NOVA SCOTIA COURT OF APPEAL
Citation: *BCE Inc. v. Gillis,* 2015 NSCA 32

Date: 20150409
Docket: CA 430654
Registry: Halifax

Between:

BCE Inc., Bell Canada, Bell Mobility Cellular Inc., Bell Mobility Inc., Microcell Telecommunications Inc., Rogers Communications Inc., Rogers Communications Partnership, Fido Solutions Inc., Rogers Cantel Inc., Rogers Wireless Inc., and Rogers AT&T Wireless

Appellants

v.

John Gillis, Jane Doe XVIII, John Doe Ltd. XVIII, John Doe XIX, and John Doe XXI

Respondents

Judges:	Bryson, Scanlan and Bourgeois, JJ.A.
Appeal Heard:	February 19, 2015, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal allowed per reasons for judgment of Scanlan, J.A.: Bryson and Bourgeois, JJ.A. concurring.
Counsel:	Robert J.C. Deane, for the appellants Bell Inc., Bell Canada, Bell Mobility Cellular Inc., Bell Mobility Inc., and Microcell Telecommunications Inc. Kent E. Thomson, Maureen Littlejohn and Bruce Outhouse, Q.C., for the appellants Rogers Communications Inc., Rogers Communications Partnership, Fido Solutions Inc., Rogers Cantel Inc., Rogers Wireless Inc. and Rogers AT&T Wireless Michael Peerless and Evatt F.A. Merchant, for the respondents

Reasons for judgment:

[1] By decision dated July 17, 2014, reported as **Gillis v. BCE Inc.**, 2014 NSSC 279, Justice Peter Rosinski refused to stay two class action claims. The two matters were consolidated into a single appeal by Order of Justice Saunders dated September 11, 2014. The respondents sued the above named appellants in relation to wireless phone system access fees. The statements of claim were filed on November 2, 2004.

[2] Because this is an appeal of an interlocutory decision, leave is required. Leave has traditionally been granted in matters where there is an arguable issue raised by the appellants. I am satisfied that this threshold has been met. I would grant leave.

[3] For the reasons set out below, I am satisfied that the decision of the motions judge should be set aside. The actions against the appellants should be permanently and unconditionally stayed.

Background

[4] The 2004 Statements of Claim filed in Nova Scotia were filed by Dr. John Gillis, a named plaintiff, along with a number of representative plaintiffs. This was one of nine virtually identical actions filed in nine different provinces, by the same plaintiff, represented by the same law firm. All claims relate to wireless telephone system access fees.

[5] After the claims were filed in Nova Scotia, there were no steps taken to advance the litigation in Nova Scotia prior to an amendment to the statements of claim filed in April 2014. There was correspondence between counsel for the plaintiffs, the Merchant Law Group, LL.P. ("MLG") and the prothonotary over the years. None of that correspondence advanced the litigation.

[6] MLG indicated to the prothonotary that it was their intention to request the Saskatchewan court to certify one national class action including the Nova Scotia plaintiffs. In a letter dated November 20, 2006, MLG stated:

> If Certification proceeds in Saskatchewan it is unlikely that we will ever pursue matters in Nova Scotia.

They asked that the Nova Scotia proceedings be set over for one year. In November, 2007, MLG asked the prothonotary to "…diarize the file until mid-2008". In December, 2009, the prothonotary advised that the file was in abeyance until June 7, 2010. An e-mail from MLG to the prothonotary on November 15, 2011, advised the prothonotary that a Mr. Clarke of MLG would discuss with Mr. Merchant, Q.C. "…how (Saskatchewan rulings) will impact the plaintiff's plans to advance the Halifax action.

[7] In a motion dated November 4, 2004, MLG made representation to the Saskatchewan courts suggesting that Saskatchewan offered a unique benefit to class participants. They urged that court to certify the action as a national class action. From 2004 to 2008 Saskatchewan had an opt-in class action scheme. It is not clear what unique attributes MLG was referring to other than the fact that it was close to where some MLG lawyers were located. The province also had a no costs regime for class proceedings. There were at least two other jurisdictions in Canada that had opt-out class action schemes as early as 2004. They included Manitoba and Ontario. The respondents assert that Nova Scotia is now a preferred jurisdiction in which to advance the national class action for all claimants.

[8] In Canada there are two different class action schemes. Opt-in class actions require individuals to take steps to become members of a class action. In opt-out class actions all persons who fall within the defined class are a part of the plaintiff class unless they opt-out. For example, in the actions brought by MLG in an opt-out jurisdiction, any persons who had a cell phone plan with the defendant companies would be a member of the plaintiff class unless they took steps to opt-out of the proceedings.

[9] The litigation related to the certification process in Saskatchewan has continued over the course of several years. Saskatchewan courts certified a national class action on September 17, 2007 (see: *Frey v. Bell Mobility Inc.*, 2007 SKQB 328). The final order for national certification was issued February 13, 2008. Certification was limited, in that it excluded any customers who had arbitration clauses with their service providers. The action was also limited to claims for unjust enrichment based on the contracts. Saskatchewan residents were included on an opt-out basis as per the legislation in effect as of 2008. Non-residents may only participate on an opt-in basis.

[10] After the certification in Saskatchewan there were several steps taken by the parties in and outside Saskatchewan. A summary of the Saskatchewan proceedings

is set out in the decision of Elson, J., in *Chatfield v. Bell Mobility Inc.* 2014 SKQB 82. He noted:

> [3] The action has had a lengthy history. The statement of claim was issued on August 9, 2004, then in the name of Mark Frey and certain other named individuals. Since then, the action has been subject to a number of applications before this Court, including two certification applications, as well as eight appeals to the Court of Appeal. A further application for leave to appeal is presently pending before the Court of Appeal, awaiting the outcome of this application. The other eight appeals were heard by the Court of Appeal in a two day hearing and determined in one decision, authored by Jackson J.A. and cited as *Frey v. BCE Inc.* 2011 SKCA 136 … .

On June 28, 2012, the Supreme Court of Canada dismissed the motions for leave to appeal the Certification Order (*Microcell Communications Inc. v. Frey*, [2012] S.C.C.A. No. 42). The above summary, although not complete, is reflective of how intensely this matter has been litigated in the Saskatchewan courts. I also refer to other portions of the *Chatfield* case to show where the class action in Saskatchewan now stands:

> [8] The first certification application was argued during the week of May 24, 2005. The relevant fiat in *Frey 2* was rendered on July 18, 2006, along with three other decisions. In the fiat, Gerein J. declined to certify the action on the grounds that there was neither a suitable plaintiff nor a proper plan for the class action. Nonetheless, the plaintiffs were granted leave to renew their application in order to address these deficiencies. In due course, the application was renewed and, in a fiat dated September 17, 2007 and cited as 2007 SKQB 328, 312 Sask. R. 4 ("*Frey 3*"), Gerein J. certified the action as a class action, with a new plaintiff and a new litigation plan.
>
> [9] It is significant to note that, in *Frey 2*, Gerein J. concluded that the only cause of action properly disclosed in the statement of claim was unjust enrichment. The other causes of action were either improperly pleaded or not properly grounded in law. As for the particular allegation of deceit, misrepresentation and negligence, Gerein J. noted the claim did not allege any material facts to support an assertion of detrimental reliance. He concluded this was fatal to its inclusion as part of a certified class action (para. 36):
>
> > 36 ... The alleged deceit takes several forms: - misrepresentation, fraudulent misrepresentation and negligent misrepresentation. In order to obtain relief respecting any of the alleged conduct there must be detrimental reliance by the party making the claim. It is an essential requirement. In this instance, the statement of claim contains no such pleading. In its absence, a cause of action is not disclosed. A description of

> bad conduct, absent an assertion that the plaintiff acted on it, does not constitute a valid cause of action.
>
> [10] Later in the same decision, Gerein J. commented on the extent to which deceit, misrepresentation and negligence factored into the common issue consideration under s. 6(1)(c) of *The Class Actions Act*, S.S. 2001, c. C-12.01. In this regard, he expressed the view that such allegations raised the "spectre of individual circumstances" (para. 61). On the other hand, with unjust enrichment as the only certifiable cause of action, a finding of liability would be limited to an analysis of the defendants' conduct. From this perspective, Gerein J. concluded the claim would meet both requirements for commonality, namely, a common ingredient to justify a class action and a likelihood that resolution of the common issue would advance the litigation in a significant way (para. 63).

[11] In *Chatfield*, Judge Elson also noted (¶ 12) that Judge Gerein's decision to reject the first six causes of action was not appealed to the Saskatchewan Court of Appeal.

[12] In addition to the proceedings in Saskatchewan, there have been related proceedings in other provinces. In British Columbia the court conditionally stayed the certification application because a different individual represented by different counsel were proceeding in that province (See: *Ileman v. Rogers Communication Inc.*, 2014 BCSC 1002; and *Drover v. BCE Inc.*, 2013 BCSC 1341). In the *Drover* action, Justice Weatherill held that it was an abuse of process to allow the plaintiff to litigate the *Frey/Chatfield* matters in Saskatchewan and to re-litigate the same issues in British Columbia. I now understand that MLG applied to the British Columbia Court of Appeal to restore its appeal of *Drover*, which had been placed on that court's inactive list. MLG's application has now been dismissed: 2015 BCCA 132.

[13] In Alberta, Justice Wilson dismissed the action in *Pappas v. BCE Inc.*, 2014 ABQB 122, on the basis of abuse of process, awarding costs to the defendants. Most recently, Associate Chief Justice Rooke refused a stay in *Tupper v. Bell Mobility*, 2015 ABQB 169. He suggested that proper access to justice was denied to Albertans with an opt-in regime. I understand that decision is under appeal.

[14] In Manitoba, Justice Schulman stayed the action in *Hafichuk-Walkin v. BCE Inc.*, 2014 MBQB 175. That decision is also currently under appeal.

[15] *Drover*, *Frey*, *Chatfield*, *Pappas* and the present appeal all involve Dr. Gillis and are virtually identical proceedings involving the same parties and the same plaintiff counsel appearing in different jurisdictions.

[16] Class action legislation across Canada has been developing for well over a decade. Although the respondents assert that there was no class action legislation in place in Nova Scotia when the action was first filed, there were provisions in the *Nova Scotia Civil Procedure Rules* (1972) governing class proceedings. In this regard I refer to Rule 5.09. That rule is under the heading; "Representative proceeding". I refer also to Rule 90 which permitted class action proceedings to be commenced or defended in Nova Scotia.

[17] The respondents are correct that the *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 1, did not come into effect until 2007, three years after the filing of the Statement of Claim. There is, however, a distinction between Nova Scotia and many other jurisdictions. In Nova Scotia, the *Civil Procedure Rules* are created by the court and they have legislative effect. In that regard I refer to the comments of Chief Justice MacDonald in *Central Halifax Community Association v. Halifax (Regional Municipality)*, 2007 NSCA 39, ¶49. Chief Justice MacDonald says:

> [49] Let me begin my analysis by exploring the Nova Scotia Supreme Court's authority to enact rules of court. It derives from the *Judicature Act*. Here are the relevant provisions:
>
> > 46 ... the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular, ...
> >
> > > (b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein;
> >
> > 47(1) All rules of Court made in pursuance of this Act shall, from and after the publication thereof in the Royal Gazette, or from and after publication in such other manner as the Governor in Council determines, regulate all matters to which they extend.
> >
> > (2) Notwithstanding subsection (1), the Civil Procedure Rules made by the judges of the Supreme Court on the second day of December, 1971, a copy of which was deposited in the office of the Provincial Secretary, are hereby ratified and confirmed and are declared to be the *Civil Procedure Rules of the Supreme Court and shall have the force of law* on and after the first day of March, 1972, until varied in accordance with the provisions of this Act. [Emphasis added.]
>
> [50] I draw particular attention to s. 47(2), which declares these rules as having the "force of law".
>
> [51] Furthermore, these rules do not represent subordinate legislation as the appellant seems to suggest. While they may not be passed by the Legislature in

> the conventional sense, they are laid before the House of Assembly where they are subject to cancellation, should the Assembly so direct. A failure to do so implies their acceptance. Thus by these provisions, the *Civil Procedure Rules* generally, and rule 56.06 specifically, embody the force of law. Here is the statutory process as set out in the *Judicature Act*:
>
> > 51 All rules made in pursuance of this Act shall be laid before the House of Assembly within twenty days next after the same are made, if the Legislature is then sitting, or, if the Legislature is not then sitting, within twenty days after the meeting of the Legislature next after such rules are made, and, if an address praying that any such rules may be cancelled is presented to the Lieutenant Governor by the Assembly within thirty days during which the Legislature has been sitting next after such rules are laid before it, the Governor in Council may thereupon, by order in council, annul the same and the rules so annulled shall thenceforth become void and of no effect but without prejudice to the validity of any proceeding which in the meantime has been taken under the same. R.S., c. 240, s. 51.

[18] The end result is that the *Rules* in place prior to the enactment of the *Class Proceedings Act* had the "force of law" governing class proceedings in Nova Scotia. It was the *Class Proceedings Act* that created an opt-out class action scheme starting in 2007. No steps were taken by the respondents to advance the Nova Scotia actions until now.

[19] The respondents assert that it is because of the constant state of flux in laws governing class actions that MLG felt it expedient to file lawsuits in numerous jurisdictions. I equate this to planting legal cherry trees across the country. For ten years the only tree they cared for was in Saskatchewan. Now they want to go from jurisdiction to jurisdiction picking only the cherries they like in jurisdictions they have totally neglected for a decade. With this selective harvesting the appellants are left to guess at where the respondents and MLG may choose to go next. If they are permitted to do what they ask, the appellants will have no choice but to re-litigate the same issues repeatedly, potentially having divergent outcomes.

[20] As noted above, some provinces have what is referred to as "opt-in" legislation. Other provinces have had "opt-out" schemes. Subsequent to the filing of the Statement of Claim, the Saskatchewan legislation was altered so that Saskatchewan became an opt-out province. This legislative change did not include non-resident members of the class. The result is that in the class proceedings as they continue in Saskatchewan, Saskatchewan residents are now participants on an opt-out basis. Non-residents would have to opt-in to become members of the class; this includes residents of Nova Scotia.

The Motions Judge's Decision

[21] The motions judge determined that it was not an abuse of process to commence litigation in a number of different jurisdictions. He said:

> [104] …there is no presumptive abuse of process merely by the filing of multiple similar class actions in different jurisdictions; whether that is done by the same law firm, or done by some agent to achieve a "carriage" advantage, and whether their reasons might be said to include "tolling the limitation period".

Once the motions judge decided there was no presumptive abuse he did not proceed to do an analysis as to whether there was in fact an abuse of process in the Nova Scotia action.

[22] The motions judge also declined to permit the appellants to adduce further evidence pursuant to Rule 82.22(2)(c):

> **82.22 Varying order or re-opening proceeding**
>
> …
>
> (2) A party may make a motion for permission to present further evidence before a final order and after one of the following events:
>
> (a) the party closes the party's case at trial;
>
> (b) the party chooses to present no evidence at trial;
>
> (c) a jury begins deliberation or a judge reserves decision.

[23] The appellants claimed that MLG's explanation to the motions judge, for starting multiple proceedings differed from MLG's explanation to the Alberta Court of Queen's Bench in related proceedings. The motions judge in this case ruled that what Evatt Merchant said to him was not so inconsistent with what Anthony Merchant stated to Justice E.L. Elson on November 19, 2013, that it "attains a material relevance to the Defendants [now Appellants'] motion".

Standard of Review

[24] A stay of proceedings is a discretionary remedy. As noted in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391

> [87] … Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our

> colleague Gonthier J. described it in *Elsom v. Elsom,* [1989] 1 S.C.R. 1367, at p. 1375:
>
> > [A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

[25] The standard of review when dealing with an appeal from a discretionary order was discussed in *Wagner v. Day*, 2003 NSCA 13. Saunders J.A. said:

> [54] The standard of review on appeal from a discretionary order has been considered by this court in a number of cases. We will intervene to overturn a discretionary interlocutory order where wrong principles of law have been applied, or where a patent injustice would result, or in cases where no weight or insufficient weight has been given to relevant circumstances or where the judge has misapprehended the evidence or where all of the facts are not brought to the attention of the judge. …

It is those standards and principles that I apply to this case.

Analysis

[26] BCE Inc. et al. asserted before the motions judge that the actions were an abuse of process, having no legitimate judicial purpose except to harass the defendants and undermine the integrity of the administration of justice. BCE relied on *Civil Procedure Rule* 88.02 as well as the *Judicature Act*, R.S.N.S. 1989, c. 240 ss. 41(e) and (g).

[27] The motion by Microcell Telecommunications Inc. and Rogers Communications Inc. and others in S.H. No. 234376 requested an order dismissing or permanently staying the action as an abuse of process on the same grounds advanced by BCE Inc. In the Microcell and Rogers motion, alternative grounds included moving for an order dismissing the action for want of prosecution pursuant to Rule 82.18. In the further alternative, they requested an order declaring the Notice of Action had expired as against the Rogers defendants, pursuant to Rule 4.04 and its predecessor Rule 9.07.

[28] These motions were in the context of nine different actions in nine different jurisdictions across Canada involving the same parties, same plaintiff counsel and the same issues. The motions judge in his analysis commented and I repeat:

> [104] To my mind, there is ***no presumptive abuse of process merely by the filing of multiple similar class actions in different jurisdictions***; whether that is

> done by the same law firm, or done by some agent to achieve a "carriage" advantage, and whether their reasons might be said to include "tolling the limitation period." [Emphasis added]

[29] This Court has previously dealt with a situation where a party started an identical action in multiple jurisdictions. In *ABN AMRO Bank v. Wackett*, [1997] N.S.J. No. 322 (C.A.). A motions judge refused to stay an action brought by the respondent bank against Collins Barrow. Collins Barrow was a chartered accountant firm retained by the bank in 1989 to determine whether the requirements had been fulfilled by the bank's clients in relation to a building to be built in Sheet Harbour, Nova Scotia. In November 1992, the bank commenced an action in the Ontario Superior Court of Justice against Collins Barrow and others. The bank claimed $14M from both Collins Barrow and the borrowers. The action against the chartered accountant firm was stayed in July 1993 pending final determination of the bank's action against the creditor. The bank's appeal of that decision in Ontario was dismissed.

[30] In March 1995, the bank commenced an action in the Supreme Court of Nova Scotia against Collins Barrow. The subject-matter of the Nova Scotia action was identical to the bank's 1992 Ontario action against Collins Barrow. Justice Pugsley, writing for the Court, referred to the decisions relied on by the motions judge. He noted they were cases dealing with competing jurisdictions on the issue of *forum conveniens*. The issue of abuse of process is not to be confused with the issue of *forum conveniens*. Justice Pugsley wrote:

> [33] The issues in this case are governed by the comments of Jones, J.A., on behalf of this court in *Canadian Life and Health Insurance Compensation Corporation vs. Blue Cross of Canada* (1997), 156 N.S.R. (2d) 384, and in particular at p. 388 and 390:
>
> > *Prima facie* it is vexatious and oppressive for a plaintiff to sue concurrently in two courts for the same matter. The relief is simply to stay or strike the second action.
> >
> > . . .
> >
> > *Lis alibi pendens* is defined in Black's Law Dictionary, 4th Ed. at p. 1080 as "a suit pending elsewhere". The author's note states:
> >
> > The fact that proceedings are pending between a plaintiff and defendant in one court in respect to a given matter is frequently a ground for preventing the plaintiff from taking proceedings in another court against the same defendant for the same object and arising out of the same cause of action.

> [34] Justice Jones referred to Halsbury's Laws of England, (4th ed.) vol. 37, paragraph 446, where it is written:
>
> > If there are two courts faced with substantially the same question or issue, it is desirable that the question or issue shall be determined in only one of those two courts if by that means justice can be done, and the court will of necessity stay one of the actions.
>
> [35] There are good reasons for such resolution. Without attempting to be exhaustive, it avoids a multiplicity of court proceedings, the possibility of contradictory judgments, and insulates a defendant from the hardship and expense of defending the same case in more than one jurisdiction.

[31] Although not arising in a class action context, in my view, Justice Pugsley's comments regarding the inappropriateness of duplicative actions, is a good starting point. The respondents submit that a multiplicity of proceedings, however, is the norm in the class-action context.

[32] In *Drover v. BCE Inc.*, 2013 BCSC 1341, Justice Weatherill referred to numerous examples of multi-jurisdictional class actions in Canada including the following: the Baycol class action proceedings (*Bouchanskaia v. Bayer Inc.*, 2003 BCSC 1306; *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.); *Walls v. Bayer Inc.*, 2005 MBQB 3, leave to appeal refused 2005 MBCA 93, leave to appeal refused [2005] S.C.C.A. No. 409; *Wheadon v. Bayer Inc.*, 2004 NLSCTD 72, leave to appeal refused 2005 NLCA 20, leave to appeal refused [2005] S.C.C.A. No. 211; *Dufour c. Bayer inc.*, [2004] J.Q. No. 11125 (S.C.) and *Lamb v. Bayer Inc.*, 2003 SKQB 442), the Agent Orange class action proceedings, which never succeeded at certification (*Ward v. Canada (Attorney General)*, 2007 MBCA 123, *Brooks v. Canada (Attorney General)*, 2009 SKQB 509; and *Ring v. Canada (Attorney General)*, 2010 NLCA 20), Indian residential schools litigation (see, for instance, *Rumley v. British Columbia*, 2001 SCC 69; *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533, affirmed 2007 SKCA 37); *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.)); the tainted blood cases (*Killough v. Canadian Red Cross Society*, 2007 BCSC 836; *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) and *Adrian v. Canada (Minister of Health)*, 2003 ABQB 142); and the contaminated pet food claims (*Joel v. Menu Foods Genpar Ltd.*, 2007 BCSC 1482 and *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (S.C.J.)).

[33] What is significant however, is that, as noted by Justice Weatherill, none of those cases are examples of class actions by the same plaintiff in two or more

jurisdictions. In each case, the defendants and the subject-matter were the same but the plaintiffs were not. He determined that the parallel action to this case in British Columbia served no legitimate purpose. It was stayed on condition that it could be reactivated if the defendants withdrew their offer to extend the class period of Saskatchewan to include British Columbia residents **and** if the separate action in Saskatchewan by separate parties and separate counsel was discontinued.

[34] The issue of starting similar actions in various jurisdictions in the context of class actions was also discussed in *Englund v. Pfizer Canada Inc.*, 2007 SKCA 62. There the court was dealing with a multiplicity of proceedings. The respondents had commenced actions in Saskatchewan and Ontario and the actions were drafted in the same terms using the same language. There was an application to stay the Saskatchewan action. The motions judge dismissed the requested stay. On appeal the Court of Appeal allowed the stay, expressed concerns that an abuse of process may arise where multiple actions have been commenced in two or more jurisdictions. They determined that the respondents' actions fell solidly within the doctrine of abuse of process. The Court noted at ¶34:

> [34] It is well established that the commencement by a plaintiff of more than one action in the same jurisdiction against a defendant in relation to the same dispute or matter is an abuse of process. As Sir George Jessel observed over one hundred years ago, "It is *prima facie* vexatious to bring two actions where one will do". See: *McHenry v. Lewis*, [1883] 22 Ch. D. 397.

[35] In the context of class actions, I am not saying that commencing actions in multiple jurisdictions is *prima facie* vexatious or an abuse of process. There may well be appropriate justification for commencing actions in more than one jurisdiction. The fact that such justification may exist does not prevent the courts from reviewing each case to assess whether there has been an abuse of process in the circumstances of the litigation as it has been prosecuted within that jurisdiction. The motions judge failed to conduct an analysis as to whether the actions in Nova Scotia amounted to an abuse of process.

Was there an abuse of process in the circumstances of the present case?

[36] The record is sufficiently complete so as to allow me to assess the issue of whether the appellants have established an of abuse of process. Abuse of process is a contextual issue that must be assessed in the context of the specific case. It is a fairness doctrine that requires a court to look at the circumstances of each case so as to determine whether the actions of the parties constitute an unacceptable degree

of inequity or fairness to opposing parties or misuse of the Court's process. Rule 88.01 of the Nova Scotia *Civil Procedure Rules* does not limit the varieties of conduct that may amount to an abuse of process in Nova Scotia. The principle of abuse of process was discussed in *Niagara North Condominium Corp. No. 125 v. Waddington*, 2007 ONCA 184.

> [21] … Abuse of process is a doctrine designed to provide a remedy in a variety of situations including a remedy for the unfairness of relitigating the same issue against the same party in circumstances where issue estoppel does not apply. Abuse of process is essentially a fairness doctrine. In *Toronto (City) v. Canadian Union of Public Employees* (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77, Arbour J. engaged in a thorough review of the doctrine. She cited with approval at para. 37 the dissenting judgment of Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[37] I now turn to factors which I consider relevant to the issue of abuse of process in the present case.

No Intention to Prosecute the Nova Scotia Action

[38] This case involves one of nine virtually identical national class actions brought on behalf of the same plaintiffs, by the same firm; MLG. I leave it to other courts to determine whether that can ever be justified. I am satisfied that there must be an intention to pursue the action in the jurisdiction in which it was filed. MLG's correspondence with the prothonotary in Nova Scotia made it clear that the intention was to pursue the Saskatchewan claims seeking national certification in that province. Dr. Gillis is bound by the national litigation strategy adopted by MLG.

[39] I refer to the comments in *Drover* where the Court said:

> 46 It is plain that Mr. Merchant's plan was to commence virtually identical class action proceedings in Saskatchewan, Manitoba, Ontario, Quebec, Alberta and British Columbia with the goal of certifying one national class in Saskatchewan. Once that goal had been achieved, the plan was to obtain either a settlement or a judgment on behalf of the national class. If that plan failed, one or more of the dormant actions in the other provinces would be resuscitated.
>
> 47 This is not a situation where class actions have been commenced in multiple jurisdictions and the courts and the defendants have been left to guess as to whether and when any particular action will be prosecuted. It has been clear from the outset that MLG intends to litigate the Frey Action only.
>
> (*Drover v. BCE Inc.*, 2014 BCSC 1341)

Drover involved the same claimants making the same claims against the same defendants (appellants here). I endorse Justice Weatherill's conclusions as they apply in this proceeding.

[40] I also refer to the comments of Lord Wolfe in *Grovit et al. v. Doctor et al.*, [1997] 2 All E.R. 417 at p. 424 where he says:

> The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James*, [1978] A.C. 297. …

[41] Absent an intent to prosecute the Nova Scotia claims, bringing an action in Nova Scotia serves no proper purpose. It is improper to file a claim in multiple jurisdictions, or even to file a single claim in a single jurisdiction when there is no intention to advance that litigation. The absence of intention to prosecute the Nova Scotia claim or an attempt at re-litigation here, weighs against the respondents on the issue of abuse of process.

Delay in Advancing the Nova Scotia Action

[42] I am satisfied that provincial legislation in Nova Scotia contemplates class proceedings proceed in a timely manner. Sections 4(3) and (4) of the *Class Proceedings Act*, 2007, c. 28, s. 1 operate to require a person commencing a proceeding on behalf of members of a class to apply for certification of the proceedings within 120 days of the commencement of the proceeding or at a later time with leave of the Court. The sections are not determinative of the present appeal but the short timelines suggest the legislation does not contemplate that proceedings will languish for ten years after being commenced.

[43] Delay in advancing the Nova Scotia action is somewhat related to the issue of the original intention not to proceed with the Nova Scotia action. Delay in and of itself can result in an abuse of process. In *Drover v. BCE Inc.* 2013 BCSC 50, Weatherill, J., considered a procedural motion related to service of a statement of claim in one of the actions related to the present appeal. In that context, he discussed the actions of the plaintiffs as opposed to the action of their solicitors and said of the procedural lapses in that case:

> [41] The fault here lies squarely at the feet of counsel for the plaintiffs.

[44] Having identified where the blame lay in that case the court then went on to consider the "interests of justice" and held:

> [42] As noted above, only a compelling case of prejudice should defeat an application to renew unless the plaintiff's conduct in causing the delay "is so egregious, refusal to renew can be justified" : *Fast Fuel Services* at para. 21. In my view, this case easily qualifies as being not only of egregious but shocking delay. Moreover, the interests of justice do not favour allowing a renewal of the writ, for the following reasons.
>
> [43] First, the over eight year delay in taking any step in this proceeding has not been explained. The court is left to surmise that plaintiff's counsel's strategy was to put this action on the back-burner, litigate the Frey Action and, if successful, turn his attention to this action. While that strategy may be the norm in multi-jurisdictional class action proceedings, it can only be employed in situations where steps have been taken in each jurisdiction to ensure that the action has been properly tolled pending the outcome of the action being prosecuted.
>
> …
>
> [51] Finally, in my view, it is an abuse of process to allow the plaintiff to litigate the Frey Action in Saskatchewan and then to re-litigate the same issues in British Columbia…

[45] On the issue of costs, Weatherill, J. said

> [62] In my view, this is an exceptional case. The conduct of counsel for the plaintiffs has caused costs to be wasted through delay and neglect. Plaintiff's counsel neglected this action for over 8 years. ...

[46] MLG suggests that starting virtually identical actions across the country is not unusual and can be sound practice. Commencing multiple class actions and then doing nothing is not permissible "tactics". It is an abuse of process. As Justice Ball noted in *Duzan v. Glaxosmithkline*, 2011 SKQB 118 at paras. 36 and 37:

> [36] However, it is not acceptable for plaintiffs to commence class actions in multiple jurisdictions and then leave the courts and the defendants guessing as to whether and when any particular action will proceed. That is what has occurred here, and it is one factor that distinguishes this case from the situation in *Englund, supra*. To recap, Mr. Merchant initially consented to a scheduling order in the Romano action designed to move that claim forward in Ontario. Two years later, he obtained leave to discontinue the action by assuring the Ontario court that the claim would be pursued in Saskatchewan. Now almost three years after this action was commenced, after the filing of the plaintiffs' motion for certification and after the delivery of related material by both sides, Mr. Merchant asserts that the matter will be pursued instead in a third jurisdiction, British Columbia.
>
> [37] This multi-jurisdictional game of class action "whack-a-mole" would in itself be sufficient basis for an unconditional stay on the basis of abuse of process. However, it is compounded by the circumstances giving rise to the second, and not entirely unrelated, argument advanced by GSK.

[47] In the context of the present case, the inordinate delay is reflective of the fact that MLG never intended to prosecute the case in this province, unless they were unsuccessful elsewhere. The defendants now may be faced with the prospect of having wasted resources in the Saskatchewan proceedings only to have the Nova Scotia action, which laid dormant for a decade, resurrected when things have not gone well for the respondents in other jurisdictions. The delay in this case is egregious and weighs against the respondents.

[48] In this case the respondents advance various reasons for commencing legal proceedings in multiple jurisdictions and argue that this excuses the long delay in not prosecuting the Nova Scotia proceedings so that these proceedings should now

proceed or at least not be stayed. In an Ontario case where these arguments were made to justify a stay by the plaintiffs pending proceedings in another jurisdiction, Justice Strathy (now C.J.O. Strathy) found these arguments did not excuse "parking" an action which is an abuse of process:

> [13] Counsel for the plaintiffs points to several valid reasons why class counsel would wish to commence a class action in several provinces. These include: the lack of a national framework for the prosecution of class actions; issues concerning the recognition by other provinces of judgment in a national class action; uncertainties concerning the availability of opt-in procedures for non-residents; potential juridical advantages to proceeding in one province as opposed to another; and the fact that limitation periods may not be automatically tolled for non-residents of the opt-in jurisdiction, such as British Columbia. There is, as well, uncertainty about the constitutionality of national opt-out class actions.
>
> [14] ***I accept these points, but they do not mean that counsel can stake out claims to national class actions in multiple jurisdictions, keep some of the actions inactive or "parked" in some jurisdictions, and leave the defendants, the potential class members and the court up in the air about their intentions.***
>
> [15] Plaintiff's counsel refers to *Hollinger International Inc. v. Hollinger Inc.* (2004), 11 C.P.C. (6th) 245, [2004] O.J. No. 3464 (S.C.J.), leave to appeal to Div. Ct. refused [2005] O.J. No. 708 (Div. Ct.), in support of the proposition that the court should exercise its discretion to grant a stay. She notes the overlap in the issues, the common factual background, and the potential duplication of judicial and legal resources. To state the obvious, that action was an ordinary civil action, not a class action, and was concerned with the stay of Ontario proceedings pending determination of an action in a foreign jurisdiction. Class action litigation, which necessarily involves common issues and facts, engages different considerations – a multiplicity of proceedings may be a necessary and acceptable result of our federal system. ***That does not mean, however, that parties can commence national class actions in several different provinces and, against the wishes of the defendant, leave some of those actions in limbo while one or more other actions proceed.***
>
> (*Turon v. Abbott Laboratories Ltd.*, 2011 ONSC 4343, aff'd 2011 ONSC 4676 (Div. Ct.))
>
> [Emphasis added]

I adopt this reasoning.

Opt-in versus Opt-out Class Action Schemes

[49] As noted above, the proceeding in Saskatchewan have advanced to the stage where there has been national certification. I am not satisfied that the distinction as

between an opt-in versus opt-out status puts Nova Scotia's residents at a disadvantage.

[50] Few Nova Scotia residents may be inclined to opt-in if they realize that class actions, which often result in huge legal fees for class plaintiff counsel, may not result in any money in their pocket. This phenomenon is referred to by counsel for the appellants as class actions "dirty little secret". Counsel did not expand on this comment other than to suggest that in some cases there is no money actually disbursed to successful claimants. Instead, the costs of distribution may be so prohibitive that the court may, for example, order the building of a library instead of distributing funds to class members. In some cases the size of the class, the small dollar amount per claim, and the costs associated with distribution, resulted in a cy-près distribution instead of the settlement to all class members. These are the cases that are perhaps examples of what appellants' counsel was referencing. In *Sorensen v. Easyhome Ltd.*, 2013 ONSC 4017, Justice Perell, an experienced class action judge in Ontario, explained a cy-près distribution and said:

> [26] Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members, the court will approve a cy près distribution to credible organizations or institutions that will benefit class members: *Sutherland v Boots Pharmaceutical plc* (2002), 21 C.P.C. (5th) 196 (Ont. SCJ) at para. 16; *Alfresh Beverages Canada Corp v Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. SCJ).
>
> [27] As a general rule, cy près distributions should not be approved where direct compensation to class members is practicable: *Cassano v Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (SCJ) at para. 17. However, where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a cy près distribution of the settlement proceeds is appropriate: *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 27; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 11; *Serhan v Johnson & Johnson*, 2011 ONSC 128 at paras. 57-59.
>
> [28] By benefiting the class, at least indirectly, the cy près distribution provides access to justice, and the expenditure at the expense of the defendant may provide some behaviour modification.

- *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.) where Winkler, J. (as he then was) approved a $2.25M settlement to be distributed, after deduction of legal fees and disbursements, to five organizations conducting research into hypothyroidism;

- *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (S.C.J.), where Cumming, J. approved a $3M settlement to all Canadians (outside QC and BC) who had purchased sorbates (chemical preservatives used as a mould inhibitor in high moisture foods such as dairy and bakery products) between 1979 and 1996. Due to the difficulty in identifying possible claimants, the settlement was distributed to specified non-profit entities.
- *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128 (S.C.J.) where Horkins, J. approved a $4M settlement to all Canadians (outside QC and BC) who had used a blood glucose monitoring product called the Sure Step system for diabetes. Of the $4M settlement, $1.5M was paid in class counsel fees, $1.25M paid for 5,000 diabetic monitoring kits to be distributed by the Canadian Diabetes Association and the remaining $1.25M to largely create a Compassionate Use Program and a Public Awareness campaign regarding diabetes.

[51] In the end I conclude that, at best, opt-in versus opt-out is a neutral consideration as it relates to the issue of abuse of process. It would be wrong to conclude that residents of Nova Scotia would, or would not, want to be members of a class involved in proceedings against the appellants.

[52] I am not convinced by the analysis of A.C.J. Rooke in *Turner v. Bell Mobility Inc.*, 2015 ABQB 169 that residents who do not operate in an opt-out jurisdiction or regime are denied access to justice.

[53] The "opt-in opt-out" distinction was not persuasive for the Saskatchewan Court of Appeal in *Englund*, finding that it was not material or relevant to the defendant's motion:

> [48] Second, we respectfully do not agree that, as framed, the Saskatchewan and Ontario Actions involve "two distinct classes of litigants". As noted, both actions seek the certification of a national class. The only difference between the two is that there is the prospect of a national opt-out class in the Ontario Action while any such class in the Saskatchewan Action would have to be established on an opt-in basis in light of s. 10(1)(g) of *The Class Actions Act*. This circumstance, however, does not mean the two actions are concerned with different classes of litigants in any sense which is significant to the point presently under consideration. As drafted, the statements of claim in the two actions seek certification of class proceedings in respect of the same individuals.
>
> (*Boehringer Ingelheim (Canada) Ltd. v. Englund*, 2007 SKCA 62)

[54] Respectfully, I would not adopt the reasoning of A.C.J. Rooke in *Turner*. In my view, his abuse of process analysis is not consistent with the weight of jurisprudence and inevitably ignores the choices and actions of representative parties and their counsel. The reasoning in *Turner* will virtually always result in a multiplicity of actions where there is a perceived advantage to the residents of the province in which the abuse motion is brought. This is clear from the way in which the issues are framed in *Turner*. The first question is:

> Whether Alberta residents with a potential claim against the Defendants are sufficiently protected by the Frey/Chatfield action?

[55] By framing the question in this manner, all sins of the respondents are forgiven or ignored. The adverse implications of those decisions for the courts and defendants are not taken into account.

[56] Respectfully, the residents of any particular province do not have an absolute right to bring a proceeding in their own province. If that were so, no plaintiff would ever lose a *forum non conveniens* motion in his own province. The key to *Turner* is this assertion:

> [99] Fourth, Bell blithely asserted (Bell Reply Brief, para. 17) that the opt-in/opt-out distinction is not relevant to the abuse of process analysis. I find that the distinction is relevant, because ***it is that distinction which "trumps" abuse of process***. The factors that might otherwise have supported an abuse of process argument are less relevant in light of the opt-in/opt-out context in which those factors arise.
>
> [Emphasis added]

[57] Two paragraphs prior to that the Court explains the alleged superiority of an opt-out regime:

> [97] Moreover, the issue here is not comity; I do not doubt the Saskatchewan judicial system, its fairness, or its capacity. But no matter how perfect an opt-in notice is, ***human nature means that people will not take action to exercise their rights***. When there are fewer class members, the behaviour modification effect of the class proceeding is less effective than it might otherwise be. Further, the Turner Action is necessary to ensure that all Albertans automatically have rights and will continue to do so, without opting-in in Saskatchewan, unless and until they opt-out.
>
> [Emphasis added]

[58] This is a civil proceeding. *Turner* does not ask or answer the question why the court and its resources should be more devoted to the financial self-interest of private litigants than they are themselves. If the "opt-out" regime of a particular province trumps bad behaviour in other Canadian jurisdictions, plaintiffs can act irresponsibly elsewhere with impunity, relying on the court in their home province to come to their rescue. Abuse of process becomes what plaintiffs do elsewhere, with the apparent approval of their "home court". Comity means nothing.

[59] With all due respect, I decline to follow *Turner*. I do not agree that "opt-in/opt-out" trumps a proper abuse of process analysis.

Multiplicity/Duplicity of Proceedings

[60] The danger of multiple proceedings is obvious and has been frequently commented upon by many courts, including the Supreme Court of Canada. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63:

> [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[61] Again in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:

> [18] The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[62] While the stay terms in *Turner* attempt to limit the ill-effects of re-litigation, the motions judge in this case apparently welcomed the prospect of re-litigation:

> [119] Arguably therefore, the pleadings of the Plaintiffs in the Saskatchewan class proceeding may have a fatal flaw, in that it has been certified only in relation to a claim for "unjust enrichment."
>
> [120] The Nova Scotia action pleads other causes of action, in addition to the recently added "unjust enrichment" aspect. Consequently, it arguably has an apparent advantage over the Saskatchewan class proceeding.

With respect, the foregoing is a clear error of law. It encourages re-litigation rather than respecting decisions affecting the same parties elsewhere. Losing parties would always welcome another opportunity to argue their case. Doing so in Nova Scotia is no less abusive than doing so in Saskatchewan which limited the respondents to unjust enrichment as a cause of action.

Actions of Counsel

[63] The actions of counsel are also relevant to the issue of abuse of process. First I consider unrelated cases where MLG was involved as counsel in a class action proceeding. For example, *Dixon v. Stork Craft Manufacturing Inc.* 2013 BCSC 1117. In that case, Gaul, J. referred to MLG starting actions in numerous jurisdictions. He held that it was improper to attempt to re-litigate using multiple jurisdictions and he referred to the fact that: "… they are represented by the same legal counsel." (¶63) MLG is re-litigating the very issue before other courts on the same claims. By my count, four courts; Nova Scotia, Alberta, British Columbia and Manitoba are now dealing with virtually the same issues of abuse of process.

[64] *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152 considered the actions of MLG group in two separate actions and said:

> [77] It would be naïve, in my respectful view, to think that MLG's common involvement with *Wuttunee* and with the Bear and Rybchinski Actions is of no import or consequence in the abuse of process analysis. ….It is only to say that MLG's across-the-board involvement cannot be overlooked when determining if this sort of approach undermines the integrity of the adjudicative process.

[65] The present appeal is not about whether respondent counsel have misbehaved in other cases. Those other unrelated cases do discuss, however, how the actions of counsel may have a bearing on the issue of abuse of process.

[66] In an action related to the present appeal, *Hafichuk-Walkin v. BCE Inc.* 2014 MBQB 175 Schulman J. said

> [3] … To sum up the situation, in 2004, MLG knew that if it pursued the Manitoba action, all Manitobans with potential claims were part of the proceedings unless they expressly opted out of it and it MLG pursued the Saskatchewan action, Manitobans with potential claims would only be part of the action if they received notice of the proceeding and expressly opted in.
>
> [4] … During the decade following initiation of the mine actions, the plaintiffs, or rather MLG, pursued the Saskatchewan action with vigor. It appears that MLG has run into at least two obstacles. Firstly, MLG now wishes to conduct an opt-out action and it has struck out repeatedly in its efforts to accomplish this. Secondly, MLG had repeatedly failed in its efforts to expand the number of causes of action, which will be certified by the Saskatchewan courts. **MLG has intermittently tried to do an end run around decisions that are adverse to its preferred course of action.** [Emphasis added]
>
> …
>
> [30] … There is no evidence to support the proposition that the Saskatchewan court will not fulfill its duty to provide for adequate notice. … MLG was aware of the existence or opt out procedures in Manitoba to protect Manitoba claimants. … Ten years later, it is hard to credit this newly advanced position. … Further, the fact that opposite conclusions have been reached on abuse issues, gives a glimpse of the disparate findings likely to follow if MLG is permitted to proceed unchecked in nine separate actions.
>
> ...
>
> [32] For the above-mentioned reasons I find that the initial filing of the statement of claim in Manitoba, the manner in which it was ignored by the plaintiffs for ten years as MLG pursued the *Frey/Chatfield* action, shows that the continued existence of the action serves no proper purpose. The action was and is an abuse of process.

[67] I am satisfied that MLG is now trying to do an end run around what courts in other jurisdictions have ruled. From the beginning they knew of the opt-in versus the opt-out differences in various provinces. Now that the Saskatchewan courts have refused to include non-residents on an opt-out basis, MLG is trying to circumvent that ruling. This, after they ignored the Nova Scotia actions for ten years. In addition, they have had rulings in other jurisdictions that have determined that the multiplicity of proceedings was and is an abuse of process. MLG presses on in this jurisdiction in an attempt to do an end run around those decisions as well.

[68] I am aware that to a certain extent, MLG has even succeeded in doing an end run around the Saskatchewan rulings. In *Turner, supra*, the plaintiff has successfully resisted a stay application. I understand *Turner* is under appeal.

Carriage of an Action

[69] It is well established that commencing an action for the purpose of securing carriage is an abuse of process. In *Turon v. Abbott Laboratories Ltd., supra*, Justice Strathy noted:

> [14] I accept these points, but they do not mean that counsel can stake out claims to national class actions in multiple jurisdictions, keep some of the actions inactive or "parked" in some jurisdictions, and leave the defendants, the potential class members and the court up in the air about their intentions.
>
> […]
>
> [18] Second, a party purporting to represent a class has an obligation to move the proceeding forward with reasonable dispatch. This is expressly contemplated by s. 2 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, which provides that a motion for certification shall be served within 90 days of the delivery of a statement of defence. While this rule is more frequently honoured in the breach than in the observance, the legislation does contemplate that a plaintiff shall move promptly to have the action certified. A person who puts herself forward as a suitable representative of a similarly-affected class has the obligation to demonstrate that capability, and to expeditiously prosecute the action on behalf of the class. Unlike an ordinary action, in which the plaintiff is entitled to consider only her own interests, a plaintiff in a class action is representing the interests of others – others who are entitled to expect that the action will be pursued expeditiously and without delay.
>
> [19] Commencing an action, with no intention of actively pursuing it, is an abuse of the class action procedure because it acts as a disincentive to the commencement of actions by other counsel and plaintiffs who are, in fact, ready, willing and able to proceed with the prosecution of the action. It may also be abused by counsel seeking to obtain the upper hand in carriage disputes by being "first in", without any intention of actually prosecuting the action.

[70] In related proceedings in Alberta in 2013 an MLG lawyer told the court when asked why he commenced multiple law suits in multiple jurisdictions; "Because sometime you face battles with other lawyers, another group of lawyers will come along in a province and try to pursue – a different group of lawyers will – will try to pursue a similar class action."

[71] While it is quite true that this was not the only reason MLG gave for commencing multiple proceedings, nevertheless it was a reason. It certainly is relevant and material to an abuse of process analysis. The evidence should have been received by the motions judge and should have been given appropriate weight in the abuse of process analysis.

[72] I agree with Justice Schulman's observation in *Hafichuk-Walkin et al. v. BCE Inc. et al.*, 2014 MBQB 175 at para. 24 which includes commonality of counsel as a factor in the abuse of process analysis:

> [24] In assessing whether the filing of multiple class actions constitutes an abuse, the court must consider the entire context in which the actions have been brought. (*Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152 (CanLII) at paragraphs 41-43 and 74) The fact that the plaintiffs are the same in each action is a relevant fact. (*Drover v. BCE Inc.* at paragraph 41) The fact that the same law firm filed each claim is a relevant fact. (*Bear v. Merck Frosst Canada & Co.* at paragraph 77 and *Drover v. BCE Inc.* at paragraph 26) The fact that one action was commenced in an opt out province and the other in an opt in province, is not a valid reason to justify the conduct of class actions in more than one province. (*Duzan v. Glaxosmithkline, Inc.* at paragraph 31 and *Englund v. Pfizer Canada Inc.* at paragraph 48)

[73] The respondents suggest that a valid reason for commencing identical actions in numerous jurisdictions is so they can maintain carriage of the claim. Filing actions in numerous jurisdictions simply to maintain carriage is not a positive thing for the respondents nor something that I condone.

[74] The result is that, if there were indeed claimants in this province who wished to pursue this case as a class action, on a national or provincial basis, they would first have to enter into a carriage dispute with the MLG group. What is especially distasteful in this case is that the action filed in Nova Scotia was one that was never intended to be pursued. Filing to maintain carriage must be discouraged. MLG's involvement in Nova Scotia should come to an end. It is an abuse of process to file a claim in Nova Scotia simply to maintain carriage.

Tolling the Limitation Period

[75] Dr. Gillis submits that filing the statement of claim in Nova Scotia allowed the limitation period to toll. I do not accept that it is appropriate to file an action

for the sole purpose of tolling a limitation if there is no intention to prosecute the case. I again refer to the MLG correspondence to the prothonotary.

[76] It is not unusual for courts to see statements of claim filed to meet the limitation periods pending ongoing investigation or settlement efforts. Those cases are distinct from this case where there never was any intention to proceed. It is an abuse of process to file a claim for the sole purpose of tolling the limitation period absent any intention to proceed.

Comity

[77] The action has proceeded through the Saskatchewan courts and the Supreme Court of Canada. The respondents sought to have a national certification in a jurisdiction which they knew was an opt-in province. After they obtained certification they sought to convert it to an opt-out certification. This request was refused by Justice Gerein (see *Frey v. Bell Mobility Inc.*, 2009 SKQB 165). What the respondents are attempting to do with this Nova Scotia proceeding is to obtain the very relief that was refused by Justice Gerein in the Saskatchewan proceeding. It is significant to note that Ontario and Manitoba had opt-out legislation between 2004 and 2008. The MLG group and Dr. Gillis and his counsel chose to pursue the certification application in Saskatchewan, not Manitoba or Ontario. Dr. Gillis made a conscious and informed decision to file and prosecute the claim in Saskatchewan. Parties must understand that they live with their choices.

[78] I am satisfied that to allow a re-litigation of these issues in Nova Scotia would result in an extraordinary abuse of process and it would undermine the administration of justice. I refer to *Montreal Trust Co. of Canada v. Hogue*, 1997 NSCA 153 where Justice Cromwell (as he then was) said:

> [67] Finality of court orders is an important value. As Fleming James, Hazard and Leubsdorf put it:
>
> > ...the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined.
>
> Fleming James, Jr., Geoffrey C. Hayward, Jr. and John Leubsdorf, Civil Procedure (4th, 1992) at 581.

[79] In *Toronto (City) v. C.U.P.E., Local 79*, *supra*, pp.107-08) Justice Abella discussed principles of consistency and finality. She said it was an abuse of process to allow re-litigation of the same issues. In addition to it being a waste of resources, inconsistent outcomes simply served to undermine the administration of justice.

[80] I also refer to *Morguard Investments ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 where the court refers to comity as a bedrock principle. LaForest, J., writing for the Court, described comity as follows: (p. 1096):

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . .

[81] Justice LaForest went on to say at pages 1100-1101:

> …For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and ***that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation***. In short, the rules of commity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the constitution.
>
> [Emphasis added]

[82] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, the Supreme Court expanded on *Morguard*.

> [112] A further issue that does not arise in these appeals is whether it is legitimate to use this factor of loss of juridical advantage within the Canadian federation. To use it too extensively in the *forum non conveniens* analysis might be inconsistent with the spirit and intent of *Morguard* and *Hunt*, as the Court sought in those cases to establish comity and ***a strong attitude of respect in relations between the different provinces, courts and legal systems of Canada. Differences should not be viewed instinctively as signs of disadvantage or inferiority.*** This factor obviously becomes more relevant where foreign countries

> are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction. At this point, the decision falls within the reasoned discretion of the trial court. The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts, which, as I emphasized above, takes place at an interlocutory or preliminary stage. I will now consider whether the Ontario courts properly assumed jurisdiction in these cases and, if so, whether they should have declined to exercise it on the basis of *forum non conveniens*.
>
> [Emphasis added]

[83] To allow the action in Nova Scotia to continue would permit a collateral attack on the Saskatchewan decision which refused to allow certification for non-residents on an opt-out basis. As noted in *Garland v. Consumers' Gas*, 2004 SCC 25 (¶72) to permit a collateral attack on the Saskatchewan decision leaves the appellants in an impossible position where they would be forced to litigate in one jurisdiction to the point that it was no longer producing the results the respondents desire. The respondents then ask the courts of Nova Scotia to permit re-litigation here in the hopes that they obtain a preferred result. That puts appellants in an impossible position and would undermine the proper administration of justice.

Conclusion

[84] This case was an abuse of process from the outset when the claim was filed with no intention to prosecute it here. The abuse was compounded by the filing of nine virtually identical claims. The respondents made it clear many years ago that Saskatchewan was the forum of choice. That was a choice made with the assistance of legal counsel. The respondents must live with that decision. It is time the respondents be forced to pick cherries from a single tree; the one groomed for so many years, while the one in Nova Scotia was neglected. The abuse of process cannot be undone through the further passage of time. There is a venue for Nova Scotia residents to join in an action in Saskatchewan if they so desire. The action in Nova Scotia should be permanently and unconditionally stayed.

Notice of Contention

[85] In a notice of contention the respondents suggest that constitutional considerations mandate or legitimize parallel proceedings in this case. In addition

the respondents suggest that even if abuse of process is established, a remedy short of a complete and permanent stay is warranted.

[86] I am satisfied that the comments I have made above deal with the points raised by the respondents in the Notice of Contention.

Disposition

[87] I am satisfied that it is appropriate to set aside the decision of the motions judge below and enter a permanent unconditional stay of proceedings.

Costs

[88] The motions judge ordered the appellants to pay costs of $9,000 below. That should be reversed. Any money the appellants paid pursuant to that order should be returned. The respondents are ordered to pay a total of $9,000 to the appellants in relation to the proceedings before the motions judge. That will be divided equally between the appellants.

[89] In addition, the respondents are ordered to pay costs on this appeal in the amount of $9,000 inclusive of disbursements. The $9,000 is to be divided equally between the appellants.

Scanlan, J.A.

Concurred in:

Bryson, J.A.

Bourgeois, J.A.