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2019 FC 766

T-940-18

Proposed Class Proceeding

Geraldine Shier LaLiberte, Eileen Rheindel LaLiberte, and Robert Doucette (*Plaintiffs*)

v.

The Attorney General of Canada (*Defendant*)

T-1251-18

Proposed Class Proceeding

Annette McComb (*Plaintiff*)

v.

Her Majesty the Queen (*Defendant*)

T-1904-18

Proposed Class Proceeding

Randy Darren Ouellette (*Plaintiff*)

v.

Her Majesty the Queen (*Defendant*)

T-2166-18

Proposed Class Proceeding

Brian Day (*Plaintiff*)

v.

The Attorney General of Canada (*Defendant*)

INDEXED AS: LALIBERTE V. CANADA (ATTORNEY GENERAL)

Federal Court, Phelan J.—Vancouver, March 6 and 7; Ottawa, May 31, 2019.

Practice — Class Proceedings — Motions for carriage of proposed class proceeding on behalf of Métis, non-status Indians (NSI) affected by "Sixties Scoop" — Cases involving persons not included in litigation, settlement in Riddle v. Canada, Brown v. Canada (Attorney General) — "Carriage motions" seeking determination as to which representative plaintiffs' class action should proceed — One carriage motion brought in respect of Day v. Canada (Attorney General) (T-2166-18) action (Day action) — Other carriage motion brought by plaintiffs in three actions sought to be consolidated (LMO action) — Issue which case should be advanced on behalf of class — Federal Courts Act, s. 50, Federal Courts Rules, r. 105(b) sufficient authority to permit Court to decide carriage motions — Best interests of class paramount — Representative quality of proposed plaintiff weighing in favour of Day action because of experience, focus Day action counsel having toward NSI community — Focus, attention paid to NSI experience, community important — Quality, expertise, conduct of counsel also weighing in favour of Day action — Carriage of proposed class proceeding granted to Day action.

These were two motions for carriage of a proposed class proceeding on behalf of Métis and non-status Indians (NSI) affected by the "Sixties Scoop".

The Sixties Scoop was a federal program whereby status Indian, Métis and NSI children were taken from their parents and placed in non-Indigenous foster homes or put up for adoption. The motions related to cases initiated on behalf of persons who were not included in the Sixties Scoop litigation and settlement in *Riddle v. Canada* and in *Brown v. Canada (Attorney General)*. The "carriage motions" at issue sought a determination as to which representative plaintiffs' class action should proceed as represented by their group of law firms while the other class actions are stayed. One carriage motion was brought in respect of the *Day v. Canada (Attorney General)* (T-2166-18) action (the Day action) and it asked to grant carriage of the Day action to its counsel Koskie Minsky LLP (KM) and Paliare Roland Rosenberg Rothstein LLP (PR) (KM/PR group). The other carriage motion was brought by the plaintiffs in three actions that were sought to be consolidated: *LaLiberte v. Canada (Attorney General)*, *McComb v. Canada* and *Ouellette v. Canada* (the LMO action). Counsel in that action formed a consortium consisting of five law firms.

At issue was which case should be advanced on behalf of the class.

Held, carriage of the proposed class proceeding is granted to the Day action.

The Federal Court class action rules have no specific provision for carriage contests. However, section 50 of the *Federal Courts Act*, giving the power to stay a matter and, most particularly, paragraph 105(b) of the *Federal Courts Rules* (Rules), giving the power to stay one proceeding until another proceeding is determined, are sufficient authority read in the context of rule 3 to permit the Court to decide carriage motions. Consistent with *VitaPharm Canada Ltd v. F. Hoffmann-LaRoche Ltd*, the best interests of the class were determined to be paramount. Those interests focus on the best representative plaintiff, the qualities of the case, and the knowledge and experience of counsel. Among the factors examined, the representative quality of the proposed plaintiff weighed in favour of the Day action because of the experience and focus the Day action counsel have toward the NSI community. The LMO representative plaintiffs had not advanced a case for their representation of the NSI component of the litigation. The focus and attention paid to the NSI experience and community was important in this case. The preparation and readiness of the action favoured the LMO action in that it conducted archival studies and prepared at least one expert report. Both the class definition and the scope of causes of action factors were essentially neutral. The quality, expertise and conduct of counsel weighed in favour of the Day action. The importance of this factor depends on the circumstances. Here, both law firm groups had extensive class action experience. They also both had experience acting for Métis people, although members of the KM/PR group had experience on behalf of NSI people as well. The consortium advanced no details of its organization, division of labour, or management which established that it was materially better able to act for Métis

and NSI across the country. The Court was left with a history of past performance and a few assumptions that were the basis for a qualitative distinction between the two groups. There was no established qualitative difference between the competing groups on the point of geography. Allegations of adverse conduct against several members of the consortium were not grounds to deny the consortium carriage of the case.

Carriage of the proposed class proceeding was granted to the Day action. The actions of *LaLiberte v. Canada (Attorney General)*, *McComb v. Canada*, and *Ouellette v. Canada* were stayed *sine die*.

STATUTES AND REGULATIONS CITED

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 91(24).

Federal Courts Act, R.S.C., 1985, c. F-7, s. 50.

Federal Courts Rules, SOR/98-106, rr. 3, 105(b), 334.1–334.4.

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, G.A. Res. 61/295.

CASES CITED

APPLIED:

VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2000] O.J. No. 4594, 101 A.C.W.S. (3d) 472 (Sup. Ct.); *David v. Loblaw; Breckon v. Loblaw*, 2018 ONSC 1298, 289 A.C.W.S. (3d) 253.

CONSIDERED:

Heyder v. Canada (Attorney General), 2018 FC 432, 295 A.C.W.S. (3d) 250; *Kowalyshyn v. Valeant Pharmaceuticals International Inc.*, 2016 ONSC 3819, 268 A.C.W.S. (3d) 519; *Strohmaier v. British Columbia (Attorney General)*, 2018 BCSC 1613, 296 A.C.W.S. (3d) 699; *Quenneville v. Audi AG*, 2018 ONSC 1530, 290 A.C.W.S. (3d) 30.

REFERRED TO:

Riddle v. Canada, 2018 FC 641, [2018] 4 F.C.R. 491, 296 A.C.W.S. (3d) 36; *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, 233 A.C.W.S. (3d) 296; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2013 FC 6, [2013] 2 F.C.R. 268, affd 2016 SCC 12, [2016] 1 S.C.R. 99; *Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 179, 273 A.C.W.S. (3d) 251; *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (QL), 160 A.C.W.S. (3d) 947 (Sup. Ct.); *Duzan v. Glaxosmithkline, Inc.*, 2011 SKQB 118, 372 Sask. R. 108; *Chudy v. Merchant Law Group*, 2008 BCCA 484, 171 A.C.W.S. (3d) 953, supplementary reasons 2009 BCCA 93, 175 A.C.W.S. (3d) 677; *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (QL), 145 A.C.W.S. (3d) 566 (Sup. Ct.); *Grasby v. Merck Frosst Canada Ltd.*, 2007 MBQB 42, 155 A.C.W.S. (3d) 1035; *Drover v. BCE Inc.*, 2013 BCSC 50, 225 A.C.W.S. (3d) 35; *McCallum-Boxe v. Sony Corp.*, 2015 ONSC 6896, 260 A.C.W.S. (3d) 24; *Hardy v. Canada (Attorney General)* (June 1, 2018), T-143-18 (F.C.); *Murphy v. Compagnie Amway Canada*, 2015 FC 958, 257 A.C.W.S. (3d) 529; *Manuge v.*

Canada, 2008 FC 624, [2009] 1 F.C.R. 416; *Moscowitz v. Attorney General of Quebec*, 2017 QCCS 3961, 2017 CarswellQue 7560; *Mancinelli v. Barrick Gold Corp.*, 2016 ONCA 571, 268 A.C.W.S. (3d) 729; *Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 59, 285 A.C.W.S. (3d) 226; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.

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The Law Society of British Columbia. *Code of Professional Conduct for British Columbia*, January 1, 2013.

MOTIONS for carriage of a proposed class proceeding on behalf of Métis and non-status Indians affected by the "Sixties Scoop". Carriage granted to *Day v. Canada (Attorney General)* (T-2166-18) action.

APPEARANCES

Ken McEwan, Q.C., *Eileen M. Patel* and *David Klein* for plaintiffs Geraldine Shier LaLiberte, Eileen Rheindel LaLiberte, and Robert Doucette; Annette McComb; and Randy Darren Ouellette.

Michael A. Eizenga, LSM and *Harnimrit Sian* for plaintiff Brian Day.

Catharine Moore and *David Culleton* for defendant.

SOLICITORS OF RECORD

Aboriginal Law Group, Saskatoon, *Strosberg Sasso Sutts LLP*, Windsor, and *DD West LLP*, Calgary and Winnipeg, for plaintiffs Geraldine Shier LaLiberte, Eileen Rheindel LaLiberte, and Robert Doucette.

Klein Lawyers LLP, Vancouver, for plaintiff Annette McComb.

Merchant Law Group LLP, Regina, for plaintiff Randy Darren Ouellette.

McEwan Cooper Dennis LLP, Vancouver, for plaintiffs Geraldine Shier LaLiberte, Eileen Rheindel LaLiberte, and Robert Doucette; Annette McComb; and Randy Darren Ouellette, on the application.

Koskie Minsky LLP and *Paliare Roland Rosenberg Rothstein LLP*, Toronto, for plaintiff Brian Day.

Bennett Jones LLP, Toronto, for plaintiff Brian Day, on the application.

Deputy Attorney General of Canada for defendant.

The following are the reasons for order and order rendered in English by

PHELAN J.:

I. Introduction

[1] The matter to be decided is two motions for carriage of a proposed class proceeding on behalf of Métis and non-status Indians (NSI) affected by the "Sixties Scoop" (also the "Scoop")—as it is generally called. The Sixties Scoop, a federal program whereby status Indian, Métis and NSI children were taken from their parents and placed in non-Indigenous foster homes or put up for adoption, is described in *Riddle v. Canada*, 2018 FC 641, [2018] 4 F.C.R. 491, 296 A.C.W.S. (3d) 36 (*Riddle*).

[2] The class members in *Riddle* were status Indians. The present motions relate to several cases initiated on behalf of persons who were not included in the Sixties Scoop litigation and settlement in *Riddle* in this Court and in *Brown v. Canada (Attorney General)*, 2013 ONSC 5637, 233 A.C.W.S. (3d) 296 (*Brown*), in the Ontario Superior Court of Justice.

[3] The "carriage motions" at issue seek a determination as to which representative plaintiffs' class action should proceed as represented by their group of law firms while the other class actions are stayed.

II. Background

[4] The proposed class actions at issue claim for loss of identity and mental, emotional, spiritual and physical suffering inflicted on Métis and NSI children by the Sixties Scoop program.

[5] One carriage motion is brought in respect of the *Day v. Canada (Attorney General)* (T-2166-18) action (Day action) and it asks to grant carriage of the Day action to its counsel Koskie Minsky LLP (KM) and Paliare Roland Rosenberg Rothstein LLP (PR) (collectively the KM/PR group).

[6] The other carriage motion is brought by the plaintiffs in three actions that also seek to be consolidated: *LaLiberte v. Canada (Attorney General)* (T-940-18) (*LaLiberte*); *McComb v. Canada* (T-1251-18) (*McComb*); and *Ouellette v. Canada* (T-1904-18) (*Ouellette*) (collectively the LMO action). Counsel in the LMO action have formed a

consortium consisting of five law firms—Strosberg Sasso Sutts LLP, Klein Lawyers LLP (Klein), Aboriginal Law Group (ALG), DD West LLP (DDW) and Merchant Law Group (MLG) and hereafter referred to as the consortium.

[7] There is a fifth similar action, *Chief v. Canada (Attorney General)* (T-1616-18) (*Chief*), but there has been no indication that counsel in that case seeks carriage in terms of advancing its action and staying related actions. The *Chief* action has not been certified and any further steps on that case will be dealt with in case management.

[8] All five class actions were commenced relatively close to each other: *LaLiberte* on May 18, 2018, *McComb* on June 27, 2018 (*Chief* on September 4, 2018), *Ouellette* on October 30, 2018, and *Day* on December 20, 2018.

[9] The KM/PR group agreed to a request by Canada that this Court's decision on carriage would govern the law firms in similar provincial superior court cases, but the consortium did not. This is the "undertaking" issue discussed later.

[10] The Court ordered on January 24, 2019, that no additional proposed class actions pleading the same cause of action and facts could be commenced in the Federal Court without leave of this Court.

III. Summary of Actions

A. *LMO Action*

[11] There are three proposed representative plaintiffs for the LMO action, Robert Doucette, Annette McComb and Randy Ouellette, all survivors of the Sixties Scoop program.

[12] Doucette is a Métis man who was placed in foster care and made a permanent ward when he was about six months old. He has subsequently worked to educate people on the Sixties Scoop, and held leadership positions within Métis organizations.

[13] McComb is a Métis woman who was placed with a non-Indigenous adoptive family when she was about six months old. She discovered her Métis roots later in life.

She works with Indigenous and at risk youth, and has served in Indigenous and Métis-specific organizations.

[14] Ouellette is also a Métis man, placed with a non-Indigenous family, which he left when he was 13. He turned to alcohol but has since turned his life around. He is connected to Indigenous communities and attends Métis meetings. He favours the consortium because Métis are in the West and he felt it would be strange to be represented by Toronto law firms.

[15] Each of the LMO representatives exhibit knowledge of, and commitment to, the duties of representative plaintiffs and have deep roots into their Métis communities. They advance no particular connection to the NSI communities.

B. *Day Action*

[16] Brian Day is also a Métis man. He did not file an affidavit and information concerning him comes from his amended statement of claim and affidavit evidence from KM lawyers. This is a flaw in the Day counsel's material and while it weighs against this proposed representative, as argued by the LMO plaintiffs, those materials are sufficient for purposes of this Court's decision and establish that he can act as a representative plaintiff.

[17] Like the LMO proposed representatives, Day was taken from his family and placed in a non-Indigenous family. He was unaware of his Métis roots, culture or customs. He was removed from his adoptive parents and became a Crown ward. As pleaded, Day lost his Métis cultural identity and is not involved in Métis events. He is emotionally, spiritually and culturally disconnected and has lost contact with his Métis family, community, language and culture.

[18] In summary, unlike the LMO representative plaintiffs who have through adversity struggled and succeeded in re-establishing connections and involvement in the Métis community, Day's experience speaks to some of the worst consequences of alienation arising from the Scoop and tracks the very issues raised by the litigation concerning Métis and NSI victims of the Scoop.

[19] What is striking in respect of each of the statements of claim is the focus on the Métis connections or lack thereof with little or nothing said about the NSI communities (except the knowledge and expertise of KM/PR, particularly with respect to PR). It is striking because the NSI community has been acknowledged judicially (see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2013 FC 6, [2013] 2 F.C.R. 268, at paragraph 108, affd 2016 SCC 12, [2016] 1 S.C.R. 99 (*Daniels*)) as a community that is approximately double the size of the Métis community and more widely dispersed across the country. It will presumably be a more complex community to communicate with as it is less organized than the Métis community. The consortium has all but ignored the NSI until recently.

C. *Counsel and Steps Taken in Litigation*

[20] The consortium consists of five firms with offices that spread from Montréal to Vancouver. Each firm is summarized briefly below:

- ALG's principal counsel on the action is Doug Racine of Saskatoon and a Métis man. He has represented Métis and other Indigenous residential school survivors as well as represented Métis individuals in other matters.

- DDW's team is led by Paul Chartrand, also a Métis man. He is a professor and author on Aboriginal legal issues. He served as a commissioner on the Royal Commission on Aboriginal Peoples and was Métis ambassador to the United Nations.

- SS's team is led by Harvey Strosberg and who in this field of class actions needs no introduction. The firm and Strosberg have been involved in numerous class actions and are leaders in this field.

- Klein has been involved in several class actions and was co-counsel in *Riddle* (Sixties Scoop).

- MLG has class action and Aboriginal law experiences having been counsel for thousands of clients in the individual claims process of the residential school

settlement and co-counsel on *Riddle*. The firm and its lead counsel Tony Merchant has had a "strained" relationship with varying law societies and courts. Counsel for the consortium described Merchant's activities more elegantly as "colourful".

[21] The consortium has clarified its proposed class definition in its amended statement of claim as:

> … Métis and Non-Status Indian persons who were removed from their homes in Canada during the Class Period and placed in the care of non-Indigenous foster or adoptive parents.
>
> In this regard there is no meaningful difference between the competing firms' class definitions, but the Consortium's definition reflects an amendment following the filing of the Day Action.

[22] The consortium has advanced the case by obtaining an expert report (Stevenson Report), which is focused on the experience of Métis children during the Sixties Scoop in Saskatchewan. In addition, other archival research has been prepared.

[23] The Day counsel are briefly summarized as follows:

- KM is a firm with class action experience on a variety of topics. Germane to this litigation, KM acted on behalf of Indigenous people in both the residential school class actions and as co-counsel in the *Riddle* Sixties Scoop case. It has also acted for Inuit and non-Status Indians in *Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 179, 273 A.C.W.S. (3d) 251.

- PR is known as a leading firm in public law with broad class action experience. Relevant to this litigation is their involvement in *Daniels* at all levels which involved Métis and NSI persons. PR has had experience in dealing with NSI issues and communities for some time and the constitutional issue of whether these two groups were "Indians" under the Constitution.

[24] The proposed class definition for the Day action class is similar to the LMO action and reads:

> … [A]ll Métis and Non-Status Indian persons in Canada who were taken and placed in the

> care of non-Aboriginal foster or adoptive parents who did not raise the children in accordance with the Aboriginal person's customs, traditions and practices.

[25] KM/PR has retained Gwynneth Jones and Dr. Raven Sinclair as experts. Jones was a crucial witness in *Daniels* and *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207. Sinclair was retained for her expertise in the Sixties Scoop. KM/PR has also retained an actuarial consultant.

[26] In addition, KM has spoken to dozens of Métis and NSI survivors of the Sixties Scoop about this current action to educate themselves and encourage participation in this litigation.

D. *Consortium and KM/PR Relationship*

[27] At the Federal Court, this motion is unusual. The usual practice is for all plaintiffs' counsel to work out some form of joint venture on the lead class action they consider best to advance.

[28] The falling out between these law firms and their coming together in the present forms appears to have stemmed from the first Sixties Scoop litigation and their experiences with each other. There is no question that there is some "bad blood" remaining. KM/PR has also raised concerns about adverse comments by the courts of particularly the conduct of MLG.

[29] This "bad blood" is of little relevance to this Court presently. The concern for MLG's role, however, has some significance. The concerns expressed by courts with respect to MLG's conduct are recorded in at least the following cases referred to in KM/PR's materials:

- *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (QL), 160 A.C.W.S. (3d) 947 (Sup. Ct. J.) (*Whiting*), at paragraph 17;
- *Duzan v Glaxosmithkline, Inc.*, 2011 SKQB 118, 372 Sask. R. 108, at paragraphs 36–37;

- *Chudy v. Merchant Law Group*, 2008 BCCA 484, 171 A.C.W.S. (3d) 953, at paragraphs 17, 99–100, supplementary reasons 2009 BCCA 93, 175 A.C.W.S. (3d) 677, at paragraph 10;
- *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (QL), 145 A.C.W.S. (3d) 566 (Sup. Ct.), at paragraphs 25–26;
- *Grasby v. Merck Frosst Canada Ltd.*, 2007 MBQB 42, 155 A.C.W.S. (3d) 1035, at paragraphs 2 and 8;
- *Drover v. BCE Inc.*, 2013 BCSC 50, 225 A.C.W.S. (3d) 35, at paragraph 62; and
- *McCallum-Boxe v. Sony Corp.*, 2015 ONSC 6896, 260 A.C.W.S. (3d) 24, at paragraphs 12–13.

IV. Issue

[30] The issue for the Court is which case should be advanced on behalf of the class. Modern jurisprudence has taught away from the “beauty contest” approach in which the competing law firms touted their wares and services to the present and more direct approach of which case is in the best interests of the proposed class to advance. Counsel’s experience and expertise are but one part of that approach.

[31] While each side eschewed the “beauty contest”, they spent a great deal of time and effort on self-promotion. Those submissions did have some bearing on the Court’s decision, but it did require the Court to separate “the wheat from the chaff”.

V. Analysis

[32] In this Court, Justices Fothergill and Favel have discussed carriage awards but only in the context of consent orders precluding the filing of other class actions on the same matter in this Court (see *Heyder v. Canada (Attorney General)*, 2018 FC 432, 295 A.C.W.S. (3d) 250 (*Heyder*), at paragraphs 7–8 and *Hardy v. Canada (Attorney General)* (1 June 2018) Ottawa, T-143-18 (F.C.)).

[33] This motion is the first contested carriage motion in this Court. Therefore, the considerations are somewhat different in this contested context. Despite the Scoop settlement in *Riddle* and *Brown*, for purposes of the motion, the Court must assess the matter based on the assumption that the case will be litigated.

[34] The Day plaintiff relies on the four elements adopted by Justice Fothergill in *Heyder*:

- Whether the order is in the best interest of the plaintiffs, the class members and the defendant;
- Whether the order furthers the Federal Court's commitment to robust case management;
- Whether the order reflects the Federal Court's unique national jurisdiction; and
- Whether the order promotes the objectives of judicial economy and a multiplicity of proceedings.

[35] These elements have not been considered as contested issues in this carriage motion except the first element, which is the general test for carriage in most common law jurisdictions. Justice Fothergill was never asked to consider which of two actions should proceed and take precedence over the other. The Day plaintiff's reliance on this authority is misplaced and it is unfair to read into that decision more than that for which it stands on its facts.

[36] The Federal Court class action rules have no specific provision for carriage contests. However, section 50 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, giving the power to stay a matter and, most particularly, paragraph 105(b) of the *Federal Courts Rules*, SOR/98-106 (Rules), giving the power to stay one proceeding until another proceeding is determined, are sufficient authority read in the context of rule 3 to permit this Court to decide carriage motions. The objectives of class proceedings, including those governed by Part 5.1 [rules 334.1–334.4] of the Rules, are judicial economy, access to justice, and behaviour modification (*Murphy v. Compagnie Amway Canada,*

2015 FC 958, 257 A.C.W.S. (3d) 529, at paragraph 34). These objectives further support the authority of the Court to decide carriage motions.

[37] Although the parties have described this motion as the Court directly determining which law firm can continue its claim, the Court is not actually doing that in a carriage motion. Instead, the Court is allowing one case to proceed while another is stayed, which has the effect of determining which counsel will act on behalf of the proposed class.

[38] In fairness to counsel in the Day action, they urge for the Court to adopt the multi-factor test drawn from Ontario jurisprudence in addition to considering the elements in *Heyder*—as did counsel for the LMO action.

[39] Courts in Ontario have developed a non-exhaustive list of factors to be considered for carriage motions. In *Kowalyshyn v. Valeant Pharmaceuticals International Inc.*, 2016 ONSC 3819, 268 A.C.W.S. (3d) 519, at paragraph 143, the Court summarized this non-exhaustive list of 16 factors:

(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

[40] The Court has looked to common law cases (see *Manuge v. Canada*, 2008 FC 624, [2009] 1 F.C.R. 416, at paragraph 24) because historically Quebec has had a unique “first-to-file” rule where carriage was awarded to whichever action had filed first. Although this presumptively continues to be the rule in Quebec, the Quebec courts have more recently indicated that carriage will not be awarded to the first action if it is shown to not be in the best interests of the class (see e.g. *Moscowitz v. Attorney General of Quebec*, 2017 QCCS 3961, 2017 CarswellQue 7560, at paragraphs 14–16). Under the multi-factor approach adopted in common law provinces, the timing of the filed actions is only one factor in the analysis.

[41] In my view and consistent with *VitaPharm Canada Ltd v. F. Hoffmann-LaRoche Ltd*, [2000] O.J. No. 4594, 101 A.C.W.S. (3d) 472 (Sup. Ct.), at paragraph 48, the best interests of the class are paramount. A multi-factor analysis allows for the flexibility necessary for the Court to determine the best interests of the class. That will often focus on the best representative plaintiff, the qualities of the case, and the knowledge and experience of counsel—although this last consideration must be examined carefully so not to exclude new counsel into the class action field and thereby creating an informal “club”.

[42] Consistent with the issues argued, the most relevant factors in this case are:

- the representative quality of the proposed plaintiff - a critical factor;

- the preparation and readiness of the action;
- the class definition;
- scope of causes of action;
- timing of filing of action;
- quality, expertise and conduct of counsel; and
- relevance of class actions in more than one jurisdiction.

[43] Not all factors have the same weight and these are not exhaustive of potential issues in other cases. Justice Morgan in *David v. Loblaw; Breckon v. Loblaw*, 2018 ONSC 1298, 289 A.C.W.S. (3d) 253, at paragraph 4, said it well:

> As my colleague Perell, J. pointed out …, "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." Certainly in a case such as this one, where some of the most highly qualified class action counsel in the country are competing for carriage, the point of the exercise is to take the measure not of the lawyers or law firms themselves, but the cases they have prepared — i.e. to engage in a "qualitative analysis of all of the factors" in the competing actions and the advantages of the steps taken in each…. [Citation omitted.]

[44] In my view, that is the correct approach for this Court. The relevant factors are case specific and the analysis is not based on competence or experience generally but what can be brought to bear for the specific case. In the end, this is not a mathematical tally of specific points awarded by factor but a more global assessment and an exercise of judicial judgment as best one can foresee the case developing.

A. *Representative Plaintiffs*

[45] This factor is close between the sides, but weighs in favour of the Day action because of the experience and focus the Day action counsel have toward the NSI community.

[46] The LMO representative plaintiffs are suitable class representatives in terms of commitment and experience. They have connections into the Métis community which

will facilitate their obligations as representative plaintiffs. They represent an experience which is Métis focused. However, they have not advanced a case for their representation of the NSI component of the litigation.

[47] Day, on the other hand, does not have these community connections. He does, however, reflect the type of circumstances and damage that is common to both the Métis and NSI group at the more severe end of the damage spectrum. He is a textbook claimant and a mirror for both indigenous components of the litigation.

[48] What Day personally may lack in connection into the Métis and NSI community due to his experience is ameliorated by the efforts of counsel to interact with both Métis and NSI people and the relevant practical experience of PR counsel in both communities. The focus and attention paid to the NSI experience and community is important in this case.

B. *Preparation and Readiness for Action*

[49] This factor slightly favours the LMO action in that it has conducted archival studies and prepared at least one expert report. In the Day action, established experts have been retained and counsel have spoken to dozens of Métis and NSI Scoop survivors. Knowledge gained from the *Daniels* litigation, while relevant to the conduct of the litigation, is not evidence of preparation or readiness.

[50] However, in this case, the parties are at a very early stage in the litigation process and the gap in preparation between the two actions is not significant. There is no reason to conclude that the gap cannot be readily made up and will have no material impact on the conduct of the action.

C. *Class Definition*

[51] This factor is largely neutral and if anything, it slightly favours the Day action. The parties have generally conceded that there is little substantive difference between them on this point and that any alterations in the class definition are a matter of “tweaking” the respective definitions.

[52] While the class definition in the LMO action is more objective than the Day action (which is consistent with the *Brown* definition), the LMO action initially did not include NSI—a significant omission given the purported attempt to include in the LMO action those Indigenous parties omitted in the *Brown*/*Riddle* settlement. This omission is consistent with the LMO action's focus on the Métis community principally.

[53] The LMO omission is also consistent with its lack of involvement with the NSI community. That omission has been corrected in its proposed consolidated statement of claim on February 6, 2019. However, the Court cannot ignore what appears to be "leap-frogging" by the LMO action when a carriage motion is pending. Such leap-frogging is to be discouraged in carriage action motions as discussed in *Whiting*, at paragraphs 21–26; *Mancinelli v. Barrick Gold Corp*, 2016 ONCA 571, 268 A.C.W.S. (3d) 729, at paragraph 61.

[54] Both actions will require amendments to better define the relevant class periods but this is a minor technical matter and gives neither party an advantage.

D. *Scope of Causes of Action*

[55] This factor is essentially neutral as both actions are based primarily on breach of fiduciary duty and common law duties owed by the defendant. Each group advances other claims such as the *United Nations Declaration on the Rights of Indigenous Peoples,* 13 September 2007, G.A. Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) (UNDRIP) and honour of the Crown.

[56] However, in the case of the LMO action's advancing the UNDRIP claim, as a declaration not yet implemented in domestic statute, the UNDRIP may aid in the interpretation of Canadian law but it does not create obligations for Canada (*Ross River Dena Council v. Canada (Attorney General*), 2017 YKSC 59, 285 A.C.W.S. (3d) 226, at paragraphs 303–307). It is an uncertain basis for a claim of this nature.

[57] In the Day action, counsel advance the honour of the Crown principle in respect of the Crown's fiduciary obligations to potential claimants. However, the honour of the Crown is not a separate cause of action but a principle describing how Canada must

fulfil its obligations to Indigenous people (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paragraph 73). The Day action has simply pleaded that the honour of the Crown is at stake without further specifics, which is not particularly helpful.

[58] In the same vein, the LMO action refers to the Saskatchewan AIM [Adopt Indian and Metis] Program but provides no details on how Canada's alleged breach of obligations under this program was materially different from the broad claims in the Day action.

[59] None of these additional grounds of claim gives either group an advantage in respect of carriage.

E. *Priority of Commencement of Action*

[60] This factor must be examined qualitatively. In the LMO action, the three claims were filed before the Day action and thus the factor slightly favours the LMO action.

[61] However, as discussed earlier, it is of no great importance in the overall scheme of the litigation as the gap in timing does not appear to materially affect the progress of the respective actions.

[62] It is important to note that while the Day action is later, it was more inclusive in that it always included NSI class members, unlike the LMO action. There is no suggestion that the Day action tried to "leap-frog" the LMO action by including NSI class members. The NSI component would have involved some further research to develop this aspect of the claim, and thus appears to have required additional time to crystallize the claims breadth.

F. *Quality, Expertise and Conduct of Counsel*

[63] Considerable time and effort was spent on this factor even though each side claimed this carriage motion was not a "beauty contest". In any event, it is a relevant factor but not as overwhelmingly determinative as some may have thought.

[64] This factor favours the KM/PR group for a number of reasons especially expertise on one aspect of the litigation—the unresolved issues in *Daniels* as to the rights flowing to the Métis and NSI groups and their composition.

[65] As held in *Strohmaier v. British Columbia (Attorney General)*, 2018 BCSC 1613, 296 A.C.W.S. (3d) 699 (*Strohmaier*), at paragraphs 55–58, the Court must assess the quality of class counsel to protect absent class members. Courts have repeatedly warned against undue reliance on this factor in order to avoid the "beauty contest" atmosphere. As recently held in *Quenneville v. Audi AG*, 2018 ONSC 1530, 290 A.C.W.S. (3d) 30, at paragraphs 78–83, the quality of counsel should not be a significant factor as usually any law firm could represent class members. Courts should generally avoid emphasis on this factor to avoid the prospect of creating a "club" referred to earlier in these reasons.

[66] Therefore, the Day action's argument that the Court should primarily consider this factor cannot be accepted. It is but one factor and its importance depends on the circumstances.

[67] In the context of these actions both law firm groups have extensive class action experience. The lead counsel in each group are experienced and respected counsel in this field. Members of both law firm groups have experience in the Sixties Scoop and residential school class actions. They also both have experience acting for Métis people, although members of KM/PR have experience on behalf of NSI people as well.

[68] KM/PR bring important experience in respect of Métis and NSI, particularly PR, in terms of the claimant group and some of the unresolved issues in *Daniels* which will likely arise in this action.

[69] In *Daniels*, the Supreme Court of Canada left certain definitional issues of who is Métis and who is NSI under the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], subsection 91(24), to a later date—this may be the time at which those definitions (or some others) are addressed. There are duties said to

flow from the constitution determination that Métis and NSI are “Indian” for constitutional purposes. PR has unique background and experience in this aspect of the litigation. It is a positive factor favouring carriage by KM/PR.

[70] The consortium has a geographic scope advantage over KM/PR in that the consortium is western based (apart from its Ontario lead) and some members (MLG and Klein) have offices in both the west and the east.

[71] However, with this apparent advantage, the consortium advanced no details of its organization, division of labour, or management which establishes that it is materially better able to act for Métis and NSI across the country. The fact that there are more firms in the consortium is not assurance that it can better manage the litigation than KM/PR which at least numerically has a simpler structure.

[72] The Court is cognizant that there may be limits on what a group of firms can publicly disclose of its plans for handling litigation. No counsel wants to disclose their “battle plan” but at least some better information should be available. Neither side was forthcoming on this matter.

[73] In essence, the Court is left with a history of past performance and a few assumptions that are the basis for a qualitative distinction between the two groups. Given that KM/PR have also handled national class actions successfully, there is no established qualitative difference between the competing groups on this point of geography.

[74] KM/PR have alleged a pattern of adverse conduct against several members of the consortium, particularly MLG. The involvement of MLG in various actions has been troubling for several courts and recently in *Strohmaier*, MLG was denied carriage because of these concerns. In that case MLG was acting alone without the discipline of a consortium, as may be the case here.

[75] In my view, the involvement of MLG is not grounds to deny the consortium carriage of the case. However, MLG’s reputation does not advantage the consortium in any qualitative assessment of counsel’s “quality, expertise and conduct”. The

consortium must be examined as a whole including the expertise and experience of some of its most prominent members.

[76] For other reasons, this factor weighs in favour of KM/PR.

G. *Interrelationship of the Class Action in Other Jurisdictions*

[77] The issue here is Canada's request that the parties to this motion undertake to not advance similar proceedings in other courts whether the Court's determination on carriage is favourable or not. Canada's concern is a reflection of the unresolved problem of multi-jurisdictional class actions—that this one defendant may be defending the same case in numerous jurisdictions.

[78] KM/PR is prepared to give such an undertaking, the consortium is not. The consortium's objection is that such an undertaking runs counter to the *Code of Professional Conduct for British Columbia* and the "right to practice".

[79] The consortium has advanced no compelling facts or argument that the undertaking would have that effect. There is no clear statement from the Law Society that the Code would be violated if a law firm committed not to file duplicative overlapping class actions following a favourable carriage decision on a national class action. Moreover, it does not address how filing duplicative claims would not be an abuse of process.

[80] The undertaking is an assurance to the Court that the class action will be prosecuted with vigour and determination in this Court and not simply be used as a pawn on a chess board of class actions.

[81] It is a matter that is reassuring but is not a requirement in the present circumstances. Class actions in this Court are case managed in an atmosphere of vigorous case management. The Court can, with the input from the defendant, ensure that the purposes of class actions and this class action in particular are fulfilled by court intervention up to and including decertification of the action.

[82] Therefore, the Court will not determine the issue of carriage on the basis of the giving of this undertaking.

[83] The more systemic problem of multi-jurisdiction claims in national class actions, the concerns for abuse of process and the potential for "forum playing" are broader issues that this carriage motion cannot resolve.

[84] In the present case, the issue is academic since the Court is not granting carriage to the consortium. KM/PR, having committed to the Court to give such an undertaking, will be required to honour that commitment.

VI. Conclusion

[85] For all these reasons, carriage of the proposed class proceeding is granted to the Day action. The actions of *LaLiberte v. Canada (Attorney General)*, *McComb v. Canada*, and *Ouellette v. Canada* will be stayed *sine die*.

[86] The previous order of January 24, 2019, precludes any further similar class actions from being filed in the Federal Court without leave.

[87] There will be no costs of this motion as costs were not sought and each firm was pursuing its own commercial interest.

ORDER in T-940-18, T-1251-18, T-1904-18 and T-2166-18

THIS COURT ORDERS that:

1. Carriage of the proposed class proceeding is granted to the plaintiff in *Day v. Canada (Attorney General)* (T-2166-18);

2. The actions of *LaLiberte v. Canada (Attorney General)* (T-940-18); *McComb v. Canada* (T-1251-18); and *Ouellette v. Canada* (T-1904-18) are stayed *sine die*; and

3. There are no costs of this motion.