement of claim. I would not refuse to approve this cause of action at certification due to a limitation period defence which has not yet been pleaded: *Polla v. Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818, at paras. 37-38.

[171] Alternatively, the defendants submit that it is plain and obvious that a claim for a breach of s. 52 of the *Competition Act* cannot succeed in the absence of evidence that the defendants

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made positive false representations regarding the baby powder product. Again, the defendants submit that the evidence from Dr. Plunkett in this regard is inadmissible hearsay.

[172] I disagree. There is admissible evidence in Kristin Baker's affidavit as to the marketing of the product as "tested" and "hypoallergenic" which could be found at trial to amount to positive representations as to the safety of the product.

[173] For the reasons provided above under the negligent manufacturing analysis, I am not persuaded that the examples cited in Dr. Plunkett's report of labelling of similar products in the U.S. are hearsay evidence, because they is not tendered for the proof of the truth of what is on the sample labels. The report provides examples of other products with consumer warnings, including one such product in the U.S. which read "Frequent application of talcum powder in the female genital area may increase the risk of ovarian cancer." Dr. Plunkett opined that this is an example of a warning that is consistent with U.S. cosmetic regulation and would have complied with Canadian cosmetics regulations.

[174] As with the negligent manufacturing issue, the report shows a basis in fact for the capacity of the plaintiffs to lead evidence at trial to establish that the defendants' labels were misleading to perineal talc users, who have an interest in common in the question as to the application of the *Competition Act.*

[175] As with the consumer protection claims, the question of damages to the purchaser class if there is a breach of the *Competition Act* is amenable to being determined in common for those members of the class, as is the question of whether these damages can be assessed in the aggregate: *Pioneer Corp.,* at para. 114.

The Punitive Damages Proposed Common Issue (Question 16)

[176] The defendants submit that until awards of compensatory damages are made on an individual basis, a court is not able to determine whether punitive damages are appropriate. Thus, the defendants argue that the question of whether their conduct is deserving of punitive damages is not a common issue that should be approved.

[177] I do not agree. Punitive damages relate to the conduct of the defendant. It is appropriate to determine as a common issue whether the defendants' conduct has been sufficiently reprehensible to support awarding punitive damages: *Carom v. Bre-X Minerals Ltd.*, 1999 CanLII 14794, 44 O.R. (3d) 173 (Ont. Div. Ct.), at para. 83; *Gariepy v. Shell Oil Co.*, [2002] O.T.C. 459, 23 C.P.C. (5th) 360 (Ont. S.C.), at para. 75; *Chalmers (Litigation guardian of) v. AMO Canada Co.,* 2010 BCCA 560, 13 B.C.L.R. (5th) 37; *Batten,* at paras. 204-5.

[178] A list of internal corporate documents described by Dr. Plunkett at para. 155 of her report, adds to the evidence that there is some basis in fact on which a trier of fact could make a finding of entitlement to punitive damages at trial. Again, these need not be proved for their truth on certification, but their specificity suggests that there is an available body of evidence to support those submissions. The list of those records includes:

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- A February 1964 record of a meeting among Johnson scientists discussing talc safety and whether cornstarch could be an alternative product. According to Dr. Plunkett's report, the memo read," The largest commercial uses of Dry Flo [a cornstarch powder under development as a talc replacement at J&J] are in Vitamin A manufacture (5% in finished product) and as a condom lubricant where it replaced talc because it was found to be absorbed safely in the vagina whereas, of course, talc was not."
- In 1966, an internal memo referred to a publication (Hughes and Kalmer, 1966) concerning hazards related to the defendants' baby powder product, noting "Baby Powder represents the cornerstone of our baby product franchise. In addition, we have a large investment in a talc mine. I am concerned over the conclusions drawn in the article..."
- In a 1971 internal memorandum, Johnson's Dr. Hildick-Smith discussed the issue of talc migration from the vagina to the ovaries, and the data showing that talc can move inside the body when particles gain entry through the vagina.
- In a 1973 Johnson document employees discussed the fact that fibrous talc was present in baby powder, and that one answer to concerns would be to replace the talc with cornstarch because "by its very nature" it "does not contain fibers" and "is assimilated by the body."
- On December 3, 1975, an internal memo titled "talc in the ovaries" includes hand-written notes by Bruce Semple of Johnson, raising the issue of the company being "On notice re: the talc/ovary problem".
- In a Johnson document dated August 5, 1992, the author discusses declining sales of baby powder, and speaks to growing the market by "targeting minority populations of women" while also acknowledging the links of these products to cancer;
- A marketing document prepared in 2000 by Burson-Marsteller for Johnson announces its intention to discontinue talc in all consumer products and use only cornstarch starting on December 1, 2000.
- In 2008, the former Global Creative Director for Johnson wrote in an email "The reality that talc is unsafe for use on/around babies is disturbing. I don't mind selling talc, I just don't think we can continue to call it Baby Powder and keep it in the baby aisle."
- Two documents from the Johnson pharmaceutical assessments in 2012 through 2014 which had determined a causal connection between talc body powder use and certain cases of ovarian cancer. A corporate decision was made to remove language about causation from the records.

[179] Subject to proof of such information at trial, assuming the described timeline of knowledge, testing and failure to act by the defendants can be established, the common question of punitive damages has some "basis in fact".

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[180] I approve the common question on the issue of punitive damages.

Restitutionary principles and disgorgement of revenue from the sale of baby powder in Canada (Question 17)

[181] Finally, Question 17 has an assumption embedded within it, given that it asks:

> In addition, or in the alternative, does the high-handed and profit-driven conduct of the Defendants, or any of them, entitle the Class Members to recover under restitutionary principles and if so, should the Defendants be required to disgorge all or part of the revenue received from the sale of Baby Powder in Canada? (Emphasis added.)

[182] As framed, I would not certify this as a common question because of the question assumes that the defendants acted in a "high-handed and profit-driven" manner. That conclusion may or may not be established at trial.

[183] The defendants and interveners submit that given the years of sales of baby powder in Canada, and the likely lack of records for purchases going back decades, this action is "too big to certify" and "too unwieldy". This submission speaks to the utility of a common question on the issue of disgorgement of profits, depending on the findings on the conduct of the defendants.

[184] The Supreme Court of Canada has found that disgorgement is a remedy for wrongful conduct. It is calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 23.

[185] The proposed question is not a cause of action. It is a remedy question that can be determined for the benefit of the class in common, at the trial of those issues.

[186] The plaintiffs will need to modify the common question to remove the assumption as it is currently written.

Conclusion on Common Issues

[187] To conclude this section, I find that the following questions are common and capable of certification. I have shown possible modifications to conform to these reasons for the guidance of counsel, who may make further submissions at the appropriate time on other consistent formulations:

> 1. Did the Defendants, or any of them, owe a duty of care to the Class Members, and if so, who, when and how?
>
> 2. Does, or did, JOHNSON'S® baby powder (the "Baby Powder"), cause or materially contribute to the development of epithelial ovarian cancer ("EOC") when applied to the perineal area? If so, is a minimum consistent period of usage required for Baby Powder to cause EOC?

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3. If the answer to question (2) is "yes", did the Defendants, or any of them, know or ought they to have known, that the Baby Powder caused and/or materially contributed to the development of EOC ovarian cancer when applied to the perineal area and if so, who and when?

4. If the answer to question (2) is "yes", did the Defendants, or any of them, have a duty to warn the Class Members of the risk of developing EOC ovarian cancer associated with the perineal use of the Baby Powder?

5. If the answer to question (2) is "yes", did the Defendants, or any of them, breach their duty to warn the Class Members of the risk of developing EOC ovarian cancer associated with the perineal use of the Baby Powder?

6. If the answer to question (5) is "yes", how long did that breach continue?

7. If the answer to question (2) is "yes", were the Defendants, or any of them, negligent in failing to conduct any or any reasonable research, investigation and/or testing of the Baby Powder in relation to the risk of developing EOC ovarian cancer?

8. If the answer to question (2) is "yes", did the risk of developing EOC ovarian cancer associated with the Baby Powder arise due to any of the Defendants' negligent design, and/or manufacture, testing, post-market surveillance and/or monitoring, marketing and/or distribution of the Baby Powder?

9. If the answer to question (2) is "yes", did the Defendants, or any of them, breach their duty to Class Members in their design, manufacture, testing post-market surveillance and/or monitoring, marketing and/or distribution of the Baby Powder?

10. Is or was the Baby Powder unfit for its intended use? If so, when did the Defendants, or any of them, know or ought to have known, and when should the Defendants have removed the Baby Powder from the Canadian market?

11. Did the Defendants' representations of the Baby Powder as safe for its intended use constitute false, misleading or deceptive representations, ~~pursuant to section 14 of the Consumer Protection Act, 2002, S. 2002, c. 30 ("Consumer Protection Act") Sch. A and/or equivalent analogous~~ consumer protection legislation in British Columbia, Alberta, Manitoba, Newfoundland & Labrador, Quebec and Saskatchewan? ~~provincial and territorial legislation?~~

12. Did the Defendants, or any of them, make false and misleading misrepresentations about Baby Powder, contrary to s. 52 of the Competition Act, R.S.C. 1985, c.34 (the "Competition Act"), and if so, who, when and how?

13. If the answer to question (11) is "yes", are the Class Members entitled to recover damages pursuant to section 18(2) of the ~~Consumer Protection Act, 2002, S. 2002, c. 30 Sch. A, and/or equivalent analogous provincial and territorial legislation~~ consumer

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protection legislation in British Columbia, Alberta, Manitoba, Newfoundland & Labrador, Quebec and Saskatchewan?

14. If the answer to question (12) is "yes", are the Class Members entitled to recover damages pursuant to s. 36(1) of the Competition Act?

15. If the answer to questions (13) and/or (14) are yes, can these damages be assessed on an aggregate basis?

16. Does the conduct of the Defendants, or any of them, justify an award of punitive damages?

17. In addition, or in the alternative, does the ~~high-handed and profit-driven~~ conduct of the Defendants, or any of them, entitle the Class Members to recover under restitutionary principles and if so, should the Defendants be required to disgorge all or part of the revenue received from the sale of Baby Powder in Canada?

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Section 5(1)(d) – Is a class proceeding the preferable procedure for the resolution of the common issues?

[188] The plaintiffs must establish that in the context of the common issues, and considering the goals of class proceedings:

a) the class proceeding would be a fair, efficient and manageable method of advancing the claim; and

b) A class proceeding would be preferable to other proceedings.

Hollick, at paras. 29-30; *Caputo v. Imperial Tobacco Ltd.*, 2004 CanLII 24753, 236 D.L.R. (4th) 348 (Ont. S.C.), at para. 62; *AIC Limited,* at paras. 22-23.

[189] In *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853, at paras. 84, 86, Perell J. summarized the criteria relevant to a preferable procedure analysis:

- whether a class proceeding would be better than other methods, such as joinder, test cases, or other means of resolving the dispute;
- whether a class proceeding represents a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims;
- whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy, and by considering the importance of the common issues to the claims, including the individual issues.

[190] In addition, preferability is the correct step at which to consider parallel proceedings which are not an abuse of process, in cases which predate amendments to the *CPA* on that procedure: *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512, at para. 8.

[191] In the absence of a motion to stay for abuse of process, at this stage, I would continue with the preferability analysis. However, given the motion to stay, I consider whether I should stay these proceedings next.

The Motion to Stay the Proceedings: Should this action be stayed or dismissed as an abuse of process?

[192] The Johnson defendants move to stay or dismiss this action based on the doctrine of abuse of process based on two arguments: because there is duplication as between the Ontario, Quebec and B.C. actions and due to unacceptable delay by the plaintiffs, who I refer to in this section as the "Ontario action."

[193] The Ontario action submits that a stay is not warranted. The Ontario action submits that it is best positioned to protect the class members' best interests because of its broader scope than the B.C. and Quebec actions, and is not wholly duplicative of those actions. In addition, the Ontario action submits that it benefits from cooperation with U.S. lead counsel in mass tort claims against Johnson in the U.S. Further, the proposed Fresh Claim names the successor Johnson entities who hold the liabilities for the talc claims.[3]

[194] The Ontario action also submits that it did not unduly delay prosecuting the action such as to amount to an abuse of process.

[195] The interveners support the position of the defendants. Mr. Roxborough for MLG submits that Ontario is now at the same stage that the BC action was at in February of 2024. Further delays could result from certifying the Ontario action and could mean that evidence is not preserved. Mr. Roxborough pointed out that both original class plaintiffs in Alberta and British Columbia have since passed away.

[196] The interveners made several suggestions on the appropriate approach to the question of the stay. They submit that to avoid a scenario where the Ontario action overlaps the B.C. and Quebec actions, I ought to consider several alternatives. These include certifying only a purchaser class, staying the proceedings as an abuse of process, denying certification, permitting joinder with the B.C. action, adjourning these proceedings to await a decision of the BCCA, and only as a last resort, "worst case" scenario, certifying the Ontario action as proposed.

The Legal Framework on a Motion to Stay a Class Proceeding for Abuse of Process

[197] In Ontario, the court has broad discretion to stay a proceeding on such terms as are considered just, at any time: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106.

Duplicative Proceedings

[198] The integrity of the administration of justice can be damaged by a "multiplicity of legal proceedings": *Courts of Justice Act*, s. 138; *DALI 675 Pension Fund,* at para. 12.

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[3] These entities are Kenvue Canada Inc. And Pecos River Talc LLC.

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[199] That said, duplicative proceedings will not always amount to an abuse of process. There may well be valid reasons for parties to initiate related yet separate proceedings: *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, at para. 39. In some circumstances the administration of justice will not be harmed by similar, separate actions: *BCE Inc. v. Gillis*, 2015 NSCA 32, 384 D.L.R. (4th) 111, at para. 35.

[200] In determining whether a stay or dismissal is an appropriate remedy for an abuse of process, the court must consider the facts and the context of the litigation to determine what is in the interests of justice: *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355, at para. 16.

[201] Where a court declines to issue a stay despite overlapping class proceedings, there are mechanisms in place to address the potential for confusion. Potential plaintiffs would receive notices of the options and could proceed with the action of their choice: *Mignacca v. Merck Frosst Canada Ltd.*, 2009 CanLII 10059, 95 O.R. (3d) 269 (Ont. Div. Ct.), at para. 80.

[202] The doctrine of abuse of process aims to prevent the harm that duplicative proceedings can cause. These harms include: duplication of effort, the risk of inconsistent findings, confusion for plaintiffs, unfairness to defendants, and the inappropriate use of judicial resources: S*askatchewan (Environment),* at para. 40; *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499, at paras. 122- 126 (*Kirsh* 2020).

[203] In applying the common law test for abuse of process for parallel, similar class proceedings, the courts will look to a variety of factors, including a consideration of the benefits to the class members, the history of the matter, the relationship between the proceedings at issue and the principle of avoiding duplicative proceedings: *Kirsh v. Bristol-Myers Squibb*, 2021 ONSC 6190, at para. 44 (*Kirsh* 2021). The courts examine the legitimacy of the overlapping actions in the context of the integrity of the administration of justice: *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447, 31 B.C.L.R. (6th) 318, at paras. 53, 71-72; *DALI 675 Pension Fund,* at paras. 15-19; *Boehringer Ingelheim (Canada) Ltd. v. Englund*, 2007 SKCA 62, 299 Sask. R. 298, at para. 40; *Silver v. Imax Corporation*, 2009 CanLII 72334, 86 C.P.C. (6th) 273 (Ont. S.C.), at para. 133.

[204] The abuse of process analysis as flexible, concerned with fairness to the parties and concerned with avoiding circumstances that may bring the legal system into disrepute: *Kirsh* 2021, at para. 44.

[205] Across Canada, there have been several decisions which have grappled with the issues flowing from competing national class action proceedings. In *Hafichuk-Walkin et al v. BCE Inc et al,* 2016 MBCA 32, 395 D.L.R. (4th) 734, at paras. 40-41, the Manitoba Court of Appeal reviewed the competing policy considerations underlying competing class proceedings:

- Multi-jurisdictional class proceedings are permissible in Canada;
- Such proceedings will be abusive where they are duplicative and serve no legitimate purpose to proceed;

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- Courts should take care not to extinguish claims too quickly, particularly at the earlier stages of the litigation;
- Courts should strive to respect provincial differences as a matter of judicial comity;
- It is important to "look below the surface" of competing actions to assess the impact on the integrity of the administration of justice.

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[206] Recently, the Supreme Court of Canada discussed the importance of access to justice, judicial comity, and cooperation in the context of class actions:

> As for the judicial branch of government, this Court has recognized that "[g]reater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe" (Hunt, at p. 292). The courts in our federation provide a comparable quality of justice, and so demand the same level of faith in one another's judgments where jurisdiction has been properly exercised (Morguard, at p. 1099). If overlapping litigation arises, courts acting in respect of one another have the tools to prevent any abuse of process (see, e.g., CPA, ss. 4(3) to 4.1). Comity between our federation's courts helps with access to justice in a world where people and problems cross borders without heed for which legislature or court has authority over them.
>
> This is true in class actions, whose "purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights" (Bisaillon, at para. 16). This Court has noted that class actions serve judicial economy, promote access to justice, and modify the behaviour of wrongdoers who might otherwise escape accountability for their actions (Dutton, at paras. 27-29; Hollick, at para. 15). <u>These goals are met where governments cooperate with one another to have their claims litigated efficiently, in one action, before one province's superior court, whose proceedings and judgment will be respected through the principle of comity in the other courts of our federation</u>. [Emphasis added.]
>
> *Sanis Health Inc. v. British Columbia*, 2024 SCC 40, at para. 106.

[207] In the context of parallel Canada-U.S. class action litigation, Rensburg J. (as she then was) observed in *Silver v. IMAX*, 2013 ONSC 1667, 36 C.P.C. (7th) 254, at para. 179, that:

> It is not the function of this court to seek to jealously guard its own jurisdiction over a class proceeding that has been certified here. Such an approach is inconsistent with the principles of comity. It is also not the function of the court to favour or protect the interests of class counsel within this jurisdiction, knowing that they have invested time and resources into the litigation, and that their compensation will depend on the size of the judgment or settlement they are able to achieve. As I have already noted, class action counsel assumes significant risks, including the potential that the court may certify a smaller class than that requested. In pursuing an action when there are existing parallel proceedings in another jurisdiction, class counsel are aware that the

other action might move more quickly or reach a determination before their own case is decided or resolved.

Dismissal for Undue Delay

[208] In addition to circumstances involving an alleged multiplicity of proceedings, a remedy for abuse of process may be available where there has been "inordinate delay that causes serious prejudice": *Saskatchewan (Environment),* at para. 36; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 115.

[209] The court can control its own process, including by dismissing cases for undue delay: *Hurst v. Société Nationale de L'Amiante*, 2008 ONCA 573, 93 O.R. (3d) 338, at para. 42; *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695, 87 O.R. (3d) 660, at paras. 24-25.

[210] These principles apply equally to class proceedings, as in other civil actions: *Barbiero v. Pollack*, 2024 ONCA 904, at paras. 6-7.

[211] The court generally looks to these factors on a motion to stay an action based on delay:

a) Is the length of the delay inordinate?

b) Have the plaintiffs reasonably accounted for the delay?

c) Has the delay created a substantial risk that a fair trial has been prejudiced?

Blencoe, at para. 122; *Belanger v. Southwestern Insulation Contractors Ltd.* (1993), 16 O.R. (3d) 457 (Gen. Div.), at p. 471; *Hurst,* at paras. 57, 59.

Background to the Stay Motions

[212] By way of necessary background, I describe next the chronology of the Ontario, B.C., and Quebec actions.

The Ontario Action

[213] The claim in the Ontario action was issued on May 18, 2016, on behalf of a class of women resident in Canada who had purchased and/or used Johnson's talcum-based baby powder. The action alleged that the product caused or materially contributed to the development of ovarian cancer in women who apply it to their perineal area. Thus, among other causes of action, the Ontario action alleged that Johnson breached its duty to warn these consumers and thus was liable in negligence to the members of the class. It was not the first claim to issue, because as seen below, the B.C. action and the Quebec actions had already both been commenced.

[214] Counsel for the Ontario plaintiffs became aware of the B.C. and Quebec actions between May and July of 2018.

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[215] Although required by the Ontario Consolidated Practice Direction, counsel to the Ontario action did not post the statement of claim on the CBA Database. The evidence on that point from Mr. Genova was that this was "inadvertent" and that it was not the firm's common practice to post originating proceedings in 2016.

[216] On October 27, 2016, plaintiff counsel wrote to Justice Perell requesting a case-management judge be assigned. On October 28, 2016, Justice Perell advised that he would case manage the Ontario action.

[217] The Ontario action took no further steps until just under five years later. On September 16, 2021, plaintiff counsel sent a letter to the defendants proposing a timetable for certification. On September 23, 2021, defendants counsel advised that they did not agree with the timetable, and the action should be dismissed or stayed for delay.

[218] Justice Perell presided over a case conference on September 29, 2021. On September 30, 2021, plaintiff counsel served their motion record on certification. They did not provide notice of their motion or their record to counsel in the B.C. or the Quebec actions. Nor did they do so in the Alberta action. The Ontario action did not provide their notice of motion for certification to all judges in those class proceedings, as required by the Ontario Consolidated Practice Direction and the 2018 Protocol referenced in the Practice Direction.

[219] On October 19, 2021, Justice Perell issued a case management file direction in which he sought submissions from the parties on a proposed timetable for the certification and stay cross-motion.

[220] On November 16, 2021, Justice Perell scheduled both the certification motion and the defendants' stay motion to be heard over a three-day period between November 30 to December 2, 2022. The motions did not proceed on those dates because Johnson initiated bankruptcy proceedings in the U.S. in response to the tort claims concerning baby powder products.

[221] The U.S. bankruptcy proceedings Johnson commenced in October 2021 led the court to issue a stay in December 2021 until September 19, 2023. In 2023, Justice Akbarali fixed new dates in September 2024 for the stay/certification motions. The defendants sought and obtained the plaintiffs' consent to adjourn the hearing of the motions to May 27, 2025.

[222] Plaintiff counsel consented to adjourn the 2024 stay/certification motions on two conditions: first, that the defendants delay arguments would focus solely on the period between May 1, 2016, and September 30, 2021, and second, that Johnson would hold any appeal of the B.C. certification decision in abeyance until the Ontario certification motion could be heard.

[223] Counsel to the Ontario action complied with the 2018 Protocol by sending copies of their material to counsel and the courts in the other actions in April 2024. During cross-examination of Mr. Genova, counsel Mr. Rochon states that "Our information is that it was posted to the CBA website on April 29, 2024.

[224] The evidence of Mr. Genova of Rochon Genova was that during the five years between issuing the claim and delivery of the certification motion record, plaintiffs' counsel were engaged

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in work behind the scenes to develop the case theory, obtain expert reports, and communicate with prospective plaintiffs.

The BC Action

[225] On March 24, 2016, counsel from the Merchant Law Group ("MLG") initiated a class action proceeding against Johnson related to its talc-based baby powder. That action originally (Williamson, now Ennis) covered B.C. class members and permitted other Canadian plaintiffs from other provinces and territories to "opt-in".

[226] On October 1, 2018, the legislature amended the B.C. *CPA* converting all B.C. class proceedings – including this one – into a national "opt out" action. The Ontario action acknowledges that as of this date, the two sets of proceedings began to overlap.

[227] The B.C. action proceeded to a contested certification hearing on February 24-26, 2020, before Armstrong J. Contrary to the B.C. *CPA*, the B.C. action did not post its claim on the CBA database, nor did it provide the Ontario action with notice of the 2020 certification hearing. The B.C. action advised Johnson's counsel that they had provided notice of the B.C. application to counsel in proposed similar actions. However, it appears that the Ontario action did not receive this notice, perhaps because they had not posted their action on the CBA database at the time. As a result, the Ontario action played no part in the 2020 certification hearing. However, as noted above, counsel in the Ontario action was aware of the B.C. action by 2018. Nevertheless, Ontario counsel did not monitor the court files or inquire about the status of the B.C. action prior to the 2020 certification hearing.

[228] On November 17, 2020, Justice Armstrong released his reasons granting the B.C. action leave to amend the claim, the class definition, to expand the claim to consumer protection legislation in other provinces, and to file additional evidence in support of a methodology for proving causation on a class-wide basis.

[229] In November and December 2021, the plaintiff delivered an expert report by Dr. Cramer, a respected epidemiologist, a Second Amended Notice of Civil Claim, and a Second Amended Notice of Application for Certification. In July 2023, the B.C. action sought a case conference before Justice Armstrong to finalize issues related to certification. Johnson notified counsel in the Ontario and Alberta actions of the case management conference.

[230] On August 23, 2023, Justice Armstrong presided over a case conference involving the B.C. action, Ontario action, and the defendants. At that time, the Ontario action asked to be included in the continuation of the certification hearing in B.C.

[231] On September 25, 2023, the plaintiff filed a "Renewed Application for Certification", and an application for leave to further amend the Notice of Civil Claim to substitute the representative plaintiff with Kelly Ennis. This was because the former representative in the B.C. action, Ms. Linda Williamson, had passed away from ovarian cancer.

[232] In the lead up to the hearing, the defendants cross-examined Dr. Cramer.

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[233] The Ontario action filed their certification record with the B.C. court and tendered an affidavit from an articling student with Rochon Genova.

[234] Justice Armstrong heard the continuing certification application on February 6-8, 2024. At the hearing the Ontario action filed submissions in writing and made oral submissions on the preferability of the Ontario action over the B.C. action.

[235] By way of summary, the Ontario action submitted that the B.C. action should not be certified, or alternatively should be stayed in favour of the Ontario action because;

a) Many potential class members are resident in Ontario;

b) Ontario counsel were prepared to advance their certification application in Ontario sooner than the B.C. action;

c) Ontario counsel were better prepared and more experienced/competent than B.C. counsel.

Ennis, at para. 167.

[236] On September 23, 2024, Justice Armstrong released his reasons for decision, certifying the B.C. action: *Ennis v. Johnson & Johnson*, 2024 BCSC 1759. Justice Armstrong excluded Quebec residents because the Quebec action had been authorized in that province.

[237] Based on the expert evidence before him, Justice Armstrong certified a class definition that excluded persons who had been diagnosed with certain subtypes of EOC, such as invasive mucinous and clear cell cancers. He also required a 10-year threshold of use for users of baby powder who had been diagnosed with EOC, based on the cross-examination of the plaintiffs' expert Dr. Cramer. Justice Armstrong issued his final order on January 23, 2025.

[238] In Justice Armstrong's reasons, he considered and rejected the Ontario action's submissions on preferability. He further rejected the Ontario action's submissions seeking to compare Ontario counsel's "superior credentials and accomplishments" to that of B.C. counsel.

[239] Justice Armstrong rejected the Ontario action's submissions that their action is "more robust with more exhaustive pleadings and should be the preferable procedure for advancing the claims." Justice Armstrong acknowledged that the Ontario claims included a broader range of relief than the B.C. action but noted that these claims were untested in Ontario. Justice Armstrong declined to certify some of those broader claims on the record and submissions before him: *Ennis* at paras. 210-211.

[240] Justice Armstrong was not persuaded that "the diligence and focus of counsel for the Ontario plaintiff demonstrates a focused plan to advance the interests of their class plaintiffs": *Ennis,* at para. 217. After considering the plans of both actions and each of their imperfections at certain stages, Justice Armstrong found the actions and competence of counsel was a "neutral factor" in the preferability analysis.

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[241] On the question of the relative stages of the proceedings, Justice Armstrong found that because no decision on either the stay or certification motions had yet been made in the Ontario action, considerations of judicial comity did not prevent him from certifying the B.C. action: *Ennis,* at para. 213; *N&C Transportation Ltd. v. Navistar International Corporation*, 2022 BCCA 164, at paras. 47-48. Further, he observed that the competing interests of the class plaintiffs might be better addressed after the Ontario certification motion is resolved: *Ennis,* at paras. 214-216.

[242] On the issue of the location of class members, Justice Armstrong assumed there would be class members in all provinces, and that Ontario is the most populous province. Overall, Justice Armstrong treated the location of class members as a neutral factor: *Ennis,* at paras. 219-222.

[243] When considering the factor of the location of evidence and witnesses, Justice Armstrong found that this would tend to favour Ontario because experts and witnesses would have to travel to the trial location. Having said that, Justice Armstrong observed that the distance involved would not preclude the B.C. action from litigating a Canada-wide action in B.C.: *Ennis,* at paras. 223-224.

[244] Overall, Justice Armstrong found that despite the population distribution across Canada and B.C. being the westernmost province, certification of the B.C. action was supported by a combination of factors. These factors included the more advanced stage of the B.C. action, the potential for the Ontario action to be stayed (thus leaving the B.C. action as the only means to vindicate the interest of the class outside of Quebec), and the unexplained delays in the Ontario action: *Ennis,* at paras. 233-242.

[245] Given the uncertainty posed by the pending Ontario claims, Justice Armstrong granted the parties leave to make further submissions following a decision on the Ontario action's motion for certification.

The Quebec action

[246] On May 2, 2018, L'Honorable André Prevost authorized a class proceeding: *Kramar c. Johnson & Johnson*, 2018 QCCS 1846. The class definition approved was described as:

> Persons in Quebec who have used Johnson's® Baby Powder and/or Shower to Shower® (the Products) in their perineal area and have been diagnosed with ovarian cancer, and/or their family members, assigns and heirs.
>
> *Kramar,* at para. 71 [translation].

[247] The common issues certified in the Quebec action are:

> a) Do the Products, when used in the perineal area, cause, contribute to, or materially increase the risk of ovarian cancer?
>
> b) Did the Respondents fail to properly and sufficiently test their Products, prior to and after its release, to ensure that they are safe for use in the perineal area by consumers?

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c) Did the Respondents fail to properly test the Products to determine the increased risk of ovarian cancer during the normal and/or intended use of the Products?

d) Did the Respondents fail to warn the Petitioner and Group Members of the health risks associated with the use of the Products by women in the perineal area?

e) Are the Respondents liable to pay compensatory damages to the Group Members?

f) Are the Respondents liable to pay exemplary or punitive damages, and if so, what amount of punitive damages should be awarded?

Kramar, at para. 72 [translation].

[248] On September 14, 2018, the Quebec Court of Appeal upheld this authorization: *Valeant Pharmaceuticals International Inc. c. Kramar*, 2018 QCCA 1500. The plaintiffs have not set the Quebec action down for trial.

Analysis: Should this action be stayed for inordinate delay?

[249] The defendants seek a stay on two alternative grounds: duplication of proceedings amounting to an abuse of process, and inordinate delay. Given that the outcome of the appeal in the B.C. action is not material to the ground of delay, I address the motion to stay based on delay at this stage.

[250] I find that the defendants have not established grounds to stay the Ontario action based on delay. I say this for three reasons. First, although the length of the delay is significant and requires an explanation, I find that it is not "inexcusable" in the overall context of this litigation and comparable Canadian proceedings.

[251] Second, there is an explanation for the delay by way of an affidavit from plaintiff counsel, Vincent Genova, as to the steps taken to prepare and advance the litigation during the period of delay.

[252] Finally, there is prejudice to the defendants' ability to cross-examine the proposed representative plaintiff, Kristin Baker, who passed away in February of 2021 before the certification motion record was filed. Ms. Baker's affidavit was sworn shortly before she died, meaning that the defendants could not preserve her evidence by cross-examining her on the affidavit.

[253] However, there are other means to test the evidence of Ms. Baker's exposure to baby powder. Her medical records have been preserved. Her spouse, Charles Baker, is willing to serve as a representative plaintiff. There are numerous class members who have been diagnosed with EOC and can give evidence and be cross-examined on their use of the baby powder product. The common issue of the causal link between the baby powder products and EOC does not depend on findings of Ms. Baker's use. I find that the prejudice is not irreparable in these circumstances.

[254] The decision of the Court of Appeal in *Barbiero* is instructive, as is the approach Glustein J. employed when staying the *Barbiero* action for delay. There, the class plaintiff had not set the

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action down for trial for 21 years. The defendant had sent a series of letters complaining that the matter had not been moved along. The class plaintiff had not filed any affidavits explaining the delay. The only affidavit tendered came from a legal assistant in the office of class counsel. The affidavit did not explain the delay and merely attached copies of the transcripts from the examinations for discovery: *Barbiero,* at para. 23.

[255] Glustein J. found that the decades-old allegations and claims for damages were prejudiced by the 21-year delay, and the plaintiff failed to provide evidence to rebut the presumption of prejudice arising from such a long period of delay: *Barbiero,* at paras. 113-127.

[256] The Court of Appeal noted that a benchmark for delay can be taken from the *Rules of Civil Procedure.* Rule 48.14(1)1 provides that actions which are not set down for trial within 5 years, are subject to dismissal by the registrar: *Barbiero,* at paras. 20-22. Such cases "begin to move into the realm of inordinate delay": *Barbiero,* at para. 22.

[257] In addition to these benchmarks, s. 2(3) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6[4] provided that the plaintiffs were required to bring their certification motion within 90 days. The 2020 amendments to the *CPA* now require motions for certification to be served within one year of the start of the case absent an agreement or a court ordered timetable otherwise.

[258] I apply these benchmarks to the delay in this case. I find that the five years of research, intake, and preparation of the certification record by the plaintiffs was inordinate delay. This five-year period demands an explanation.

[259] While the plaintiffs did not take any formal steps for the first five years in the life of this action, they have explained the delay and the steps taken during that period. This included researching and attending talc litigation conferences in the U.S., creating an intake process for class members, and locating appropriate and willing representative plaintiffs. In Mr. Genova's answer to undertakings, he confirmed that his firm had spent over 3600 hours during the five-year delay period, and Howie Sacks Henry (HSH) had spent 173 hours working on the file.

[260] As of his March 27, 2024, affidavit, Mr. Genova reported that his firm had been retained by 281 putative class members, and HSH had been retained by 80 putative class members.

[261] Mr. Genova's affidavit also described setbacks in retaining appropriate experts in the years 2018-2019. His affidavit states:

> Throughout 2018 and 2019, we encountered certain setbacks in the preparation of our expert evidence, including those resulting from challenges by the Defendants to the expert testimony of several plaintiff expert witnesses, including two potential experts being considered for the Ontario action. One defence challenge, in a Georgia state trial, was unsuccessful, but nonetheless consumed the time and energy of these experts, causing substantial delay in our ability to move forward with their expert reports for the Canadian litigation.

[4] This was the version in force between June 22, 2006 and September 30, 2020.

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[262] Mr. Genova described the benefits to the class of retaining experts who had been tested in parallel litigation, but ensuring this level of expertise came with some delays. While the defendants have characterized this reason for the delay as indefensible because it is akin to waiting for the science to evolve in favour of the plaintiffs, I do not agree with that characterization.

[263] The availability of appropriate experts is a critical feature in this type of litigation. Indeed, a finding that the B.C. action had not tendered sufficient expert evidence of methodology at the first certification hearing in 2020 led to an additional three years of delay, without triggering a similar motion to stay those proceedings by the defendants. Again, at this motion the defendants carefully cross-examined all three experts and have rested several sets of submissions against certification on admissions obtained during cross-examination.

[264] Class proceedings often span several years. As comparators, the three other class proceedings in Canada, from Alberta, B.C. and Quebec were all initiated in 2016. None of them has progressed to the discovery phase, much less been set down for trial. This marks over 8 years of litigation without a trial date being set in any province. The Quebec action was authorized first. The Alberta action has not been certified. The B.C. action was certified in 2024.

[265] Further, these actions were "paused" between December of 2021 and September of 2023, close to two years, because the defendant's pursued remedies in bankruptcy to address the thousands of tort claims related to their baby powder products across North America. The defendants do not rely on this period of delay in support of their motion to stay these proceedings. However, I find that these litigation steps and the impact on this action are relevant in assessing the overall period of delay, and the risk of prejudice to the defendants' fair trial rights.

[266] I find that the plaintiffs have provided a reasonable explanation for the 5-year delay after the statement of claim was issued. Counsel to the plaintiffs have tendered evidence of the work done, reasons for the delay in finalizing the certification motion record, and a comprehensive motion record with three experts all of whom have had experience in talc-related litigation in the U.S.

[267] As Sharpe, J.A. wrote in the context of a dismissal for delay under the *Rules of Civil Procedure* in *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544, 112 O.R. (3d) 67, at para. 20:

> The challenge posed in cases involving dismissal for delay is to find the right balance between, on the one hand, the need to ensure that the rules are enforced to ensure timely and efficient justice and, on the other, the need to ensure sufficient flexibility to allow parties able to provide a reasonable explanation for failing to comply with the rules to have their disputes decided on the merits.

[268] I find that a similar balance should be sought in this motion to stay for delay. There was a long "intake" delay in this action. There is a reasonable explanation. There is also the comparative trajectory of similar Canadian proceedings in Canada, and the defendants' steps that added to the overall delay. There is evidence of prejudice due to the untimely death of the representative plaintiff. However, I do not find that there is evidence of significant prejudice to a fair trial that

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can be solely laid at the feet of the plaintiffs and connected to the initial five-years of delay in an action that has been ongoing now for 9 years.

[269] I dismiss the defendants' motion to stay on the grounds of inordinate delay.

Analysis: Should this action be stayed because it is duplicative of other class proceedings?

[270] As of the date of this certification hearing, there are class proceedings in negligence in B.C. and Quebec which are further advanced than the Ontario action. The claims are similar because they involve some of the same defendants, the same product, a similar class group, the same injury, mechanism of injury, science and methods proposed to establish causation.

[271] The B.C. action poses some uncertainty given that it is now before the British Columbia Court of Appeal, without need of leave. I am placed in circumstances here which are analogous to those encountered by Armstrong J. during the B.C. certification proceedings. Like Justice Armstrong, I am faced with submissions from the parties on preferability and a stay motion, and an out of province intervener. The outcome on appeal could be relevant to those decisions and is unknown.

[272] In these circumstances, I find that I should await the B.C. process prior to making a final ruling on the motion to stay for duplication, or considering preferability. The procedural foundation for a ruling now could be quite different in six months' time. The recent decision from the Supreme Court of Canada in *Sanis* encourages greater comity among the judicial branch of the Canadian federation.

[273] I have considered the delay concerns raised in the stay motion. Those concerns have guided my approach to the arguments on certification that do not rely on extra provincial considerations – hence my decision not to simply adjourn the entire motion to certify pending the appeal in B.C.

[274] There is precedent for adjourning proceedings and awaiting the outcome of an appeal. In *Tang Estate v. Huang & Danczkay Properties* (1997), 10 C.P.C. (4th) 344, 31 O.T.C. 397, Winkler J. (as he then was) stayed a putative class proceeding involving the same parties and issued as a parallel action, which was under appeal, but not yet scheduled to be heard. Winkler J. stayed the class proceeding pending the outcome of the appeal.

[275] In the context of adjourning a certification motion to permit a suitable representative plaintiff to be located, the Divisional Court recognized that "[i]t is not uncommon in certification proceedings that certain elements of the certification [test] are met and the parties return to court at another time to address those elements which did not satisfy the court in the first instance": *Ottawa Police Association v. Ottawa Police Services Board*, 2014 ONSC 1584, 321 O.A.C. 65 (Div. Ct.), at para. 41.

[276] I thus adjourn both the motion to stay this action as a duplicative abuse of process, and the consideration of the preferability requirement in s. 5(1)(d) of the *CPA* on the motion to certify the proceeding.

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Section 5(1)(e) – Representative Plaintiff

[277] To be an adequate representative plaintiff, a proposed plaintiff must be able to fairly and adequately represent the class, develop a plan for proceeding, and cannot have a conflict with the class. The representative plaintiff must be prepared and able to vigorously represent the interests of the class: *Rosen v. BMO Nesbitt Burns Inc.,* 2013 ONSC 2144, 9 C.C.E.L. (4th) 315, at para. 73.

[278] The plaintiffs propose the Estate of Kristin Baker, and Kristin Baker's husband Charles, to be the representative plaintiffs. They have tendered affidavits from both, Ms. Baker's having been sworn shortly before she died. I accept Mr. Baker's affidavit as evidence that he will fairly and adequately represent the interests of the classes. I further find that Mr. Baker does not have a conflict of interest with the other class members on the common issues. The question of the litigation plan will require further consideration depending on any findings relative to the proceedings in other provinces and whether there will need to be coordination or carve-outs. An amended litigation plan can be provided depending on the outcome of the stay motion and preferability analysis, yet to be completed.

[279] The defendants have not challenged Mr. Baker's ability to serve as a representative plaintiff.

[280] Given his experience with Kristin Baker's EOC illness during her lifetime, Charles is well informed about the nature of the claims being advanced. He is motivated to prosecute this claim on behalf of the class members.

[281] Subject to the other considerations which remain to be decided later, I find that the Estate of Kristin Baker and Charles Baker are suitable representative plaintiffs.

Conclusion

[282] I adjourn the motion to stay this action as an abuse of process for being duplicative. I adjourn the preferability analysis pending a decision on the stay motion.

[283] If requested, I may grant the plaintiffs an additional limited opportunity to respond to the issue of whether the consumer protection claims under the New Brunswick and Yukon legislation are "bound to fail" based on the defendants' submissions that those statutes do not prohibit deceptive trade practices.

[284] Following release of the British Columbia Court of Appeal in *Ennis*, the parties are directed to schedule a case conference before me. Based on my prior direction permitting the interveners to make submissions on these motions, they shall be entitled to notice and to attend any such case conference.

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[285] Finally, I propose to deal with costs of both motions after making a final decision.

Leiper, J.

Date: June 25, 2025

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CITATION: Strathdee v. Johnson & Johnson Inc., 2025 ONSC 3738
COURT FILE NO.: CV-16-553046-00CP
DATE: 20250625

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ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

CINDY LOU STRATHDEE, MARIO NUNZIATO, MATTHEW STRATHDEE, SHAEDA BEGUM FAROOQI-WILLISON, GERALD DOUGLAS WILLISON, THÉRÈSE BERNIER, by her Estate Representative MARILYNE BERNIER, MARILYNE BERNIER, JANET HEATON and BARRY HEATON

Plaintiffs

– and –

JOHNSON & JOHNSON INC., JOHNSON & JOHNSON and JOHNSON & JOHNSON CONSUMER COMPANIES, INC.

Defendants

REASONS FOR DECISION

Leiper, J.

Released: June 25, 2025