CITATION: Winder v. Marriott International Inc., 2019 ONSC 5766
COURT FILE NO.: CV-18-00611365-00CP
COURT FILE NO.: CV-18-00610076-00CP
COURT FILE NO.: CV-18-00610017-00CP
COURT FILE NO.: CV-18-00610079-00CP
DATE: 2019/10/07

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN: **GLEN WINDER** Plaintiff - and - **MARRIOTT INTERNATIONAL, INC., MARRIOTT HOTELS OF CANADA LTD. and STARWOOD CANADA ULC** Defendants	*Michael G. Robb, Sajjad Nematollahi* and *Stefani Cuberovic* for the Plaintiff Glenn Winder *Adam Tanel, Christopher Du Vernet*, and *Vadim Kats* for the Plaintiffs Ruth Kogut, Zachary Schnarr, and Frank Brown
BETWEEN: **LAVERNE ARTHUR and ANNE ARTHUR** Plaintiffs - and – **MARRIOTT INTERNATIONAL, INC.** Defendant	
BETWEEN: **KARA MARTINEAU** Plaintiff - and – **MARRIOTT INTERNATIONAL, INC. and STARWOOD HOTELS & RESORTS WORLDWIDE, LLC** Defendants	

BETWEEN:	)	
	)	
RUTH KOGUT, ZACHARY SCHNARR and FRANK BROWN	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
LUXURY HOTELS INTERNATIONAL OF CANADA, ULC and MARRIOTT INTERNATIONAL, INC.	)	
Defendants	)	
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: September 19, 2019

PERELL, J.

REASONS FOR DECISION

To consortium or not to consortium, that is the question.

A. Introduction

[1] Proposed Class Counsel in two proposed national class actions commenced in Ontario bring a carriage motion.

[2] In *Winder v. Marriott International Inc., Marriott Hotels of Canada Ltd., and Starwood Canada ULC,* (the "*Winder Action"*), the proposed Class Counsel is Siskinds LLP. In *Kogut, Schnarr and Brown v. Luxury Hotels International of Canada ULC and Marriott International, Inc.* ("*Kogut Action"),* the proposed Class Counsel are a consortium of four Ontario law firms comprised of Koskie Minsky LLP, Landy Marr Kats LLP, McKenzie Lake Lawyers LLP, and Du Vernet, Stewart.

[3] There are two other class actions commenced in Ontario; namely: *Arthur v. Marriott International, Inc.* (CV-18-00610076-00CP) and *Martineau v. Marriott International, Inc*, (CV-18-00610017-00CP), but counsel in those actions advise that they do not contest carriage. Thus, this is a motion to decide carriage between the *Winder Action* and the *Kogut Action.*

[4] There are a long list of factors that courts consider when determining who should have carriage. As the discussion below will reveal, in the case at bar, most of the factors are neutral, and save for one factor, the carriage factors tend to balance each other out and do not tip the scales decisively in favour of the *Winder Action* or the *Kogut Action*. In the immediate case, the tipping point or decisive factor is about overlapping class actions and the management of a multiplicity of class actions across the country.

[5] In the case at bar, in my opinion, the factor that weighs against the Consortium in the *Kogut Action* is that the Consortium has developed a strategy that concedes at the outset that there should be overlapping national class actions in all of British Columbia, Alberta, and Ontario and also overlapping regional class actions in Québec and Nova Scotia. The Ontario

Consortium is, in truth, a part of a larger consortium of law firms including two firms in Alberta and depending upon the outcome of a carriage fight, up to five law firms in British Columbia. The Consortium already has carriage in Alberta and Nova Scotia and is fighting for it in British Columbia and Ontario. Siskinds LLP fights for a carriage of a national class action out of Ontario.

[6] I regard as a negative factor that the *Kogut Action* Consortium envisions that there inevitably will be a multiplicity of national and regional class actions in a case where there are strong arguments that there is a singular *forum conveniens* for a national class action. While it remains to be determined, there is a reasonably strong argument that a multiplicity of overlapping class actions is unnecessary and an undesirable waste of judicial resources for the courts in British Columbia, Alberta, Ontario, Québec, and Nova Scotia. While co-operating national consortiums may be desirable in some cases, in my opinion, it remains to be determined whether the case at bar is one of them; it may or may not be.

[7] In contrast, Class Counsel in the *Winder Action* are committed to a national class action (possibly excluding Québec) in Ontario. While Class Counsel in the *Winder Action* will, if necessary, co-operate with the Class Counsel in British Columbia, Alberta, Québec, and Nova Scotia, should those actions all be prosecuted, Class Counsel in the *Winder Action* do not concede at the outset that it is inevitable that overlapping class actions should be prosecuted in British Columbia, Alberta, Ontario, Québec, and Nova Scotia.

[8] Class Counsel in the *Winder Action* seem prepared to employ the Uniform Law Conference of Canada provisions that address competing multi-jurisdictional class actions.[1] The approach of the Uniform Law Conference of Canada has been adopted by statute in Alberta[2] and British Columbia[3] and recently, the Law Commission of Ontario recommended that the Uniform Law Conference's recommendations for addressing multi-jurisdictional class actions be adopted in Ontario.[4]

[9] The approach of the Uniform Law Conference of Canada is that Class Counsel in the domestic province is required to notify Class Counsel in other jurisdictions of the certification motion in the domestic province. Then, the court hearing the certification motion in the domestic province is directed to consider whether it would be preferable for some or all of the claims of the proposed class members to be resolved in the action in the other jurisdiction. Much like the considerations of a *forum conveniens* motion, the Uniform Law Conference's legislation include criteria to determine what would be the preferable choice between the multiple actions. The statutes contain jurisdictional provisions to enforce that choice; for example, the court hearing the certification motion is, among other things, empowered to refuse to certify, if the court determines that the class action should proceed in another jurisdiction.

[10] In the immediate case, it is desirable that the matter of multi-jurisdictional class actions not be conceded at the outset, and for this reason and for several other reasons, I grant carriage to Siskinds, LLP in the *Winder Action*.

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[1] *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations*, Vancouver, B.C., March 9, 2005.
[2] *Class Proceedings Amendment Act*, SA 2010, c15.
[3] *Class Proceedings Amendment Act*, 2018, SBC 2018, c 16.
[4] *Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto, July 2019)

B. Factual Background

[11] The Defendants, Marriott International, Inc., Marriott Hotels of Canada Ltd., Starwood Canada ULC and Luxury Hotels International of Canada ULC (collectively "Marriott") are a well-known operator of hotels and resorts around the world.

[12] Marriott is a global operator, franchisor and licensor of hotel and hospitality properties. It is headquartered in Bethesda, Maryland, U.S. Marriott's properties are owned and operated under various brand names, including Starwood Hotels.

[13] It shall prove important to note that Marriott acquired the Starwood Hotels through its acquisition of Starwood Hotels & Resorts Worldwide, Inc. in September 2016. In Canada, Marriott owns and/or operates its properties through wholly owned subsidiaries, including Marriott Canada and Starwood Canada.

[14] As part of Marriott's reservation and booking system, Marriott asks its customers to create, maintain, and update personal profiles containing personal information, including names, gender, birthdays, addresses, email addresses, phone numbers, communication preferences, arrival and departure information, reservation dates, credit card numbers, and payment information. For international travelers, Marriott requires customers to provide passport information. All of the data is stored by Marriott in its database or databases.

[15] Marriott's Terms of Use for its reservation and booking system contain the following choice of law, choice of forum and class action waiver clauses:

> *Terms of Use for United States & Canada*
>
> 1. Marriott International, Inc. with its corporate headquarters at 10400 Fernwood Road, Bethesda, Maryland 20817-1102, United States of America, and its subsidiaries, including The Ritz-Carlton Hotel Company L.L.C. (collectively, "Marriott", "we", "our" or "us") provide various websites available to visitors located throughout the world. Our websites include without limitation, this website, www.marriott.com, www.autographhotels.marriott.com, www.vacationsbymarriott.com, www.ritzcarlton.com and www.corproate.ritzcarlton.com (collectively, our "Sites"). These Terms of Use also apply to translations of our Sites, for example, www.espanol.marriott.com. Our Sites are controlled and operated from the United States and are subject to United States law.
>
> […]
>
> 15. These Terms of Use shall be construed and enforced under the laws of the State of Maryland, USA, applicable to contracts executed and performed within Maryland, USA. You specifically agree and submit to the jurisdiction of the State and Federal Courts situated in the State of Maryland and stipulate to the fairness and convenience of proceedings in such courts for all disputes arising out of or relating to the use of our Sites. You will not object to jurisdiction or venue on the grounds of lack of personal jurisdiction, inconvenient forum or otherwise. You agree that you will not file or participate in a class action against us. YOU HEREBY WAIVE ANY RIGHT YOU MAY NOW HAVE OR HEREAFTER POSSESS TO A TRIAL BY JURY.
>
> The foregoing shall not apply to the extent that applicable law in your country of residence requires application of another law and/or jurisdiction and this cannot be excluded by contract.

[16] On November 30, 2018, Marriott announced that the security of its reservation and booking system had been compromised. In the *Winder Action*, this data breach is associated only with the database of the Starwood Hotels, a database that was once separate from Marriott's other databases.

[17] Marriott's announcement of the data breach on November 30, 2018 and its subsequent statements, including in its filings with the United States Securities and Exchange Commission, indicate that as far as presently known, the data breach affected only the reservations database of the Starwood Hotels.

[18] The *Kogut Action* does not make this precise association between the data breach and the Starwood Hotels' database. As the discussion below will reveal, the significance of what databases were involved was a contentious issue on the carriage motion.

[19] Marriott issued a notice to the public stating that approximately 500 million hotel guests may have been affected by the data breach. In the *Kogut Action*, it is alleged that although the public announcement was made on November 30, 2018, Marriott had learned around September 8, 2018, that nefarious actors had had access to the guest reservation database since 2014.

[20] Immediately, in Québec, on November 30, 2018, Daniel Poulin and others commenced an action against Marriott International, Inc., Luxury Hotels of Canada ULC, and Starwood Canada ULC. Woods LLP and Rochon Genova LLP are the proposed Class Counsel in the *Poulin Action*. The *Poulin Action* began as a national class action, but the class definition was amended in May 2018 to make the action just for residents of Québec. The amended class definition is as follows:

> "Class" and "Class Members" means all residents of Québec who stayed at one of the Starwood Properties hotels operated by the Defendants prior to November 30, 2018

[21] In response to the data breach, Ruth Kogut, an Ontario resident, retained Landy Marr Kats LLP, McKenzie Lake Lawyers LLP, and Du Vernet,Stewart to prosecute a proposed class action.

[22] It is to be noted that the Du Vernet, Stewart firm was added to this consortium of lawyers because Christopher Du Vernet was counsel for the successful plaintiff in *Jones v Tsige*,[5] the pre-eminent decision about the privacy tort of intrusion on seclusion. Subsequently, Koskie Minsky LLP joined the group and the Consortium was formed.

[23] Ms. Kogut signed a contingency fee agreement that provides that Class Counsel's fees are payable only in the event of success as follows: (a) 15% of the recovery, if the action is settled prior to the delivery of the motion record for certification; (b) 20% of the recovery, if the action is settled after the delivery of the motion record for certification; (c) 25% of the recovery, if the action is settled after the commencement of the contested motion for certification or after a consent order is made certifying the class action; or (d) 30% of the recovery, if the Action is settled after the commencement of examinations for discovery including the delivery of an affidavit of documents to the Defendants by the Plaintiffs.

[24] The Consortium have instructions to obtain third-party funding for the Plaintiffs. Although not initially prepared to do so, during oral argument of the carriage motion, the Consortium undertook to indemnify the Plaintiffs from adverse costs consequences and not to use the absence of third-party funding as a reason to apply to withdraw as Class Counsel. (I shall comment further below about the significance of this undertaking from the Consortium later in these Reasons for Decision).

[25] The Consortium signed a Consortium Agreement. The Consortium Agreement, however,

[5] 2012 ONCA 32.

was not produced in the material for the carriage motion.

[26] The Consortium has a cooperative working relationship with several American firms acting for plaintiffs in the U.S. Marriott Class Action. The Consortium has a cooperative working relationship with the counsel who were recently appointed as the co-lead of the Plaintiff's Steering Committee in the multi-district litigation in Maryland (the "MDL litigation").

[27] On December 3, 2018, the *Kogut Action* was commenced by Notice of Action.

[28] Meanwhile, in response to the data breach, Zachary Schnarr and Frank Brown had retained Koskie Minsky LLP to prosecute a proposed class action. This action, the *Schnarr Action* was commenced on December 7, 2018. As noted above, Messrs. Schnarr and Brown and Koskie Minsky LLP later joined the Consortium.

[29] Meanwhile, in response to the data breach, Glenn Winder, an Ontario resident who is a member of the Starwood Preferred Guest program, retained Siskinds LLP. He signed a contingency fee retainer that provides that Siskinds LLP's fees are payable only in the event of success as follows: (a) 17.5% of the recovery if resolution occurs before certification; (b) 20% of the recovery if resolution occurs after certification but before the commencement of the common issues trial; or (c) 22.5% of the recovery if resolution occurs after the commencement of the common issues trial.

[30] If there is no third-party funding, Siskinds LLP is entitled to a further 5% of the amount recovered. If Siskinds LLP does obtain third-party funding, Siskinds LLP is authorized to claim an additional legal fee premium representing the cost of any such percentage charged by the third-party financier. Siskinds LLP, however, has not obtained third-party funding and has no plans to do so. It has agreed to indemnity Mr. Winder for any adverse costs award.

[31] On December 20, 2018, the *Winder Action* was commenced by Statement of Claim. The class definition in the *Winder Action* is as follows:

> [All] Canadian residents whose Personal Information was accessed by unauthorized parties in or as a result of the Data Breach.
>
> "Data Breach" means the unauthorized access to the Class Members' Personal Information through the Defendants' computer systems and networks, which was publicly disclosed on November 30, 2018, the events out of which this action arises;

[32] Should carriage be granted to the *Winder Action*, Class Counsel plans to exclude Québec residents from the class action and co-operate with Class Counsel in the *Poulin Action*. At present, however, the *Winder Action* includes Québec residents.

[33] On December 21, 2018, Mr. Winder served a motion record for certification of his action as a class action.

[34] With the formation of the Consortium, the *Kogut Action* was consolidated with the *Schnarr Action*, and on June 19, 2019, the Consortium delivered a Fresh as Amended Statement of Claim in the *Kogut Action*. The Consortium has not filed a motion record for certification.

[35] The class definition in the *Kogut Action* is as follows:

> [All] persons in Canada (including their estates, executors or personal representatives) whose Data was stored in database(s) owned and/or operated by the Defendants or any of their affiliates or subsidiaries which Data was stolen from, released to, obtained by or accessed by unauthorized

> persons on or before November 30, 2018 (or such further or different period that is specified as investigations of this case progresses)

[36] The *Winder Action* and *Kogut Action*, join the same defendants, save and except for Starwood Canada ULC, which is only named in the *Winder Action*.

[37] Both the *Winder Action* and *Kogut Action* advance causes of action for: (a) breach of privacy statutes;[6] and (b) intrusion upon seclusion. The *Winder Action* adds a claim of breach of consumer protection statutes from all of the Canadian provinces and territories including Québec.[7] The *Kogut Action* adds claims for: (a) breach of contract; (b) breach of warranty; (c) negligence; (d) breach of confidence; and (e) breach of fiduciary duty.

[38] There is also a proposed national class action in Alberta. Two actions were initially filed in Alberta, but on consent on June 27, 2019, carriage was granted to the action styled *Birnbaum v. Marriott International Inc.*, (the "*Birnbaum Action*"). Proposed Class Counsel in the *Birnbaum Action* are the Alberta-based law firms of Guardian Law Group LLP and James H. Brown Associates. There is a co-operation agreement between proposed Class Counsel in the *Birnbaum Action* and the Consortium of the *Kogut Action.*

[39] The class definition in the *Birnbaum Action* is as follows:

> Any and all individuals who had their personal information compromised as a result of the breach of the Defendant's records and electronic information storage.

[40] Six class proceedings having commenced in British Columbia, including *Krygier v. Marriott International, Inc.*, ("the *Krygier Action*"), which is a national class action. Koskie Minsky LLP, a member of the Consortium, is the proposed Class Counsel in the *Krygier Action*.

[41] The class definition in the *Krygier Action* is as follows:

> [A]ll Canadian residents, except for Excluded Persons, whose Personal Information was improperly accessed as a result of the Database Breach.
>
> "Excluded Persons" means the Defendants, their current and former officers and directors, members of their immediate families, and their legal representatives, successors or assignees.
>
> "Database Breach" means the unauthorized access to the Defendants; Guest Database;
>
> "Guest Data Base" means the Defendants' guest reservation systems and Starwood Prefence Guest Membership Systems;

[42] The other class actions in British Columbia are: (2) *Sache v. Marriott International, Inc*. (S-1813823), in which Boughton Law Corporation is the proposed Class Counsel; (3) *Wenman v. Marriott International Inc*. (VLC-S-S-185437), in which Acheson Sweeney Foley Sahota LLP. Is the proposed Class Counsel; and (4)(5) and (6): *James v. Marriott International, Inc.* (S-

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[6] *Privacy Act*, RSBC 1996, c. 373; *The Privacy Act*, RSS 1978, c. P-24; *The Privacy Act*, CCSM, c. P125; the *Civil Code of Québec*, CQLR c CCQ-1991, the *Charter of Human Rights and Freedoms*, CQLR c. C-12; the *Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c P-39.1; and *the Privacy Act*, RSNL 1990, c. P-22.

[7] *Business Practices and Consumer Protection Act*, SBC 2004, c 2; *the Fair Trading Act*, RSA 2000, c. F-2; *the Consumer Protection Act*, SS 1996, c. C-30.1; the *Consumer Protection and Business Practices Act*, SS 2014, c. C-30.2; *the Business Practices Act*, CCSM, c. B120; *Consumer Protection Act*, 2002, SO 2002, c. 30, Sch A; the *Consumer Protection Act*, CQLR, c P-40.1, the *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, *the Consumer Protection Act*, RSNS 1989, c. 92; and, *the Business Practices Act*, RSPEI 1988, c. B-7

1813409), *Wong v. Marriott International, Inc.*, and *Bhinder v. Marriott International, Inc.*, in which Hammerberg Lawyers LLP, Evolink Law Group and Garcha & Company have agreed to form a consortium.

[43] There is a pending carriage contest in British Columbia amongst the *Krygier Action* and the three other rival proposed class actions.

[44] There is also a maritime regional proposed class action in Nova Scotia, *Mann v. Marriott International Inc.* The proposed Class Counsel once again is Koskie Minsky LLP. It seeks to represent a proposed class defined as follows:

> All Maritime Residents, except for Excluded Persons, whose Personal Information was improperly accessed as a result of the Database Breach.
>
> "Maritime Residents" means all individuals who are domiciled or residing in one of the following provinces: Nova Scotia, New Brunswick, and Prince Edward Island.
>
> "Database Breach" means the unauthorized access to the Defendants' Guest Database;
>
> "Excluded Persons" means the Defendants, their current and former officers and directors, members of their immediate families, and their legal representatives, heirs, successors or assignees

[45] Thus the Consortium already has carriage or co-operation agreements with respect the proposed class actions in Alberta and Nova Scotia, and it is seeking carriage in British Columbia and Ontario. The Consortium says that it has developed a national strategy that involves working cooperatively with other Canadian firms who have brought parallel proceedings in other provinces.

[46] The details of that national strategy have not been disclosed.

[47] If granted or controlling carriage in all of British Columbia, Alberta, Ontario, and Nova Scotia, the Consortium has not disclosed whether it intends to prosecute one or more class actions simultaneously or to pick one and idle the others. It appears that if the Consortium fails in obtaining carriage in British Columbia and Ontario Koskie Minsky LLP would attempt to prosecute a national class action out of Alberta and a regional class action out of Nova Scotia.

C. Discussion and Analysis

1. The Test for Carriage

[48] The *Class Proceedings Act, 1992*, confers upon the court a broad discretion to manage the proceedings. Section 13 of the *Act* authorizes the court to "stay any proceeding related to the class proceeding", and s. 12 of the *Act* authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Section 138 of the *Courts of Justice Act*,[8] directs that "as far as possible, multiplicity of legal proceedings shall be avoided".

[49] Where two or more class proceedings are brought with respect to the same subject-matter, a proposed Representative Plaintiff in one action may bring a carriage motion to stay all

[8] R.S.O. 1990, c. 43.

other present or future class proceedings relating to the same subject-matter.[9] There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected.[10]

[50] The court will grant carriage to the putative Class Counsel whose proposed action is better for the interests of the putative Class Members while being fair to the defendants and promoting the prime objectives of class proceedings, which are access to justice for plaintiffs, class members, and defendants, behaviour modification, and judicial economy.[11] Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class.[12]

[51] Courts generally consider a list of overlapping and non-exhaustive factors in determining which action should proceed; including:[13] (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Relative Priority of Commencement of the Action; (7) Preparation and Readiness of the Action; (8) Preparation and Performance on Carriage Motion; (9) Case Theory; (10) Scope of Causes of Action; (11) Selection of Defendants; (12) Correlation of Plaintiffs and Defendants; (13) Class Definition; (14) Class Period; (15) Prospect of Success: (Leave and) Certification; (16) Prospect of Success against the Defendants; and (17) Interrelationship of Class Actions in more than one Jurisdiction.[14]

[52] It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel.[15]

[53] As I shall explain below, Factor 17 (the Interrelationship of Class Actions in more than one Jurisdiction) is the tipping point factor in the immediate case. Because of this factors'

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[9] *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 at paras. 9-11 (S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.).

[10] *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.).

[11] *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 at para. 14 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd., supra*, at para. 13; *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 at para. 48 (S.C.J.).

[12] *Simmonds v. Armtec Infrastructure Inc., sub nom. Locking v. Armtec Infrastructure Inc.,* 2012 ONSC 44, leave to appeal to Div. Ct. granted, 2012 ONSC 5228, affirmed 2013 ONSC 331 (Div. Ct.); *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), *sub. nom Mignacca v. Merck Frosst Canada Ltd.*, leave to appeal granted [2008] O.J. No. 4731 (S.C.J.), aff'd [2009] O.J. No. 821 (Div. Ct.), application for leave to appeal to C.A. ref'd May 15, 2009, application for leave to appeal to S.C.C. ref'd [2009] S.C.C.A. No. 261.

[13] *Rogers v Aphria Inc*, 2019 ONSC 3698; *Agnew-Americano v. Equifax Canada Co*., 2018 ONSC 275; *Kaplan v. Casino Rama Services Inc*., 2017 ONSC 2671; *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.,* 2016 ONSC 3819; *Mancinelli v. Barrick Gold Corp*., 2014 ONSC 6516 aff'd ONSC 2015 ONSC 2717 (Div. Ct.), aff'd 2016 ONCA 571; *Wilson v. LG Chem Ltd*., 2014 ONSC 1875; *McSherry v. Zimmer GMBH,* 2012 ONSC 4113; *Smith v. Sino-Forest Corporation*, 2012 ONSC 24; *Sharma v. Timminco Ltd., supra*; *Genier v. CCI Capital Canada Ltd., supra; Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (S.C.J.); *Ricardo v. Air Transat A.T. Inc., supra*.

[14] *Quenneville v. Audi AG*, 2018 ONSC 1530.

[15] *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.,* 2016 ONSC 3819 at para. 146.

significance to the immediate case, in the next section of these reasons, I shall explain the problems of overlapping class actions. Later in these reasons, I shall explain why Factor 17 is the tipping point in the immediate case. I shall also suggest a procedure to rationalize in the immediate case the existence of overlapping class actions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia.

2. Avoiding a Multiplicity of Class Proceedings

[54] Judicial economy and the avoidance of a multiplicity of proceedings is a foundational principle of civil procedure generally. As far back as the great law reform movements of the middle-nineteenth century that fused the courts of equity and the common law courts, it is has been a policy of civil procedure to avoid a multiplicity of proceedings.

[55] The policy favoring a singularity of proceedings is memorialized in s. 138 of Ontario's *Courts of Justice Act*[16] which provides that "[a]s far as possible, multiplicity of legal proceedings shall be avoided". Similar provisions exist in the statutes of the other provinces.

[56] One of the policy imperatives for the enactment of Ontario's *Class Proceedings Act, 1992*, and the class proceedings statutes across the country is to achieve access to justice for a group of similarly situated persons while at the same time avoiding a multiplicity of proceedings. Optimally, a class proceeding should resolve, in just one proceeding, all the claims and defences and distribute compensation and releases for all of the groups' claims.

[57] The phenomena of multiple overlapping class actions, as exists in the case at bar, present problems for the courts across the country. The disadvantages of multiple proceedings about the same wrong are inefficiency, the duplication of creating an evidentiary record, the duplication of fact-finding, the duplication of legal analysis, the duplication of appeals, the embarrassment of inconsistent outcomes, the wasted forensic resources of lawyers and experts, and wasted judicial resources.

[58] Further, multiple class actions raise the adverse prospect of the corruption of settlements and of extra-territorial judgment enforcement proceedings because for example, where there is more than one rival national class action, the defendant has an opportunity to shop around for a bargain settlement causing difficulties for courts across the country about whether to approve the settlement or to facilitate the enforcement of a judgment reached in another jurisdiction.

[59] Avoiding a multiplicity of class actions about a single wrongdoing is particularly important to Class Counsel because the viability of an entrepreneurial class action is highly dependent on class size. Class proceedings increase access to justice by spreading litigation costs while increasing litigation rewards for Class Counsel across a large group. If that group is diluted by a rival regional, national, or global class action, then Class Counsel may forgo taking on the risk of prosecuting the group's claim.

[60] However, before moving on in the discussion to consider whether there are any solutions to the problems of a multiplicity of class actions, it is important to disabuse any idea that a multiplicity of class actions is always a problem. Sometimes, more than one class action about the same wrongdoing is unobjectionable and even advantageous.

[61] In the immediate case, for example, that there is a separate proceeding in Québec may be

[16] R.S.O. 1990, c. 34.

advantageous because Québec's *Civil Code* may offer advantages not available in the common law provinces. As another example, multiple class actions may be desirable to administer a settlement of a national class action making the participation of class members in any claims program or individual issues trials feasible and convenient.

[62] That said, I can say from experience that where there are overlapping class actions even when all but one of them are idled only to be revved up for the settlement approval and settlement administration stages of the national class action, the need for two or more courts having been involved is often a redundant and expensive waste to the administration of justice.

[63] Turning to solutions for a multiplicity of overlapping class actions, in practice, one of the purported solutions to a multiplicity of class actions is the formation of consortiums and cooperation agreements among the Class Counsel of the overlapping class actions.

[64] The Consortium in the immediate case pitches its assembly as one of the factors favoring it in the contest for carriage. It submits that the assembly of a team is economical, efficient, and proficient. It submits that a consortium provides a means to train novice law firms in the arts of class actions by partnering them with seasoned veterans. It submits that a consortium allows the mixing of expertise, and as noted above, the Consortium apparently sought out Mr. Du Vernet's law firm because of his personal experience with *Jones v. Tsige*,[17] which undoubtedly will be at the forefront of the class action against Marriott.

[65] Apart from the fact that it may avoid expensive carriage fights, it is true that in some cases the formation of an consortium of Class Counsel is a good because the members of the consortium can jointly undertake the risks of the class action and can efficiently share the workload of prosecuting what is often very complicated, very expensive, and very risky litigation.

[66] However, the formation of a consortium is not intrinsically or inevitably good. Sometimes the formation of a consortium is bad because additional Class Counsel are just deadweight and their participation in the consortium is just a façade for unethical fee-splitting and for obtaining a share of the spoils of the class action without actually earning it, all to the detriment of the Class Members.

[67] Although under the class proceedings statutes, the court must approve Class Counsel's fee, it is very difficult to uncover whether the members of a consortium genuinely worked as a team. It is easy for the members of the consortium to dress up their contribution as a team effort and, of course, the consortium members do not air their dirty laundry at the fee approval hearing.

[68] It remains to be seen whether there is a consortium solution in the immediate case because there are carriage contests in British Columbia and Ontario. When there is not a consortium solution to the problem of a multiplicity of class actions, the carriage motion, like the one in the immediate case, is one mechanism for avoiding or at least reducing a multiplicity of proceedings.

[69] However, a carriage motion is an awkward and somewhat limited mechanism because it can only indirectly address the situation that presents itself in the immediate case of overlapping and possibly rival class actions in other jurisdictions. Unlike the situation in the United States, there is no available pan-Canadian procedure to address the situation of overlapping class actions

[17] 2012 ONCA 32.

in several provinces.

[70] The United States is a union of states and its multiple district litigation (MDL litigation) regulations provide a means to consolidate or organize proceedings that are initiated in several different states. Canada is a confederation of provinces and as a matter of Canadian constitutional law, the legislative power of the provinces is limited to legislating within the province and the courts of one province cannot be empowered to stop or organize class actions in the courts of another province or territory even if that litigation is redundant, duplicative, or unnecessary. As a matter of constitutional law, it is also very doubtful whether the federal government could impose on the provinces a supervisory tribunal to decide which province should have exclusive jurisdiction when there is more than one overlapping class action.

[71] The Uniform Law Conference of Canada Civil Law Section, in its Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations,[18] described the problem of a multiplicity of class proceedings across the country as follows:

> 17. Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial class actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact-finding, judicial analysis and pre-trial procedures and eliminates the risk of inconsistent findings. It increases access to justice by spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.
>
> 18. By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are thirteen overlapping actions with thirteen different counsel. The uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since: (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members.

[72] However, notwithstanding the absence in Canada of a MDL litigation protocol as exists in the U.S., the Uniform Law Conference of Canada Civil Law Section believed that with some amendments to the provincial class action statutes and with the use of the existing common law conflict of laws provisions about *jurisdiction simpliciter*, *forum conveniens* and the recognition of foreign judgments, the provincial courts may have all the authority they need to address the problems of multiple overlapping class actions. The Uniform Law Conference of Canada Civil Law Section stated: [19]

[18] Vancouver, B.C., March 9, 2005.

[19] The Uniform Law Conference of Canada Civil Law Section, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations* (Vancouver, B.C., March 9, 2005), para. 32.

> 32. ... Finally, it may be possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem. This latter approach, which we recommend, would require some modification of existing class proceedings legislation, including with respect to certification processes, and the development of a central class action registry.

[73] The Uniform Law Conference of Canada recommended a notice procedure to respond to the circumstance of multiple multi-jurisdictional class actions. Class Counsel in the local class action is required to notify the counsel in the rival proceedings in the other jurisdiction. Then, the court hearing the certification motion is directed to consider whether it would be preferable for some or all of the claims of the proposed class members to be resolved in the rival proceeding in another jurisdiction. The Uniform Law Conference's legislation include criteria to determine what would be the preferable choice between the multiple actions and jurisdictional provisions to enforce that choice; for example, the court hearing the certification motion is, among other things, empowered to refuse to certify if the court determines that the class action should proceed in another jurisdiction.

[74] The Uniform Law Conference of Canada Civil Law Section's legislation provides that in deciding whether a class action in another jurisdiction might be preferable for the resolution of the claims of all or some class members; *i.e.*, in deciding whether to defer a class action in one jurisdiction to another jurisdiction's class action, the courts across the country should consider the list of facts that have been developed for carriage motions. The factors about choosing between the rival class actions include: (a) the nature and the scope of the causes of actions advanced, including any variation in the cause of actions available in the various jurisdictions; (b) the theories offered by counsel in support of the claims; (c) the state of preparation of the various class actions; (d) the number and extent of involvement of the proposed representative plaintiffs; (e) the order in which the class actions were commenced; (f) the resources and experience of counsel; (g) the location of class members, defendants and witnesses; and (h) the location of any act underlying the cause of action.

[75] The approach of the Uniform Law Conference of Canada has been adopted by statute in Alberta[20] and British Columbia,[21] two of the provinces implicated in the case at bar, and recently the Law Commission of Ontario recommended that the provisions for addressing multi-jurisdictional class actions be adopted in Ontario.[22]

[76] It may be noted that when there are a multiplicity of overlapping class actions, the factors suggested by the Uniform Law Conference for determining what class action(s) should proceed are also connected to the factors that the courts use when determining whether to stay an action on the grounds that the action has been brought in a *forum non conveniens*. The non-exhaustive *forum conveniens* factor include: (a) the location of the majority of the parties; (b) the location of the key witnesses and evidence; (c) contractual provisions that specify applicable law or accord jurisdiction; (d) the avoidance of multiplicity of proceedings; (e) the applicable law and its weight in comparison to the factual questions to be decided; (f) geographical factors suggesting the natural forum; and (g) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court.

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[20] *Class Proceedings Amendment Act*, SA 2010, c15.
[21] *Class Proceedings Amendment Act*, 2018, SBC 2018, c 16.
[22] *Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto, July 2019)

3. The Carriage Factors

[77] I shall save the analysis in the immediate case of the tipping point factor, Factor 17, (the Interrelationship of Class Actions in more than one Jurisdiction) to last, but I shall not ignore the other factors, which I shall discuss next below.

[78] As noted at the outset of these Reasons for Decision, most of the factors are neutral and the remaining carriage factors tend to balance each other out and do not tip the scales decisively in favour of the *Winder Action* or the *Kogut Action*. That said, while not decisive, in my opinion, overall the factors do very narrowly favor the *Winder Action.*

(a) The Quality of the Proposed Representative Plaintiffs

[79] In the immediate case, the quality of the proposed representative plaintiffs factor is neutral.

[80] In future cases, I would suggest that the quality of the proposed representative plaintiff factor be removed as a carriage factor because it is a matter better left to the certification motion. The immediate carriage motion demonstrates why this suggestion is desirable.

[81] In *Sondhi v. Deloitte Management Services LP*,[23] I stated that "[t]he proposed representative plaintiff must be a genuine plaintiff with a real role to play and not a placeholder plaintiff recruited to cater to the entrepreneurial interests of class counsel". While, I do not retract from that statement, the immediate case demonstrates that a carriage motion is not the place to resolve the matter of whether the proposed representative plaintiff is a genuine plaintiff or an incompetent or submissive puppet of entrepreneurial Class Counsel.

[82] In the motion material and in the factum for the carriage motion, the Consortium in the *Kogut Action* extoll the competence and commitment of each of the three *Kogut Action* plaintiffs but devalue the more modest, in the sense of less self-aggrandizing, affidavit evidence of Mr. Winder.

[83] For instance, the Consortium mistakenly points out that Mr. Winder did not swear an affidavit in support of his motion for carriage, which he in truth did , and the Consortium correctly points that Mr. Winder does not explain why he retained Siskinds LLP, which is truly something he did not expressly do. The Consortium submits that there is thus a limited basis to assess Mr. Winder's engagement, compared to the more detailed information submitted on behalf of the three Kogut Plaintiffs.

[84] The weakness in these submissions against Mr. Winder is that they disregard the fact that Mr. Winder had already delivered an early affidavit in his proactive record for certification and that the obvious reason that any representative plaintiff retains counsel is that he or she is a member of a group that has been harmed by the defendant and is seeking access to justice.

[85] It may be that Mr. Winder was more modest and less effusive than the *Kogut Action* Plaintiffs, but in most cases, including the immediate one, the quality of the proposed representative plaintiffs will be a neutral factor. At the carriage motion stage, all that is required is that the proposed representative plaintiff personally be able to plead a claim against the

[23] 2018 ONSC 271 at para. 44.

defendant and have retained counsel do so.

[86] Had the outcome of the carriage motion been different, Mr. Winder would have been a class member in the *Kogut Action*. In my opinion, it is unseemly and unnecessary on a carriage motion for Class Counsel in one proposed class action to disparage the proposed representative plaintiff in another proposed class action.

(b) Funding

[87] In the immediate case, the Funding Factor is a neutral factor.

[88] The Consortium and Siskinds LLP respectively have entered into contingency fee agreements. The Consortium and Siskinds LLP respectively have a sufficient track record in class proceedings to reveal that they have the resources to prosecute the action. The Consortium and Siskinds LLP respectively have undertaken to indemnify the Representative Plaintiffs from any adverse costs award. Siskinds LLP has not obtained third-party funding but is committed to prosecuting the action. The Consortium has plans to attempt to obtain third-party funding or the support of the Class Proceedings Fund, but the Consortium is committed to prosecuting the action regardless. The Funding Factor is thus neutral.

[89] As I noted earlier in these Reasons for Decision, it was only during the oral argument of the carriage motion, that the Consortium undertook to indemnify the Plaintiffs from any adverse costs award. This undertaking was prompted because during the oral argument, I indicated that the absence of this undertaking might be a "deal breaker" as far as carriage was concerned.

[90] I said as much because in promoting the *Winder Action* for carriage, Siskinds LLP had criticized the Consortium because it had reserved the right to seek to discontinue the action if an indemnity for adverse costs awards was not obtained from a third-party funder. In this regard, the retainer agreement in the *Kogut Action* stated:

> 18. In the event that funding for disbursements and/or an indemnity for the payment of adverse cost awards is not obtained from a third party funder or the [Class Proceedings Fund], the Clients acknowledge that [Kogut Counsel] may seek to discontinue the Action on a without costs basis.
>
> […]
>
> 21. This agreement and the Clients' participation as representative plaintiffs in this Class Action is contingent upon a private funder or the [Class Proceedings Fund] granting funding and, in particular, a cost indemnity to the Clients.

[91] Siskind LLP's criticism of the approach of the Consortium was correct. In my opinion, if proposed Class Counsel wishes to make their commitment to a class action contingent upon a private funder or the Class Proceedings Fund granting funding and, in particular, a cost indemnity to the clients, then Class Counsel should not file a notice of action or a statement of claim or participate in a carriage motion until that third-party funding or the participation of the Class Proceedings Fund is secured. They ought not to hedge.

[92] In my opinion, it is indeed a deal breaker on a carriage motion to commence a proposed class action and reserve the right to seek to discontinue the action if third-party funding is not obtained or an indemnity for the payment of costs is not obtained. As it is, Class Counsel has the right to select whether they will take on the risks associated with a class action, but Class Counsel cannot hedge their bets with a right to seek a bail-out by applying to discontinue the

class action on the sole ground that third-party funding or an adverse costs indemnity for their client proved unavailable after they had already issued a statement of claim. This is to play red-light green light with the access to justice that Class Counsel control. It is a deal breaker as far as obtaining carriage is concerned.

[93] In the immediate case, the Consortium heard the gospel and found class action religion, and in the result, the Funding Factor became a neutral factor.

[94] To avoid problems in future cases, I wish to be clear that I am not saying that the plaintiff in a proposed class action must always be protected from adverse costs consequences by an entrepreneurial class counsel or a third-party funder. While I think it will be quite rare, there may be cases where it would be appropriate for the plaintiff to share the risks of the action with class counsel notwithstanding that the plaintiff's share of the settlement or judgment prize will dwarf class counsel's giant share of the prize. What I am saying is that this sharing of the risks and rewards must be clearly understood and accepted by the client and it must be determined before a proposed class action is commenced and not made a future contingency for the prosecution of the class action.

[95] To avoid problems in future cases, I also wish to be clear that I am not saying that if Class Counsel does agree to indemnify the plaintiffs for adverse costs consequences, they cannot - with proper instructions from the plaintiff - apply for a discontinuance of the proposed class proceeding.

[96] One final point about funding. I was not impressed with the Consortium's argument that obtaining external funding, as it was attempting to do, favoured granting carriage to it because third party funding would allow the Consortium to take more aggressive steps in the litigation, and advance Class Members' interests more assertively and that conversely, Siskinds LLP which was not seeking third-party funding would necessarily be more risk-averse absent any third-party funding agreement.

[97] Without or without third party funding, Class Counsel takes on the risks associated with a contingency fee agreement, which is the major risk assumed by entrepreneurial class counsel action. It is doubtful that that the additional risk of picking up the tab of an adverse costs award will make Class Counsel risk adverse or abate its aggressiveness in prosecuting the class action.

(c) Fee and Consortium Agreements

[98] The fee arrangements are a neutral factor in the immediate case.

[99] The Consortium and Siskinds LLP have respectively been engaged pursuant to contingency fee agreements. Ultimately, the court must approve Class Counsel's fee regardless of what is stated in the retainer agreement.

[100] In so far as the matter of consortium agreements effects fees, this is a matter that typically can be sorted out at the fee approval hearing. As such, in the immediate case, the Consortium Agreement factor is neutral.

[101] I shall, however, return to the topic of value of forming consortiums in the discussion below about Factor 17 (the Interrelationship of Class Actions in more than one Jurisdiction).

(d) The Quality of Proposed Class Counsel

[102] While the Consortium acknowledges that Siskinds LLP is excellent Class Counsel, the Consortium submits that its own experience and expertise with respect to the tort of intrusion upon seclusion cannot be matched by Siskinds LLP, whose materials do not include any evidence of the lead lawyers having experience with this tort. The Consortium says that its more substantial experience in privacy law tips the scales in favour of the Consortium.

[103] I disagree that the quality of proposed Class Counsel favors the Consortium. Granted it is nice that the Consortium has Mr. Du Vernet on its team, but there is nothing to suggest that Siskinds LLP cannot get up to speed or that the Consortium without Mr. Du Vernet could not adequately do the job.

[104] There is nothing to suggest that the putative Class Members will not be equally well served by whatever law firm or whatever combination of law firms is granted carriage of the class action. All of the law firms appear to have the legal and forensic skills to prosecute the representative plaintiff's claims.

[105] The quality of proposed Class Counsel is a neutral factor in the immediate case.

(e) Disqualifying Conflicts of Interest

[106] There are no apparent conflicts of interest, and so, this factor is neutral in the immediate case.

(f) Relative Priority of Commencement of the Action

[107] The *Kogut Action* was commenced on December 3, 2018, and the *Winder Action* was commenced on December 20, 2019. Technically, this factor favors the *Kogut Action*, but the relative priority of the commencement of the actions is, practically speaking, neutral or of weightless significance in the circumstances of the immediate case.

(g) Preparation and Readiness of the Action

[108] Siskinds LLP relied heavily on the preparation and readiness of the action factor in support of its quest for carriage. It submitted that its superior preparation and readiness was demonstrated by the fact that it, alone among the competing law firms, had already delivered its motion record for certification, including expert evidence and a detailed litigation plan.

[109] In my opinion, this factor was neutral, and while Siskinds LLP was not harmed by the early delivery of its certification motion record, this is not a helpful practice when there is the prospect of a carriage contest.

[110] Putting aside the matter of Siskind LLP's early delivery of the record for a certification motion, it and the Consortium have demonstrated that they have prepared and will be ready to proceed with the proposed class action. While not as revealing of its plans and preparation, the Consortium has revealed enough to neutralize the greater disclosure of information made by Siskinds LLP.

[111] Turning to the matter of an early delivery of the motion material for the certification

motion, it would appear that this was done for the purpose of winning carriage. If this is true, one is left to ask whether and why but for the carriage contest, would Siskinds LLP have been so prompt in delivering a certification motion? And, more importantly, one is left to ask when ought the record for a certification motion be delivered?

[112] To begin to answer these questions, I begin by noting that although in practice the class action bar seem to ignore the matter, the proper practice before a certification motion is brought is to address, usually at a case conference, among other things: (a) whether the defendant proposes to bring a jurisdictional or stay motion; (b) whether the defendant intends to challenge the statement of claim as not disclosing a reasonable cause of motion; and (c) whether the defendant will be relieved of its obligation under the *Rules of Civil Procedure* to deliver a Statement of Defence before the certification motion. Until these matters are addressed, it is premature to deliver material for a certification motion.

[113] I have opined on the matter of the close of pleadings in class actions, as have some other courts, but there is a strong case to be made that a certification motion should follow the close of pleadings because this facilitates the analysis of whether the certification criteria are satisfied.[24] In any event, there are a variety of issues that ought to be addressed before the plaintiff brings his or her motion for certification. Thus, it was presumptuous, procedurally disruptive, wasteful, and ill-advised for Siskinds LLP to serve a record for a certification motion for the purpose of shoring up its request for carriage.

[114] Further, until the matter of carriage is resolved, generally speaking, it is ill-advised to deliver the evidentiary record for the certification motion for reasons apart from properly managing the progress of the proposed class action.[25] One disadvantage of a preemptive delivery of the record for the certification motion, as occurred in the immediate case, is that defendant's counsel sits at the back of the courtroom copiously taking notes of how the Consortium attacks the plans and preparation of the party that delivered its certification motion before learning whether it has carriage of the proposed class action.

[115] Thus, in the immediate case, in seeking carriage, Siskinds LLP was ultimately not helped by the early delivery of a motion for certification. That said, for the purposes of the carriage motion, all that can be said is that Siskinds LLP and the Consortium both satisfy the preparation and readiness of the action factor and thus this factor is neutral.

(h) Preparation and Performance on Carriage Motion

[116] Preparation and performance on the carriage motion is a neutral factor in the immediate case.

(i) The Quality of the Litigation Plan Factors: Case Theory; Scope of Causes of Action; Selection of Defendants; Correlation of Plaintiffs and Defendants; Class Definition; Class Period; Prospect of Success: (Leave and) Certification; Prospect of Success against the Defendants

[117] As noted above, nine of the factors (Factors 9 to 17) are about or are connected to case

[24] *Pennyfeather v. Timminco Limited*, |2011 ONSC 4257.
[25] *Quenneville v. Audi AG*, 2018 ONSC 1530.

theory, which is at the heart of the test for determining carriage. However, while these factors are very important on a carriage motion, once again, they are problematic, ironical, controversial, and difficult to weigh.

[118] Amongst the problems is the problem that to win the carriage contest, the rival proposed Class Counsel laud the ingenuity and the advantages of their own case theory while savaging their rival's case theory as prosaic, mistaken, and disadvantageous, but it is both premature and difficult for the court on the carriage motion to decide who wins this extolling and dissing match.

[119] In most cases, the debate is not beneficial to the putative Class Members, but the debate is all to the delight to the defendants' counsel sitting in the back of the court room monitoring the carriage motion. Because of the open-court debate about case theory, the defendants are tipped off to the strengths and weaknesses of both case theories.

[120] Another problem is that putative Class Counsel's self-praise of its case theory, particularly the supposedly ingenious aspects of it, must be evaluated with a high level of skepticism.

[121] Amongst the many ironies of class action practice, what is lauded about the case theory on a carriage motion is on a settlement motion discarded and used to explain; (a) how enormous were the high litigation risks of proceeding in the action to a trial; and (b) why Class Counsel now recommends a settlement that is at some considerable distance from the aspirations of the case theory extoled at the carriage motion.

[122] The reality is that the overwhelming majority of class actions settle based on standard case theories and not the ingenious ones advanced at the carriage motion. The ingenious claims are shed like bargaining chips that have served their purpose.

[123] In the immediate case, with these thoughts in mind, in comparing and contrasting the case theories of the Consortium and Siskinds LLP, I make the following observations.

[124] With the exception of the matter of whether only Starwood's database was compromised and whether Starwood Canada is a proper, necessary, or unnecessary party, there is negligible difference about the factual underpinning for the competing case theories.

[125] From the perspective of the facts, the theory of both Siskinds LLP and the Consortium is built upon how the Defendants received and used the Class Member' information as part of Marriott's reservation and booking system or systems. Both theories build on whether the Defendants took adequate care to protect information and whether Marriott's response to the discovery of the data breach was appropriate. Based on these facts, both Siskinds LLP's case theory and the Consortium's case theory focus on the provincial privacy statutes and most particularly the tort of intrusion on seclusion.

[126] Although Starwood Canada is a party in some of the Consortium's overlapping class actions, the Consortium's case theory - for Ontario - does not have Starwood Canada as a party. Ultimately nothing might turn on this circumstance because of the parallel actions, and, in any event, the design of the Consortium's action against the Defendants in Ontario does not make Starwood Canada a necessary party because joining the parent company defendants is adequate.

[127] I do not regard the matter of whether Starwood Canada is a party, which it is in the *Winder Action*, or is not a party, which is the situation in the *Kogut Action*, is a substantive factor in the context of the carriage motion.

[128] In the *Kogut Action*, the Consortium augments the statutory claims and the predominant intrusion on seclusion tort with claims for: (a) breach of contract; (b) breach of warranty; (c) negligence; (d) breach of confidence; and (e) breach of fiduciary duty.

[129] For its part, Siskind LLP's adds the consumer protection statutory claims from all of the provinces. It submits these claims cover more readily and to the same end the legal territory of the breach of contract and other civil claims advanced by the Consortium. Further, Siskinds LLP submits that the statutory claims it advances avoid problems that would confront the Consortium's case theories because of the choice of law, choice of forum, and class action waiver clauses in the agreements between Marriott and those consumers using its reservation and booking system(s).

[130] Notwithstanding the arguments of the Consortium or the arguments of Siskinds LLP, I do not regard the claims that are additional to the claims based on the provincial privacy statutes and the tort of intrusion on seclusion as enhancing either case theory in the sense of enhancing the chances of certification, which will depend on whether the intrusion on seclusion claim satisfies the test for certification. Thus, the case theory contest is essentially a tie.

[131] In my opinion, in the context of the carriage factors, the extolled strengths and the dissed weakness of the case theories of either the Consortium or of Siskinds LLP balance each other out. Since both theories are built on the same factual foundation and since the workhorse for both case theories is the tort of intrusion on seclusion on the macroscopic level of grand strategy, the case theory carriage factor approaches neutral.

[132] Relatively speaking, I do not see either the Consortiums or Siskinds LLP added statutory or common law claims as adding to the complexity or expense of what will be a very complex intrusion on seclusion claim that involves whether or not Marriott met the standard that the law requires in protecting the privacy of consumers.

[133] Because of the disagreement about what Marriott databases were compromised, Siskinds LLP criticizes the class definition of the Consortium's case theory and also suggests that the Consortium has revealed that it does not understand the nature of the Class Member's claims. In turn, the Consortium defends its class definition and criticizes Siskinds LLP for introducing a merits-based class definition, which is a no-no to class action aficionados.

[134] While I do not think that there is anything technically wrong with either proposed class definition, once again, at this juncture, I do not see the differences as a substantive factor in the determination of whom should be granted carriage.

[135] Practically speaking, the right definition of the Class will be determined when more is known about the data breach. Practically speaking, the investigation and pinning down who was affected by the data breach will not add to the expense or the complexity of the class action. If it emerges that more than the Starwood database was compromised, it does not follow that that the class action proposed by the Consortium would be unmanageable. And the result of properly identifying Class Members would not be a merits-based analysis or a merit-based class definition, because it would remain to be determined whether all the elements of their causes of action could be proven.

[136] Thus, case theory, scope of the causes of action, selection of defendants, correlation of plaintiffs and defendants, class definition, and class period are all more or less equal or equalized as carriage factors. Although Siskinds LLP disclosed more of its litigation plan because of the

delivery of its motion for certification, the Consortium disclosed enough to neutralize this carriage factor. I would rate the prospects of either case theory obtaining certification as equal. At this juncture of the proceedings, I would rate the prospects of ultimate success against the defendants of either case theory as equal.

4. Interrelationship of Class Actions in more than one Jurisdiction

[137] This brings the discussion to what I regard as the tipping point or determinative factor in the carriage contest. The discussion below should be read with the discussion above about avoiding a multiplicity of class proceedings.

[138] In normal litigation, if a defendant was sued by the same plaintiff about the same cause of action in British Columbia, Alberta, Ontario, Québec, and Nova Scotia, the defendant would bring motions in those provinces for the purpose of being sued in just one jurisdiction; *i.e.*, the defendant would seek to have the action tried in the one court with jurisdiction *simpliciter* and that was the *forum conveniens* for the action. As noted above, the criteria for determining which is the *forum conveniens* are well known and bear some resemblance to the factors used to determine carriage.

[139] In class actions, however, when there is a multiplicity of overlapping class actions, instead of using the procedures available to identify the *forum conveniens*, defendants acquiesence to there being more than one class action. They acquiescence because Class Counsel or the Consortium of Class Counsel informally agree to prosecute the class action in one jurisdiction while informally "parking" or "pausing" the other class actions.

[140] This approach is what appears to be happening in the immediate case where overlapping class actions have been brought in British Columbia, Alberta, Ontario, Québec, and Nova Scotia. In the immediate case, the approach of the Consortium is to use the approach of having a multiplicity of overlapping class actions and then sorting out the matter of how to proceed with them through the use of co-operation agreements. Indeed, the Consortium relies on this approach as being a factor strongly in its favour.

[141] In contrast, while Siskinds LLP is prepared to co-operate and co-ordinate with other Class Counsel, its approach does not concede that there should be overlapping class actions. Siskinds LLP has not prejudged the outcome of using the Uniform Law Conference of Canada provisions that address competing multi-jurisdictional class actions.

[142] Indeed, Siskinds LLP harshly criticizes the approach of the Consortium and submits that its different approach favours granting it carriage. To quote from its responding factum on the carriage motion, Siskinds LLP states:

> Kogut Counsel has brought four distinct class actions with substantially overlapping or identical classes in four distinct jurisdictions across Canada, including in British Columbia where they also contest carriage on behalf of a proposed national class (a proposed class definition identical to the Kogut Action). Pursuing the four actions across Canada is *prima facie* inefficient use of the parties' and the courts' resources. Additionally, Kogut Counsel has advanced no evidence on the reason why four actions had to be commenced across Canada, or what they plan to do about them, giving rise to concerns regarding potential abuses of the courts' processes. Furthermore, the four actions cannot be pursued at the same time coherently, but would inevitably give rise to complexities, inefficiencies and potential conflicts. Kogut Counsel has not produced any plans regarding how it plans to manage and prosecute the four actions.

[143] While Siskinds LLP's criticism may be overly critical and somewhat hypocritical given that it has participated in consortiums in other cases, in my opinion, in the immediate case, Siskind LLP's approach does strongly favours granting carriage to it.

[144] The approach adopted by Siskinds LLP does not suffer from the not uncommon inconsistencies and ironies of class action practice in Canada of a putative Class Counsel commencing more than one national or regional class action, as for example Koskie Minsky LLP did in the immediate case.

[145] In the immediate case, Koskie Minsky LLP achieved carriage in Alberta by settlement and in Nova Scotia without opposition while it is fighting for carriage in British Columbia and Ontario. It is difficult to explain why Koskie Minsky LLP thought it desirable for the administration of justice to have it commence or participate in national class actions in three provinces and bring a demi-national class action in a fourth province.

[146] In my opinion, in the immediate case, it is desirable that the courts across the country, not Class Counsel, determine how to manage a multiplicity of overlapping class actions. I agree with the Uniform Law Conference that it is "possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem".

[147] Based on the record on the carriage motion, I am not convinced that class proceedings about the same wrongdoing are inevitable or necessary in all of British Columbia, Alberta, Ontario, Québec, and Nova Scotia. Based on the record on the carriage motion, there is a reasonably strong case that a single national class action be it in British Columbia, Alberta, or Ontario would provide of access to justice, behaviour modification, and judicial economy. Based on the record on the carriage motion, there is a reasonably strong case that while any of the courts of British Columbia, Alberta, or Ontario could do the job, Ontario is the *forum conveniens* for a national class action having regard to the current rules governing jurisdiction, which focus on such matters as the avoidance of multiplicity of proceedings; the applicable law and its weight in comparison to the factual questions to be decided; geographical factors suggesting the natural forum; and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court.

[148] As I stated above, sometimes a multiplicity of overlapping class actions may be desirable and that may be true in the immediate case, but the Consortium in the immediate case assumes this to be true without having it tested, and the Consortium in the immediate case simply leaves unanswered the question of whom among all of the following shall share the work, risks, and rewards of being Class Counsel: (1) Siskinds LLP, (2) Koskie Minsky LLP, (3) Landy Marr Kats LLP, (4) McKenzie Lake Lawyers LLP, (5) Du Vernet, Stewart, (6) Guardian Law Group LLP, (7) James H. Brown Associates, (8) Woods LLP; (9) Rochon Genova LLP; (10) Boughton Law Corporation; (11) Acheson Sweeney Foley Sahota LLP; (11) Hammerberg Lawyers LLP, (12) Evolink Law Group; and (13) Garcha & Company

[149] If the Consortium were granted carriage in Ontario and in British Columbia and with the national strategy of working cooperatively with other Canadian law firms, it appears that without being tested as to desirability or necessity as many as nine law firms might be involved in resolving a national class action.

[150] In contrast, if carriage is granted to Siskinds LLP, while it is possible that there will be

overlapping class actions with nine or more law firms sharing the risks and the rewards, it is also possible that there might be: (a) one national class action out of Ontario involving one law firm; or (b) two class actions, one for the common law provinces out of Ontario with a regional action for Québec involving just three law firms.

[151] In the circumstances of the immediate case, in my opinion, Siskinds LLP approach to the interrelationship of class actions in more than one jurisdiction favours granting it carriage.

[152] I should add that although it would have been a very close call, I would have granted it carriage in any event.

D. Conclusion

[153] For the above reasons, I grant carriage to the *Winder Action* and I stay: (a) *Kogut, Schnarr and Brown v. Luxury Hotels International of Canada ULC and Marriott International, Inc.*; (b) *Arthur v. Marriott International, Inc.*; and (c) *Martineau v. Marriott International, Inc. and Starwood Hotels & Reports Worldwide*.

E. Epilogue

[154] In Ontario, carriage has now been granted to Siskinds LLP for a national class action. In Québec, carriage has been granted to Woods LLP and Rochon Genova LLP for a regional class action. In Alberta, Koskie Minsky LLP, along with Guardian Law Group LLP and James H. Brown Associates has carriage for a national class action. In Nova Scotia, Koskie Minsky LLP has carriage in for a regional class action for the maritime provinces. In British Columbia, carriage has not been determined.

[155] To sort out this procedural morass, I suggest that: (a) either the Marriott Defendants simultaneously bring *forum conveniens* motions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia; or (b) Siskinds LLP simultaneously bring motions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia to settle how many class actions should proceed pursuant to the model of the the Uniform Law Conference's legislation.

[156] The model legislation is already in place in British Columbia and Alberta and it already fits nicely with the existing forum conveniens law in Ontario, Québec, and Nova Scotia.

[157] Using modern technology, the simultaneous motions could be heard simultaneously, or given the Supreme Court of Canada's decision in *Endean v. British Columbia*,[26] there could be a joint hearing in any of British Columbia, Alberta, Ontario, Québec, and Nova Scotia. It may be that this approach will allow Canadian courts to develop a procedure akin to and perhaps better than the MDL procedure (multiple district litigation) used by American states.

Perell, J.

Released: October 7, 2019

[26] 2016 SCC 4.

CITATION: Winder v. Marriott International Inc., 2019 ONSC 5766
COURT FILE NO.: CV-18-00611365-00CP
COURT FILE NO.: CV-18-00610076-00CP
COURT FILE NO.: CV-18-00610017-00CP
COURT FILE NO.: CV-18-00610079-00CP
DATE: 2019/10/07

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GLEN WINDER

Plaintiff

- and -

MARRIOT INTERNATIONAL, INC., MARRIOT HOTELS OF CANADA LTD. and STARWOOD CANADA ULC

Defendants

AND BETWEEN:

LAVERNE ARTHUR and ANNE ARTHUR

Plaintiffs

- and -

MARRIOTT INTERNATIONAL, INC.

Defendant

AND BETWEEN:

KARA MARTINEAU

Plaintiff

- and -

MARRIOTT INTERNATIONAL, INC. and STARWOOD HOTELS & RESORTS WORLDWIDE, LLC

Defendant

AND BETWEEN:

RUTH KOGUT, ZACHARY SCHNARR AND FRANK BROWN

Plaintiffs

- and -

LUXURY HOTELS INTERNATIONAL OF CANADA and MARRIOTT INTERNATIONAL, INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: October 7, 2019