COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Stanway v. Wyeth Canada Inc.*,
2012 BCCA 260

Date: 20120615
Docket: CA039316

Between:

Dianna Louise Stanway

Respondent
(Plaintiff)

And

**Wyeth Canada Inc., Wyeth Pharmaceuticals Inc.,
Wyeth Holdings Canada Inc., Wyeth Canada,
Wyeth-Ayerst International Inc. and Wyeth**

Appellants
(Defendants)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, August 4, 2011,
(*Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057,
Vancouver Docket No. S111075)

Counsel for the Appellants:	W. McNamara R.C. Sutton T.J. Walsh
Counsel for the Respondent:	D. Lennox N. Hartigan
Place and Date of Hearing:	Vancouver, British Columbia March 20, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 15, 2012

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:

The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

[1] This is an appeal from a certification order of a class action. The claim concerns allegedly harmful hormone replacement therapy drugs.

[2] The *Class Proceedings Act*, R.S.B.C. 1996, c. 50, (the "*Act*") came into force on August 1, 1995. In the following 17 years trial and appellate courts have grappled with the many issues raised by this new procedural tool in a wide array of civil disputes.

[3] The legislation is no longer novel and has since been utilized in a host of different claims. It can now be said that certain issues have been settled and guiding principles (including those expressed in the *Act*) have emerged to answer a key, and often determinative, question in the action – the certification application.

[4] In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15, Chief Justice McLachlin discussed three important advantages of class actions over a multiplicity of individual suits:

> 15 ... First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

[5] In light of these advantages, McLachlin C.J.C. instructed courts not to take "an overly restrictive approach to the legislation, but rather [to] interpret the Act in a way that gives full effect to the benefits foreseen by the drafters" (at para. 15).

[6] At para. 16, she further underscored the limited nature of the inquiry on certification:

> [16] ... the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action ...

[7] Although the certification stage does not entail a test of the merits of an action, the

representative plaintiff must still establish an evidentiary basis for the certification requirements provided in the *Act*, other than the requirement that the pleadings disclose a cause of action: *Hollick*, *supra*, at para. 25; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 25, 46 B.C.L.R. (4th) 234. In *Ernewein*, Madam Justice Newbury described the basis for the evidentiary requirements for certification as follows:

> [25] Although it is clear that no assessment of the merits of the claim takes place at the certification stage, it is equally clear that an "evidentiary basis" is required for each of the certification requirements other than that the pleadings disclose a cause of action. The phrases "evidentiary basis" and "basis in fact" were used by the Supreme Court of Canada in *Hollick*, (*supra*, at paras. 24-26) in such a manner as to be synonymous with "evidence", and as the Chief Justice pointed out, the requirement arose from the statutory obligation placed on the plaintiff in a class proceeding in Ontario to file "one or more affidavits setting forth the material facts" to be relied upon. The British Columbia legislation is similar in this regard: s. 5(1) of the Act requires an applicant for certification to file an affidavit containing the items specified at s. 5(5), and the recipient of the notice of motion may also file affidavit material: s. 5(4). In *Hollick*, after citing with approval the Ontario cases of *Caputo v. Imperial Tobacco Ltd.* (2004) 236 D.L.R. (4th) 348 (Ont. Sup. Ct. J.) and *Taub v. Manufacturers Life Insurance Co.* (1988) 40 O.R. (3d) 379 (Ont. Ct. (Gen. Div.)), McLachlin C.J.C. noted:
>
> > I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, supra, at para. 4.60.
>
> [Emphasis in original.]

[8] Although the determination of common issues often proves contentious, they need not be determinative of liability for certification. The resolution of a single common issue does not have to provide a sufficient basis for relief. For common issues to be certifiable, they need only be "issues of fact or law that move the litigation forward": *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 at para. 53, 98 B.C.A.C. 22 (C.A.), *per* Cumming J.A., for the Court.

[9] In addition, commonality should be approached purposively, in light of the underlying question of whether class proceedings will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39, [2001] 2 S.C.R. 534, *per* McLachlin C.J.C.

[10] Expounding upon this purposive approach to certification in *Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184 at para. 29, McLachlin C.J.C. accepted that there was "clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms". She explained that the ends of fairness and efficiency would not be served by certifying issues that are only common in the most general of terms. An action dependent upon overly general common issues will inevitably break down into individual proceedings such that the initial certification of common issues would only serve to undermine the policy rationales of fairness and efficiency (at para. 29).

[11] Despite the caution against certifying issues that are overly broad, common issues need not predominate over non-common issues or be determinative of each member's claim. This tension was addressed in *Dutton,* where McLachlin C.J.C. explained that proposed common issues for class members in non-identical circumstances can be certifiable so long as the class is bound together by a substantial ingredient necessary to the resolution of each member's claim:

> [39] ... an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [Emphasis added.]

[12] The requisite relationship between common and individual issues was addressed more specifically in *Harrington v. Dow Corning,* 2000 BCCA 605, 82 B.C.L.R. (3d) 1. In that case, the common issue certified by the chambers judge was: "Are silicone gel breast implants reasonably fit for their intended purpose?" (at para. 41). According to the chambers judge, the common issue encompassed the question of whether implants could cause the diseases at issue. In her reasons, Madam Justice Huddart found the core of the appellant's objection to the certification of this common issue to be that "severance of the issue of general causation from individual causation [was] unfair" to the appellants (at para. 55). However, Huddart J.A. went on to find that a question concerning general causation was not too broad to be certified as a common issue. She wrote:

> [42] At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. Some American authorities refer to this step as "general causation", whether a product is capable of causing the harm alleged in its ordinary use.

[13] She went on to explain why resolution of general causation advances class members'

individual cases at para. 63:

> [63] The policy goals underlying the *Class Proceeding Act* are efficiency, access to the courts, and modification of the behaviour of wrongdoers. All will be served by the preliminary determination of whether breast implants carry inherent danger and, if so, what the risks are. Individual issues of proximate causation, date of discoverability, allocation of fault, and damages are important but they are consequential to a finding of the risks inherent in breast implants. No persuasive reason was put forward for requiring that those individual issues be determined in the same proceeding as the nature and extent of the risks. Their resolution will be made easier by the resolution of the common issue.

[14] As alluded to in paragraph 10 above, it is also well established that the *Act* is designed to accommodate limited differentiation amongst class members that are bound together by a common issue or issues. For instance, in *Harrington* at para. 64, Huddart J.A. held that:

> The possibility that some claims may be barred by a limitations period or that others may require the consideration of negligence by the plaintiffs or third parties, is not a reason to refuse certification of the common issue. It is equally possible that the determination of the common issue will reduce the number of active claimants as well as the size of some claims.

[15] In addition, in *Rumley,* McLachlin C.J.C. explained that variation of the applicable standard of care over the relevant time period "simply means that the court may find it necessary to provide a nuanced answer to the question" (at para. 32). The Chief Justice went on to highlight mechanisms in the *Act* for dealing with variance amongst the class, and concluded that it provides a degree of flexibility for accommodating differentiation amongst members (at para. 32):

> 32 ... I further note that the *Class Proceedings Act* contemplates the possibility of subclasses and that the court may amend the certification order at any time: see s. 6(1) (permitting court to recognize subclasses under certain conditions); s. 7(e) (stating that the court "must not refuse to certify a proceeding as a class proceeding merely because . . . the class includes a subclass whose members have claims that raise common issues not shared by all class members"); s. 8(3) (stating that "[t]he court, on the application of a party or class member, may at any time amend a certification order"); s. 10(1) (stating that "[w]ithout limiting section 8(3), at any time after a certification order is made . . . the court may amend the certification order"). In my view the *Class Proceedings Act* provides the court with ample flexibility to deal with limited differentiation amongst the class members as and if such differentiation becomes evident.

[16] After canvassing the wording of the *Act* and its mechanisms for accommodating differentiation, McLachlin C.J.C. came to "question the extent to which differences between class members should be taken into account" at the certification stage. She concluded that the commonality question, under the British Columbian legislation, is "quite narrow":

> [33] ... The British Columbia *Class Proceedings Act* explicitly states that the commonality requirement may be satisfied "whether or not [the] common issues predominate over issues affecting only individual members": s. 4(1)(c). (This distinguishes the British Columbia legislation from the corresponding Ontario legislation, which is silent as to whether predominance should be a factor in the commonality inquiry.) While the British Columbia *Class Proceedings Act* clearly contemplates that predominance will be a factor in the preferability inquiry (a point to which I will return below), it makes equally clear that predominance should not be a factor at the commonality stage. In my view the question at the

commonality stage is, at least under the British Columbia *Class Proceedings Act*, quite narrow.

THE APPEAL

[17] Wyeth Canada, Inc., Wyeth Pharmaceuticals, Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth Ayerst International Inc. and Wyeth (collectively, "Wyeth") appeals from the certification order made August 4, 2011 and entered November 22, 2011. The respondent, Dianna Louise Stanway, was appointed the representative plaintiff of the class which was defined by the order as:

> Women who were prescribed Premplus, or Premarin in combination with progestin, in Canada during the Class Period and ingested Premplus, or Premarin in combination with progestin and were thereafter diagnosed with breast cancer.

[18] The class period is defined by the order to run from January 1, 1977 until December 1, 2003, inclusive, or 26 years and 11 months.

[19] The appellants' factum identifies the following alleged errors of judgment:

> The learned Chambers Judge:
>
> > (a) erred in finding that the Plaintiff had advanced an evidentiary basis to support the Plaintiff's position that the proposed common issue relating to a causal connection between HT [Hormone Therapy] and breast cancer was a triable issue or that there was a workable methodology for a determination of "causation" on a class wide basis;
> >
> > (b) erred in accepting that the class period should be defined as running from January 1, 1977 to December 1, 2003;
> >
> > (c) erred in certifying as a common issue the question of whether the Defendants engaged in "*deceptive acts or practices*" contrary to the *BPCPA* [*Business Practices and Consumer Protection Act*], as this common issue as framed is overly broad and fails to identify which of the numerous representations identified in the record were allegedly "*deceptive acts or practices*";
> >
> > (d) erred in certifying as a common issue the question of whether the Defendants engaged in "*deceptive acts or practices*", as there was no basis in fact for the conclusion that even a single proposed class member had seen any of the statements or representations by the Defendants or that there was a single representation to the "*world at large*";
> >
> > (e) erred in finding that the Plaintiff's claims based upon an alleged "*failure to disclose*" disclosed a cause of action under the *BPCPA*; and
> >
> > (f) erred in finding that the Plaintiff had satisfied the "*preferable procedure*" requirement under subsection 4(1)(d) of the *CPA* [*Class Proceedings Act*], in that the individual issues would overwhelm any benefit conferred by a common issues trial, particularly in light of the errors stated above and when considered in the context of the expansive class period certified.

BACKGROUND

[20] Wyeth began selling a hormone therapy, Premarin, a conjugated estrogen, in 1941. Conjugated estrogen became widely used in the 1960s as a treatment for the symptoms of menopause. In the 1970s, hormone therapy prescriptions began to include progestin, a synthetic form of progesterone, to counter an increased risk of endometrial cancer associated with taking estrogen alone. Premplus, which combines a conjugated estrogen tablet with a progestin tablet in the same package, was first authorized for sale in 2000. Premarin and Premplus are the two hormone therapy products in issue in this action. Both products are available only by prescription from a licensed health care professional.

[21] The products were each subject to prescribing information. In 1977, the prescribing information for Premarin included contraindication for use in patients with a history of breast or endometrial cancer. The prescribing information was revised in August 1996 to include references to epidemiological studies showing an increased risk of developing breast cancer and the use of hormone therapy in menopause for periods exceeding ten years.

[22] In October 2000, the Premplus product monograph indicated that an increased risk of breast cancer after five years of hormone therapy should be considered and discussed with patients. It also recommended regular breast self-examination.

[23] A watershed event in the use of hormone therapy was the release in June 2002 of the results of the Women's Health Initiative Study (the "WHI study"). It found that 8,500 women who used estrogen plus progestin therapy had a small but statistically significant increased risk of breast cancer compared to 8,100 women who were given a placebo. Eight more incidents of breast cancers per 10,000 women per year were observed in the group taking hormone therapy.

[24] The WHI study was terminated when researchers concluded it would be unethical to continue given the harm observed in the study. A public warning was issued in July 2002, after which the prescriptions for hormone therapy products fell from 12.7% of all 50-69 year-old Canadian women in 2002 to 4.9% of all 50-69 year-old Canadian women in 2004. The decreased use coincided with a 9.6% drop in Canadian breast cancer rates.

[25] The respondent, Ms. Stanway, began taking Premarin and progestin in 1995 for symptoms related to menopause. In 2002, she became aware of the WHI study linking hormone therapy to breast cancer. After consulting with her physician, she reduced her consumption and by March 2003 she had stopped taking the hormone therapy completely. In May 2003 she had a mammogram that revealed a tumour, which was later diagnosed as breast cancer. She filed her statement of claim in May 2005, in which she alleges both negligence and breach of the provisions of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BPCPA*").

SUPREME COURT CERTIFICATION APPLICATION

[26] The certification application was heard over three days in March 2011 by the judge who has been the case management judge since 2006.

[27] In reasons indexed as 2011 BCSC 1057, the judge reviewed the conditions necessary to certify a class action, sections 4(1) and (2) and 5(1) and (7) of the *Act*; the *Business Practices and Consumer Protection Act* ("*BPCPA*"); and Rule 9-5(1) of the *Supreme Court Civil Rules*, applicable to whether the pleadings disclose a cause of action.

[28] The judge then considered the evidence tendered on the certification application, cognizant that the plaintiff must provide "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action, upon which no evidence is admissible (Rule 9-5(2)).

[29] The centrepiece of the plaintiff's evidence was the reports of an epidemiologist employed by Cancer Care Ontario, Dr. Victoria Kirsh. Dr. Kirsh's evidence was summarized at para. 14 of the reasons:

> [14] The plaintiff asserts that the reports of Dr. Kirsh show there is "some basis in fact" to the allegations in the statement of claim. Specifically, the plaintiff asserts (all quotations are from Dr. Kirsh's reports):
>
> 1. Evidence supports the implication of estrogen and progestin in the etiology of breast cancer. Breast tissue is estrogen dependent and responds to the hormone's growth simulating [sic] effects. There is evidence of a role for estrogen metabolites in breast cancer. Progestin increases cell proliferation in breast tissue and "therefore an association with breast cancer is not unexpected."
> 2. The Women's Health Initiative (WHI) study was initiated in 1991. It was a randomized controlled trial, referred to as a level 1 study. One arm of the study was designed to measure the risks and benefits of estrogen-progestin HT. This portion of the clinical trial commenced in 1997. In 2002, WHI researchers concluded that the risks associated with estrogen plus progestin for use among healthy post menopausal women outweighed the benefits: after five years of follow up, estrogen plus progestin increased the risk of breast cancer.
> 3. A causal connection between estrogen-progestin therapy and an increased risk of breast cancer was established in the WHI study and these "findings were corroborated by results from recent prospective cohort studies; the increased risk appears to be particularly pronounced with longer durations of use."
> 4. News of the results of the WHI study caused a significant reduction in the number of prescriptions of HT. The decline in hormone therapy use in North America was followed by a decline in breast cancer rates.
> 5. Studies in international population trends show the same patterns in the years following the WHI trial results.

[30] Wyeth tendered several expert reports which the judge summarized at para. 16:

[16] Based upon the evidence they have provided, the defendants assert:

1. Dr. Collins addresses epidemiological issues in his affidavit, particularly the different types and corresponding levels of scientific evidence used in epidemiological research. He explains in his report the development of breast cancer and the numerous factors relating to genetics, family and personal history and life choices. The risk of each woman for breast cancer based on these various factors is different. Dr. Collins explains the hormone therapy which preceded the WHI study and the significance of the WHI study. Despite an association between HT and breast cancer, causation of breast cancer remains unknown, both generally and in specific cases.
2. Dr. Reid addresses a perspective on HT from his practice related experience. He addresses the pre-WHI study attitudes on HT and explains how the WHI study, and additional research, continued to change perceptions about the role of HT in treating menopausal symptoms. Dr. Reid reviews the sources of information and drug products for physicians over the period of HT. He also describes a typical encounter with a menopausal patient and the discussion which would occur between a doctor and his or her patient forming part of the informed consent for treatment, the individualized nature of the decision to use HT and the factors that each patient and physician must consider in determining whether HT use is appropriate.
3. Dr. Sedgeworth describes the regulatory framework in which Canadian drug manufacturers develop, test, manufacture, label and market their products. She discusses the role that Health Canada has played in considering use of HT in patients and that a consultative panel was struck to consider the relationship between HT and breast cancer. Health Canada regulates the contents of the pharmaceutical product labels and the packaging inserts and imposes stringent restrictions regarding consumer advertising.
4. Marie Berry describes the interchangeability of pharmaceutical products. A pharmacist may dispense another congregated estrogen instead of a branded estrogen product like Premarin. She also addresses the interaction between a pharmacist and a patient concerning the risks associated with HT, including breast cancer and the benefits.
5. Terry Davidson's affidavit attaches extensive communications and informal documents from Wyeth Canada and from the public domain regarding menopause, conditions associated with aging and HT. The materials appended to Mr. Davidson's affidavit describe the ongoing debate about whether HT is a risk factor for breast cancer and the evaluation and risk benefit analysis to be undertaken by a physician before prescribing HT. The material also demonstrates that Health Canada approved the product labelling. There was limited direct to consumer advertising undertaken and Wyeth Canada's sales representatives did not provide marketing material or information directly to patients, only to physicians and pharmacists.

[31] The judge found there to be an identifiable class, including a non-resident class that is not entitled to pursue a remedy under the *BPCPA*. She concluded that the plaintiff's claim disclosed causes of action in both negligence and under the provisions of the *BPCPA*. Wyeth did not take issue with the plaintiff having a cause of action in negligence, but did challenge the plaintiff's claim to a cause of action under the *BPCPA*.

[32] Applying a non-exhaustive list of general propositions provided in *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42, at para. 140, 87 C.P.C. (6th) 276, the judge determined whether there were any common issues that will resolve each class member's claim or a substantial ingredient of

each member's claim. Several other relevant authorities were also considered in making this determination: *Campbell*, *supra*; *Lam v. University of British Columbia*, 2010 BCCA 325 at para. 48; *Boulanger v. Johnson & Johnson Corp*. (2007), 40 C.P.C. (6th) 170 at para. 25; *Harrington v. Dow Corning Corp*. (1996), 22 B.C.L.R. (3d) 97, 48 C.P.C. (3d) 28 (S.C.); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575*; Wilson v. Servier Canada Inc*. (2000), 50 O.R. (3d) 219 (Ont. S.C.); and *Walls v. Bayer Inc*., 2005 MBQB 3.

[33] The common issues proposed by Ms. Stanway in the negligence aspect of her claim related to general causation, duty of care, breach of duty, whether Wyeth's conduct justified punishment, and punitive damages. The judge concluded that it was not necessary to certify a question as to whether Wyeth owed a duty of care, accepting Wyeth's submission that it is a self-evident proposition of law that manufacturers owe a duty of care to consumers of their products, and the resolution of the question would not advance the litigation.

[34] Central to the appeal is Wyeth's challenge to the certification of the question concerning general causation. The judge's analysis of this issue was to the point:

> [47] The defendants' position requires that I engage in "exacting scrutiny" of the expert opinions. While I appreciate that the experts hold differing views concerning whether there is a causal connection between the use of the defendants' products and breast cancer, I cannot at this stage of the proceedings compare or weigh the opinions. Such an approach is not consistent with the provisions of the *CPA*, which is to be construed generously in order to achieve its objects, as the jurisprudence consistently emphasises. I am not to assess the merits of the claim but rather, whether the form of the action can be heard as a class proceeding.
>
> (a) The defendants have emphasized that the cases where certification has been granted have the three factors: a limited time period on the market, a more apparent nexus between the product and the harm, and the product was withdrawn voluntarily or at the direction of Health Canada. The drug Neurontin was still on the market when the class action was certified in *Goodridge v. Pfizer Canada Inc*., 2010 ONSC 1095. I agree with the plaintiff that whether the drug is removed from the market or sold with a revised warning is immaterial: *Heward v. Eli Lilly & Co*. (2007), 39 C.P.C. (6th) 153 (Ont. S.C.J.), aff'd (2008) 91 O.R. (3d) 691 (Div. Ct.). The allegation is whether the defendants failed to provide a timely warning. In regard to the defendants' assertion that other cases were certified where there was more apparent nexus between the product and the harm, I repeat that it is not appropriate at this stage to subject the opinion evidence to vigorous scrutiny. Finally, in respect of whether the drug was voluntarily withdrawn from the market or by the direction of Health Canada does not preclude a certification in a class proceeding. Whether the drug was approved and reviewed from time to time by Health Canada is not dispositive of liability.
>
> (b) I find that the causal connection issue is a "substantial ingredient" of each of the class member's claims.

[35] Wyeth also challenges the certification of the question relating to the breach of duty of care. The judge acknowledged Wyeth's argument that determining the duty of care would be unduly complex because the duty would have to be evaluated over a 27-year period during which the state of

medical knowledge and Wyeth's product monograph were evolving. She also noted the complicating feature of the involvement of "learned intermediaries" in the care of class members. The judge rejected Wyeth's concerns, stating:

> [54] I find that this common issue should be certified as such despite the defendants' reliance on having provided an adequate warning to a "learned intermediary." The defendants continue to have an obligation to provide accurate product labels throughout the class period. If they failed to do so, it remains the manufacturer's responsibility. The learned intermediary's considerations are irrelevant if the defendants failed to provide accurate product labels or did not fairly state the risk of the drugs. In *Tiboni v. Merck Frosst Canada Ltd*. (2008), 295 D.L.R. (4th) 32 (Ont. S.C.J.), aff'd (2009) 95 O.R. (3d) 269 (Div. Ct.), the court stated at para. 88:
>
> > Merck accepts that the information it is to provide to physicians, and the manner in which this is to be done, is prescribed by regulation. If it has failed to provide such information in the prescribed manner, it may well be found to breach a duty, and a standard of care, whether or not a patient or a physician has obtained information from other sources, and whether the physician has passed on all appropriate information and warnings to the patient.

[36] The judge next turned to the second branch of the plaintiff's claim, concerning the *BPCPA*, and Wyeth's opposition to the certification of that common issue. Wyeth argued that the alleged deceptive acts under the *BPCPA* arose in individualized contexts, and that there was therefore no commonality between individual class members. The judge was not persuaded and found that consideration of individual participation was not necessary to determine whether Wyeth made deceptive or misleading representations, in apparent reliance on *Wakelam v. Johnson & Johnson*, 2009 BCSC 839, 71 C.P.C. (6th) at para. 39 (a decision regarding an application for particulars, not to be confused with the certification ruling referred to in paras. 70 and 72 of these reasons):

> [39] The specifics requested by the defendants with respect to the representations made, are inappropriate. The defendants have misunderstood the nature of the claim. This is not a claim on common law misrepresentation based on individual reliance. The plaintiff is relying on specialized consumer protection statutes which focus the inquiry on the impact of the representation on the public at large. The question of whether a representation is deceptive or misleading does not, therefore depend on an individual inquiry. The question of deception or no deception is something that can be litigated without reference to the circumstances of the plaintiff or individual class members: *Knight v. Imperial Tobacco*, 2006 BCCA 235, 54 B.C.L.R. (4th) 204 at para. 26. Therefore, it would be inappropriate to order particulars of those representations. The pleadings make it clear that the same representation (that children's cough syrup is safe and effective) was made in each and every transaction. It is not so impossibly vague that the Court could not determine whether there were any common issues.

[37] The judge then considered at some length whether a class proceeding was the preferable method for resolving the claims, and whether, as argued by Wyeth, individual issues would overwhelm common issues. She concluded:

> [72] I find that in spite of the significant individual issues which arise, class proceeding is a preferable procedure to resolve the common issues. The common issues are not, in my view, overwhelmed or subsumed by the individual issues and in spite of there being a number of individual issues, there will be substantial benefits with respect to access to justice and judicial

> economy achieved through a common issues trial. As noted in *T.L. v. Alberta,* a class proceeding will be of some practical utility (at paras. 131-132). As noted in *Cloud* at para. 73-75, the preferability requirement can be met even where there are substantial individual issues and the common issues do not predominate.

[38] The common issues certified by the Court read as follows:

> The certified common issues pertaining to the Class are:
>
> (a) Is there a causal connection between the use of Premplus, or Premarin in combination with progestin, and breast cancer and if so, what is the nature and extent of the connection?
>
> (b) Did the Defendants, or any of them, breach a duty of care to Class members, and if so, when?
>
> (c) If the Defendants, or any of them, breached a duty of care owed to Class members, were the Defendants, or any of them, guilty of conduct that justifies punishment?
>
> (d) If the answer to common issue 1(c) is "yes" and if the aggregate compensatory damages awarded to Class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against the Defendants, or any of them?
>
> The certified common issues pertaining to Class members who ingested Premplus, or Premarin in combination with progestin, that was supplied in British Columbia are:
>
> (a) Did the Defendants' solicitations, offers, advertisements, promotions, sales and supply of Premplus and Premarin for personal, family or household use by class members fall within the meaning of "consumer transactions" under the *Business Practices and Consumer Protection Act* ("BPCPA")?
>
> (b) With respect to the supply in British Columbia of Premplus and Premarin to Class members for their personal, family or household use, are the Defendants, or any of them, "suppliers" as defined by the BPCPA?
>
> (c) Are the Class members "consumers" as defined by the BPCPA?
>
> (d) Did the Defendants, or any of them, engage in conduct that constituted deceptive acts or practices contrary to the BPCPA as alleged in the Amended Statement of Claim?

ON APPEAL

[39] Wyeth's appeal focuses on three general issues: causation; the class period and preferability; and the *BPCPA*.

CAUSATION

[40] The first certified common issue is whether there is a causal connection between the use of the hormone therapies in issue and breast cancer and, if so, what is the nature and extent of that connection.

[41] Wyeth's central submission is that there was no evidence adduced at the certification hearing that would permit a determination of a "causal connection" between the hormone products and breast cancer. Wyeth further submits that the evidence adduced by the plaintiff does not disclose any methodology, statistical or otherwise, by which it can be determined that these drugs cause cancer or materially increase the risk of breast cancer.

[42] Nine volumes of appeal books were filed on appeal, which I assume was all of the evidence filed on the certification hearing. Competing expert reports form the bulk of the evidence. One point of commonality among the experts was that many factors may cause breast cancer, including genetic mutations, spontaneous genetic events, lifestyle (diet, physical activity, prescription drug use, exposure to pollutants, *et cetera*), or an interaction between genetic and lifestyle factors.

[43] Dr. Kirsh, the scientist whose reports were tendered by the plaintiff, explained the concerns regarding hormone therapy and breast cancer. She noted that the relative risk (defined as "RR") is a measure of association between breast cancer and exposure to hormone therapy. A relative risk of 1.3 can be interpreted as a 1.3-fold or 30% increase in risk, and a relative risk of 2.0 represents a doubling of the risk. Dr. Kirsh described the findings of the WHI study, stating:

> Results from an analysis that combined data from the WHI trial and the WHI observational study indicate that women who began the estrogen-progestin regimen within 5 years of menopause and continued use on a long-term basis were at a particularly high risk of breast cancer: there was a 1.64-fold increase in risk over 5 years of use (95% CI, 1.00-2.68), and a 2.19-fold increase in risk over 10 years of use (95% CI, 1.56-3.08).

Dr. Kirsh concluded:

> In conclusion, the WHI established a causal association between use of estrogen-progestin therapy and increased risk of breast cancer, findings which were corroborated by results from recent prospective cohort studies; the increased risk appeared to be particularly pronounced with longer durations of use. Due to the uncertainties introduced by the WHI findings, the effects of estrogen alone remain inconclusive, although observational studies do suggest an increased risk associated with long-term use.

[44] Wyeth tendered, among other reports, the opinion of Dr. John Collins, a retired certified specialist in obstetrics and gynecology, with a subspecialty in reproductive endocrinology and infertility. He commented on Dr. Kirsh's reports. He reviewed the numerous breast cancer risk factors, the WHI study, pre-WHI studies, and discussed estimates of absolute risk in some detail. His central opinion was stated as follows:

> The relative risk in the definitive report on breast cancer from the WHI study was 1.24. Accordingly, allowing for five years of estrogen-progestin use, the probability of breast cancer would be 1.24-fold higher than the average woman's chance of breast cancer. Instead of ten cases per 1000 women, there would be 12.5 cases per 1000 women using estrogen-progestin treatment for five years. Also, with every 12.5 cases of breast cancer among estrogen-progestin users, ten would have been diagnosed regardless of the HRT use. **There is no**

> **known means to determine which 2.5 of the 12.5 breast cancer cases might be related to HRT use.**
>
> **For this reason as well, none of the members of the proposed class would be able to demonstrate that her breast cancer was caused by HRT or by any one or more of numerous other risk factor(s). The presence of risk factors does not predict who will develop breast cancer or any other disease.**
>
> [Emphasis in original.]

[45] Further, in a point repeated by counsel for Wyeth, Dr. Collins stated:

> Association and causation are not synonymous terms. Despite dozens of studies on breast cancer carried out in the last three decades, we do not know what causes breast cancer – either generally or in specific cases.

[46] In Dr. Kirsh's third and last report, she acknowledged the numerosity of breast cancer risk factors and responded to Dr. Collins' inference that because the background risk is not zero, there is no means to determine which of the breast cancer cases might be related to hormone therapy use and that therefore none of the proposed class could demonstrate causation. Dr. Kirsh's rejoinder was:

> Chronic diseases such as cancer are multifactorial in their etiology and the background incidence among those not exposed to any *one* particular risk factor will never be zero (cervical cancer and human papilloma virus (HPV) exposure being the *only* exception in cancer epidemiology that I am aware of, where HPV infection is present in all cases of cervical cancer). **This is precisely why we rely on the magnitude of the relative risk (RR)— and not the absolute risk—to provide an indication as to whether a woman's breast cancer is more likely than not attributable to her exposure (HRT in this case).** [Emphasis in original.]

[47] The foregoing is merely a sampling of the extensive evidence presented to the chambers judge. She correctly observed that she was not to compare or weigh the differing expert opinions, contrary to Wyeth's submission that she engage in "exacting scrutiny" of the expert opinions.

[48] On appeal, Wyeth contends that the judge failed to apply this Court's decision in *Ernewein,* as to the evidentiary basis required for each of the certification requirements other than that the pleadings disclose a cause of action. In *Ernewein*, this Court stated the proposition as follows:

> [33] ... In each instance, the question must be determined "contextually" - i.e., not on the basis of a blanket assumption regarding product liability cases but in light of all the evidence concerning the specific case before the court. In the case at bar, the plaintiffs failed to establish an evidentiary basis; i.e., to adduce admissible evidence, for the proposition that the determination of the real common issues ... would advance the litigation in a meaningful way. I conclude that the certification order must therefore be set aside.

[49] I am not persuaded that the judge in this case failed to consider all of the evidence before her or made "blanket assumptions" of liability. The sheer volume of material presented on the certification application precluded any comprehensive recitation of the evidence. Nor was any

required. The evidence at this stage speaks for itself. The judge correctly noted that she was not to engage in weighing evidence that is clearly contradictory. In my view, the judge's summary of the expert evidence, including the regulatory framework, adequately placed the common issues in context.

[50] The evidentiary challenges in products liability litigation in the context of mass torts were discussed by Huddart J.A. in *Harrington*, at para. 40:

> [40] ... When a plaintiff produces epidemiological studies that treat products of all defendants as generic, it behooves any defendant who is of a contrary view to produce evidence supporting its view. As Professor Boodman noted in an article entitled *The Malaise of Mass Torts,* (1994) 20 Queen's Law J. 213 at 242, modern methods of mass production and distribution often make it difficult or impossible to identify the exact source or sources of injury, to link a particular victim to a particular defendant, and to demonstrate accurately the harmful effects of a defendant's act other than on the basis of epidemiological studies and statistical probabilities. Class proceedings were designed with precisely these uncertainties in mind.

[51] She explained the analytical approach to the causation issue at paras. 42-46, para. 42 of which I recited earlier in these reasons:

> [42] At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. Some American authorities refer to this step as "general causation", whether a product is capable of causing the harm alleged in its ordinary use.
>
> [43] The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a manufacturer did not but should have known of its product's propensity for harm.
>
> [44] In my view, these two steps are the "risk assessment" Mr. Justice Mackenzie permitted to be undertaken as a part of what he saw as a multi-staged proceeding.
>
> [45] If the value of the product's use outweighed its propensity to injure such that distribution with a warning was appropriate, the third step will be an assessment of the reasonableness of the warning (whether direct or by a learned intermediary) given the state of the art and the extent of the risks inherent in the product's use.
>
> [46] The final step will be the determination of individual causation and damages. The difficult question will be whether the individual's knowledge of the risks would have prevented the injury. If the product should not have been manufactured or distributed, the determination of whether the product caused the injuries to the individual seeking damages and the assessment of those damages will be the last step. At this stage, the risks created by the product will be used to determine whether a defendant caused the alleged injury to an individual plaintiff. They may also be used in the determination of the date of discoverability for the purposes of any limitation defence, and for the allocation of fault, if that becomes necessary.

[52] Wyeth disputes that there exists in this case a "propensity to injure" or, as referred to in

Harrington, "general causation". As noted, Wyeth's central submission is that the plaintiff did not provide evidence as to how the "causal connection" between hormone therapy and breast cancer might be proven given the numerous other risk factors. Wyeth argues that, at most, the evidence only shows an "association" between hormone therapy and breast cancer, which Wyeth submits does not equate to a causal connection. Accordingly, Wyeth contends there was no evidence to support the certification of the common question of a "causal connection."

[53] As the Court observed in *Harrington*, the division between general and specific causation affects certification. This division is examined in an article by Patrick Hayes entitled *Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification*, 19 J. Env. L. & Prac. 190 at 195:

> Proving causation in the context of toxic substances, however, puts the added burden on plaintiffs to establish two types of causation, both general and specific. This is because, unlike the causal connection between being hit by a car and suffering a broken bone, for instance, the causal connection between a toxic substance and a disease is not as easy to decipher. Thus, a plaintiff must first prove "general" or "generic" causation--that a particular substance is capable of causing a particular illness. The issue must be addressed, whether explicitly or implicitly, in toxic torts litigation, since it is axiomatic that "an agent cannot be considered to cause the illness of a specific person unless it is recognized as a cause of that disease in general." Next, a plaintiff must prove "specific" or "individual" causation--that exposure to a particular toxic substance did, in fact, cause the plaintiff's illness.

[54] I recognize that these comments were made in the context of toxic tort class actions, where it may be said the proof of legal causation is particularly challenging. However, as can be seen from Wyeth's submissions, it is the appellants' fundamental contention that individual class members will be unable to prove legal causation. The underlying, unspoken assertion is that "if the action is doomed to fail there is little point in certifying the class proceeding": *L.(T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 at para. 36, 58 Alta. L.R. (4th) 23.

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

[56] In saying this, I have not overlooked Wyeth's argument that, at best, the plaintiff's evidence – that uses the phrase "causal association" – merely established an "association" between hormone therapy and breast cancer and not actual causation, or the "causal connection" certified as a common issue. In my opinion, this argument amounts to semantics not substance. The word "association" is

synonymous with the "connection" the plaintiff seeks to establish, and these two words should not be interpreted in isolation. Their meaning is dependent on the modifying adjective, which, in both cases, is "causal". Thus, in my view, both expressions clearly refer to general causation. The fact that Dr. Kirsh chose "association" to describe the potential link does not render the common question unsupported by evidence.

[57] Moreover, this initial link, if established, is clearly a substantial element of each class member's claim in negligence. A finding of general causation will obviously influence specific causation depending on the strength of the evidence supporting general causation. For example, if it were found that hormone therapy doubles the risk of developing breast cancer, the individual class members, depending on their individual circumstances, may more readily prove specific causation. Wyeth's awareness of the link is also relevant to the standard of care. Moreover, it is doubtful that an individual litigant could marshall the medical and epidemiological evidence necessary to establish the connection. On the other hand, if the link is not established, the class proceeding will come to an end.

[58] Furthermore, I am not persuaded the plaintiff had to establish, at this stage of the proceedings, the methodology by which the court can determine that hormone therapy causes breast cancer. That determination will necessarily be informed by the expert evidence at trial; if no methodology is available, it is difficult to see how general causation will be established. However, there is in my view sufficient evidence to support the general causation issue posed, which deserves to be tried.

[59] I would not accede to Wyeth's challenge to the general causation question.

CLASS PERIOD

[60] Wyeth submits that the 27-year class period is unmanageable in the context of the changing scientific knowledge regarding the risks of hormone therapy. Wyeth contends that there is no commonality because its duty of care must be assessed at a specific period of time. Wyeth submits that the evolving medical knowledge and the concomitant changing prescribing information precludes a finding of a single common standard of care for the entire 27-year class period.

[61] There may well be challenges in assessing the duty of care (and the standard of care) over the 27-year class period. Similar concerns arose in *Rumley*, but the Supreme Court of Canada concluded that the common question was capable of a "nuanced answer". It is too early to say in this case what shape that answer might take, but one obvious potential solution would be the development of sub-classes defined by reference to the changing product monographs. If the class period proves to be truly unmanageable, it is open to the court to decertify the action. These are refinements that can be

addressed as the litigation progresses.

[62] Wyeth also points to the complicating factor of the involvement of learned intermediaries such as physicians. In Wyeth's submission, a manufacturer can discharge its duty to warn if it provides adequate warning of potential dangers to physicians who prescribe the drug, rather than to the ultimate consumer. A further complicating feature is whether liability attaches to Wyeth if it has provided accurate information to physicians but the physicians have failed to accurately inform patients.

[63] The chambers judge was conscious of the learned intermediary considerations, but concluded they would be irrelevant if Wyeth failed to provide accurate product labels or did not fairly state the risk of the drugs (at para. 54). I am not persuaded that the learned intermediary considerations render the class period unmanageable for the same reasons given by the chambers judge.

BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

[64] Wyeth contends that the common issue, whether Wyeth engaged in deceptive acts or practices contrary to *BPCPA* as alleged in the amended statement of claim, is overly broad and fails to identify any deceptive act or practice. In particular, Wyeth says there is no evidence of a common representation. Any representations would, according to Wyeth, vary with the changing product monographs over the 27-year class period, rendering the common question unworkable. Wyeth's central argument is that this common issue is incapable of extrapolation on a class wide basis by reason of the fact that no one representation was made over the 27-year class period. As such, Wyeth submits that the question posed does not satisfy the commonality requirement that "success for one class member must mean success for all", as articulated in *Dutton* at para. 48.

[65] In Wyeth's submission, any claim under the *BPCPA* must rest on a representation. An allegation of a failure to disclose, absent a corresponding representation, is not actionable.

[66] Wyeth further submits that, as in the general causation issue, there is no evidence to support the common question posed in respect of the *BPCPA*. Wyeth contends there is no evidence from the representative plaintiff as to a representation made to her and no evidence from an expert that, at the time a product monograph or label was published, it was deceptive.

[67] Wyeth thus contends that the question as certified amounts to a commission of inquiry that cannot be said to be fair and efficient, especially since, under the *BPCPA*, the burden of proof is reversed, requiring Wyeth to prove the truth of any representation.

[68] The plaintiff relies on the provisions in s. 4(1) and (3) of the *BPCPA*, which read:

> Deceptive acts or practices
>
> 4(1) In this Division:
>
> "deceptive act or practice" means, in relation to a consumer transaction,
>
> (a) an oral, written, visual, descriptive or other representation by a supplier, or
>
> (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;
>
> "representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.
>
> ...
>
> (3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
>
> (a) a representation by a supplier that goods or services
>
> (i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,
>
> (ii) are of a particular standard, quality, grade, style or model if they are not,
>
> ...
>
> (b) a representation by a supplier
>
> ...
>
> (vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,
>
> ...

[69] The plaintiff's essential submission is that Wyeth's product monographs and labels failed to accurately disclose the risks of the hormone therapy and therefore run afoul of s. 4(3)(b)(vi).

[70] At the hearing of the appeal, the parties tendered Wyeth's demand for particulars and the plaintiff's response, both of which post-date the certification order.

[71] The parties argued at some length as to whether a failure to disclose can constitute a cause of action under the *BPCPA*, citing conflicting authorities: *Blackman v. Fedex Trade Networks Transport & Brokerage*, 2009 BCSC 2001, relied upon by Wyeth, and *Wakelam v. Johnson & Johnson*, 2011 BCSC 1765, relied upon by the plaintiff.

[72] The *Blackman* decision concerned a summary trial application brought by the defendants to strike a proposed class action. The plaintiff had purchased a product from a business contact in California. The business contact told the plaintiff that the Fedex courier service informed him they would charge $25 to courier the package to Canada. Sometime after the Fedex courier delivered the product, the plaintiff received an invoice from a related Fedex brokerage entity for brokerage fees and

disbursements in addition to the $25 courier charge. For customers who did not assign a customs broker, the Fedex courier's practice was to appoint the Fedex brokerage entity as the customs broker. The plaintiff claimed, among other things, that failure to disclose the fact Fedex intended to charge the plaintiff a brokerage and disbursement fee was a deceptive act or practice within the meaning of s. 4(3)(b)(vi) of the *BPCPA*. In her reasons, Madam Justice Garson noted that the predecessor to the *BPCPA*, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*"), included a "failure to disclose" in the definition of "deceptive act or practice" in s. 3(1), but that this language was not included in the definition of a deceptive act of practice in the *BPCPA*. Accordingly, Garson J. (now J.A.) found that an omission or failure to disclose could not constitute a representation that qualified as a deceptive practice under the *BPCPA*.

[73] In *Wakelam*, the plaintiff sought certification of common issues in a class action against numerous manufacturers and/or suppliers of cough and cold syrup. The plaintiff claimed that the medications were ineffective for children and pleaded, *inter alia*, that the defendants had engaged in deceptive acts or practices under the *BPCPA* by failing to disclose in medication instructions that children's cough medicine was ineffective and dangerous for children. The defendants argued that a failure to disclose was not capable of constituting a "deceptive act or practice" under s. 4 of the *BPCPA*, except in the limited circumstance of a representation failing to "state a material fact, if the effect is misleading", as set out in s. 4(3)(b)(vi). After surveying the case law, including *Blackman*, as well as the repealed *TPA*, Grauer J. found that the failure to include the words "including a failure to disclose" in the *BPCPA* definition did not exclude omissions from the broad definition of a "deceptive act of practice" in s. 4(1) of the *BPCPA*. He noted that the definition includes "any conduct ... that has the capability, tendency or effect of misleading a consumer ..." (s. 4(1)(b)), and that the legislation states that the definition of "deceptive act or practice" is not to be limited by the specific examples provided in s. 4(3). Accordingly, Grauer J. found that the representations and omissions pleaded in the amended statement of claim were not bound to fail and could conceivably constitute deceptive practices under the *BPCPA*.

[74] Both parties also referred to this Court's decision in *Chalmers (Litigation Guardian of) v. AMO Canada Ltd.*, 2010 BCCA 560, 13 B.C.L.R. (5th) 37, a class action in which the plaintiff alleged the defendants engaged in deceptive acts or practices contrary to the *BPCPA* in relation to a contact lens solution. At the time of the certification hearing, the statement of claim did not plead particulars of the alleged misrepresentations. The defendants contended that there was no pleading or evidence that they had intended to mislead or deceive. The statement of claim was subsequently amended. Mr. Justice Tysoe, speaking for the Court, held:

> [18] Whatever deficiencies may have existed in the statement of claim at the time of the certification hearing, it is my opinion that the amended statement of claim clearly gives particulars of the claim under the *Consumer Protection Act*. The amended statement of claim

> gives particulars of two specific representations allegedly made by the defendants, and asserts they were untrue. It also asserts that the defendants breached the *Consumer Protection Act* by failing to disclose the risk that the lens solution would not prevent the eye infection and by misrepresenting that the lens solution was safe, comfortable and effective at preventing infection.

[75] The plaintiff in the case at bar submits that the holding in *Chalmers*, together with the plain meaning of the *BPCPA* (which she says prohibits misstatements by omission) defeats Wyeth's submission that there is no cause of action for a failure to disclose a risk.

[76] Wyeth contends that the two specific representations particularized in *Chalmers* were tied to the failure to disclose and thus brought the claim within the *BPCPA*. However, absent any representation at all, Wyeth submits that a failure to disclose does not on its own amount to a deceptive act or practice.

[77] I do not read *Chalmers* as supporting Wyeth's position that deceptive acts alone do not run afoul of the *BPCPA*. In this respect, the remarks of this Court in *Knight v. Imperial Tobacco Canada Ltd*., 2006 BCCA 235, 54 B.C.L.R. (4th) 204 at para. 26 are instructive:

> [26] ... As I observed *supra*, it seems to me that the question of whether or not it can be established by the plaintiff that there have been deceptive acts or practices committed by the defendant in marketing cigarettes is central to the claims advanced on behalf of the plaintiff. Given the broad definition of deceptive acts or practices which includes acts or practices capable of deception, the question of deception or no deception is something that can, in my opinion, be litigated without reference to the circumstances of the plaintiff or individual class members. The situation with respect to this issue is somewhat analogous to that in *Rumley*, where there was an allegation of systemic negligence made against a defendant.

Similarly, Ms. Stanway alleges what amounts to a systemic course of deceptive conduct throughout the class period.

[78] The *BPCPA* is obviously directed at consumer protection. In *Seidel v. Telus Communications Inc*., 2011 SCC 15, [2011] 1 S.C.R. 531, a case dealing with whether the statutory right to bring an action set out in s. 172 of the *BPCPA* could override an arbitration clause in a consumer contract, Binnie J., for a majority of the Supreme Court of Canada, wrote as follows in regard to interpretation of the *BPCPA*:

> [37] As to statutory purpose, the *BPCPA* is all about consumer protection. As such, its terms should be interpreted generously in favour of consumers: *Smith v. Co-operators General Insurance Co*., 2002 SCC 30, [2002] 2 S.C.R. 129, and *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd*., 2005 BCCA 605, 48 B.C.L.R. (4th) 328. ...

[79] Further, s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 requires that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and

interpretation as best insures the attainment of its objects."

[80] Turning to the wording of the *BPCPA* with those principles in mind, it is significant that the definition of a "deceptive act or practice" in s. 4(1), is broadly worded, including "an oral, written, visual, descriptive or other representation by a supplier" (s. 4(1)(a)). The wording of s. 4(3)(b)(vi) – "representation by a supplier ... that fails to state a material fact" – anticipates that an omission can constitute a deceptive practice. As I interpret s. 4(3)(b)(vi) of the *BPCPA*, in light of the definition of a deceptive act or practice in s. 4(1), non-disclosure of a material fact alone, absent a corresponding oral, written, visual, or descriptive representation, can ground a cause of action.

[81] In my opinion, this interpretation is consonant with the purposes of the *BPCPA* and avoids an interpretation that is clearly contrary to the objectives of consumer protection.

[82] In my opinion, the responses to Wyeth's demand for particulars, which form part of the pleadings, particularize what amounts to an alleged systemic pattern of "representation by omission" by Wyeth in failing to disclose the risks of hormone therapy throughout the 27-year class period, contrary to the *BPCPA*. In my view, the common issue posed in relation to the *BPCPA* is supported by the pleadings and was properly certified.

PREFERABILITY

[83] Section 4(2) of the *Act* provides that in determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant factors including:

> 4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[84] In *Hollick*, McLachlin C.J.C. explained the requirement that a class action be the preferable procedure for the resolution of the common issues at paras. 29-30:

> 29 The Act itself, of course, requires only that a class action be the preferable procedure

> for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:
>
> > The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> See Branch, *supra*, at para. 4.690. I would endorse that approach.
>
> 30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia *Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (1993), at p. 27.
>
> [Emphasis in original.]

[85] Wyeth submits that in finding a class proceeding to be the preferable procedure the judge failed to consider the complexity of the issues in question which, combined with the lengthy class period, render the determination of individual issues unworkable.

[86] The judge in my view did not overlook the complexity of the case. She considered the advantages of a class proceeding enumerated in *Bouchanskaia v. Bayer Inc*, 2003 BCSC 1306 at para. 150. As I have previously noted, but repeat for ease of reference, the judge concluded at para. 72:

> [72] I find that in spite of the significant individual issues which arise, class proceeding is a preferable procedure to resolve the common issues. The common issues are not, in my view, overwhelmed or subsumed by the individual issues and in spite of there being a number of individual issues, there will be substantial benefits with respect to access to justice and judicial economy achieved through a common issues trial. As noted in *T.L. v. Alberta,* a class proceeding will be of some practical utility (at paras. 131-132). As noted in *Cloud* at para.

> 73-75, the preferability requirement can be met even where there are substantial individual issues and the common issues do not predominate.

[87] There can be no doubt that the individual claims will face significant challenges of proof. The multiplicity of causative factors in the development of breast cancer and the role of learned intermediaries will certainly complicate the trial of individual claims. However, there can also be no doubt that the determination of the common issues will move the litigation forward, serve judicial economy, and improve access to justice.

[88] Wyeth further submits that the judge misdirected herself in her application of s. 4(2)(a) of the *Act*. It submits she inverted the issue to be decided – whether the common issues predominate over any questions affecting only individual members.

[89] I am not persuaded that the judge misdirected herself as alleged by Wyeth. When one reads para. 72 in the context of the reasons as a whole it is clear that the judge was attuned to the existence of complex individual issues but was unconvinced that they would overwhelm the common issues. Although the judge did not use the word "predominate" in relation to the common issues, it is evident that she considered the common issues would predominate because, clearly, she found they would not be subsumed or overwhelmed by the individual issues.

[90] In my opinion, the judge had due regard for all of the factors referred to in s. 4 of the *Act*. A certification judge has a broad discretion in determining whether a class proceeding meets the criteria of s. 4 of the *Act*. An appellate court should not interfere with the exercise of the discretion unless it is shown that the judge erred in principle or was clearly wrong: *Flexwatt* at para. 25; *Hoy v. Medtronic, Inc*., 2003 BCCA 316, at para. 38, 14 B.C.L.R. (4th) 32.

CONCLUSION

[91] For all of the above reasons, I would dismiss the appeal with costs to the respondent.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Neilson"

I agree:

"The Honourable Madam Justice Bennett"