CITATION: Kowalyshyn v. Valeant Pharmaceuticals International, Inc., 2016 ONSC 3819
COURT FILE NO.: CV-15-541082-00CP
COURT FILE NO.: CV-15-543678-00CP
DATE: 20160610

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JOYCE KOWALYSHYN Plaintiff **– and –** VALEANT PHARMACEUTICALS INTERNATIONAL, INC., J. MICHAEL PEARSON, ROBERT L. ROSIELLO, HOWARD B. SCHILLER, LAIZER D. KORNWASSER, KATE STEVENSON, NORMA PROVENCIO, THEO MELAS-KYRIAZI and PRICEWATERHOUSECOOPERS LLP Defendants Proceeding under the *Class Proceedings Act, 1992*	*Jonathan Ptak, Jay Strosberg,* and *Garth Myers* for the Plaintiff Joyce Kowalyshyn
AND BETWEEN:	
LORRAINE O'BRIEN Plaintiff **– and –** VALEANT PHARMACEUTICALS INTERNATIONAL, INC., J. MICHAEL PEARSON, HOWARD B. SCHILLER, ROBERT A. INGRAM, ROBERT H. FARMER, THEO MELAS-KYRIAZI, G. MASON MORFIT, DR. LAURENCE E. PAUL, ROBERT N. POWER, NORMA A. PROVENCIO, LLOYD M. SEGAL, KATHARINE B. STEVENSON, FRED HASSAN, COLLEEN GOGGINS, ANDERS LONNER, JEFFREY W. UBBEN and PRICEWATERHOUSECOOPERS LLP Defendants Proceeding under the *Class Proceedings Act, 1992*	*Peter R. Jervis, Daniel E.H. Bach,* and *Michael G. Robb,* for the Plaintiff Lorraine O'Brien
	HEARD: April 8, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] This is carriage motion in a securities misrepresentation class action. The Reasons for Decision will be organized under the following major headings: (A) Introduction; (B) *Dramatis Personae*; (C) Procedural Background to the Proposed Class Actions; (D) Factual Background to the Proposed Class Actions; (E) The Design of the Competing Class Actions; (F) Critique of the Design of the Competing Class Actions; (G) The Test for Carriage; (H) Methodological and Evidentiary Problems; (I) Discussion and Analysis of the Carriage Factors; and (J) Conclusion.

[2] The carriage motion is a fierce battle between two proposed class actions under Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6; namely: *Joyce Kowalyshyn v. Valeant Pharmaceuticals International, Inc.* and *Lorraine O'Brien v. Valeant Pharmaceuticals International, Inc.*

[3] *Catucci c. Valeant Pharmaceuticals International, inc.*, a proposed class action in Québec under the *Code of Civil Procedure*, C.Q.L.R. c. C-25, and *Mirza Alladina v. Valeant Pharmaceuticals International, Inc.* and *Randy Okeley v. Valeant Pharmaceuticals International, Inc.*, two proposed class actions in British Columbia under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, are part of the carriage fracas.

[4] The common main Defendant in all these proposed class actions is Valeant Pharmaceuticals International, Inc. ("Valeant"), which is joined by different assemblies of co-Defendants in the proposed class actions.

[5] The putative Class Members lost approximately $60 billion from purchases in the primary and secondary capital markets around the world when Valeant's alleged misrepresentations were revealed. Subsequent disclosures and events have seen Valeant's share and bond prices plummet further.

[6] The proposed Representative Plaintiff in one Ontario action is Lorraine O'Brien. Ms. O'Brien is also a Class Member and an ally of the proposed class action in Québec, in which the Representative Plaintiffs are Celso Catucci and Nicole Aubin.

[7] The proposed Representative Plaintiff in the other Ontario action is Joyce Kowalyshyn. She proposes to add Robert Morton and SEB Investment Management AB and SEB Asset Management S.A. (collectively "SEB") as co-plaintiffs. Ms. Kowalyshyn is an ally of the plaintiffs in the proposed class actions in British Columbia.

[8] Determining carriage was very difficult. As will be seen in the discussion below, the proposed class actions are very complex and advance gargantuan claims for many billions of dollars, and the carriage battle was between well matched Class Counsel, whose firms collectively would have undoubtedly already invested a great deal of money for the proposed class actions. The voluminous motion material was comprised of a motion record of 4,011 pages, six factums (247 pages), and 101 legal authorities not counting numerous statutory references. The carriage motion raised serious questions about the utility of the approach to evidence, methodology, and the factors used in a carriage fight. There was a serious question about how far the court can and should explore the likelihood of whether the competing case theories: (a)

would succeed on the merits; and (b) would yield optimum compensation for the putative Class Members.

[9] The difficulties in determining carriage were exacerbated by appearing, disappearing, and reappearing positions taken by the contestants for carriage. For example, Ms. O'Brien submitted that one of the advantages of her Ontario action was its direct connection to the *Catucci* Action. Initially, Ms. O'Brien said that if she were granted carriage in Ontario, she contemplated "parking" (self-staying) her Ontario action and then ramping it up depending on the exigencies of the action in Québec. However, later, Ms. O'Brien's consortium of Class Counsel said that, in any event, they would litigate in both Ontario and Québec as directed by the courts. Ms. Kowalyshyn's response to Ms. O'Brien's reliance on the Québec proceedings and to her candor about her plans of parking the Ontario action was to malign the merits of the *Catucci* Action and to accuse Ms. O'Brien of an abuse of process and to submit that her plan was a threshold reason to disqualify her from being granted carriage. However, despite maligning the design of the *Catucci* Action, Ms. Kowalyshyn said that, in any event, her lawyers would be able to co-ordinate or co-operate with the Class Counsel in Québec. Ms. O'Brien, of course, denied that there was any abuse of process, and she submitted that her claim to carriage should be evaluated on the understanding that whether the Ontario action should be stayed or parked was an issue for another day.

[10] Thus, the carriage fight had moving target positions and issues, and the motion raised the issue of the relevance of parallel and multi-jurisdictional class actions in the context of a carriage motion in one of the jurisdictions. Indeed, the interrelationship between the proceedings in three provinces was a very contentious matter in the carriage fight. As the discussion below will reveal, this issue plays the prominent role in my decision.

[11] There is a great deal at stake for Class Counsel and for the putative Class Members in the outcome of this carriage fight, and the motion was very hard fought. The rival law firms were arrogantly proud about the merits of the design of their respective class actions and aggressively dismissive of their rival's plans. The rival law firms were each harshly critical of their rival. Some of the criticisms were petty, and fair concessions were scarce to be found.

[12] There is too much to discuss, but I foreshadow the outcome to say that for the reasons that follow, I provisionally grant carriage to Ms. Kowalyshyn. I temporarily stay Ms. O'Brien's proposed class action, subject to the stay being lifted if: (a) Mr. Catucci or the Defendants bring a motion to stay the *Kowalyshyn* Action; (b) Ms. Kowalyshyn agrees that Ms. O'Brien's action be consolidated with her action; or (c) Ms. O'Brien shows strong cause that the temporary stay should be lifted.

B. *DRAMATIS PERSONAE*

1. Representative Plaintiffs and Class Counsel

[13] **Ms. O'Brien** is a resident of Alberta. She is a Construction Safety Advisor. Ms. O'Brien purchased 150 shares of Valeant during the Class Period. Fifty of these shares were acquired over the New York Stock Exchange ("NYSE").

[14] Ms. O'Brien has not obtained funding from the Class Proceedings Fund for her proposed class action.

[15] Ms. O'Brien has retained **Siskinds LLP** and **Rochon Genova LLP** as her proposed Class Counsel.

[16] Siskinds LLP is counsel in another class action against Valeant styled *Marie Anne Tonasket Denommee v. Valeant Pharmaceuticals International, Inc.* The *Denommee* Action was commenced in July 2014, and Ms. Denommee claims $45 million dollars in damages for the alleged negligent manufacturing of a drug known as Delatestryl. As will be discussed below, Ms. Kowalyshyn submits that because of the *Denommee* Action, Siskinds LLP and Rochon Genova LLP should be disqualified as Class Counsel.

[17] **Mr. Catucci** is a resident of Toronto, Ontario suing in Québec. He purchased 300 Valeant securities on September 24, 2015 and continued to hold those securities after October 26, 2015.

[18] **Ms. Aubin** is the other Representative Plaintiff in the *Catucci* Action. She resides in Langueuil, Québec. She purchased 500 Valeant securities on August 28, 2015 and continued to hold those securities until October 21, 2015.

[19] Mr. Catucci and Ms. Aubin have retained **Faguy & Co. Barristers & Solicitors Inc.**, **Morganti Legal**, and **Siskinds, Desmeules, Avocats, S.E.N.C.R.L.**, as her proposed Class Counsel in the Québec action.

[20] The President of Faguy & Co. is **Shawn Faguy**, who is qualified to practice in Québec and Ontario.

[21] The managing partner of Morganti Legal, whose primary office is in Toronto, is **Andrew Morganti**, who is qualified to practice in Michigan, the District of Columbia, U.S. federal courts, and Ontario.

[22] Siskinds, Desmeules, Avocats is a Québec law firm affiliated with Siskinds LLP, one of Ms. O'Brien's proposed Class Counsel.

[23] **Ms. Kowalyshyn** resides in Vancouver, British Columbia. From 2000 – 2008, she was a General Manager at Siemens Canada Ltd., and from October 2008 to August 2010, she was a Vice President of Business Development at SNC Lavalin. Ms. Kowalyshyn has passed the Canadian Securities Course, and she invests on her own without an investment advisor. Ms. Kowalyshyn purchased over 15,000 shares in Valeant and sustained losses in excess of $200,000.

[24] Ms. Kowalyshyn proposes that she be joined as Representative Plaintiff by **Robert Morton, SEB Investment Management AB**, and **SEB Asset Management S.A.** (collectively "SEB").

[25] Robert Morton resides in Sarnia, Ontario. He is a professor at Lambton College who teaches engineering. Mr. Morton purchased 80 shares of Valeant during the Class Period.

[26] SEB are investment fund management companies that operate within the Skandinaviska Enskilda Banken AB financial group, a Swedish-based financial institution formed in 1972 that employs over 15,000 people worldwide and had operating income of over $7 billion in 2015.

[27] SEB Investment Management AB is organized under the laws of Sweden, and SEB Asset Management S.A. is organized under the laws of Luxembourg. SEB manages over $100 billion in its funds. During the Class Period, SEB purchased 477,900 Valeant shares on the Toronto

Stock Exchange ("TSX") and continued to own some of these shares until the end of the Class Period. SEB held a total of 339,300 Valeant shares as of November 12, 2015. SEB's estimated losses from trading in Valeant shares during the Class Period exceeds $20 million.

[28] Ms. Kowalyshyn has obtained funding from the Class Proceedings Fund for her proposed class action.

[29] Ms. Kowalyshyn has retained **Koskie Minsky LLP** and **Sutts, Strosberg LLP** as her proposed Class Counsel.

2. Class Members

[30] In her Statement of Claim Ms. O'Brien proposes the following class definition:

> All individuals and entities, wherever they may reside or are domiciled, other than the Excluded Persons, who: (a) purchased shares of Valeant through a primary market prospectus offering in Canada during the Class Period; or (b) who purchased Notes pursuant to the Offering Memoranda during the Class Period; or (c) who purchased the publicly traded common share [sic] of Valeant on the TSX or other secondary market in Canada or elsewhere other than in the United States during the Class Period.

[31] However, in paragraph 35 of her March 22, 2016 factum, Ms. O'Brien proposed a different class definition that borrows from the *Catucci* Action definition. The revised class definition states:

> 35. Claims are advanced on behalf of the following groups of Valeant investors:
>
> > (a) secondary market investors (common shares): all persons and entities who acquired Valeant's common shares in the secondary market in Canada and elsewhere (other than the U.S.), and the persons and entities who are resident in Canada or were resident in Canada at the time of such acquisitions regardless of the location of the exchange on which they acquired their Valeant common shares;
> >
> > (b) secondary market investors (notes): all persons and entities who acquired Valeant's notes in the secondary market in Canada and elsewhere (other than the U.S.), and the persons and entities who are resident in Canada or were resident in Canada at the time of such acquisitions regardless of the location of the secondary market venue on which they acquired their Valeant notes;
> >
> > (c) primary market investors (common shares): all persons and entities who acquired Valeant's common shares offered in the prospectus offerings completed in June 2013 and March 2015, wherever they may reside or may be domiciled; and
> >
> > (d) primary market investors (notes): all persons and entities who acquired Valeant's notes offered in the offerings by way of the offering memoranda dated June 27, 2013, November 15, 2013, January 15, 2015 and March 13, 2015.

[32] Although the claim is advanced in the Amended Statement of Claim, it would appear that Ms. O'Brien's original class definition has mistakenly omitted purchasers of notes on the secondary market. I shall treat this error as corrected in the *O'Brien* Action, without engaging in the petty debate about whether it was a typographical error, as submitted by Ms. O'Brien, or a glaring error, as submitted by Ms. Kowalyshyn.

[33] In the Québec action, Mr. Catucci proposes the following class definition:

> Primary Market Sub-Class: All persons and entities, wherever they may reside or may be domiciled, who acquired Valeant's Securities in an Offering, and held some or all of such Securities as of at least October 19, 2015; and
>
> Secondary Market Sub-Class: All persons and entities, wherever they may reside or may be domiciled who, during the Class Period, acquired Valeant's Securities in the secondary market and held some or all of such Securities as of at least October 19, 2015, and
>
> > (a) are resident in Canada or were resident in Canada at the time of such acquisitions, regardless of the location of the exchange on which they acquired their Valeant Securities, or
> >
> > (b) acquired Valeant's Securities in the secondary market in Canada or elsewhere other than in the United States,
>
> Excluded from the Class are the Defendants, the individual Defendants, members of the immediate families of the individual Defendants, and the directors, officers, subsidiaries, affiliates of Valeant and its subsidiaries.

[34] Ms. Kowalyshyn proposes the following class definition:

> All persons, except for Excluded Persons, who purchased or otherwise acquired Securities of Valeant on the TSX or other secondary market in Canada during the Class Period, and all persons who acquired Valeant's Securities during the Class Period who are resident of Canada and all persons who were resident of Canada at the time of acquisition and acquired Valeant Securities outside of Canada.

[35] The following diagram illustrates the scope of the class definitions in the *Kowalyshyn, O'Brien,* and *Catucci* class actions:

	Kowalyshyn Action	*O'Brien* Action	*Catucci* Action
All purchasers of Valeant securities (shares, notes) from Canadian secondary market	•	•	•
All purchasers of Valeant securities from foreign secondary market (other than United States)		•	•
Resident Canadians purchasing Valeant securities inside Canada from Canadian primary or secondary market	•	•	•
Resident Canadians purchasing Valeant securities outside Canada	•	•	•
Primary market purchasers wherever they may reside of Valeant securities		•	•

[36] Thus, the *O'Brien* Action is a representative action for a global class of investors with an exception for foreign purchasers purchasing on United States' markets and the *Kowalyshyn* Action is a representative action for Canadian residents who purchased on any market and for foreigners who purchased securities on Canadian markets, but it excludes foreigners who purchased Valeant securities on foreign exchanges.

3. Defendants

[37] In her proposed class action, Ms. O'Brien sues Valeant, J. Michael Pearson, Howard B. Schiller, Robert A. Ingram, [Robert Rosiello], Robert H. Farmer, Theo Melas-Kyriazi, G. Mason Morfit, Dr. Laurence E. Paul, Robert N. Power, Norma A. Provencio, Lloyd M. Segal, Katharine B. Stevenson, Fred Hassan, Colleen Goggins, Anders Lonner, Jeffrey W. Ubben and PriceWaterhouseCoopers LLP ("PWC").

[38] Ms. O'Brien has mistakenly omitted Valeant's CFO Robert Rosiello in her selection of defendants. Mr. Rosiello is a defendant in the *Catucci* Action. I shall treat this error as corrected in the *O'Brien* Action, without engaging in the debate about whether it was a typographical error, as submitted by Ms. O'Brien, or a glaring error, as submitted by Ms. Kowalyshyn.

[39] In the *Catucci* Action, Mr. Catucci and Ms. Aubin sue J. Michael Pearson, Howard Schiller, Robert Rosiello, Robert Ingram, Robert Farmer, Theo-Melas-Kyriazi, G. Mason Morfit, Dr. Laurence Paul, Robert Power, Norma Provencio, Lloyd Segal, Katharine Stevenson, Fred Hassan, Colleen Goggins, Anders Lonner, Jeffrey Ubben, PWC, Goldman, Sachs & Co., Goldman Sachs Canada Inc., Deutsche Bank Securities Inc., Barclays Capital Inc., HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA) Inc., DNB Markets Inc., RBC Capital Markets LLC, Morgan Stanley & Co. LLC, Suntrust Robinson Humphrey Inc., Citigroup Global Markets Inc., CIBC World Markets Corp., SMBC Nikko Securities America Inc., TD Securities (USA) LLC, J.P. Morgan Securities LLC Merrill Lynch, Pierce, Fenner & Smith Incorporated, and BMO Capital Markets Corp.

[40] It may be noted that the *Catucci* Action is the only action against Valeant that joins the seventeen underwriters who participated in primary distributions of Valeant's securities.

[41] In her proposed class action, Ms. Kowalyshyn sues Valeant, J. Michael Pearson, Robert L. Rosiello, Howard B. Schiller, Laizer D. Kornwasser, Kate Stevenson, Norma Provencio, Theo Melas-Kyriazi, and PWC.

[42] **Valeant** is a specialty pharmaceutical and medical device company incorporated in British Columbia but headquartered in Québec, Canada with sales and operations in Canada, the United States and abroad. Its shares traded on the TSX, the NYSE, and in Mexico and various European exchanges.

[43] Valeant's connection to Québec is based on the following: (1) Valeant's international headquarters, its principal executive offices, and several of its major subsidiaries, including Valeant Canada Limited, Valeant Canada GP Limited, and Valeant Canada LP, are located in Laval, Québec; (2) Valeant is principally regulated by the Québec Autorité des marchés financiers; (3) the annual meetings of Valeant's shareholders were held in Québec; (4) Valeant's Investor Relations Department is located in Laval, Québec; and (5) the significant communications to Valeant investors originated from Valeant's headquarters in Laval, Québec.

[44] Valeant's connection to Ontario is based on the following: (1) Valeant is a reporting issuer in Ontario subject to Ontario legislative and regulatory oversight; (2) Valeant's securities traded on the TSX; (3) the majority of Canadians who purchased Valeant's notes on the primary market reside in Ontario; (4) Valeant operates a large industrial property in Ontario; (5) Valeant's Vice President and Chief Compliance Officer are located in Ontario; and (6) two of Valeant's Directors reside in Ontario.

[45] Between January 2013 and October 2015, the following individuals were officers, or directors of Valeant:

- **J. Michael Pearson** of New Jersey, U.S. was the CEO.
- **Howard Schiller** of New Jersey, U.S. was CFO from December 2011 to July 1, 2015.
- **Robert Rosiello** of New Jersey, U.S. was CFO after July 1, 2015.
- **Laizer Kornwasser** of New Jersey, U.S. was Vice President and Company Group Chairman from February 1, 2013 to July 2015.
- **Theo Melas-Kyriazi** of Massachusetts, U.S. was a director and a member of the Audit Committee.
- **Norma Provencio** of California, U.S. was a director and a member of the Audit Committee.
- **Katherine Stevenson** of Ontario, Canada was a director and a member of the Audit Committee.
- **Robert Ingram** of North Carolina, U.S. was a director.
- **Robert Farmer** of Ontario, Canada was a director.
- **G. Mason Morfit** was a director.
- **Dr. Laurence Paul** was a director.
- **Robert Power** of Pennsylvania, U.S. was a director.
- **Lloyd Segal** was a director.
- **Fred Hassan** was a director.
- **Colleen Goggins** of New Jersey, U.S. was a director.
- **Anders Lonner** of Stockholm, Sweden was a director.
- **Jeffrey Ubben** of California, U.S. was a director.

[46] The Defendants who are members of Valeant's audit committee are Mr. Melas-Kyriazi and Mesdames Provencio and Stevenson.

[47] Valeant's auditor was **PWC** out of its Florham, New Jersey, United States office.

4. Witnesses for the Carriage Motion

[48] Ms. Kowalyshyn supported her carriage motion with the following evidence:

- Her affidavit sworn on January 21, 2016.
- An affidavit from Mr. Morton sworn on February 12, 2016.
- An affidavit from Johan X. Sundin, on behalf of SEB, sworn on February 15, 2016.
- An affidavit from Andrew Eckart, a lawyer at Sutts, Strosberg LLP, sworn on February 17, 2016.

- Affidavits from Garth Myers, an associate lawyer at Koskie Minsky LLP, sworn on February 17 and 26, 2016. Mr. Myers was cross-examined on March 7, 2016.

[49] Ms. O'Brien supported her carriage motion with the following evidence:

- Her affidavit sworn on February 25, 2015.
- An affidavit from Remissa Hirji, a lawyer at Rochon Genova LLP, sworn on February 17, 2016.
- An affidavit from Andrew Morganti, of Northville, Michigan, the managing partner of Morganti Legal, sworn on February 17, 2016.
- An affidavit from Eliezer Karp, a lawyer at Morganti Legal, sworn on February 26, 2016.
- An affidavit from Ira M. Press of New York City, New York State, an attorney with Kirby McInerney LLP sworn on February 25, 2016. Mr. Press was retained to provide an opinion concerning the Rule 10b claim under the U.S. *Securities Exchange Act 1934,* which is being asserted in Ms. Kowalyshyn's Action.
- Affidavits from Serge Kalloghlian, an associate lawyer at Siskinds LLP, sworn on February 17 and 26, 2016 and March 22, 2016. Mr. Kalloghlian was cross-examined on March 7, 2016.
- An affidavit from Shawn Faguy, the President of Faguy & Co. sworn on March 1, 2016. Mr. Faguy was cross-examined on March 9, 2016.

C. PROCEDURAL BACKGROUND TO THE PROPOSED CLASS ACTIONS

[50] On October 26, 2015, the *Catucci* Action was commenced in Québec with Morganti Legal and Faguy & Co. as proposed Class Counsel. Mr. Catucci was the proposed Representative Plaintiff. Later, Nicole Aubin was added as a Representative Plaintiff.

[51] On October 27, 2015, Siskinds Desmeules, as noted above, the Québec-based affiliate of Siskinds LLP, commenced an action in Québec styled *Rousseau-Godbout v. Valeant et al.*

[52] Around the same time, several class actions were commenced in the United States against Valeant.

[53] In mid-November 2015, the parties to the Québec actions informed the Québec case management judge that there would be a carriage motion to determine whether one of the actions should be stayed. As explained below, this motion did not proceed.

[54] On November 16, 2015, by notice of action, Ms. Kowalyshyn commenced an action in Ontario with Koskie Minsky LLP and Sutts, Strosberg, LLP as her proposed Class Counsel.

[55] On the same day, Misuzu Sukenaga commenced a rival action in Ontario with Morganti Legal as the proposed Class Counsel.

[56] On November 17, 2015, Mirza Alladina commenced an action in British Columbia with Investigation Counsel P.C. as proposed Class Counsel. Subsequently, Investigation Counsel would agree to join the consortium for the *Kowalyshyn* Action.

[57] On November 23, 2015, Ms. O'Brien commenced a revised action in Ontario by notice of action with Siskinds LLP and Rochon Genova LLP as her proposed Class Counsel.

[58] On December 2, 2015, Ms. Kowalyshyn's Class Counsel commenced a proposed class action in British Columbia with Randy Okeley, a resident of Nanaimo, as the proposed Representative Plaintiff. The *Okeley* Action and the *Alladina* Action are being prosecuted by Ms. Kowalyshyn's consortium of Class Counsel. Their plan is to discontinue the *Okeley* Action but to preserve the *Alladina* Action because it asserts an oppression remedy claim under British Columbia's *Business Corporations Act*, S.B.C. 2002, c. 57.

[59] On December 17, 2015, Ms. Kowalyshyn delivered her Statement of Claim and on December 18, 2015, she served a Notice of Motion for leave under s. 138.8(1) of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 and equivalent provisions in the *Securities Acts* of other provinces.

[60] By mid-December, 2015, Morganti Legal, Rochon Genova LLP, and Siskinds LLP formed a consortium to prosecute the Québec action and a carriage motion was no longer necessary. The *Catucci* Action is thus the unrivaled national action out of Québec with Ontario and Québec plaintiffs.

[61] At the same time as the consortium was being formed in Québec, in Ontario, Morganti Legal referred Ms. O'Brien to Rochon Genova, and the plan was that Ms. O'Brien's action would replace Ms. Sukenaga's action, which would be discontinued. The *O'Brien* Action would be associated with the *Catucci* Action.

[62] On December 30, 2015, Ms. O'Brien commenced her action in Ontario with Rochon Genova LLP as proposed Class Counsel.

[63] On January 6, 2016, Morganti Legal undertook to discontinue the *Sukenaga* Action, and Morganti Legal agreed that it would not challenge carriage in Ontario.

[64] In January 2016, Ms. Kowalyshyn's proposed Class Counsel became aware of the rival *O'Brien* Action, and after a scheduling case conference, a carriage motion was scheduled for April 8, 2016.

[65] On February 3, 2016, an amended Statement of Claim was delivered in the *O'Brien* Action in Ontario, and on February 11, 2016, an amended Statement of Claim was delivered in the *Catucci* Action.

[66] In February 2016, Ms. O'Brien served a Notice of Motion for leave under s. 138.8(1) of the Ontario *Securities Act*, and equivalent provisions in the *Securities Acts* of other provinces.

[67] In March 2016, Ms. Kowalyshyn and Ms. O'Brien exchanged materials for the carriage motion. They completed cross-examinations. They exchanged six lengthy facta.

[68] The carriage motion was argued on April 8, 2016.

D. FACTUAL BACKGROUND TO THE PROPOSED CLASS ACTIONS

1. Valeant's Financial Market Activity

[69] Valeant's securities, stocks and notes, were sold in stock exchanges around the world including the TSX, the NYSE, and exchanges in Germany, Switzerland, and Mexico.

[70] During the Class Period, there were primary market distributions of shares and notes. Valeant and its subsidiaries engaged in five note offerings and two share offerings, the second of

which was not distributed in Canada or to Canadians.

[71] During the Class Period, the Valeant notes sold were offered pursuant to offering memoranda in which the governing law was expressed to be the law of New York State.

[72] During the Class Period, Valeant shares and a variety of its notes and the notes of its subsidiaries with different interest rates and maturity dates were traded in secondary markets around the world.

[73] Although some of the offerings will be mentioned below, for present purposes, it is not necessary to list the numerous offerings and types of Valeant securities traded on secondary markets, and it only needs to be noted that there were many offerings and much trading of Valeant securities during the Class Period.

2. Summary of the Alleged Wrongdoing of Valeant, the Valeant Officers and Directors, Valeant's Auditor, and the Underwriters

[74] A brief summary of the factual background and of the allegations of wrongdoing made against Valeant, its officers and directors, its auditor, and the underwriters who assisted Valeant in securing capital for its growth and operations is as follows.

[75] Valeant was established in its current form in 2010 as a result of a reverse merger between the Canadian Biovail Corporation and a California-based pharmaceuticals company called Valeant Pharmaceuticals.

[76] After the merger, Valeant pursued leveraged acquisitions of pharmaceutical products, and its growth was phenomenal. By 2015, Valeant's revenues grew by more than 700%; its stock price increased by 1,700%, and its market capitalization exceeded $110 billion.

[77] Although articulated differently in the competing Statements of Claim, it is alleged by the rival Plaintiffs that to raise capital in the primary markets for securities and to increase the value of its securities in the secondary markets and to convince investors that its growth was not predicated solely on acquisitions but rather based on the corporation's performance and productivity, Valeant misrepresented the true reasons for its apparently phenomenal financial results. Further, it is alleged that its financial statements misrepresented the true situation.

[78] The alleged misrepresentations, which were largely failures to disclose information that ought to have been disclosed to investors, kept hidden that Valeant's spectacular performance was actually predicated on price increases for its products supported by improper product distribution practices that were carried out by a hidden extensive network of "Specialty Pharmacies," i.e., pharmacies dispensing drugs made by one manufacturer to its customers. Valeant's actual performance was obscured by Valeant including the operations of mail-order pharmacies in its consolidated financial statements.

[79] One of the channels of distribution used by Valeant was Philidor Rx Services, LLC, ("Philidor"), a mail-order pharmacy. Philidor was set up as a licensed pharmacy in Pennsylvania and as a non-resident licensed pharmacy in 45 other American states and in the District of Columbia. In January 2013, Valeant entered into a service agreement with Philidor, and it is alleged that Valeant, which, practically speaking, tightly controlled Philidor, used it to overstate its revenue from product sales.

[80] For generally accepted accounting principles ("GAAP"), Philidor was what is known as

a "Variable Interest Entity" ("VIE"). The fact that Valeant's financials included the operations of mail-order pharmacies and that it treated Philidor as a VIE was not disclosed to investors. Moreover, it is alleged that to the extent that Philidor and others were boosting the sales of Valeant's products, they did so by improper and illegal business practices, including the altering of prescriptions to require the dispensing of Valeant products rather than available generics and the deceiving of insurance companies to pay for Valeant drugs or medical devices.

[81] It is alleged that in October 2015, the marketplace and regulators began to learn the truth about Valeant's apparent success, it pricing practices, as well as its relationships with Philidor and other Specialty Pharmacies. Valeant's own disclosures and revelations from business media commentators revealed Valeant's financial interests in the Specialty Pharmacies and the improper business practices within the Specialty Pharmacies network.

[82] On October 19, 2015, the disclosure of the nature of the relationship between Valeant and Philidor resulted in a market reaction that saw the price of Valeant shares fall from $220.00 to $154.21 at the opening of the TSX on October 21, 2015.

[83] Between October 25 and 30, 2015, there were further disclosures of the relationship between Valeant and Philidor and about their business practices, and on October 30, 2015, Valeant announced that it would terminate its relationship with Philidor and that Philidor would be shutting down its business at the end of the year. With these disclosures, the price of Valeant shares fell from $144.80 at the opening of the TSX on October 26, 2015 to $122.04 at the close of the TSX on October 30, 2015.

[84] On November 4, 2015, it was reported that certain Valeant employees, including a Valeant manager named Gary Tanner, who had been involved in the distribution of Valeant products, had been dismissed by Valeant. The price of Valeant shares fell from $129.73 at the opening of the TSX on November 4, 2015 to $121.20 at the close of trading.

[85] On November 10, 2015, Valeant hosted a conference call to update investors about the Philidor matter. After the conference call, the price of Valeant shares fell from $112.11 at the opening of the TSX on November 10, 2015 to $110.76 at the close of trading.

[86] On November 12, 2015, additional information concerning the ties between Valeant and Philidor was reported, including the involvement of Valeant employees in interviewing job applicants at Philidor, and the price of Valeant shares fell from $102.17 at the opening of the TSX on November 12, 2015 to $98.14. Thus, between October 26 and November 12, 2015, there was a $46.66 decline in the price of Valeant shares.

[87] The decline in the price of Valeant shares from October 19, 2015 was $121.86. Since mid-August 2015 with the disclosure to the public of information about Valeant's business practices, to the commencement of the various class actions, Valeant's market capitalization plummeted nearly $45 billion.

[88] In the fallowing months, there have been more substantial declines in the price of Valeant securities.

[89] In differently articulated ways and with different combinations of Defendants, the proposed Representative Plaintiffs contend that during the Class Period, the Defendants knowingly made misrepresentations including misrepresentations in a variety of documents including financial statements that ought to have been but were not prepared in accordance with professional accounting and auditing standards. Ms. O'Brien lists almost 60 impugned

documents. Ms. Kowalyshyn focuses on what are known as "core documents" under securities statutes. The proposed Representative Plaintiffs contend that the Defendants' misrepresentations constitute breaches of common law, *Civil Code,* and various Canadian and American securities statutes.

[90] With a combination of various legal theories and reliance on securities statutes, Ms. O'Brien, Mr. Catucci, and Ms. Kowalyshyn, share the allegations that Valeant, its officers and directors, its auditor, and the underwriters were legally culpable for misrepresentations and, therefore, should compensate the Class Members who invested in Valeant's securities for their losses.

E. THE DESIGN OF THE COMPETING CLASS ACTIONS

1. Preparation and Due Diligence

[91] Ms. O'Brien's proposed Class Counsel undertook an impressive amount of investigatory, due diligence and preparatory work.

[92] The work of Ms. O'Brien's consortium included reviewing public documents, such as: (i) disclosure documents, (ii) corporate presentations, (iii) transcripts of Valeant's earnings calls and business update calls, (iv) offering documents, (v) freedom on information reports from the Autorité des marchés financiers, (vi) business and financial analyst reports, (vii) market commentators and major hedge fund managers' presentations, (viii) studies of the pharmaceuticals market and of pricing practices, (ix) documents filed as part of litigation between R&O Pharmacy LLC, a Specialty Pharmacy, and Valeant Pharmaceuticals North America LLC, (x) a Reference Binder issued by Philidor, (xi) 28 reports issued by Veritas Investment Research Corporation, an independent firm of financial analysts, (xii) reports by short traders, and (xiii) trading data.

[93] Ms. O'Brien's proposed Class Counsel retained: (a) Professor Ramy Elitzur, professor of accounting and financial reporting at the Rotman School of Business at the University of Toronto; (b) Peter Lennon, a lawyer based in Pennsylvania, a certified public accountant and a professor of economics, to assist with due diligence and understanding of the accounting issues raised in this proceeding; (c) Xpera Risk Mitigation & Investigation to conduct an investigation regarding accounting and business practices at Valeant since 2013; (d) Frank Torchio of Forensic Economics to provide evidence and assistance with matters related to damages, loss causation, materiality and market efficiency; and (e) Professor Stephen Schondelmeyer to provide evidence and assistance with matters related to pharmacies, the pharmacy industry, specialty pharmacies, patient assistance programs, pharmacy benefit managers and U.S. laws and regulations.

[94] Ms. Kowalyshyn's proposed Class Counsel undertook an impressive amount of investigatory, due diligence and preparatory work.

[95] The work of Ms. Kowalyshyn's consortium included: (a) purchasing and reviewing published reports by key analysts and consulting with the analysts; (b) retaining Ken Froese and Cyrus Khory of Froese Forensic Partners Ltd. to advise in respect of U.S. GAAP issues; (c) retaining Professor Adam C. Pritchard, Professor of Law of the University of Michigan, to give evidence on the availability of a private right of action under U.S. federal securities laws on behalf of purchasers of Valeant's notes; (d) retaining Professor Patrick Borchers of the University

of Creighton School of Law to give evidence on the availability of New York State common law claims on behalf of purchasers of Valeant's notes; (e) retaining Chad W. Coffman of Global Economic Group, LLC to give evidence on a methodology to calculate aggregate damages and other damages issues; (f) retaining Professor Thomas McGuire, a professor of health economics at Harvard Medical School, to give evidence relating to the conduct in the pharmaceutical industry; (g) retaining Harris L. Devor, an audit and forensic litigation services partner at Friedman LLP, to give evidence on applicable U.S. GAAP and GAAS standards, internal controls over financial reporting, and disclosure controls and procedures; (h) retaining Dean R. Glenn Hubbard, an economics professor at the Columbia Business School (Columbia University), to give evidence on issues surrounding materiality and loss causation; and (i) retaining Diane Schulman of The Indago Group Inc., a former investigative journalist, to investigate the allegations raised in the claim through interviews with former Philidor employees.

2. Proposed Class Periods

[96] The Plaintiffs in the *Catucci* Action propose a Class Period from February 28, 2013 to October 26, 2015. Ms. O'Brien proposes a Class Period from February 28, 2013 to October 26, 2015. Ms. Kowalyshyn proposes a Class Period from February 28, 2013 to November 12, 2015.

[97] The parties thus agree that the start of the Class Period is February 28, 2013, which is the date that Valeant released its MD&A and Financial Statements for the year ended December 31, 2012. The parties disagree about the end of the Class Period with the *Kowalyshyn* Action being 17 days longer.

3. The *Catucci* Action's Theory of the Case against Valeant and Others

[98] The *Catucci* Action is the most comprehensive case in the sense that it includes the most defendants, the most causes of action, and the largest Class Membership, including foreign purchasers of Valeant securities in both Canadian and world stock markets.

[99] The *Catucci* Action advances claims on behalf of those who acquired Valeant shares and notes between February 28, 2013 (the date on which Valeant issued its disclosure documents for fiscal 2012) and October 26, 2015 (the date on which Valeant first disclosed certain elements of its relationships with the Specialty Pharmacies). The *Catucci* Action pleads that, while there has been a period of corrective disclosures, the entire truth regarding the alleged misrepresentations has not yet been disclosed to the public.

[100] In the *Catucci* Action, claims are advanced on behalf of the following groups of Valeant investors: (1) primary market investors of common shares from the prospectus offerings completed in June 2013 and March 2015, wherever they may reside or may be domiciled; (2) primary market investors of notes from the offering memoranda dated June 27, 2013, November 15, 2013, January 15, 2015, and March 13, 2015, wherever they may reside or may be located; (3) secondary market investors of common shares in the secondary market in Canada and elsewhere (other than the U.S.), and the persons and entities who are resident in Canada or were resident in Canada at the time of such acquisitions regardless of the location of the exchange on which they acquired their Valeant common shares; and (4) secondary market investors (notes) in the secondary market in Canada and elsewhere (other than the U.S.), and the persons and entities

who are resident in Canada or were resident in Canada at the time of such acquisitions regardless of the location of the secondary market venue on which they acquired their Valeant notes.

[101] The theory or grand strategy of the *Catucci* Action is what might be described as a pincer attack against the Valeant corporate and individual defendants and the underwriters for misrepresentation claims in the primary and secondary markets. A pincer movement, or double envelopment, is a military maneuver in which forces simultaneously attack both flanks of an enemy formation. One flank of the *Catucci* Action focuses on Valeant's involvement in a previously undisclosed network of Specialty Pharmacies and the second flank focuses on Valeant's alleged to be systematic, improper financial reporting practices. The ammunition for the coordinated attacks is a lengthy list of impugned documents alleged to contain misrepresentations.

[102] The first flank of the strategy of the *Catucci* Action is that Valeant engaged in undisclosed and improper business practices concerning the pricing of its products and their distribution through its network of Specialty Pharmacies, which misrepresented Valeant's business and operational results and misrepresented the sustainability of its business model. The argument is that Valeant's misrepresentation in failing to disclose its relationships with and conduct of business through the Specialty Pharmacies network gave rise to other misrepresentations in Valeant's disclosure documents, including but limited to so-called "core documents" under securities statutes, namely: (a) insufficient and defective risk disclosures; (b) misrepresentations regarding Valeant's organic growth and the sustainability of its business; (c) violations of GAAP; (d) misrepresentations regarding Valeant's internal controls; and (e) misrepresentations regarding Valeant and its directors' and officers' compliance with Valeant's Standards of Business Conduct and Code of Ethics.

[103] The second flank of the attacking strategy of the *Catucci* Action was informed by the analysis of Professor Elitzur and submits that - before Valeant established its relationships with Specialty Pharmacies - it violated GAAP: by improperly recognizing revenues; by overstating income; and, by failing to disclose qualitatively material information about how it generated its growing revenue, all of which were allowed to occur as a result of Valeant's failure to employ effective internal controls over financial reporting. These allegations, supported by Professor Elitzur's preliminary analysis identify Valeant's GAAP violations throughout the Class Period and also underpin the liability of Valeant's auditors, PWC. The case against PWC is that it failed to comply with the Public Company Accounting Oversight Board ("PCAOB") standards in performing its audit of Valeant.

[104] In the *Catucci* Action, the claims against the underwriters are facilitated by two juridical tools - arguably - not available in Ontario. Pursuant to *Bank of Montreal v. Marcotte,* 2014 SCC 55, and unlike the Ontario authorities based on *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) and *Hughes v. Sunbeam Corp. (Canada)* (2002), 61 O.R. (3d) 433 (C.A.), appeal to S.C.C. ref'd (2003), [2002] S.C.C.A. No. 446, Québec law does not require that the representative plaintiff(s) to personally have a claim against each of the class action defendants. Further, Québec law is said to provide a unique juridical advantage to the primary market members of the proposed class in that ss. 217-221 of the Québec *Securities Act,* CQLR c. V-1.1 provide for a statutory right of action against, among others, the underwriters who acted in the offerings of Valeant's notes pursuant to offering memoranda—a right of action that the Ontario *Securities Act* does not provide.

[105] Class Counsel for the *Catucci* Action lauds their strategy for being comprehensive in capturing all the culpable Defendants for all of their culpable misrepresentations and for maximizing the putative Class Members' recovery.

4. The *O'Brien* Action's Theory of the Case against Valeant and Others

[106] The theory or grand strategy of the *O'Brien* Action generally mimics the *Catucci* Action without the claim against the underwriters and with common law misrepresentation claims rather than analogous *Civil Code* claims.

[107] Ms. O'Brien confesses that her claim against PWC incorrectly pleads a failure to comply with Generally Accepting Audit Standards ("GAAS"), and she says that her pleading will be amended to accord with the pleading in the *Catucci* Action which alleges non-compliance with the PCAOB. Ms. O'Brien criticizes Ms. Kowalyshyn for not making a similar confession and for stubbornly denying that she made the same mistake.

[108] The case theory of the *Catucci* Action and the *O'Brien* Action against the Valeant Defendants is explained in paragraph 33 of Ms. O'Brien's factum as follows:

> 33. Based on this case theory, the [*Catucci* and *O'Brien* Actions] pleads distinct, yet interrelated, misrepresentations each of which are important to the class's claims:
>
> (a) failure to disclose material facts relating to Valeant's relationships with and its conduct of business through Specialty Pharmacies;
>
> (b) insufficient and defective risk disclosures regarding the material and identifiable risks to Valeant and its business in engaging in the business with and through Specialty Pharmacies;
>
> (c) misrepresentations regarding Valeant's organic growth and the sustainability of its business;
>
> (d) GAAP violations in Valeant's financial statements and associated misrepresentations in Valeant's MD&As as a result of:
>
> (i) improper revenue recognition, recognition of phantom sales, non-existent or uncollectible accounts receivable and/or channel stuffing;
>
> (ii) the failure to disclose related parties and material related party transactions; and
>
> (iii) the failure to comply with GAAP applicable to financial reporting of VIE entities;
>
> (e) misrepresentations regarding Valeant's internal controls, consisting of both Valeant's disclosure controls and procedures and its internal controls over financial reporting;
>
> (f) misrepresentations regarding the compliance of Valeant, its directors, officers and employees with Valeant's stated Standards of Business Conduct and its stated Code of Ethics; and
>
> (g) the individual defendants' false certifications regarding the accuracy of Valeant's disclosures.

[109] With an exception for the underwriters, who are a target in the *Catucci* Action, Class

Counsel for the *O'Brien* Action lauds their strategy for being comprehensive in capturing all the culpable Defendants for all of their culpable misrepresentations and for maximizing the putative Class Members' recovery.

5. The *Kowalyshyn* Action's Theory of the Case against Valeant and Others

[110] To continue the military analogies, the theory or grand strategy of the *Kowalyshyn* Action is a blitzkrieg or "schwerpunktprinzip" ("concentration principle") proposed by Carl von Clausewitz, who advocated a concentration of force against an enemy and who criticized the dispersal and inefficient use of military resources. The focused theory of the *Kowalyshyn* Action is that Valeant, its officers and directors on its audit committee, and PWC made misrepresentations in Valeant's public disclosure documents; i.e., its "core documents" under securities legislation, that: (1) Valeant's financial statements were prepared in accordance with GAAP; (2) Valeant's disclosure controls and procedures and internal controls over financial reporting were effective; and (3) PWC's audit met the standard of care. Thus, the *Kowalyshyn* Action alleges that there were three misrepresentations during the Class Period: (1) the "GAAP Misrepresentation"; (2) the "Internal Controls Misrepresentation"; and (3) the "GAAS Misrepresentation."

[111] The "GAAP Misrepresentation" is the allegation that Valeant's failure to disclose the treatment of Philidor as a VIE and its consolidation in Valeant's balance sheet to investors was a violation of U.S. GAAP, which requires an enterprise to disclose when it holds an interest in a VIE and specific information about the relationship between the enterprise and VIEs was a misrepresentation.

[112] The "Internal Controls Misrepresentation" is the allegation that after Valeant took on Philidor's liabilities with respect to non-reimbursement by insurers, Valeant did not have effective systems of: (a) internal controls over financial reporting; or (b) disclosure controls and procedures, that would allow it to prevent or detect unauthorized or unlawful conduct that could endanger Valeant or affect its consolidated financials and, therefore, Valeant misrepresented in core public disclosure documents that both: (a) its disclosure controls and procedures, and also (b) its internal controls over financial reporting, were effective.

[113] The "GAAS Misrepresentation" is the allegation that PWC misrepresented that it conducted its audit of Valeant in compliance with the standards of the United States; PCAOB standards. Ms. Kowalyshyn alleges that: (a) the financial statements were untrue; (b) PWC did not comply with its legal duties; and (c) PWC allowed Valeant to hide Philidor and its risky business practices from investors.

[114] Ms. Kowalyshyn submits that the misrepresentations were made in Valeant's financial statements and MD&A issued on February 28, 2013 and constituted misrepresentations at that time. February 28, 2013 commences the Class Period which closes on November 12, 2015, which is 17 days longer than the closing date for the *O'Brien* and *Catucci* Actions.

[115] In addition to the statutory misrepresentation and common law claims in the primary market, Ms. Kowalyshyn advances two types of claims in the primary market for Canadian Class Members who purchased Valeant's notes from an offering memorandum in a distribution in the United States; namely: (1) negligent misrepresentation under the common law of New York State (primary market class); and (2) securities misrepresentation under Rule 10b-5 of the *U.S.*

Securities Exchange Act of 1934 (primary market class). She does so in accordance with the governing law provision in the notes and out of an abundance of caution for the eventuality that the court determines that U.S. law applies to these purchases.

[116] Class Counsel for the *Kowalyshyn* Action lauds their strategy as focused to ensure the greatest likelihood of maximum recovery for Class Members with dispatch without the overextended, needless, and impairing excesses and ill-advised and unbeneficial tactics of the *O'Brien* Action.

6. Summary of the Causes of Action

[117] The following is a summary of the nature and scope of the causes of action in the actions:

Right of Action	*Kowalyshyn* Action	*O'Brien* Action	*Catucci* Action
PRIMARY MARKET			
Statutory Action Misrepresentation in Prospectus	All named Defendants. (June 2013 Prospectus)	All named Defendants. (June 2013 and March 2015 Prospectus)	All named Defendants (notably this includes the underwriters) (June 2013 and March 2015 Prospectus)
Statutory Action Misrepresentation in Offering Memorandum	Valeant. (March 2013, July 2013, December 2013, January 2015, March 2015 Offering Memoranda)	All named Defendants. (July 2013, December 2013, January 2015, March 2015 Offering Memoranda)	All named Defendants (notably this includes the underwriters) (July 2013, December 2013, January 2015, March 2015 Offering Memoranda)
Common Law Action Negligent Misrepresentation Primary Market	All named Defendants. (June 2013 Prospectus/ March 2013, July 2013, December 2013, January 2015, March 2015 Offering Memoranda)	All named Defendants. (June 2013 and March 2015 Prospectus/July 2013, December 2013, January 2015, March 2015 Offering Memoranda)	
Québec Duty of Due Diligence Primary Market			All named Defendants (notably this includes the underwriters) (June 2013 and March 2015 Prospectus/July 2013, December 2013, January 2015, March 2015 Offering Memoranda)
Common Law of New York State Negligent Misrepresentation under the (primary market class)	Valeant and PWC (March 2013, July 2013, December 2013, January 2015, March 2015 Offering Memoranda)		
Statutory Action Securities Misrepresentation under Rule 10b-5 of the U.S. *Securities Exchange Act of 1934* (primary market class)	Valeant and PWC (March 2013, July 2013, December 2013, January 2015, March 2015 Offering Memoranda)		

SECONDARY MARKET			
Statutory Action Misrepresentation Shares in Canadian Secondary Market	All named Defendants.	All named Defendants.	All named Defendants except Underwriters
Statutory Action Misrepresentation Notes in Canadian Secondary Market	All named Defendants		All named Defendants except Underwriters
Statutory Action Misrepresentation Shares in Secondary Market (not U.S.)		All named Defendants	All named Defendants except Underwriters
Statutory Action Misrepresentation Notes in Secondary Market (not U.S.)		All named Defendants	All named Defendants except Underwriters
Common Law Action Negligent Misrepresentation in Secondary Market	All named Defendants except PWC	All named Defendants	
Québec Duty of Due Diligence Secondary Market			All named Defendants except Underwriters

F. CRITIQUE OF THE DESIGN OF THE COMPETING CLASS ACTIONS

1. Ms. Kowalyshyn's Critique of the *O'Brien* Action

[118] Ms. Kowalyshyn was harshly critical of the design of Ms. O'Brien's action for being procedurally, managerially, and substantively dysfunctional for overbreadth. Further, no doubt much to the delight of PWC, Ms. Kowalyshyn debunked Ms. O'Brien's common law negligent misrepresentation action against PWC.

[119] Ms. Kowalyshyn criticizes Ms. O'Brien's theory as unproductive, dysfunctional, and inefficient. She submits that by advancing a theory of many distinct and unrelated misrepresentations, the *O'Brien* Action has added needless complexity and has imposed on itself a much higher burden than is necessary to achieve recovery for the class and that the O'Brien design does not offer the class any additional benefit.

[120] Ms. Kowalyshyn argues that the *O'Brien* Action fails to distinguish between misrepresentations relating to internal controls over financial reporting and misrepresentations relating to disclosure controls and procedures. She says that if the controls had existed, this would have allowed Valeant to detect and to prevent unauthorized or unlawful conduct that could endanger Valeant or affect its consolidated financials. Ms. Kowalyshyn submits that her theory of the case is qualitatively better than Ms. O'Brien's theory of the case because her Action focusses on three misrepresentations in core documents while the *O'Brien* Action claims misrepresentations in core documents, non-core documents, and public oral statements.

[121] Ms. Kowalyshyn submits that Ms. O'Brien needlessly complicates her action by relying on misrepresentations in non-core documents and public oral statements and on misrepresentations relating to "forward-looking information," which she says will present enormous difficulties of proof on the leave motion because under the Ontario *Securities Act,* a defendant is only liable for misrepresentation in a non-core document where the misrepresentation is made deliberately, where the defendant deliberately avoided acquiring knowledge of the misrepresentation, or through gross misconduct: Ontario *Securities Act*, s. 138.4; *Coffin v. Atlantic Power*, 2015 ONSC 3686. Ms. Kowalyshyn submits that the increased

complexity in the *O'Brien* Action arising from the additional misrepresentations will not lead to any further recovery and will harm rather than help the prospect of certification and the advancement of the action in an expeditious manner.

[122] Ms. Kowalyshyn criticizes Ms. O'Brien's causes of action for three technical reasons: (1) Ms. O'Brien does not include a pleading of U.S. law claims on behalf of primary market purchasers of Valeant's notes where the offering memoranda was governed by the law of New York State; (2) Ms. O'Brien's pleading contains an untenable common law claim for negligent misrepresentation against PWC on behalf of purchasers of Valeant's securities on the secondary market; and (3) Ms. O'Brien advances a purported statutory claim on behalf of primary market purchasers of notes against the non-Valeant defendants that has no basis in law.

[123] Ms. Kowalyshyn submits that her claim against PWC has been carefully crafted to be limited to the primary market and that Ms. O'Brien's negligent misrepresentation claim in the secondary market against PWC is destined to fail because it runs afoul of the entrenched principles enunciated by the Supreme Court of Canada in *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165 limiting secondary market claims against auditors of publically traded companies. Ms. Kowalyshyn argues that Ms. O'Brien does not plead any extraordinary facts whereby PWC's liability to purchasers of securities on secondary markets would be determinate and thus satisfy the test for a duty of care.

[124] Ms. Kowalyshyn submits that the claim against PWC will add enormous complexity and costs to the proceeding, delaying recovery to the rest of the class. She submits that Ms. O'Brien's reliance on the Québec decision in *Widdrington (Estate of) c. Wightman,* 2011 QCCS 1788 is not helpful to Ms. O'Brien's action because: (a) there is no duty of care analysis under Québec law and as a result, no concern for indeterminate liability arose; and (b) the action was on behalf of a member of a private investment club who made investments in Castor Holdings, not a purchaser of securities on the secondary market.

[125] Ms. Kowalyshyn submits that in the application of the carriage test there is a preference for streamlined actions that will be manageable, avoid excess costs and unnecessary delay, be amenable to certification and, in securities actions such as the case at bar, will obtain leave under the Ontario *Securities Act* and ultimately, recovery. More complex claims should only be preferred if they will still be workable and if their increased complexity provides concurrent benefits.

2. Ms. O'Brien's Critique of the *Kowalyshyn* Action

[126] Ms. O'Brien is harshly critical of the design of the *Kowalyshyn* Action as too narrow and as missing the target. She submits that the *Kowalyshyn* Action is procedurally, managerially, and substantively dysfunctional for being too narrow. Ms. O'Brien submits that Ms. Kowalyshyn's theory is fundamentally flawed and omits fundamental aspects of the case.

[127] Ms. O'Brien submits in contrast to her class action, which is designed to secure maximum recovery for the Class Members, that the *Kowalyshyn* Action is designed to secure carriage without regard to the interests of the putative Class Members. She submits that Ms. Kowalyshyn misunderstands the applicable securities law and has restricted her claim to three accounting-focused misrepresentations in an effort to appear "streamlined." Ms. O'Brien claims that Ms. Kowalyshyn's theory misses misrepresentations about: (a) Valeant's improper business

practices and improper revenue generating activities; (b) Valeant's improper revenue recognition; and (c) Valeant's unsustainable business model. Ms. O'Brien says that Ms. Kowalyshyn's failure to include these allegations exposes the weaknesses of her theory and reveals flaws that will lead to failure in the litigation against Valeant and the other Defendants.

[128] Ms. O'Brien is dismissive of Ms. Kowalyshyn's reliance on the common law of New York State and on Rule 10b of the U.S. *Securities Exchange Act of 1934*.

[129] Ms. O'Brien submits that Ms. Kowalyshyn advances claims based on a March 2013 Offering Memorandum which may not exist and that Ms. Kowalyshyn conceded on cross-examination were speculation. Ms. O'Brien argues that the Rule 10b-5 claim is not available because the purchases were made in Canada. This is disputed by Ms. Kowalyshyn who argues that Valeant's primary market note offerings during the Class Period were "bought deals", i.e., purchased from Valeant by investment banks and then subsequently sold to investors. Ms. Kowalyshyn argues that for the purposes of the 10b-5 claims, all such note transactions took place in the U.S. and, in any event, this is a matter best determined at trial on a full record.

[130] Further, Ms. O'Brien submitted that Ms. Kowalyshyn's Rule 10b-5 claims under the U.S. *Securities Exchange Act of 1934* are useless, because they are not available. In the alternative, she argued that even if Rule 10b-5 claims were available, they would fail to satisfy a *scienter* element. Ms. Kowalyshyn disputed both arguments and submitted that her pleading of recklessness satisfied the *scienter* element. Ms. O'Brien's counter-counterargument was that Ms. Kowalyshyn had not pleaded the Defendants' recklessness and that the concept of recklessness was not as simplistic as Ms. Kowalyshyn submitted.

[131] Assuming that the Rule 10b-5 claims were available, Ms. O'Brien also disputed Ms. Kowalyshyn's submission that proof of *scienter* was less onerous than the standard applicable to plaintiffs under the Ontario *Securities Act* in respect of misrepresentations in non-core documents, which was an aspect of Ms. O'Brien's case theory. Ms. O'Brien submitted that given the uncertainty about the *scienter* standard, it could not be said whether it was lesser, equal to, a more demanding than the statutory standard for misrepresentation claims.

G. THE TEST FOR CARRIAGE

[132] With the above factual background and with certain additional factual, procedural, evidentiary, and substantive matters that may be most conveniently introduced as part of the discussion and analysis below, the explanation of my carriage decision can now get underway. The first step of the explanation involves describing the test for determining carriage of a proposed class action because there is more than one proposed class action in Ontario.

[133] In the following part (Part H), I shall take the next step which involves discussing a methodological and evidentiary problem for the immediate carriage fight. Then, in Part I of the Reasons for Decision, I shall take the final big step of applying the carriage test with its numerous factors to the circumstances of the immediate case.

[134] 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 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*, R.S.O. 1990, c. 43 directs that "as far as possible,

multiplicity of legal proceedings shall be avoided."

[135] 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 other present or future class proceedings relating to the same subject-matter: *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at paras. 9-11; *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.).

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

[137] In a carriage fight, practically speaking, the contestants are the rival putative class counsel, and the defendant is a bystander. The carriage motion will decide which one of two or more rival actions will exclusively go forward in the province and which action(s) will be stayed.

[138] It is to oversimplify, but the court will grant carriage to the putative class counsel whose proposed action in the province is better for the interests of the putative class members while being fair to the defendants and while promoting the prime objectives of class proceedings, which are access to justice for plaintiffs, class members, and defendants, behaviour modification, and judicial economy. See: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 48; *Setterington v. Merck Frosst Canada Ltd., supra*, at para. 13; *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.) at para. 14.

[139] 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: *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; *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.).

[140] Where there is a competition for carriage of a class proceeding, the circumstance that one competitor joins more defendants is not determinative; rather, what is important is the rationale for the joinder and whether or not it is advantageous for the class to join the additional defendants: *Joel v. Menu Foods Gen-Par Limited*, [2007] B.C.J. No. 2159 (B.C.S.C.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd., supra.*

[141] Courts generally consider a list of non-exhaustive factors in determining which action should proceed. There are fourteen factors that have been identified in the case law. Because of the arguments made on this carriage motion, I shall add two additional factors for the case at bar; i.e., (1) the prospect of success of the action; and (2) the interrelationship with class actions in other jurisdictions.

[142] For the traditional factors, see: *Ricardo v. Air Transat A.T. Inc., supra; Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (S.C.J.); *Genier v. CCI Capital Canada Ltd., supra; Sharma v. Timminco Ltd., supra*; *Smith v. Sino-Forest Corporation*, 2012 ONSC 24;

McSherry v. Zimmer GMBH, 2012 ONSC 4113; *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875; *Mancinelli v. Barrick Gold Corp.*, 2015 ONSC 2717 (Div. Ct.).

[143] The factors tend to overlap and interconnect. The sixteen factors for the immediate case are:

(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) Preparation and Readiness of the Action

(7) Relative Priority of Commencement of the Action

(8) Case Theory

(9) Scope of Causes of Action

(10) Selection of Defendants

(11) Correlation of Plaintiffs and Defendants

(12) Class Definition

(13) Class Period

(14) Prospect of Success: (Leave and) Certification

(15) Prospect of Success against the Defendants

(16) Interrelationship of Class Actions in More than one Jurisdiction

[144] For present purposes, I foreshadow that for this particular carriage motion, the nine predominant factors for Ms. Kowalyshyn and Ms. O'Brien were: (5) Disqualifying Conflicts of Interest; (8) Case Theory; (9) Scope of Causes of Action; (10) Selection of Defendants; (12) Class Definition; (13) Class Period; (14) Prospect of Success: (Leave and) Certification; (15) Prospect of Success against the Defendants; and (16) Interrelationship of Class Actions in More than one Jurisdiction. As the discussion below will reveal, I did not necessarily agree that all of these factors were influential in arriving at a decision.

[145] In considering the various factors, I will, generally speaking, avoid participating in several spats about whether proposed Class Counsel respectively made explanations, retractions, corrections, revisions, apologies, or excuses in responding to the criticisms levied against their respective proposed class actions and whether their alleged mistakes before correction are grounds to disqualify them from success in the carriage fight. I shall rather allow each party's amendments to be made, even as late as during oral argument. I am not going to treat the factors for carriage as if I was marking a law school exam with no marks for an answer after time has expired. There is no copyright in an idea, and I am not going to ignore the reality that the competing Class Counsel applied lessons learned from their rival's criticisms and bettered their

own proposal for carriage during the carriage contest.

H. METHODOLOGICAL AND EVIDENTIARY PROBLEMS

[146] 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. Eight of the factors are about or are connected to case theory; namely: (8) Case Theory; (9) Scope of Causes of Action; (10) Selection of Defendants; (11) Correlation of Plaintiffs and Defendants; (12) Class Definition; (13) Class Period; (14) Prospect of Success: (Leave and) Certification; and (15) Prospect of Success against the Defendants.

[147] This examination of case theory, however, may ultimately be detrimental to the interests of the putative Class Members. Metaphorically speaking, the rival Class Counsel treated the carriage motion in the case at bar as an opportunity to play the Royal Navy in pursuit of the Battleship Bismarck. In pursuit of carriage, Class Counsel attempted to sink their rival's legal battleship, and they did not hold back in pointing out allegedly very serious weaknesses and supposedly fatal flaws in the quality of their rival's legal, procedural, and evidentiary plans. All of this occurred no doubt to the delight of the Defendants who were standing gauging on the sidelines. The factums are public documents and undoubtedly the Defendants took copious notes of the carriage motion arguments, and they will reprise the attacks beginning with the delivery of their own pleadings or at the certification and leave motion, whichever comes first.

[148] This critical examination of the qualitative merits of the competing class actions is troublesome not only for the putative Class Members who watch the potentially lethal friendly-fire of the battling putative Representative Plaintiffs, but the examination also presents a serious feasibility and jurisdictional problem for the court, which is not in a position where it can - or where it should – determine in any definitive way: (a) the qualitative merits of the proposed class actions; or (b) the likelihood of success of the proposed class actions. These types of determinations cannot be properly made on a carriage motion.

[149] In the immediate carriage motion, the putative Class Counsel made arguments better situated at a summary judgment motion or at a trial, and their arguments went far beyond the substantive and evidentiary arguments that might arise in the process of their attempting to obtain leave under the Ontario *Securities Act* and certification under the *Class Proceedings Act, 1992.*

[150] Moreover, the case law about carriage motions suggests that it is inappropriate for the court to do other than a limited or modest examination of case theories for the limited purpose of identifying: (a) conspicuous or egregious problems; or (b) readily apparent advantages and disadvantages in the competing theories.

[151] The authorities on carriage motions hold that on a carriage motion, it is inappropriate for the court to embark upon an analysis as to which claim is most likely to succeed unless one is "fanciful or frivolous": *Setterington v. Merck Frosst Canada Ltd., supra,* at para. 19. In *Genier v. CCI Capital Canada Ltd., supra* at para. 7, on a carriage motion, Justice Pardu stated that it was premature to come to a conclusion about the ultimate viability of the action against each defendant. In *Gorecki v. Canada (Attorney General), supra*, Justice Rady stated at para. 14:

> It is true that different theories underlying the causes of action exist in the two proceedings. The defendant takes the position that none of the causes of action are tenable. Each plaintiff urges that

> his claim is preferable. It seems to me that it is inappropriate for a Court at this stage of the proceedings to embark on an analysis of which claim is more likely to succeed. A Court should be satisfied, as I am, that none of the theories advanced are fanciful or frivolous.

[152] In *Locking v. Armtec Infrastructure Inc.,* 2013 ONSC 331 (Div. Ct.), Justice Molloy stated at para. 19:

> 19. Clearly, it is inappropriate at the carriage motion stage to get into the likelihood of success on the substantive merits with respect to any given cause of action, or as against any given defendant. That level of scrutiny is not even appropriate at the certification stage.

[153] See also: *Simmonds v. Armtec Infrastructure Inc., sub nom. Locking v. Armtec Infrastructure Inc., supra.*

[154] It is inappropriate for a court on a carriage motion to embark on an analysis of which claim is more likely to succeed because there is no meaningful objective measure to make the prediction. Moreover, in determining the likelihood of success should the court assume that the plaintiff will be able to prove the facts upon which his or her case theory depends? If not, what measure of probability should the court use for the likelihood of the plaintiff proving those facts? Should the court assume what defences the defendant will mount when the defendant has not pleaded but is benefiting by seeing the competing plaintiffs pick each other's cases apart?

[155] In the carriage motion in *Sharma v. Timminco Ltd., supra* at para. 90, I stated:

> On this motion, both law firms raised issues about the comparative merits and demerits of the pleadings, legal theories, and strategic battle plans of their rival. I am not to be taken as scolding them for this approach, but such an approach to a carriage motion puts the court in a difficult position because at this point in the respective proceedings, without hearing from the defendants, it is inappropriate, and, practically speaking, not possible to say much about:
>
> > (a) the substantive merits of the competing theories and their chances of success; (b) substantive legal weaknesses in the causes of action and theories advanced; (c) whether the court would certify either action as a class proceeding ...

[156] It is as speculative as it is unsurprising that Ms. Kowalyshyn would predict her case more likely to succeed than Ms. O'Brien's and that Ms. O'Brien would believe the opposite. The point is that at the time of a carriage motion, predicting the relative success or failure rates for obtaining leave, obtaining certification, and securing a judgment is all of premature and objectively impossible. As a bookmaker, the court on a carriage motion is as likely to predict who will win the litigation as were the bookies in England who set the odds at 5000-to-1 that Leicester would win the Premier League.

[157] I appreciate that in *Locking v. Armtec Infrastructure*, that the Divisional Court stated that on a carriage motion in comparing the rival class actions, it may be necessary to make some analysis of the merits of the claims being advanced. The Court stated at paras. 20 and 25:

> 20. Where there is a "glaring deficiency" in one action over the other, determining which action should take precedence will be an easier task than where there isn't such a defect. However, where the only difference between two proceedings is the inclusion of a claim in one proceeding that is not in the other, there must be some critical analysis of the claim and of why it is not included in one of the proceedings. If the claim is "frivolous" or does not disclose a cause of action, this will be an easy task. However, that is often not the case. If the analysis goes no further than to consider whether the claim advanced is "frivolous," then the advantage will always be to the action that includes the most claims. That would result in the process becoming a quantitative, rather than qualitative, one, and is not desirable. Depending on the circumstances, some additional analysis

> may therefore be required.
>
> ....
>
> 25. It is always preferable on a carriage motion to avoid any analysis of the merits of including or excluding a particular claim or defence and the strategy of counsel in doing so. However, it is apparent from reviewing the authorities that some carriage motions are incapable of being resolved by merely considering whether claims have "glaring deficiencies" or can be said to be "frivolous." Sometimes it is necessary for the motion judge to conduct a more detailed and nuanced analysis, because there is no other way to properly distinguish between the actions and choose the proceeding that is in the best interests of the class. That does not mean that in doing so that motion judge has departed from the test established in *Setterington*, or the principles underlying that decision. We do not consider those cases that have undertaken such an analysis to have adopted a different test. Neither are we of the view that the motion judge in this case adopted a different test.

[158] However, in *Locking v. Armtec Infrastructure,* the Divisional Court was not mobilizing the troops for a fulsome battle about the qualitative nature of the competing actions and about their relative likelihood of success. Rather, the Divisional Court affirmed the approach of *Setterington* that the qualitative analysis should be a limited and restrained analysis and one that does not speculate about which theory will win or about which theory is more likely to win.

[159] Ms. Kowalyshyn's attack on Ms. O'Brien's secondary market misrepresentation claim against PWC is a good example of the troublesome nature of a qualitative and comparative analysis. Ms. Kowalyshyn relied on *Hercules Management Ltd. v. Ernst & Young*, *supra,* the leading case about an auditor's duty of care, to attack Ms. O'Brien's case theory. *Hercules Management Ltd.,* however, was a summary judgment motion decided after the parties had documentary discovery and 40 days of examinations for discovery. Recently, with a prelude of fulsome production of documents and more than 52 days of examinations for discovery and cross-examinations, I was asked on a five-day summary judgment motion to determine the same argument that Ms. Kowalyshyn makes in the immediate context of a one-day carriage motion. See *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2015 ONSC 7695. But, it is none of salutary, feasible, or fair for me to resolve Ms. Kowalyshyn's argument based on *Hercules Management Ltd. v. Ernst & Young* in the context of a carriage motion. Much the same may be said about Ms. O'Brien's attack on Ms. Kowalyshyn's reliance on American statutes.

[160] If Ms. Kowalyshyn's attack on Ms. O'Brien's secondary market misrepresentation claim against PWC and Ms. O'Brien's attack on the availability of the American statutes were regarded as akin to a motion under Rule 21 or pursuant to s. 5(1)(a) of the *Class Proceedings Act, 1992* that the opponent's claim failed to show a reasonable cause of action, then they both wasted their breath and the court's time because it is easy for the opponent to resist the motion by showing that it is not plain and obvious that the claim would fail.

[161] The troublesome matter on a carriage motion of Class Counsel attacking the qualitative value of the competing class actions and the equally troublesome matter of Class Counsel undertaking expensive prophylactic measures to ward off their opponent's attacks by filing copious amounts of evidence was exacerbated in the immediate case because part of the design of the competing class actions involved foreign law. As noted above, Ms. Kowalyshyn planned to advance claims for negligent misrepresentation under the common law of New York State (primary market class) and for securities misrepresentation under Rule 10b-5 of the U.S. *Securities Exchange Act of 1934* (primary market class). For her part, Ms. O'Brien associated

herself with the claims in the *Catucci* Action in Québec including its claims against the underwriters and for breach of a duty of due diligence under Québec law.

[162] Ms. Kowalyshyn hired experts to fend off Ms. O'Brien's attacks on the pleading of American law and challenged Ms. O'Brien's use of Mr. Faguy's evidence to support the advantages of Québec law and her association with Mr. Catucci's action as a plus for her Ontario action. Ms. Kowalyshyn submitted that the Court was not in a position to assess the strength of the Québec pleading or the nature of the Québec substantive and procedural law being relied on by Ms. O'Brien without expert evidence from a neutral expert who is experienced in both Ontario and Québec class actions. However, the only evidence about Québec law came from Mr. Faguy, a member of the consortium associated with the *O'Brien* and *Catucci* Actions, and Ms. Kowalyshyn argued that I should not admit or consider Mr. Faguy's evidence on this motion.

[163] The test for expert evidence is that the evidence: (a) must be relevant; (b) be necessary in assisting the trier of fact; (c) is not excluded by any exclusionary rule; and (d) is given by a properly qualified expert: *R. v. Mohan*, [1994] 2 S.C.R. 9. To be properly qualified as an expert, the witness must: (1) be unbiased; (2) be aware of the duty to assist the court; (3) not act as an advocate of a party: and (4) disclose their underlying assumptions: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[164] I agree that Mr. Faguy's evidence is not admissible as expert evidence because as a partisan he is not qualified to proffer expert evidence. And, putting aside whether the same principles should apply in the context of a carriage motion, I agree with Ms. Kowalyshyn's submission that foreign law, which includes the civil law of Québec, is a question of fact to be proved by a competent and qualified expert witness and if proper expert evidence of Québec law is not proffered, then the Ontario court must presume that Québec law is identical to Ontario law: *Re Low*, [1933] O.R. 393 (C.A.); *Baron de Bode's Case* (1845), 115 E.R. 854 (Q.B.) at p. 19; *ABN Amro Bank N.V. v. BCE*, [2003] O.J. No. 5418 (S.C.J.), para. 13. Thus, outside of the context of a carriage motion, Mr. Faguy's evidence about foreign law would not be admissible.

[165] Ms. O'Brien made a valiant effort to have Mr. Faguy's evidence admitted. She submitted that Mr. Faguy was not proffered as an independent expert on Québec law and did not purport to give definitive opinions on how Québec law will be applied to the claims asserted in the *Catucci* Action. Rather, Ms. O'Brien argued that all he was doing was identifying the relevant statutory provisions of Québec legislation and regulations which informed her Class Counsel's views about the superiority of proceeding in Québec and about their litigation strategy of coordinating actions in Québec and Ontario. Further, Ms. O'Brien argued that, in any event, under s. 25 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, statutes and regulations of Québec are not required to be proved by an expert in foreign law. Section 25 "makes the contents of a provincial statute 'good evidence in the cause'" and "a court can take judicial notice of another provincial statute without requiring expert evidence." Ms. O'Brien argued that the Court was not being asked to apply Québec law and rather Mr. Faguy's evidence simply informed the Court, succinctly, of the non-controversial aspects of Québec law underlying her litigation strategy.

[166] For the reasons that follow, it is not necessary for me to comment about these efforts to save Mr. Faguy's testimony. Rather, where my analysis takes me is to the conclusion that as a methodology for the purposes of a carriage motion, the court can accept Class Counsel's explanations of the legal theory of their own case be it based on domestic law or foreign law without the need of retaining non-partisan experts to file affidavits about legal issues that cannot

or should not be determined on a carriage motion. This cursory level of evidence and argument is all the court needs in order to make its limited qualitative analysis of the competing cases, which largely will be determined by assuming that the pleaded facts in the competing statements of claim are true.

[167] Future carriage fights should be determined largely by legal argument about the adequacy of the case theories as legal theories applicable to pleaded facts assumed to be true. The evidentiary standard for a carriage motion should be lower not higher than what in most class actions will be the first substantive motion; that is, the certification motion. Thus, in the case at bar, I shall accept all the evidence and argument about the domestic and foreign law elements of the competing cases.

[168] With that methodological and evidentiary issue resolved, I shall turn to an analysis of the carriage test factors in the circumstances of the immediate case.

I. DISCUSSION AND ANALYSIS OF THE CARRIAGE FACTORS

1. The Quality of the Proposed Representative Plaintiffs

[169] Typically, the quality of the proposed representative plaintiffs is a minor factor in a carriage contest, unless there is something radically wrong or disqualifying about the candidate.

[170] That, relatively speaking, the quality of the proposed representative plaintiffs is a minor factor follows from the circumstance that the initiation of class proceedings is very carefully screened by Class Counsel, who typically have more to gain and more at risk than the Class Members, whose losses will have already materialized. Further, as is well known, sometimes Class Counsel will recruit the proposed Representative Plaintiff, who typically will be protected by an indemnity agreement or by third party funding. Thus, typically Class Counsel recruit or are retained by clients who are qualified to be a Representative Plaintiff.

[171] The principle purposes of a class action is access for justice for Class Members, and the Representative Plaintiff plays an important role in pursuit of that goal giving instructions to Class Counsel, but, realistically speaking, Class Counsel's fiduciary responsibilities could just as easily be described as arising from a partnership with the Representative Plaintiff as from a solicitor and client relationship, and Class Counsel, practically speaking, instructs as much, if not more, than he or she is instructed.

[172] It may be the case that in enacting class action statutes, legislators envisioned that Representative Plaintiffs would be representative of the class in more than just a theoretical sense and that the Representative Plaintiff would actually reflect the character traits of human Class Members as opposed to reflecting the corporate culture of large institutions that might stand to gain from the class action. But, class actions have evolved, and institutions and corporations are not disqualified as candidates for Representative Plaintiff. In *Smith v. Sino-Forest Corporation*, *supra* at para. 291, I stated:

> Another advantage of keeping the institutional plaintiffs in the case at bar in a class action is that the institutional plaintiffs are already to a large extent representative plaintiffs. They are already, practically speaking, suing on behalf of their own members, who number in the hundreds of thousands. [...] These pseudo-Class Members are probably better served by the court case managing the class action, assuming it is certified and by the judicial oversight of the approval process for any settlements.

[173] Perhaps because of what I said in *Smith v. Sino-Forest*, in the immediate case, Ms. Kowalyshyn submits that the co-Plaintiffs in her action are better suited to direct this litigation and she and they are in the best position to advance the interests of the class because of: (a) their sophistication; (b) the size of their losses; (c) the fact that SEB already represents hundreds of thousands of its own investors; and (d) taken together, the co-Plaintiffs will give voice to the interests of a diversity of Class Members.

[174] To my mind, save for one feature, the mentioned features do not make Ms. Kowalyshyn's proposed Representative Plaintiffs better suited as Representative Plaintiffs. The size of SEB's losses, however, does give it the incentive to carefully scrutinize a proposed settlement to ensure its providence, and that is indeed an advantage to Class Members. That said, Ms. O'Brien is a worthy candidate for Representative Plaintiff and the *Kowalyshyn* Action's advantages about the quality of the proposed Representative Plaintiffs are not overwhelming.

[175] In the result, in the immediate case, the quality of the proposed Representative Plaintiffs is a neutral or non-determinative factor.

2. Funding

[176] After noting that Ms. O'Brien had not applied for funding in Ontario, Ms. Kowalyshyn submitted that the arrangement made to fund her action from the Class Proceedings Fund was a favourable factor for her action.

[177] Ms. Kowalyshyn acknowledges that Ms. O'Brien is relying on funding for the Québec action having been sought on March 11, 2016, but Ms. Kowalyshyn argues that a funding application in another jurisdiction relating to a separate action is irrelevant in Ontario and, in any event, funding has not been granted by the Québec Fonds D'aide Aux Recours Collectifs, and, thus, Ms. Kowalyshyn submits that the court should not presume that funding will be obtained by Ms. O'Brien.

[178] The presence of third party funding is largely for the benefit of the Representative Plaintiff who is exposed to what would be a devastating risk of an adverse costs award. However, third party funding comes at the expense of Class Members because the third party funder will share in the proceeds of a successful action.

[179] In my opinion, in the immediate case, funding is a neutral or non-determinative factor.

3. Fee and Consortium Agreements

[180] Ms. Kowalyshyn disclosed the consortium agreement between herself and her proposed Class Counsel, but Ms. O'Brien did not disclose a copy of the consortium agreement between her proposed Class Counsel for the Ontario and Québec actions until the argument of the carriage motion.

[181] The absence of pre-motion disclosure led to speculative criticism about the nature of the fee and the consortium agreement for the *O'Brien* Action. However, after the fee and consortium agreements were disclosed, Ms. Kowalyshyn had nothing critical to say about them.

[182] The fee and consortium agreements are neutral or non-determinative factors in the immediate case.

4. The Quality of Proposed Class Counsel

[183] The competing law firms have extensive class action experience in all genres of class actions, including securities class actions. The quality of proposed Class Counsel is a neutral or non-determinative factor in the immediate case.

5. Disqualifying Conflicts of Interest

[184] For the following reasons, I regard the matter of disqualifying conflicts of interest as a neutral or non-determinative factor in the immediate case.

[185] Ms. Kowalyshyn submits that Siskinds LLP has a disqualifying conflict of interest because it is counsel in *Denommee v. Valeant Pharmaceuticals International, Inc.* which is a multi-million dollar product liability claim against Valeant. And, it is true that Siskinds LLP has a conflict of interest in the sense that one can envision circumstances where Siskinds LLP might have to make a decision that might prefer the interests of Ms. Denommee and her Class Members over the interests of Ms. O'Brien and her Class Members.

[186] In determining which firm should be granted carriage of a class action, the court may consider whether there is any potential conflict of interest if carriage is given to one counsel as opposed to others: *Joel v. Menu Foods Gen-Par Limited, supra* at para. 16; *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) and [2001] O.J. No. 3673 (S.C.J.).

[187] In *Setterington v. Merck Frosst Canada Ltd., supra*, counsel seeking carriage of the action was criticized for failing to disclose that he was acting as counsel in an action that sought billions of dollars against the same defendants in the action for which carriage was being sought.

[188] It is, however, somewhat surreal to discuss disqualifying lawyer conflicts of interest in the context of class proceedings because the entrepreneurial model that underlies the bringing of class actions institutionalizes lawyer conflict of interests by essentially partnering Class Counsel with Class Members. But, the entrepreneurial model controls the inherent conflicts of interest by: (a) the participation of a Representative Plaintiff, to whom Class Counsel owes fiduciary and professional obligations; (b) judicial case management, and (c) requiring court approval for settlements and for Class Counsel's fees. In the immediate case, there is the additional factor that Siskinds LLP has a co-counsel with professional and fiduciary responsibilities to Class Members.

[189] In the case at bar, at the present time, there is no active conflict of interest for Siskinds LLP, and there may never be a genuine conflict apart from the institutional ones. I see no reason to disqualify Siskinds LLP, and in all the circumstances the matter of a disqualifying conflict of interest is a neutral or non-determinative factor in the immediate case.

6. Preparation and Readiness of the Action

[190] The preparation and readiness of the rival class actions is a substantive factor in a carriage contest, but in the immediate case, it is a neutral or non-determinative factor.

[191] Both putative Class Counsel have undertaken a considerable amount of work to prepare and advance their litigation plans. Both actions are in a more or less equivalent state of readiness

to proceed to the next steps in the class action.

7. Relative Priority of Commencement of the Action

[192] The relative priority of the commencement of the action is typically a trivial factor. It becomes substantial if there is evidence that in an attempt to expropriate the carriage of the action, Class Counsel is prospecting for a piece of the action by staking a claim by a *pro forma* notice of claim without genuine due diligence and without preparation.

[193] In the immediate case, in November 2015, Ms. Kowalyshyn commenced her national class action at the same time as what was to become the consortium for Ms. O'Brien's action commenced the *Sukenaga* Action in Ontario and a global class action in Québec. However, by December 2015, Ms. O'Brien had brought her own Ontario action to replace the *Sukenaga* Action.

[194] In the result, there is little to distinguish between the rivals in terms of the relative priority of the commencement of the actions. This is a neutral or non-determinative factor in the immediate case.

8. Case Theory

[195] Case theory was one of the two major battles in the respective campaigns to capture carriage. The other major battle, discussed below, was about the interrelationship between the class actions in Ontario with the class actions in British Columbia and Québec.

[196] While the discussion above reveals that there was a great deal more to it, the essential argument of Ms. O'Brien was that Ms. Kowalyshyn's case theory contained a mistake about the class period and that Ms. Kowalyshyn missed the target and did not deserve carriage because her proposed action was too narrow in its selection of defendants, class definition, and scope of causes of action.

[197] While the discussion above reveals that there was a great deal more to it, the essential argument of Ms. Kowalyshyn was that Ms. O'Brien's action was overextended with no appreciable benefit for Class Members and with attendant risks that could lead to failure in recovering the Class Members' losses.

[198] With the exceptions of: (a) the joinder of defendants, for which Ms. O'Brien went far beyond Ms. Kowalyshyn (but not as far as Mr. Catucci who added the underwriters as defendants); and (b) class definition, for which Ms. O'Brien's class definition included more foreign claimants, in my opinion, there actually was not that much difference between the case theories of Ms. O'Brien and Ms. Kowalyshyn.

[199] The actual similarity of the actions can be demonstrated by the thought experiment of imagining the production of documents and the examinations for discovery in the rival actions. Ms. Kowalyshyn's Statement of Claim would compel virtually the same set of documents, be they core documents or be they non-core documents as would Ms. O'Brien's Statement of Claim, and the questioning of the discovery witnesses in Ms. Kowalyshyn's action would explore the same forensic territory as mapped out by Ms. O'Brien's Statement of Claim. Thus, I tend to agree with Ms. Kowalyshyn's argument that her case theory would not miss discovering the material facts that are described with perhaps more particularity in Ms. O'Brien's Statement of Claim. If implemented successfully, either case theory would be adequate to provide Class

Members with access to justice and behavior modification of the Defendants.

[200] I disagree, however, with Ms. Kowalyshyn's criticism of Ms. O'Brien's action as procedurally, managerially, and substantively dysfunctional for overbreadth. A billion dollar class action is going to be a leviathan and Ms. Kowalyshyn cannot minnow the claim against Valeant by some magic of a 47-page pleading. Putting aside the matters of the joinder of defendants and the class definition, which I discuss below, both case theories are adequate.

[201] I conclude that the case theory element is a neutral or non-determinative factor in the circumstances of the immediate case.

9. Scope of Causes of Action

[202] As noted above, putting aside the matters of the joinder of defendants and the class definition, the scope of the causes of action in both Ms. O'Brien's and Ms. Kowalyshyn's actions are adequate to provide Class Members with access to justice and behaviour modification of the Defendants. The scope of the causes of action is a neutral or non-determinative factor.

10. Selection of Defendants

[203] Ms. Kowalyshyn submits that the *O'Brien* Action makes errors of omission and of commission in its selection of defendants. She submits that Ms. O'Brien's case theory is deficient because: (1) she does not name Laizer Kornwasser as a Defendant; and (2) she names 10 outside directors that do not appear to be directly involved in the misrepresentations.

[204] Laizer Kornwasser was Vice President and Company Group Chairman. He reported to Mr. Pearson, Valeant's CEO during the relevant time. Mr. Kornwasser was asked to testify before the U.S. Congress as to Valeant's relationship with Philidor.

[205] Ms. O'Brien responds that: (1) there is no evidence to substantiate a claim against Mr. Kornwasser; and (2) the 10 outside directors signed Valeant's misleading disclosure documents or sat on the Nominating and Corporate Governance Committee with specific responsibilities with respect to Valeant's disclosure and corporate governance practices.

[206] In *Rumley v. British Columbia*, 2001 SCC 69 at para. 30, the Supreme Court held that plaintiffs are entitled to restrict the claims in a class proceeding to make it more amenable to certification. See also: *Pearson v. Inco*, [2005] O.J. No. 4918 (C.A.). In my opinion, from the perspective of making a case out against Valeant, which is the main Defendant, the selection of co-Defendants is adequate for both Ms. O'Brien's and Ms. Kowalyshyn's class actions. That said, in my opinion, Ms. O'Brien has persuaded me that there is good reason to join its longer list of Defendants and it would be advantageous for the Class Members to have these additional defendants joined to the class action. I regard the selection of defendants factor as a substantive factor supporting Ms. O'Brien's action. The selection of defendants in the *Catucci* Action is even more favourable.

[207] I do not know whether it is too late to join Mr. Kornwasser for any or all of the claims but it would have been preferable to join him at the outset and let him out later, if it indeed proved the case that there was no evidence to support culpability. The failure to join Mr. Kornwasser, however, is not of sufficient weight to diminish Ms. O'Brien's superior choice of Defendants.

11. Correlation of Plaintiffs and Defendants

[208] The correlation of plaintiffs and defendants relates to the rule from *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*, *supra* and *Hughes v. Sunbeam Corp. (Canada)*, *supra* that the representative plaintiff(s) personally have a claim against each of the class action defendants.

[209] There may be an argument based on the Supreme Court's decision in the Québec case of *Bank of Montreal v. Marcotte, supra*, that the *Ragoonanan Estate* line of authorities needs to be revisited, but for present purposes, Ms. O'Brien and Ms. Kowalyshyn have adequately correlated the plaintiffs and the defendants.

[210] The correlation of plaintiffs and defendants factor is a neutral or non-determinative factor in the circumstances of the immediate carriage fight.

12. Class Definition

[211] Ms. Kowalyshyn submits that Ms. O'Brien's inclusion of foreign purchasers of Valeant securities as Class Members will result in additional cost, complexity, and delay, and will prejudice the expeditious recovery for the Class Members who have a direct connection to Ontario.

[212] Ms. Kowalyshyn says that the presence of foreign Class Members may give rise to jurisdictional issues and conflict of law concerns on behalf of Class Members who, for example, reside in Germany and who acquired Valeant securities on a German stock exchange. She submits that domestic securities legislation does not provide a statutory claim for foreign Class Members who purchased Valeant's notes in a primary distribution in a foreign country. Citing and comparing and contrasting jurisdictional cases (jurisdiction *simpliciter* and *forum conveniens*) and also choice of law cases, Ms. Kowalyshyn submits that Ms. O'Brien's action will bog down in years of delay.

[213] See: *Pearson v. Boliden Ltd.*, 2002 BCCA 624; *McCutcheon v. The Cash Store Inc.*, [2006] O.J. No. 1860 (S.C.J.); *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, varied on other grounds 2011 ONSC 3782 (Div. Ct.); *Meeking v. Cash Store Inc.*, 2013 MBCA 81; *Kaynes v. BP, PLC*, 2014 ONCA 580, leave to appeal to the S.C.C. ref'd [2014] S.C.C.A. No. 452; *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118, aff'd 2015 ONSC 1634 (Div. Ct.); *Airia Brands v. Air Canada*, 2015 ONSC 5332; *Swisscanto v. BlackBerry*, 2016 ONSC 534.

[214] Ms. Kowalyshyn's submission is another example of the troublesome nature of a qualitative and comparative analysis of the competing cases of the rivals for carriage with the additional aggravations that: (1) it is speculative whether the Defendants will challenge the class definition by making a jurisdictional motion or by challenging the class definition at the leave hearing; and (2) if the Defendants do make the challenge, the Representative Plaintiff may simply make a strategic retreat and move forward with a smaller Class Membership but still sustainable class proceeding. As observed below, under the heading "Interrelationship of Class Actions in More than one Jurisdiction," sometimes Defendants are content with a large Class Membership because it enhances the value of releases or success at the common issues trial, and, in any event, it is not uncommon to revise the class definition at the certification motion.

[215] Generally speaking, having regard to the goals of class actions to provide access to

justice, behaviour modification, and judicial economy, more serious than an over-inclusive Class Membership, which can be pruned, is an under-inclusive definition. One, however, cannot be definitive about the extent of a class definition because class size involves several concerns and the nature of the particular class action makes a difference. In the immediate case, in my opinion, Ms. O'Brien's class definition is preferable to Ms. Kowalyshyn's but Ms. Kowalyshyn's is not objectionable.

[216] On balance, I conclude that the class definition factor modestly favours Ms. O'Brien.

13. Class Period

[217] The *Kowalyshyn* Action's Class Period is 17 days longer than that in the *O'Brien* Action.

[218] Ms. O'Brien submits that the relationship between the Class Period proposed in the *O'Brien* Action and the corrective disclosures alleged is superior to that of the *Kowalyshyn* Action and that Ms. Kowalyshyn's use of a longer period is unfounded because she has conflated two distinct points regarding: (1) the period during which Class Members acquired artificially overpriced securities and, (2) the duration of corrective disclosure. Ms. O'Brien pleads that the misrepresentations have not yet been fully corrected as the entire truth has not yet been revealed. In other words, Ms. O'Brien argues that Ms. Kowalyshyn's later class period is unnecessarily long because a shorter period does not preclude arguments about the duration of corrective disclosure.

[219] Ms. O'Brien justifies the end of the Class Period at October 26, 2015 based on the argument that Valeant securities acquired after October 26, 2015 were acquired while the purchasers were substantially on notice of the misrepresentations alleged and, therefore, may be vulnerable to arguments to the effect that either: (a) they acquired their securities with knowledge of the misrepresentation in which case their claims would be barred by s. 138.4(5) of the Ontario *Securities Act*; or (b) that their losses were not related to the misrepresentation, and thus they have no damages under s. 138.5(3) of the *Act*. Ms. O'Brien submits that her class definition avoids potential complications at certification and at trial and her shorter period does not affect her arguments about the timing of a corrective notice.

[220] As I view it, neither party is precluded in making arguments about the timing of corrective disclosure and the suggested problems of Ms. Kowalyshyn's longer period are really matters for the individual issues trial if the action goes that far. In other words, there is little to choose from here about the competing Class Periods.

[221] In the result, the Class Period factor is neutral or non-determinative.

14. Prospect of Success: (Leave and) Certification

[222] Although it was much argued in the factums and at the hearing of the carriage motion, for the reasons expressed above, this is not a case in which anything meaningful can be said about the prospect of success factor in the test for determining carriage. In the circumstances of the immediate case, it is a neutral or non-determinative factor.

15. Prospect of Success against the Defendants

[223] Although it was much argued in the factums and at the hearing of the carriage motion, for

the reasons expressed above, this is not a case in which anything meaningful can be said about the prospect of ultimate success factor in the test for determining carriage. In the circumstances of the immediate case, it is a neutral or non-determinative factor.

16. Interrelationship of Class Actions in More than one Jurisdictions

(a) Introduction

[224] As foreshadowed above, a controversial element of the immediate carriage fight between two proposed Ontario class actions and the second major battle in the respective campaigns to capture carriage is the matter of the significance of companion or rival class actions in British Columbia, Ontario, and Québec.

[225] In this regard, Ms. O'Brien prefers to have her ally, Mr. Catucci, prosecute the Québec action while she parks her Ontario action, and Ms. Kowalyshyn prefers to prosecute the Ontario action and park the British Columbia proceedings while prosecuting the Ontario action. The plans of both Ms. O'Brien and Ms. Kowalyshyn raise the issues of how the avoidance of a multiplicity of proceedings in more than one jurisdiction is a factor in a carriage motion and how should this factor be resolved in the circumstances of this carriage motion where there are similar but not identical class actions in British Columbia, Ontario, and Québec.

[226] As I shall explain below, carriage motions are an aspect of the larger problem of avoiding a multiplicity of proceedings, which is a complex problem. In the next section of my Reasons for Decision, I shall describe those problems to lay the foundation for the discussion that follows of how the interrelationship of class actions in more than one jurisdiction is a factor in the immediate carriage fight.

[227] To foreshadow the analysis that follows the general discussion of the problems associated with a multiplicity of class proceedings, I conclude that the multiplicity of proceedings factor is a substantial and determinative factor in my ultimate conclusion to provisionally grant carriage to Ms. Kowalyshyn and to temporarily stay Ms. O'Brien's proposed class action, subject to the stay being lifted if: (a) Mr. Catucci or the Defendants bring a motion to stay the *Kowalyshyn* Action; (b) Ms. Kowalyshyn agrees that Ms. O'Brien's action be consolidated with her action; or (c) Ms. O'Brien shows strong cause that the temporary stay should be lifted.

[228] As explained more fulsomely below, my analysis is that the real competition in the immediate case is between Ms. O'Brien's ally, Mr. Catucci, and Ms. Kowalyshyn and that Mr. Catucci is attempting through the surrogacy of Ms. O'Brien seeking carriage in Ontario to achieve indirectly what should be achieved, if at all, directly by a motion to stay Ms. Kowalyshyn's action. If there was a stay motion, then the Defendants would move from the sideline onto the pitch to be a participant in the contest about which action or actions should be going forward.

[229] In my opinion, it was not an abuse of process for Ms. O'Brien to commence her action in Ontario, but Ms. O'Brien is essentially the surrogate for Mr. Catucci, both of whom it should be recalled are Ontario residents. They should not do indirectly by a carriage motion what should properly be done directly by a stay motion. I, therefore, shall stay Ms. O'Brien's action subject to the stay being lifted if Mr. Catucci or the Defendants bring a motion to stay the *Kowalyshyn* Action. I also would lift the temporary stay if Ms. Kowalyshyn were to agree that Ms. O'Brien's

action be consolidated with her action. As with all temporary stays, the stay of Ms. O'Brien's action might be lifted if Ms. O'Brien showed strong cause that the temporary stay should be lifted.

[230] I note that the granting of carriage to Ms. Kowalyshyn is without prejudice to the Defendants bringing a stay motion if they are not content to defend actions in all of British Columbia, Ontario, and Québec.

(b) The Problems of a Multiplicity of Actions

[231] The *Class Proceedings Act, 1992* was designed to provide access to justice where there were groups or classes of claimants, and one of the policy imperatives in the enactment of class action statutes was to achieve this access to justice while at the same time avoiding a multiplicity of proceedings. Access to justice and the behavior modification of culpable defendants was to be achieved while maximizing judicial efficiency.

[232] The need to control the number of class actions was foreseen by the Ontario Law Reform Commission when it recommended class proceedings legislation for Ontario, but the Commission was blind to the extent of the problems described below. The Ontario Law Reform Commission, in its *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), p. 455, dedicated just one paragraph to the topic, which stated:

> In the case of a mass wrong, it is easy to envisage that more than one class action, seeking similar relief, may be commenced. It is also possible that members of the class may commence individual actions against the defendant, either before a class action is bought or in ignorance of the existence of a class action on their behalf. The question that arises is whether the proposed *Class Actions Act* should contain a specific provision empowering the court to stay other class actions for the same relief or individual actions claiming similar relief. In our opinion, such an express provision is unnecessary, since a court today is able to co-ordinate related actions under its power to stay litigation pursuant to section 18.6 of the *Judicature Act*, R.S.O.1980, c. 223.

[233] Also without envisioning the extent of the problems, discussed below, the Attorney General's Advisory Committee in its *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990), simply recommended that a specific provision, now found in s. 13 of the *Class Proceedings Act, 1992*, be enacted. The provision states: "[t]he court, on its own initiative or on the motion of a party or Class Member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate." This provision, however, would not empower an Ontario court to stay a class action in another jurisdiction.

[234] Discussing the problem of the multiplicity of actions in class actions involves considering numerous topic of civil procedure including the availability of individual actions, the availability of joinder of parties, the availability of consolidation and trial together, the nature of representative actions, the right to opt-in to a representative action, the right to opt-out of a representative action, the subject-matter jurisdiction of a court (jurisdiction *simpliciter*), the matter of *forum conveniens*, and the theory of *res judicata*. Further, the problem of the multiple class actions also involves constitutional law and conflicts of law rules about; (1) the joinder of foreign plaintiffs and defendants; (2) choice and proof of foreign law; and (3) the enforcement of foreign judgments. Moreover, the problem involves a consideration of the policy goals of class actions and the economics of class actions. Further still, the topic also involves several hidden

agenda items including court parochialism and insularity, lawyer avarice, and lawyer conflicts of interest. The problem of the multiplicity of proceedings, particularly in the context of class proceedings, is no small problem, and as will be seen from the discussion below, carriage motions are part of the solution, but the problem is larger than carriage motions. (See also *McSherry v. Zimmer GMBH, supra.*)

[235] In the context of class proceedings, the desirability of avoiding a multiplicity of class proceedings is obvious. In W.K. Winkler, P.M. Perell, J. Kalajdzic and A. Warner, *The Law of Class Actions in Canada* (Toronto: Canada, 2014), the authors state at p. 170:

> The problems of multiple class actions is particularly intense where there are numerous class actions in several jurisdictions across the country, some or all of which may claim to be national class actions bringing claims on behalf of Class Members across Canada. The positive attributes of a single national class is that it avoids duplication of fact finding, efficiently uses judicial resources, and eliminates the risk of inconsistent findings. A national class maximizes the efficiencies and access to justice that may be achieved by a class proceeding, and is more fair to defendants. These positive effects are diluted and may evaporate when there are multiple class actions.

[236] 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), described the problem of a multiplicity of class actions across the country in paras. 17 and 18 of its report 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.

[237] Judicial economy and the avoidance of a multiplicity of proceedings is a foundational principle of civil procedure generally and the class proceedings statutes are notoriously procedural. Section 138 of the *Courts of Justice Act,* R.S.O. 1990, c. C. 43 provides that "[a]s far as possible, multiplicity of legal proceedings shall be avoided." This provision is fostered by s. 106 of the *Courts of Justice Act*, which provides that "[a] court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such

terms as are considered just." Section 138 of the *Courts of Justice Act* is recognized and facilitated by various *Rules of Civil Procedure*, including: the joinder of claims and parties (Rule 5); consolidation and hearing together (Rule 6); separate hearings (Rule 6.1); class proceedings (Rule 12); service outside Ontario (Rule 17); and the determination of an issue before trial (Rule 21), which rule, among other things, empowers the court to stay or dismiss an action on the ground that "the court has no jurisdiction over the subject matter" or that "another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter."

[238] It has taken over three decades to appreciate that notwithstanding the abundance of procedural tools, in the context of class proceedings, the goal of judicial economy and the avoidance of a multiplicity of proceedings is a complex matter confronted by serious problems. There are at least six problems.

[239] The first problem in achieving the goal of an avoidance of a multiplicity of class actions is the right of a putative class member to opt-out of the class proceeding. Class action legislation is not intended to impede actions by individual plaintiffs who opt-out of the class proceedings: *Dumoulin v. Ontario*, [2004] O.J. No. 2778 (S.C.J.); *Northfield Capital Corp. v. Aurelian Resources Inc.* (2007), 84 O.R. (3d) 748 (S.C.J.). Putative class members may decide to maintain their litigation autonomy, opt-out, and sue the defendant in individual actions or in actions involving the joinder of two or more plaintiffs. Thus, notwithstanding the certification of a class action, a defendant could confront a multiplicity of proceedings because of the right to opt-out.

[240] The case at bar provides an illustration of how opting-out can lead to a multiplicity of claims. Had I granted carriage to Ms. O'Brien, then SEB, Ms. Kowalyshyn's proposed co-plaintiff, which had a $20 million loss, might have continued with an individual action against Valeant. Perhaps, Ms. Kowalyshyn and others would have opted-out to be added as co-plaintiffs to SEB's action. Thus, the choice of a single class action does not necessarily avoid a multiplicity of proceedings.

[241] The second problem in achieving the goal of an avoidance of a multiplicity of class actions is, in part, a corollary of the first problem, and it is a compound problem because it also adversely affects the access to justice purposes of class action legislation. The second problem is the influence and importance of class size and class member loyalty.

[242] In class actions, class size and class member loyalty are influential matters. For instances of their significance, if many putative class members exercise their right to opt-out, or to opt-into another class action, perhaps by participating in that class action's settlement, then the class action to which they were disloyal might suffer because: (1) it might not be certified; (2) it might be decertified; (3) any settlement might scupper or never occur; or (4) the representative plaintiff and class counsel may request leave to discontinue the rejected class action because it is no longer sustainable.

[243] For present purposes, it is a too lengthy a story to tell fully, but *Silver v. Imax,* 2013 ONSC 1667, aff'd 2013 ONSC 6751, demonstrates the problem and the interrelationship between class size and the multiplicity of proceedings. Like the cases at bar, *Silver v. Imax* was a class action for misrepresentations harming investors purchasing Imax's shares in the securities marketplaces in Canada and outside Canada. In that case, after certification, the defendants moved to amend the class definition in the Ontario action, which was a global class action, to exclude "overlapping Class Members;" i.e., class members who were eligible to participate in

either the Ontario proceeding or in a parallel U.S. class action. The defendants' request arose because in the litigation in the U.S., a settlement had been reached, and in Canada, the defendants wished to narrow the class definition. Among several unsuccessful arguments opposing the amendment, the plaintiff in *Silver v. Imax* submitted that the economic viability of the claims of the remaining class members, the TSX purchasers, would be reduced by the order downsizing the class in Canada. Colloquially speaking, the Ontario action was being "gutted" by the diminishment in class size by the settlement in the competing class action in the U.S.

[244] For carriage fights, class size and maintaining class member loyalty is a hidden agenda item. The importance of maintaining class size and class member loyalty to the brand explains, in part, why Ms. O'Brien, who is an ally of the *Catucci* Action, wishes to have carriage of the Ontario action in order to control class member loyalty, and the influence of the class size factor belies, in part, Ms. Kowalyshyn's assertion that she will be able to co-operate with Mr. Catucci notwithstanding that there is no consortium agreement.

[245] The problem of class size, however, is subtle because sometimes there may be nothing objectionable about having a multiplicity of identical class actions in more than one jurisdiction where each is sustainable and where there may be good reason for more than one jurisdiction to be involved. I believe that the payday loans class actions against National Money Mart Co. are an example. In that case, there was a class action in Ontario confined to Ontario claimants and this action was economically viable without including claimants from British Columbia, where there was an identical class action. While one national class action might have been possible, there were advantages in each province providing access to justice just for its own residents.

In *Brunet v. Zimmer of Canada Ltd.*, 2012 QCCS 1461, a proposed class action with respect to a defective medical device, the defendant requested a stay of the class action proceedings in Québec because there was already a national class action in British Columbia. The Québec Superior Court refused a stay because the interests of the Québec Class Members to have their claims analyzed and decided on the basis of applicable Québec law were not protected.

[246] However, sometimes, having identical class actions in more than one province is a waste of judicial and counsel resources, because if the truth be told, the heavy lifting will be done mainly by one court and it is a waste of judicial and legal resources to have more than one action. The price-fixing class action known as *Pro-Sys Consultants Ltd. v. Infineon Technologies Inc.* in British Columbia and known as *Option Consommateurs* c. *Infineon Technologies AG* in Québec and *Eidoo v. Infineon Technologies AG* in Ontario is an example where, in my opinion, parallel national class actions were unnecessary.

[247] I have managed the parallel national class action in Ontario known as *Eidoo v. Infineon Technologies AG*, but the heavy lifting and superb judicial work was done by Justice Masuhara in British Columbia and Justice Gagnon in Québec. The citizens of Ontario did not need their own class action, which was parked but occasionally roused to implement consent certifications and settlements. Frankly, the Ontario action could have simply been stayed or it should not have been started at all.

[248] In this last regard, I do not agree with the argument that I have seen in some commentary that a parallel action in Ontario is necessary because British Columbia is an opt-in jurisdiction. The fact that British Columbia is an opt-in jurisdiction just front ends the problem that effective notice programs are necessary to have class members participate in a class action. In this regard, it may be observed that, practically speaking, an opt-out jurisdiction will become an opt-in

jurisdiction because the class members must actually do something to participate if there is a settlement, a distribution, or individual issues trials. See: *McSherry v. Zimmer GMBH*, *supra* at paras. 121-125; *Turner v. Bell Mobility Inc.*, 2016 ABCA 21.

[249] A third problem in achieving the goal of an avoidance of a multitude of class proceedings is a law firm prospecting for a quick profit from class action work. In other words, like a prospector staking mining claims, a law firm commences a proposed class action in numerous jurisdictions with the design that its stake will be purchased by other law firms. This prospecting leads to a multiplicity of claims. In *Bancroft-Snell v. Visa Canada Corp.*, 2015 ONSC 7275 and 2015 ONSC 7411, I attempted to put a stop to this practice, but my decision is under appeal and regardless of the outcome of the appeal, the practice of starting multiple class actions or redundant class actions in order to get a piece of the class-action-action may continue. For present purposes, the point I wish to make is that sometimes no purpose other than the not altruistic purposes of class counsel may be served by a multitude of proceedings.

[250] The fourth problem in achieving the goal of an avoidance of a multiplicity of class actions and another hidden agenda item is the double dealing of defendants. For culpable defendants, while they protest against strike suits, and extortive settlements, class proceedings are more often a godsend, because class counsel takes on the responsibility of distributing the compensation to the injured and the defendant's liability is discharged on mass, perhaps at bargain prices that may be just a license fee for ill-gotten gains.

[251] Despite their protests, defendants often benefit by class actions and even by multiple class actions. For example, where there is more than one national class action, the defendant has an opportunity to shop around for a bargain settlement. Defendants may be content to have more than one class proceedings because where there is no consortium, it allows them to negotiate to the bottom of the settlement range knowing that a settlement in the hand is worth two in the bush and that a court is, therefore, unlikely to refuse a settlement or to refuse to enforce another jurisdiction's judgment because another class action might speculatively provide a more remunerative alternative for class members. The integrity of most plaintiffs' lawyers and that the court must approve the settlement is a significant safeguard against improvident settlements, but for present purposes, the point is that defendants may be content to live with more than one class action in more than one jurisdiction.

[252] The fifth problem, which is related to the sixth problem in achieving the goal of an avoidance of a multiplicity of class actions, is the absence in Canada, which is a confederation of provinces, of any mechanism as exists in the United States, which is a union of states, to consolidate proceedings that are initiated in several different jurisdictions. The problem is that there is no readily available procedural solution for the courts in Canada when confronted with similar proposed class actions in several jurisdictions.

[253] The sixth problem in achieving the goal of an avoidance of a multiplicity of class actions is the rarity of purely local class actions and the prevalence of parallel regional, national, or global class actions that are difficult to cull.

[254] A purely local class action is one in which the court has jurisdiction *simpliciter* and the class members and the defendant are all within one province. The rarity of purely local class actions and the prevalence of multiple class actions in more than one jurisdiction can be explained by a combination of: (a) the defendant not being local or the defendant's wrongdoing extending beyond the boundaries of the local province and harming non-local claimants; (b)

provincial parochialism, in which a court is reluctant to have another province's court provide access to justice for its citizens or to provide access to justice for foreigners; (c) Canadian constitutional law obstacles to consolidating proceedings in multiple jurisdictions; (d) law firm competition for remunerative national class actions; (e) the economics of the particular class action requiring a larger than locally constituted class; and (f) there being valid reasons for the existence of more than one class action in several provinces even when the class actions have the same class counsel.

[255] Because of the rarity of purely local class actions, where there is a fight for carriage in one province, the test for determining carriage will likely be impacted by some or all of the six problems associated with the multiplicity of class actions. As already mentioned several times, the impact was felt in the immediate case where there are class actions against Valeant in the United States, two in British Columbia, two in Ontario, and one in Québec.

[256] It is difficult to cull class actions brought in multiple jurisdictions because there is no constitutional mechanism to bring together actions commenced in different jurisdictions and because, unlike choosing in a carriage motion among purely local actions, for there to be a reduction in the number of proceedings, there must be a stay motion and one or more courts must forgo having any action in their own jurisdiction.

[257] It is also difficult to cull proceedings brought in multiple jurisdictions because while class action legislation presents a monolithic model, the problems for that model are multifarious and the size and genre or type of class action makes a difference about the needs and justifications for more than one class action across the country.

(c) The Carriage Motion and the Multiplicity of Proposed Class Actions

[258] I turn now to the analysis of how the multiplicity of class actions factor influences the carriage motion in the immediate case.

[259] Quite strongly in her factums, but also during the oral argument of the carriage motion, Ms. Kowalyshyn took the position that Ms. O'Brien's reliance on her direct relationship with the *Catucci* Action was an abuse of process and, therefore, as a threshold matter Ms. O'Brien should be disqualified from having carriage in Ontario. Ms. Kowalyshyn submitted that the cross-examination of Ms. Hirji, one of Ms. O'Brien's lawyers, revealed that the plan of Mr. Catucci and Ms. O'Brien was to use the Ontario action only as needed; i.e., to the extent that claims were not authorized in Québec, then resort would be made to the Ontario courts. Ms. Hirji disclosed the approach in her affidavit as follows:

> The consortium's position is that the *O'Brien* Action is pending to protect the interests of Class Members and should proceed if, but only if, the Québec Superior Court does not authorize the class proceeding before it on behalf of the broad class as defined in that action. If in fact all of the claims of Class Members are protected by the authorization order of the Québec Superior Court, then the *O'Brien* Action should be stayed. If on the other hand the Québec Superior Court is not prepared to authorize this action in whole or in part, then by necessity, the *O'Brien* Action should proceed to leave and certification to pursue all or some of the claims not dealt with by the Québec Superior Court.

[260] Ms. Kowalyshyn submitted this approach was an abuse of process and unfair to Class Members who would be left uncertain about which claims would be advanced on their behalf. Further, Ms. Kowalyshyn submitted that Ms. O'Brien was, in effect, importing the "first-to-file"

rule from Québec by obtaining carriage in Québec, filing in Ontario, and then seeking to stay all Ontario actions on the basis of the Québec action. Ms. Kowalyshyn submitted that this strategy had been rejected by Justice Conway in *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875.

[261] I do not see how it is that Ms. O'Brien's approach would import into Ontario the "first-to-file" rule from Québec, but more to the point, applying Québec's rule would make no difference because in *Schmidt c. Johnson & Johnson inc.*, 2012 QCCA 2132, the Québec Court of Appeal held that a plaintiff who filed second in Québec may still obtain carriage if he or she shows that the first proceeding is not in the best interests of the class members, which, in effect, imports Ontario's carriage motion rule into Québec.

[262] Also, I do not see how it is that Ms. O'Brien's plan to park her Ontario action is categorically an abuse of process. Where class counsel or a consortium of class counsel commence the same or similar class actions in a multiplicity of jurisdictions, it may or it may not be an abuse of process. It all depends on whether or not a multiplicity of proceedings can be justified.

[263] I accept that the commencement of multiple class actions in the same or other jurisdictions or commencing a class action may be an abuse of process and a redundant or purposeless class action may be stayed as an abuse of process: *Englund v. Pfizer Canada Inc.*, 2007 SKCA 62; *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152; *Duzan v. Glaxosmithkline*, 2011 SKQB 118; *McSherry v. Zimmer GMBH*, 2012 ONSC 4113 para. 141; *Drover v. BCE Inc.*, 2013 BCSC 1341; *Pappas v. BCE Inc.*, 2014 ABQB 122; *Hafichuk-Walkin v. BCE Inc.*, 2014 MBQB 175; *BCE Inc. v. Gillis*, 2015 NSCA 32; *Turner v. Bell Mobility Inc.*, 2016 ABCA 21.

[264] For example, if the reason for the multiplicity of class actions is no more than an attempt to expropriate a piece of the class-action-action, then there might be an abuse of process, but if there is more to it than that, then the matter of avoiding a multiplicity of proceedings becomes more subtle and complex, including having regard to the interests of the defendant, who, as discussed above, may or may not be content to be sued in more than one jurisdiction. The problems of a multiplicity of proceedings also becomes more complex because traditional jurisdictional factors about jurisdiction *simpliciter* and *forum conveniens* will come into play in determining what is the best way, if there is a way, to choose amongst the possible jurisdictions.

[265] Relying on the decision of Justice Strathy, as he then was, in *Turon v. Abbott Laboratories Ltd.*, 2011 ONSC 4343, aff'd 2011 ONSC 4676 (Div. Ct.), Ms. Kowalyshyn argued that Ms. O'Brien's plan to park her Ontario action was an abuse of process. However, all that *Turon* shows is that sometimes - but not categorically - commencing more than one class action in a multitude of jurisdictions may be an abuse of process. The circumstances of each case must be examined to determine whether there is a legitimate reason to have a multiplicity of class actions. As noted by Justice Scanlan in *BCE Inc. v. Gillis*, *supra* at para. 35:

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

[266] The facts of *Turon v. Abbott* were that class counsel had commenced a proposed products liability class action in Ontario and then commenced similar actions in British Columbia,

Saskatchewan, and Québec. Class counsel lost carriage of the action in Québec to another law firm. Of the remaining actions, class counsel decided to prosecute the British Columbia action, discontinue the Saskatchewan action, and park the Ontario action instead of proceeding to certification. Class counsel, therefore, sought a temporary stay of its own action in Ontario. The stay was opposed by the defendants, who moved to have the Ontario action dismissed as an abuse of process.

[267] Justice Strathy dismissed both the motion and the cross-motion and required the plaintiff to proceed to a certification motion. It appears that what Justice Strathy was doing by forcing the reluctant class counsel to prosecute the Ontario action was to ensure that the action not be an abuse of process and that it actually have a meaningful role to play. In this regard - and this is the important point for present purposes - Justice Strathy accepted that there might be reasons for more than one class action in more than one jurisdiction, but he also accepted that it might be acceptable to idle one action while a lead action proceeded. However, what was unacceptable was to bring an action for no purpose. Justice Strathy concluded that it was acceptable that there be actions brought by the same counsel in Ontario and British Columbia (and by other counsel in Québec) and the court's case management jurisdiction could be exercised to make appropriate directions to avoid unnecessary duplication and to ensure that the actions proceed efficiently.

[268] The main lessons to be learned from In *Turon v. Abbott Laboratories Ltd.*, are that class actions in more than one jurisdiction may be appropriate subject to suitable case management to co-ordinate the actions, but a class action brought for no legitimate purpose is not proper and is an abuse of process. See also *Pollack v. Advanced Medical Optics*, 2011 ONSC 1966.

[269] In the immediate case, having regard to the fact that Ms. O'Brien's ally had commenced a global action in Québec it is not entirely clear what purpose she had in bringing an action in Ontario. Notwithstanding that she brought an action in Ontario, Ms. O'Brien argued that Québec was the natural forum for the class action because Valeant has a closer and more intense connection to Québec than Ontario, and she argued that Québec provided unique juridical advantages including the circumstance that the *Catucci* Action joined 17 underwriters responsible for US$19 billion in Valeant's offerings during the Class Period. These arguments suggest that the purpose of Ms. O'Brien's Ontario action was to maintain class size and Class Member loyalty and to prevent a divide and conquer tactic by the Defendants. These arguments also explain Ms. O'Brien's initial candor in revealing that she intended to park the Ontario action and save it as a fall back if matters went awry in Québec. Ms. O'Brien's arguments suggest that there may be legitimate reasons for actions in both Québec and Ontario, but the arguments also suggest that the prime reason for the action in Ontario was to protect the viability and strength of the global Québec action.

[270] Put somewhat differently, the circumstances of the immediate case suggest that Ms. O'Brien was a surrogate for Mr. Catucci and that if Mr. Catucci and Ms. O'Brien had been confident that there would be no action in Ontario, they would have not brought an action in Ontario and rather would have relied exclusively on the more comprehensive action brought in Québec. And, the circumstances of the immediate case also suggest that if Mr. Catucci and Ms. O'Brien were concerned that there would be an action in Ontario, then they had the choice of bringing a stay motion of that action where they could directly, and not indirectly, make the argument that Québec was the natural forum and the forum *conveniens*. A stay motion would also force the Defendants to show their hand.

[271] In many respects the immediate carriage motion was a camouflaged stay motion brought by Ms. O'Brien for Mr. Catucci. It was an attempt to do indirectly what would be better done directly. While I do not think that Ms. O'Brien's action is necessarily or categorially an abuse of process, if her purpose was not so much to win carriage but to stay Ms. Kowalyshyn's action, then that purpose should be achieved, if at all, directly and not indirectly. Given the alleged superiority of the Québec action, which is unrivaled and which is already moving forward, what is in the best interests of the Class Members in Ontario and across Canada and what is fairest from the perspective of the Defendants is to determine whether there is a need and a purpose for the action in Ontario. That question, however, cannot be determined on a carriage motion which assumes that one Ontario action will be going forward.

[272] In the context of the immediate carriage motion, where this analysis takes me is that this factor favours Ms. Kowalyshyn, who should be granted carriage, leaving it open to Mr. Catucci and the Defendants to bring a stay motion in Ontario if they are so advised. If Ms. Kowalyshyn wants to protect the national scope of her action, she would have to bring a stay motion in Québec. What actually needs to be litigated is the question of how many class actions are needed to serve the purposes of the class action regimes across the country.

[273] In the result, in my opinion, the multiplicity of proposed class actions strongly favours granting carriage in Ontario to Ms. Kowalyshyn while recognizing that Ms. O'Brien's Ontario ally, Mr. Catucci, has an action in Québec.

17. Determination of Carriage

[274] To summarize, after a heated debate, the following carriage motion factors are neutral or non-determinative: (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) Preparation and Readiness of the Action; (7) Relative Priority of Commencement of the Action; (8) Case Theory; (9) Scope of Causes of Action; (11) Correlation of Plaintiffs and Defendants; (13) Class Period; (14) Prospect of Success: (Leave and) Certification; and (15) Prospect of Success against the Defendants. The following factors favour Ms. O'Brien's action: (10) Selection of Defendants; and (12) Class Definition. The following factor strongly favours Ms. Kowalyshyn's action: (16) Interrelationship of Class Actions in More than one Jurisdiction. Indeed, this last factor is the determinative tipping point factor for my decision that carriage be granted to Ms. Kowalyshyn and that Ms. O'Brien's action should be temporarily stayed subject to the terms described above.

J. CONCLUSION

[275] For the above reasons, I grant carriage to Ms. Kowalyshyn by temporarily staying Ms. O'Brien's proposed class action.

[276] There should be no order as to costs.

Perell, J.

Released: June 10, 2016

CITATION: Kowalyshyn v. Valeant Pharmaceuticals International, Inc., 2016 ONSC 3819
COURT FILE NO.: CV-15-541082-00CP
COURT FILE NO.: CV-15-543678-00CP
DATE: 20160610

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOYCE KOWALYSHYN

Plaintiff

– and –

VALEANT PHARMACEUTICALS INTERNATIONAL, INC., J. MICHAEL PEARSON, ROBERT L. ROSIELLO, HOWARD B. SCHILLER, LAIZER D. KORNWASSER, KATE STEVENSON, NORMA PROVENCIO, THEO MELAS-KYRIAZI and PRICEWATERHOUSECOOPERS LLP

Defendants

AND BETWEEN:

LORRAINE O'BRIEN

Plaintiff

– and –

VALEANT PHARMACEUTICALS INTERNATIONAL, INC., J. MICHAEL PEARSON, HOWARD B. SCHILLER, ROBERT A. INGRAM, ROBERT H. FARMER, THEO MELAS-KYRIAZI, G. MASON MORFIT, DR. LAURENCE E. PAUL, ROBERT N. POWER, NORMA A. PROVENCIO, LLOYD M. SEGAL, KATHARINE B. STEVENSON, FRED HASSAN, COLLEEN GOGGINS, ANDERS LONNER, JEFFREY W. UBBEN and PRICEWATERHOUSECOOPERS LLP

Defendants

REASONS FOR DECISION

PERELL J.

Released: June 10, 2016