Federal Court Cour fédérale

Date: 20210114

Dockets: T-724-19
T-725-19
T-726-19
T-1319-19
T-1320-19
T-1321-19

Citation: 2021 FC 51

Ottawa, Ontario, January 14, 2021

PRESENT: The Honourable Madam Justice Strickland

Docket: T-724-19

BETWEEN:

SHAUN WILLIAM ARNTSEN, MICHAEL GRANT RUDE AND MARTIN LEPINE

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

Docket: T-725-19

AND BETWEEN:

DAVID BONA, CLAUDE LALANCETTE AND SHERRI ELMS

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

Docket: T-726-19

AND BETWEEN:

CHRISTIAN MCEACHERN AND PHILLIP BROOKS

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

Docket: T-1319-19

AND BETWEEN:

STEPHEN BOULAY, TYSON MATTHEW BOWEN, ALISON CLARK, ALEXANDER DEELEY, BENJAMIN DOMINIE, ROGER GAUTHIER, TYLER COADY, MICHAEL BUZNY, STEPHANE CHARBONNEAU, JASON ANDERSON, ANN BASTIEN, MATTHEW BLEACH, WADE COOPE, HAROLD DICKSON, KYLE GETCHELL, IAN LANG, JORDAN LOGAN, ALI NEHME, MAXIME GABORIAULT, JUSTIN PAQUETTE, BRAD PETERS, KIRK POWELL, ISAAC PRESIDENT, ERNEST SMITH, RANDY J. SMITH, ANDREW STAFFORD, JASON LE NEVEU, DANIEL HASLIP, RICHARD FIESSEL, GARY

SANGSTER, CODY KULUSKI, ADRIAN DROHOBYCKY, JIMMY LAROCQUE, LANCE COVYEOW, SALVADOR RENATO ZELADA-QUINTANILLA, TREVOR GROHS, CHRISTOPHER CHARTIER, ROB COBB, GREG HART, EWARLD HOLLY, TRAVIS JONES, DANIEL JOUDREY, JOSEPH MOORE, BRANDON KETT, WILLIAM ALDON NICKERSON, JUSTIN NORMAN, JUDY OCHOSKI, OWEN PARKHOUSE, LANDON PERRY, THOMAS BOWDEN, CURTIS GIBSON, LEO VEMB, LEROY BOURGOIN, JEREMY LEBLANC, MARK VERALL, CONRAD KEEPING, WILLIAM PERRY, JEFFRY FLEMING, TIMOTHY MILLS, STEPHEN BARTLETT, SCOTT FIERLING, ADAM LANG, NATHAN BLAKE, CHRISTOPHER MADENSKY, GORDON MAIDMENT, MICHAEL DESMOND JOHN RYAN, TOM BRYSON, BRADLEY QUAST, JODY HARTLING, ANDREW JASON GUSHUE, ROBBIE LATREILLE, LUC CHAMPAGNE, ANTONY PETERS, DARYL INGLIS, DANIEL BOUDREAULT, JUSTIN TOBIN AND QUENTIN MULLIN

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

Docket: T-1320-19

AND BETWEEN:

ALLAN ALEXANDER, MARK AUCOIN, DEAN BERGSTROM, ROBERT GARY BURNS, MICHAEL KENNETH ESTEY, MARIE-CLAUDE LEMIEUX, JOSEPH

DANIEL ROBERT LIZZOTTE, BRAD LOCKE, PATRICK MACDONALD, MELVYN NEVILLE, ALLEN SZABON, RANDY TITUS, GRAHAM MASON, VERNON MACKAY, STEVE WRATHALL, KEVIN DAWE, TERRENCE HURLEY, JOHN ALEXANDER WILT, PETER THORP-LEVITT, PETER BARNES, DAVE BURTCH, JOHN JOSEPH HARDY, JEFFEREY HARRISON, ANDREW BLACKIE, BLAISE BOURGEOIS, MICHAEL THIER, MURRAY CLARKE, JAMES HOWARD MACKAY, SHELDON ERNEST ROBERTS, MICHAEL BENNETT, FREDERICK ROBERT PERRY, STEPHEN SIMMONS, THOMAS KEARNEY, MICHAEL HACKETT, WAYNE FRANK, ALAIN PELLEGROMS, DONALD WAYNE COLE, MARK DIOTTE, RICHARD ROY CAMERON, STEPHEN LIVELY, JAMES KEITH SHEPPARD, JOSPEH LOREN BOLT, YVES JOSEPH LEGERE, DARLENE ARSENAULT, JASON HOEG, DONALD FOX, MICHAEL BECH, PIERRE GENTES, THOMAS YURKIW, MARIE GODFREY, RUBY SMITH, PETER CHIASSON, MARK ROYAL, MARK STRICKLAND AND MICHAEL THIBODEAU

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

Docket: T-1321-19

AND BETWEEN:

WILLIAM AITKEN, BRENDA CAMPBELL, TOM GOODBODY, MICHAEL HOPPING,

STEPHANE LEROUX, ANDY MOSIENKO, DAVID NYSOLA, NEIL DODSWORTH, KEVIN MORROW, JOSEPH JASIN, PAUL MORNEAULT, COLIN WILMS, JAMIE P. GRENIER, JOHN ARTHUR ARMSTRONG, CHRIS HODD, STEVEN M.D. BARTON, ALAN BROWN, TONY HILL, TRENT HOLLAHAN, GERARD MOORES, DARREN VERNVILLE, JOHN DOWNS, DINO SIMONE, ROERT MACDONALD, NORMAN HARRISON, RODERICK MACKAY, KEITH LOSIER, PHILLIP PALMER, THOMAS PATRICK HANEY, RICKIE CHAYKOWSKI, PETER OLAND, JOHN RALPH MCMILLAN, GARY JOHN REID, JASON CLAUDE FLANDERS, JODY DANIAL GILLIS, MILES WATSON, JOSEPH (ANDRE) VAILLANCOURT, DEAN HISCOCK, BRIAN PETER JEFFERSON, BRIAN MCGEAN, BRENT COUNTWAY, PAUL TURMEL, ERIC ST. GELAIS, ROBERT FARQUHAR, DWAYNE SPENCER, RONALD HERBERT O'CONNOR, KEVIN JOHN STEWART, MARTIN GAGNON, PERRY ANTLE, TRACY BARNSDALE, EAMONN BARRY, GRAHAM FORD, PHILLIPE JOSEPH CERE, MASON EDWARD HUDDLESTON AND CHRISTOPHER BRECKON

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

[1] The Plaintiffs bring this motion, pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [Rules], appealing the September 16, 2020 Order of the Case Management Judge, Prothonotary Furlanetto. By her Order, the Prothonotary granted the motion of the Defendant [Canada] seeking to stay the Plaintiffs' proceedings against Canada, pursuant to s 50.1(1) of the *Federal Courts Act*, RSC 1985 c F-7 [*Federal Courts Act*], because Canada intends to institute a third party claim over which this Court lacks jurisdiction (*Arntsen v Canada (Attorney General)*, 2020 FC 898 [*Arntsen*]).

Factual Background

[2] In their statements of claim, the Plaintiffs allege that the Canadian Armed Forces [CAF] and the Department of National Defence [DND] negligently ordered them to take an anti-malarial drug, mefloquine (also known as Lariam), prior to and during deployment to malarial endemic regions between 1992 and 2017. Those Plaintiffs deployed to Somalia in 1992 and 1993 claim that they were ordered to take the drug as part of a clinical drug trial in which CAF and DND participated and that Canada negligently administered the drug trial. All Plaintiffs allege that CAF and DND knew or ought to have known that mefloquine can cause severe and potentially permanent neurological and psychological damage but negligently continued to order CAF members to take the drug. To date, six actions have been filed in this Court (T-724-19, T-725-19, T-726-19, T-1319-19, T-1320-19 and T-1321-19). These actions are being case managed as a group but are not consolidated or class proceedings. They are described by counsel for the Plaintiffs as a "mass tort proceeding" and additional actions are anticipated. In these proceedings, Canada is the only named defendant.

[3] Prior to commencing the subject proceedings in this Court, proposed class action proceedings were filed in the Ontario Superior Court of Justice [ONSC]. In 2000, a class action was commenced by Ronald Smith as the representative plaintiff on behalf of a proposed class of CAF members and former members who were ordered to take mefloquine. Canada and the drug manufacturer, Hoffman-La Roche [Roche] were named as co-defendants in that proposed class action. That action was dismissed for delay on April 17, 2018. On January 18, 2019, a new proposed class action was commenced in the ONSC against Canada and Roche, as co-defendants, by John Dowe as the representative plaintiff [Dowe Proposed Class Action]. Counsel for the Plaintiffs in these actions subsequently assumed conduct of the Dowe Proposed Class Action.

[4] On July 16, 2019, Canada delivered a Notice of Intent to Defend the Dowe Proposed Class Action.

[5] On September 26, 2019, Canada indicated its intention to initiate a third party claim against Roche in respect of the proceedings in this Court. On November 5, 2019, Canada moved to stay these proceedings pursuant to s 50.1 and sections 50(1)(a) and (b) of the *Federal Courts Act*. On September 16, 2020, the Prothonotary granted the motion pursuant to s 50.1.

Decision under review

[6] The Prothonotary described the background facts in some detail, which I need not restate here (*Arntsen*, para 2-12).

[7] The Prothonotary noted that for a stay to be granted under s 50.1 of the *Federal Courts Act*, Canada had to establish two elements: i) that it has a desire to institute the third party proceedings, and ii) that its third party claim against Roche is outside the jurisdiction of the Federal Court (*Dobbie v Canada (Attorney General)*, 2006 FC 552 at para 8 [*Dobbie*]). Further, that once a party seeking the stay establishes the elements of s 50.1, then the stay of the action is mandatory.

Desire to institute third party proceedings

[8] The Prothonotary noted that at the first stage of the analysis, establishing a genuine desire to institute third party proceedings, the Court will consider three factors: (a) evidence of a desire to commence third party proceedings; (b) whether the information provided about the third party claim is clear, or vague and un-particularized; and (c) whether the third party claim has any likelihood of success (*Dobbie* at para 11).

[9] The Prothonotary found that Canada had asserted that it will be initiating a third party claim against Roche in these actions and had provided a draft form of a third party claim as part of its motion materials, and she reproduced the draft pleading in full (*Arntsen*, para 18). She noted that the stated intention to proceed with the third party claim was made prior to the pleadings closing and a statement of defence being filed. She found that the timing was without delay and supported a desire to institute third party proceedings.

[10] The Prothonotary next considered the Plaintiffs' assertion that there was insufficient detail provided in the draft third party claim to support a genuine interest in pursuing the claim.

She noted that for the purposes of a s 50.1 stay motion, the Court does not require that the third party claim plead particulars of the negligence that would satisfy the ordinary rules of pleading. It is sufficient for the defendant to set out a rational basis for the third party claim (*Dobbie* at para 14). Based on her reasoning at paras 18 – 24, the Prothonotary held that Canada articulated the basis for the proposed third party claim in sufficient detail in the motion materials.

[11] Finally, with respect to the possible likelihood of success of the proposed third party claim, the Prothonotary noted that it was not appropriate at this part of the analysis for the Court to assess the reasonable likelihood that the claim will succeed (*Dobbie* at paras 17-18). Rather, the threshold for this part of the test is whether the claim proposed is so plainly without any possibility of success. The Prothonotary found that she could not conclude that the third party claim would be so plainly without any possibility of success, based on the filed materials and facts asserted, including that similar claims against Roche have been made by former CAF members in the Dowe Proposed Class Action (*Arntsen*, para 25).

[12] The Prothonotary concluded that Canada has a genuine desire to institute third party proceedings.

Jurisdiction of the Court over the proposed third party claim

[13] At the second stage of analysis, whether the proposed third party claim was outside the Federal Court's jurisdiction, the Prothonotary noted that for a proceeding to be within the jurisdiction of the Federal Court it must satisfy the three part test set out in *ITO-International Terminal Operators v. Miida Electronics*, [1986] 1 SCR 752 at para 12 [*ITO*] which she set out:

(i) There must be a statutory grant of jurisdiction by the federal Parliament;

(ii) There must be an existing body of federal law that is essential to that the disposition of the case and that nourishes the statutory grant of jurisdiction; and

(iii) The law on which the case is based must be a "law of Canada" as that phrase is used in s.101 of the *Constitution Act, 1867*.

[14] The Prothonotary held that s 17(5) of the *Federal Courts Act* grants the Federal Court concurrent original jurisdiction in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief. Thus, the first part of the *ITO* test was met as Canada seeks third party relief in these actions (*Arntsen*, para 30).

[15] As to the second and third parts of the *ITO* test, these overlap (*Canadian Forest Products Ltd. v. Canada (Attorney General)*, 2005 FCA 220 at para 24 [*Stoney Band*]) and the analysis is contextual. The Prothonotary noted that she must characterize the claim to determine its essential nature or "pith and substance", based on a realistic appreciation of the practical result sought by the claimant (*Windsor (City) v Canadian Transit Co*., 2016 SCC 54 at para 26 [*Windsor (City)*]; *744185 Ontario Inc. v Canada*, 2020 FCA 1 at para 31 [*Air Muskoka*]; *Peter G. White Management Ltd. v Canada (Minister of Canadian Heritage)*, 2006 FCA 190 at para 58 [*Peter G. White*]). Further, when applying the analysis to a third party claim, the third party claim must be characterized separately from the main claim, although the main claim may assist in ascertaining the essential nature of the third party claim (*Air Muskoka* at para 32).

[16] The Prothonotary noted that Canada's proposed third party claim alleges contribution and indemnity for any damages awarded against Canada in the Federal Court actions and also claims contribution and indemnity under the *Negligence Act* of Ontario, RSO 1990, c N.1 [*Negligence Act*].

[17] Further, that Canada's position was that the third party claim is rooted in the common law of negligence and is governed by the *Negligence Act*. Accordingly, there is no body of federal law or law of Canada that is essential to the disposition of the case and that nourishes the grant of jurisdiction in this Court. Conversely, the Plaintiffs submitted that Canada's position is flawed because it does not consider that the relationship at the heart of the actions is one between Canada and its soldiers. The Prothonotary rejected the Plaintiffs' assertion that the allegations are grounded in either Canadian military law and the common law fiduciary duty that Canada owes to members of the CAF as governed by the statutory regime of the *National Defence Act*, RSC 1985, c N-5 [*National Defence Act*], or the statutory and regulatory regime regarding clinical drug trials, as governed by the *Food and Drugs Act*, RSC 1985 c F-27 [*Food and Drugs Act*] and its associated regulations (*Arntsen* at paras 38-42).

[18] The Prothonotary concluded that the central issue is whether Roche manufactured and supplied a drug that it knew to be unsafe (*Arntsen*, para 53). The actions complained of relate to tortious acts that arise out of an alleged common law duty of care arising from Roche's manufacture and supply of the drug and its role in the clinical trial. Thus, the third party claim is grounded in allegations of tort, not in drug regulatory law.

[19] The Prothonotary also rejected the Plaintiffs' claim that this case parallels *Canada (Attorney General) v. Gottfriedson*, 2014 FCA 55 [*Gottfriedson*] (*Arntsen*, paras 43 and 51). She noted that in *Gottfriedson*, Canada sought to bring a third party claim against religious organizations that operated residential schools. There, the Court found that Canada's *sui generis* duties under the Constitution, the duties stemming from the honour of the Crown, and the *Indian Act* were all federal laws central to the disposition of both the main and third party claim. The Prothonotary also noted that in *Scott v Canada (Attorney General)*, 2017 BCCA 422 at paras 68-72 [*Scott*], the British Columbia Court of Appeal rejected the concept of expanding the constitutional honour of the crown doctrine in Aboriginal law as a foundation to support claims by former members of the CAF against the Crown. The Court in *Scott* also rejected that the Crown owed a fiduciary duty to CAF members in the context of the claim that had been made for administrative benefits. The Prothonotary concluded that, unlike in *Gottfriedson*, the allegations against Roche do not depend on a heightened duty between Canada and CAF members under the *National Defence Act*. Further, there is no statutory basis in the *National Defence Act* that would ground an extension of any asserted fiduciary duty owed by Canada to CAF members and impose such a duty on Roche (*Arntsen*, para 50). The Prothonotary also did not consider there to be the same *sui generis* relationship at play in this case as was at issue in *Gottfriedson*. Rather, the correct parallels in the case before her were to *Air Muskoka* and *Dobbie*.

[20] The Prothonotary concluded that the proposed third party claim was outside the Federal Court's jurisdiction.

[21] The Prothonotary also stated that while her conclusion on s 50.1 was sufficient to dispose of the motion, she would not have granted a stay pursuant to s 50(1)(a) and (b) of the *Federal Courts Act* and gave her reasoning for this (*Arntsen*, paras 55 – 65).

[22] Finally, the Prothonotary considered whether to grant the Plaintiffs' alternate request for relief, being that if a stay was granted pursuant to s 50.1 that they be granted leave to amend their statements of claim before the actions were stayed. The Prothonotary stated that she saw no reason to grant leave at that stage based on the submissions made and without further detail as to the nature of the amendments sought. She denied the request (*Arntsen* at para 66).

Issues

[23] The issues in this motion can be framed as follows:

(i) Did the Prothonotary err in finding that the information provided by Canada about the intended third party claims is sufficiently clear to establish Canada's genuine desire to institute third party proceedings;

(ii) Did the Prothonotary err in finding that the Federal Court does not have jurisdiction over Canada's proposed third party claims; and

(iii) Did the Prothonotary err by refusing the Plaintiffs' request to permit them to amend their statements of claim prior to staying the actions?

Standard of review

[24] In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] the Federal Court of Appeal held that the appellate standards in *Housen v. Nikolaisen*, 2002 SCC 33 apply to reviews of discretionary decisions by prothonotaries (para 69).

Therefore, the palpable and overriding error standard applies to questions of fact, while questions of law are reviewed on the standard of correctness.

[25] In *Hughes v. Canada (Human Rights Commission)*, 2020 FC 986 Justice Little summarized which standard applies to issues of mixed fact and law:

> [63] The correctness standard may also apply to a question of law or a legal principle that is extricable from a question of mixed fact and law: *Hospira*, at paras 66, 71-72; *Creston Moly Corp. v Sattva Capital Corp*., 2014 SCC 53, [2014] 2 SCR 633, at paras 53-55, 63-64; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 FCR 344 (Stratas, JA), at paras 57 and 74; *Canadian National Railway v Emerson Milling*, 2017 FCA 79, [2018] 2 FCR 573 (Stratas, JA), at paras 21-28; *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32, [2017] 1 SCR 688, at para 44; *Clayworth v Octaform Systems Inc.*, 2020 BCCA 117 (Hunter, JA), at para 47. However, if the impugned findings are factually suffused or a legal principle is not readily extricable, the standard will be palpable and overriding error: *Mahjoub* at paras 60, 156 and 318; *Housen*, at para 36; *Teal Cedar Products*, at paras 45-46.

[26] Therefore, which standard applies to questions of mixed fact and law depends on whether the legal principle is bound with, or extricable from, the finding of fact.

[27] As to the first issue, whether the Prothonotary erred in finding that the information provided by Canada about the intended third party claims is sufficiently clear to establish Canada's genuine desire to institute third party proceedings, the Plaintiffs make no substantive submission other than stating that the appeal raises errors reviewable on the standard of correctness. However, elsewhere in their written submissions the Plaintiffs assert that while the Prothonotary identified the correct legal tests she misapplied the legal principles, meaning she erred in finding that Canada's proposed third party claims are set out in sufficient detail in the

motion materials. Canada submits, and I agree, that the finding of sufficiency of detail is factual and, therefore the applicable standard of review is one of palpable and overriding error.

[28] As to the second issue, whether the Prothonotary erred in finding that the Federal Court does not have jurisdiction over Canada's proposed third party claims, the parties submit and I agree that this attracts the correctness standard (*Air Muskoka* at paras 49-50).

[29] Finally, as to the third issue, being whether the Prothonotary erred by refusing the Plaintiffs' request to permit them to amend their statements of claim prior to staying the actions, the Plaintiffs assert that the Prothonotary erred by stating the law incorrectly and by applying the wrong legal principles, thereby attracting the correctness standard of review. Canada submits that the Plaintiffs requested that they be granted 30 days to file amended statements of claim if the Prothonotary was inclined to stay these actions and that this discretionary finding is factual, attracting the palpable and overriding error standard.

[30] I note that in the Plaintiffs' written submission filed in support of the stay motion before the Prothonotary, under the heading "Order Sought", the Plaintiffs requested that Canada's motion be dismissed and:

> 92. In the alternative, if this Court is inclined to grant the Defendant's motion pursuant to s 50.1 of the *Federal Courts Act*, the Plaintiffs respectfully request that they be granted 30 days' indulgence to file amended statements of claim before these actions are stayed.

[31] In her reasons, under "Alterative Relief", the Prothonotary stated:

> [66] As part of their motion the plaintiffs have included a request that if a stay is granted under section 50.1 of the *Federal Courts Act*, that they be granted leave to amend their statements of claim before the actions are stayed. I see no reason to grant leave for amendment at this stage based on the submissions made and without further detail as to the nature of amendments sought. Accordingly, the request for alternative relief is denied.

[32] The Plaintiffs argue that the Prothonotary erred by imposing a leave requirement where none existed. They submit that as the pleadings had not closed, the Plaintiffs were permitted as of right to amend their claims pursuant to Rule 200 of the *Federal Courts Rules*. In my view, if the Prothonotary misapprehended the facts and, therefore, the requirement for leave to amend the statements of claim, then this issue is subject to review on the palpable and overriding error standard. In any event, even if the correctness standard applies to the Prothonotary's apparent determination that leave to amend was required, for the reasons that follow I am of the view that the Prothonotary did not err in declining to delay the implementation of the stay in the circumstances that were before her.

[33] The correctness standard is non-deferential and the Court may intervene and substitute its own discretion or decision (*Hospira* at para 68). Conversely, palpable and overriding error is a highly deferential standard where the Court may only intervene if the motions judge made an obvious error that affects the outcome of the case (*Laliberte v Day*, 2020 FCA 119 at para 32, *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61 – 64).

Issue 1: Did the Prothonotary err in finding that the information provided by Canada about the intended third party claims is sufficiently clear to establish Canada's genuine desire to institute third party proceedings?

Plaintiffs' position

[34] The Plaintiffs submit that determining whether Canada has a genuine desire to institute third party proceedings involves consideration of whether the proposed claim is clear or if it is vague and un-particularized (*Dobbie* at para 11). And, although the Prothonotary correctly found that Canada's proposed third party claim in a s 50.1 stay motion need not satisfy the strict rules of pleadings, the Prothonotary erred in finding that Canada's proposed third party claims are sufficiently detailed.

[35] The Plaintiffs submit that Canada's draft third party claim lacks a description of the claim, since it only states that Canada is bringing the claim against Roche for contribution and indemnity under the Ontario *Negligence Act*. Therefore, it is impossible to assess what Roche is alleged to have done wrong. The Plaintiffs submit that there is no legal basis for Canada to seek indemnity from Roche based on the Plaintiffs' causes of action as against Canada and that Canada has not provided any details regarding the contribution claim, relying only on Roche's potential liability as raised in the Dowe Proposed Class Action.

[36] The Plaintiffs submit that this case is distinguishable from *Dobbie* and the Prothonotary erred in relying on that case. While the draft third party claim supplied in *Dobbie* was "pro forma" it was still sufficient to demonstrate a rational basis for the claim, unlike the draft third party claim submitted in this matter. Further, the Prothonotary erred in equating the evidence of a rational basis for the third party claim in *Dobbie* – settlements in similar US actions – to Canada's reliance on the allegations against Roche as a co-defendant in the Dowe Proposed Class Action and failed to consider the draft third party claim on its own merits.

Defendant's Position

[37] Canada submits that the Prothonotary considered, and correctly decided, that Canada met the three elements that demonstrate it has a genuine desire to bring a third party claim.

[38] As to the second element of the test, the Prothonotary gave sufficient weight to the evidence before her and did not misapprehend the facts in finding that Canada's proposed third party claim was set out in sufficient detail. Accordingly, there is no basis upon which to interfere with her decision (*Hospira* at para 68).

[39] Canada notes that the draft third party claim refers to the allegations made against Canada and Roche in the Dowe Proposed Class Action and points to a chart showing the similarities between the allegations made against Roche by the plaintiffs in the Dowe Proposed Class Action and those made by the Plaintiffs against Canada in these actions. Canada submits that the proposed third party claim explains that if the allegations made against Roche in the Dowe Proposed Class Action are proven to be true, and assuming causation is established, Roche as the manufacturer of the allegedly unsafe drug would be partially or fully liable for the injuries the Plaintiffs allege to have suffered in these actions.

[40] Canada submits that in this appeal the Plaintiffs' attempt to narrow their claims, arguing that they do not allege that the drug was unsafe or dangerous, rather that the Plaintiffs' harm stems from how DND administered the drug and the drug's use during military deployments. However, the Plaintiffs did not previously raise this narrow claim and therefore the Plaintiffs' suggestion that the Prothonotary erred by not considering the assertion cannot succeed (*Canada (Attorney General) v Honey Fashions Ltd*, 2020 FCA 64 at paras 47-48; *Becker v Toronto (City)*,

2020 ONCA 607 at paras 34-43). In any event, Canada may genuinely desire to bring a third party claim against Roche irrespective of how narrowly the Plaintiffs now describe their claim. And neither a broad reading of the claim, that the drug was unsafe, nor a narrow reading, that Canada negligently administered the drug, reveals an error in the Prothonotary's findings. Canada submits that the Prothonotary correctly found that the particulars of negligence need not be pleaded to establish that the desire to bring a third party claim is genuine (*Dobbie* at para 14), that their draft pleadings are sufficiently clear, and that the pleadings do in fact specify the types of claims against Roche.

[41] Canada also submits that the Plaintiffs provide no authority in support of their submission that it was not appropriate for Canada to have relied on similar allegations made against Roche in another jurisdiction as support for the rationale for its proposed third party claim, or that the stage of the ONSC proceeding render reliance improper. As to the latter point, the Prothonotary's reliance on *Dobbie* was appropriate. In *Dobbie,* the existence of parallel proceedings supported the Court's finding that there was a rational basis for a third party claim. While those parallel proceedings had been settled, there is no indication that the stage of the proceeding impacted the decision. The Prothonotary did not err in relying on the allegations made against Roche as co-defendant in the Dowe Proposed Class Action to support her finding that there is a rational basis for the proposed third party claim.

Analysis

[42] As the Prothonotary correctly found, the test for determining whether the Crown genuinely intends to commence third party proceedings in this matter was set out by this Court in *Dobbie*:

> [11] To satisfy the requirement for a stay under section 50.1 of the Act, the Crown's desire to institute the third party claim must be genuine. (See *Fairford First Nation v. Canada (Attorney General)*, 1995 CanLII 3597 (FC), [1995] 3 F.C. 165 (T.D.), aff'd 205 N.R. 380 (F.C.A.) per Justice Paul Rouleau at paragraph 11; and *Charalambous v. Canada* (2004), 128 A.C.W.S. (3d) 282 (F.C.) per Prothonotary Hargrave at paragraphs 4-6). In determining genuineness, the Court will consider:
>
> 1. the evidence of the desire to commence a third party proceeding;
>
> 2. whether the information provided about the proposed third party claim is clear or if it is vague and un-particularized; and
>
> 3. does the third party claim have any possible likelihood of success.
>
> ……..
>
> [13] In the third party claim against the manufacturers Dow and Monsanto, the defendants plead elements of a cause of action in negligence:
>
> 5. The third parties manufactured the Agent Orange and other herbicides identified in the *Amended Statement of Claim* as having been used in the 1966 and 1967 test sprayings.
>
> 6. If any harm has been caused to any of the plaintiffs or proposed class members as alleged in the *Amended Statement of Claim*, then that harm was caused by the products manufactured by the third parties.
>
> 7. The use of these products as alleged in the *Amended Statement of Claim* was one of the uses that the third parties knew or ought to have known would be made of the products they manufactured.
>
> 8. The third parties knew or ought to have known that use of these products as alleged in the *Amended Statement of Claim* was likely to cause the harm as alleged in the *Amended Statement of Claim*.
>
> 9. Liability for any harm that has been caused to any of the plaintiffs or proposed class members rests entirely with the third parties.

> In my view, this is sufficient to establish that the Crown intends to take third party proceedings against the manufacturers.
>
> Vague and un-particularized allegations
>
> [14] In *Fairford*, above, Justice Rouleau found that the Crown's information about an intended third party claim was "extremely vague" and did not contain any particulars. In *Charalambous*, Prothonotary Hargrave found that the Crown's intent to commence third party proceedings was so vague and un-particularized that he found that the Crown did not really intend to commence third party proceedings. **In the case at bar, the third party claim has actually been filed *pro forma*. While it is lacking in particulars, it is sufficient to show the general basis of the claim.** The plaintiffs submit that the third party claim does not properly plead a cause of action in negligence, and relies upon the Federal Court of Appeal in *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.* (2005), 144 A.C.W.S. (3d) 726 (F.C.A.). I agree but **at the stage of this motion for a stay the Court does not require that the third party notice plead the particulars of the negligence that would satisfy the ordinary rules of pleading**.
>
> [15] Further evidence that the claim has a rational basis is in the U.S. class action against Dow and Monsanto by Vietnam veterans for damages suffered as a result of their exposure to Agent Orange and other chemicals. This action was settled for 180 million dollars. While this settlement is no precedent for liability, it illustrates the rationale for the claim.
>
> (emphasis in bold added)

[43] The Plaintiffs take issue with the second element of the three part test, asserting that the Prothonotary erred in finding the third party claim sufficiently detailed. The Plaintiffs submit that Canada's proposed third party claim contains only one bald statement regarding the nature of its claims against Roche and that Canada should have included "material facts or an articulate theory of liability against Roche as a tortfeasor that caused or contributed to the Plaintiffs' injuries". Canada notes that "pages 2 and 3 of Annex I demonstrates that claims against Roche would include Roche failing to properly advise Canada, failing to properly administer and

monitor the SMS [Safety Monitoring Study] and supplying a drug to members of the CAF which it knew or ought to have known was unsuitable for military use".

[44] Contrary to the Plaintiffs' submissions made in support of this motion appealing the Prothonotary's decision, the draft third party claim does not "contain only one bald statement regarding the nature of its claim(s) against Roche", referencing paragraph 14 of the draft claim. The draft third party claim seeks "[c]ontribution and indemnity for any amounts which Canada may be found liable to pay the plaintiffs in any of the six (6) following actions….". It sets out background facts and then states:

> 8. All plaintiffs allege that they were ordered to take mefloquine when CAF and DND knew or ought to have known that mefloquine causes serious neurological and psychiatric side-effects. The plaintiffs allege that the CAF and DND were aware of the risks of taking mefloquine and willfully concealed them or failed to warn of the risks, and failed to properly screen individuals before ordering them to take the drug. The claims seek a series of declarations against Canada along with hundreds of millions of dollars in damages for not only negligence, but also negligent misrepresentations, breach of fiduciary duty, battery and breach of section 7 of the *Canadian Charter of Rights and Freedoms*.
>
> 9. If these Federal Court actions proceed and Canada has to defend, it will deny any and all liability. Canada will also deny that the plaintiffs have suffered the alleged injuries as a result of taking mefloquine. Canada will put the plaintiffs to the strict proof thereof.
>
> 10. The potential liability of Roche has been raised in essentially the same claim which was commenced as a proposed class action in the Ontario Superior Court of Justice (OSCJ) in January 2019. The representative plaintiff in that case who is represented by the same counsel who represents the plaintiffs in these Federal Court actions has made a series of allegations of breaches of duty of care on the part of Roche related to its role in the SMS in the early 1990s and its distribution of mefloquine.
>
> 11. A chart attached to Canada's written representations as Annex 1 shows the similarities between the allegations of breaches of duty

> of care made against Roche in the OSCJ and those made against Canada in these Federal Court actions.
>
> 12. Should the allegations made against Roche in the OSCJ be proven to be true, and assuming causation is established, Roche would be partially or entirely responsible for the injuries the plaintiffs allege they have suffered in these Federal Court actions.
>
> 13. Accordingly, Canada brings this third party claim against Roche for contribution and indemnity under the *Negligence Act* of Ontario, R.S.O. 1990, c. N.1 as amended.

[45] In her reasons, the Prothonotary reproduced the draft third party claim in whole and, referencing paragraph 14 of *Dobbie*, correctly found that for the purpose of a motion for stay the Court does not require that the third party claim plead particulars of the negligence that would satisfy the ordinary rules of pleading. It is sufficient for the defendant to set out the *rational basis* for the third party claim (*Arntsen*, para 20). She acknowledged that Canada relied on the allegations of CAF members made in the Dowe Proposed Class Action against Canada and Roche as co-defendants for negligence and breach of duty of care as the rational basis for its third party claim. She then stated:

> [22] As submitted by Canada, if the allegations against Roche are proven to be true and causation established, Roche would be partially or entirely responsible for the injuries alleged to have been suffered by the plaintiffs. It is reasonable to conclude that a third party claim would be brought by Canada to similarly allege indemnity from Roche for the same causes of action alleged. As similarly held in *Dobbie supra* at para 14, the fact that Roche is already a defendant in the Dowe proposed class action, which includes assertions against Canada that parallel those made in the Federal Court actions, provides support for the rationale for the proposed third party claim.

[46] In my view, the Prothonotary did not err in relying on *Dobbie* or in her conclusion that the basis for the proposed third party claim is set out in sufficient detail. That conclusion is based

upon the content of the draft third party claim and the Annexes referenced therein comparing the actual allegations against Roche and against Canada in the Dowe Proposed Class Action to the actual allegations against Canada in these actions. I see no error in the Prothonotary's finding that the draft third party claim provided sufficient detail such that the rational basis for the claim could be ascertained. Put otherwise, it is sufficient to show the general basis of the claim (*Dobbie* at para 14).

[47] I also see no reason why the Prothonotary could not rely on the similar allegations in the parallel Dowe Proposed Class Action proceeding in the ONSC to demonstrate a rational basis for Canada's proposed third party claim given that Canada and Roche are named as co-defendants in the Dowe Proposed Class Action. And while the Plaintiffs' attempt to distinguish *Dobbie* on the basis that the parallel proceedings in *Dobbie* were settled, in that case the Court relied on the existence of parallel proceedings as further evidence of a rational basis for the third party claim; the fact that the claims were settled does not detract from this finding.

[48] The Plaintiffs also assert, as an aspect of their allegation that the Prothonotary erred in finding that the information provided in the third party claim was sufficiently clear, that the Prothonotary did not consider the third party claim "on its own merits". As I have found above, the Prothonotary was fully aware of the content of the draft third party claim and did not err in her assessment of it with respect to the second element of the test. Whether the third party claim has any possible likelihood of success on the merits is addressed by the third branch of the test.

[49] In *Dobbie* this Court stated that in deciding whether the Crown had a genuine intention to commence third party proceedings in a s 50.1 stay motion, "any speculation of this Court as to the merits of the defendants' claim against Dow and Monsanto would similarly obstruct the superior court in the exercise of its jurisdiction". For that reason, it took no view as to the merits of the Crown's third party claim, but went on to say that:

> [18] At the same time, the Court will find the third party claim disingenuous if it plainly has no possibility of success. That is a much lower threshold which the Court should examine in deciding whether a third party claim is genuine. In this case, I cannot say that the third party claim has no possibility of success.

[50] Accordingly, in my view the Prothonotary did not err in her assessment of the third party claim as set out in her finding that:

> [25] With respect to the possible likelihood of success of the proposed third party claim, as noted in *Dobbie supra* at paras 17 and 18, it is inappropriate at this part of the analysis for the Court to assess the reasonable likelihood that the claim will succeed as this will be a matter for the Court to determine on its merits. The threshold proposed for this part of the test is whether the claim proposed is so plainly without any possibility of success. In this case, I cannot conclude that the third party claim would be so plainly without any possibility of success based on the facts asserted, including that similar claims have also been made by former CAF members in the Dowe proposed class action.

[51] In sum, while Canada's draft third party claim could certainly have been more particularized, that was not required. Nor is there a palpable and overriding error in the Prothonotary's conclusion that the draft third party claim is sufficiently clear to establish a rational basis for the claim, as an element of demonstrating that Canada has a genuine desire to bring the third party claim.

Issue 2: Did the Prothonotary err in finding that the Federal Court does not have jurisdiction over Canada's proposed third party claims?

Plaintiffs' position

[52] The Plaintiffs submit that the Prothonotary failed to consider the true nature of their claims and how a third party claim against Roche would be established. This error led the Prothonotary to further err in her determination of the pith and substance of the proposed third party claims.

[53] The Plaintiffs allege that the Prothonotary failed to appreciate the nuances of their claim. Without justification and in error, the Prothonotary held that the core issue for determining Roche's liability is whether it manufactured and supplied a drug that it knows to be unsafe. However, the Plaintiffs submit that they are not arguing that Roche manufactured and supplied an unsafe drug, but rather that the Plaintiffs suffered damages from being forced, pursuant to the *National Defence Act*, to take mefloquine in unsafe circumstances and/or to participate in drug trial which was improperly conducted under the *Food and Drugs Act* and applicable regulations. The Plaintiffs assert that the pith and substance of the third party claim cannot be a determination of whether Roche supplied a drug that it knew to be unsafe when the Plaintiffs are not alleging that the drug, in and of itself, is unsafe.

[54] The Plaintiffs submit that the only possible third party claim against Roche, based on the nature of their claim, is whether Roche owed and breached a duty of care when supplying a drug forcibly administered to CAF members, including as part of a drug trial conducted by Canada.

The Plaintiffs submit that this third party claim raises additional issues not usually considered in a "typical" negligent manufacture and supply case, such as *Dobbie*. They submit that the Prothonotary erred in drawing a parallel between these actions and *Dobbie*, as she failed to appreciate this key distinction in the original claims and, by extension, differences in the essential nature of the proposed third party claims.

[55] The Plaintiffs also submit that the Prothonotary's erroneous conclusion that the pith and substance of the proposed third party claims is Roche's alleged negligent manufacture or supply of mefloquine led to her to err in concluding that the proposed third party claim is not grounded in federal law. The Plaintiffs submit that the CAF ordered its members to take mefloquine pursuant to the *National Defence Act* and the *Food and Drugs Act.* A proper contextual analysis of the essential nature of the proposed third party claims demonstrates that the determination of Roche's liability for any third party claims is inextricably bound up in the determination of Canada's liability, and that neither Canada nor Roche's liability can be determined without federal law. The Plaintiffs further submit that the Prothonotary erred in not considering that any duty of care owed by Roche to the Plaintiffs would arise in the context of the duties imposed on Roche by the *Food and Drugs Act*.

[56] The Plaintiffs submit that this case is similar to *Gottfriedson* as, like in *Gottfriedson*, there is a unique relationship at the core of this litigation between Canada and CAF members. In the context of the forcible administration of a medication, pursuant to s 126 of the *National Defence Act*, the Plaintiffs were in a position of vulnerability and dependence on Canada. While the Plaintiffs say they do not allege any extension of a fiduciary duty from Canada to Roche,

they assert that this substantial infringement on the Plaintiffs' bodily autonomy is accompanied by a corresponding fiduciary duty on Canada. Therefore, it was an error in law and in principle for the Prothonotary to reject the fiduciary claim on its merits at a preliminary pleadings motion. Further, the Prothonotary erred in relying on *Air Muskoka*. In *Air Muskoka* the aeronautics aspect of the claim was peripheral, while in these actions the third party claim is fundamentally rooted in both the *National Defence Act* and the *Food and Drugs Act,* that give rise to the duties owed.

[57] Finally, the Plaintiffs submit that while there are constraints on this Court's jurisdiction due to its statutory foundation, the origin and purpose of the Federal Court remain relevant when considering and applying the *ITO* test. They submit that the Prothonotary's order staying the actions undermines the very purpose of the Court as the Plaintiffs in these actions are located across the country and requiring them to litigate in provincial superior courts means that claim must be brought in at least 10 separate jurisdictions.

Defendant's Position

[58] Canada submits that the Prothonotary correctly ascertained the pith and substance of the third party claim as a claim for contribution and indemnity against Roche – the manufacturer and distributor of mefloquine, a drug alleged to have caused deleterious health effects – for any damages awarded against Canada. In particular, the claim is for damages assessed as the result of the negligence alleged under the Ontario *Negligence Act*. The determination of that negligence claim will involve consideration of the alleged duty of care owed by Roche to CAF members as recipients of the drug. Even under the narrow reading of the Plaintiffs' claim asserted for the first time at this hearing, a third party claim against Roche can and should be brought in negligence

and potentially other torts if Roche knowingly supplied mefloquine to DND to administer to CAF members in unsafe circumstances including military deployments. Accordingly, the narrower characterization of the drug now asserted by the Plaintiffs has no significant impact on the pith and substance of the third party claim. Whether or not a drug is dangerous is a specific context necessarily falls within a broader claim that the drug is dangerous.

[59] Canada also submits that *Windsor (City)* does not support the Plaintiffs' contention that where plaintiffs are distributed in multiple provinces the Federal Court may apply provincial law and ignore the *ITO* test as to the limits of its jurisdiction.

[60] Canada submits that the Prothonotary correctly followed *Air Muskoka*. There, the Federal Court of Appeal held that the mere existence of a federal regulatory scheme, and the need to consider that regime in determining claims, is not sufficient to establish the Court's jurisdiction if the essence of the claim is in tort and the relevant federal law is not a central element of the third party claim. The Prothonotary correctly found that the claims against Roche are all based in tort, specifically the common law duty of care arising from Roche's manufacture and supply of the drug and its role in the drug trial. The Plaintiffs have not pointed to any statutory basis in the *National Defence Act* that could ground their claims and Canada's third party claim against Roche. Nor is the third party claim grounded in drug regulatory law.

[61] Further, Canada submits that the Prothonotary correctly found that *Gottfriedson* does not apply in this matter because the necessary connection to federal law found to arise in *Gottfriedson* does not exist in this case, the *sui generis* relationship is not at play nor is the

honour of the Crown engaged. She also correctly found that none of the assertions made by Canada against Roche in the third party claim rely on a heightened duty arising from the relationship between Canada and CAF members under the *National Defence Act.* Therefore, the heighted duty owed in the First Nations context of in *Gottfriedson* is not analogous to the case at bar. Roche's conduct, as in any other case, will be measured against the applicable common law standard of care.

Analysis

[62] The parties agree with the Prothonotary's finding that in order for a proceeding to fall within the Federal Court's jurisdiction it must satisfy the three part *ITO* test:

1. There must be a statutory grant of jurisdiction by the federal Parliament;
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. The law on which the case is based must be a "law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

(see also *Windsor (City)* at para 34; *Air Muskoka* at para 30).

[63] There is also no dispute that the Prothonotary correctly identified s 17(5) of the *Federal Courts Act* as the statutory basis for the Court's jurisdiction, fulfilling the first branch of the *ITO* test.

[64] The Plaintiffs assert, however, that the Prothonotary erred in her conclusion that the second and third branches of the test have not been met.

[65] The Federal Court of Appeal in *Air Muskoka* reviewed the ITO test as it applies in the context of s 50.1 stay motions. The Federal Court of Appeal stated that in analyzing whether a claim falls within the Federal Court's jurisdiction, it is necessary to characterize the claim to determine its essential nature, or to ascertain the "pith and substance" of the claim, referencing *Windsor (City)* at paras 26-27. Significantly, for the purposes of this matter, the Federal Court of Appeal stated:

> [32] When applying this analysis to a third-party claim, the third-party claim must be characterized separately from the main claim. As Justice Evans, writing for this Court, noted at paragraph 56 of *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, 2006 FCA 190, [2007] 2 F.C.R. 475 [*Peter G. White*] "[…] a claim not otherwise based on federal law is not brought within the jurisdiction of the Federal Court merely because it arises from essentially the same facts as a related claim which is within federal jurisdiction". (See also, to similar effect, *Fuller* at p. 711 and *Canadian Forest Products Ltd. v. Canada (Attorney General)*, 2005 FCA 220 at paras. 50-52, (sub nom. *Stoney Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2006] 1 F.C.R. 570 [*Stoney Band*]).) That said, regard may nonetheless be given to the main claim to assist in ascertaining the essential nature of the third-party claim, as was done by this Court in *Canada (Attorney General) v. Gottfriedson*, 2014 FCA 55 at para. 34, 456 N.R. 391 [*Gottfriedson*].

[66] Further, when the Crown's claims are founded in tort and/or contract against non-Crown defendants, the central issue will be whether the parties' rights in respect of the third party claim arise under, and are extensively governed by, a detailed statutory framework sufficient to ground the jurisdiction of the Court (*Air Muskoka* at para 59; *Peter G. White* at paras 58-60).

[67] The Supreme Court of Canada in *Windsor (City)* stated that the essential nature of the claim must be determined on a realistic appreciation of the practical result sought by the claimant (at para 26). The Supreme Court also briefly commented, in *obiter*, on the second part of the *ITO* test, stating that while it is relevant that a claim involves rights and obligations conferred by federal law, "[t]he fact that the Federal Court may have to consider federal law as a necessary component is not alone sufficient; federal law must be 'essential to the disposition of the case'. It must 'nourish' the grant of jurisdiction" (at paras 66-69).

[68] In other words, the fact that a federal statute may have to be considered when determining the third party claim is alone not enough to bring the claim under the Federal Court's jurisdiction.

i. Basis of the Plaintiffs' claim

[69] The Plaintiffs' main argument, and upon which all of its submissions as to the mischaracterization of the claim turn, is that the Prothonotary failed to recognize that in these actions they are not asserting that mefloquine is categorically unsafe. Rather, that the Plaintiffs' damages arose as a result of being forced, pursuant to the *National Defence Act*, to take mefloquine in unsafe circumstances and, as a result of being forced to participate in a drug trial which was conducted improperly under the *Food and Drugs Act* and its related regulations. That is, CAF administered the drug in an unsafe manner. The Plaintiffs submit that the Prothonotary failed to appreciate that this is not a "typical" pharmaceutical case like *Dobbie* and this error tainted her jurisdictional analysis.

[70] The Plaintiffs' submission in this regard is based on the Prothonotary's statement that "the central issue is whether Roche has manufactured and supplied a drug that it knows to be unsafe".

[71] In my view, that statement must be read in the context of the paragraph in which it is found and the Prothonotary's reasons in whole. At paragraph 53 of her decision the Prothonotary stated:

> [53] I agree with Canada, the central issue is whether Roche has manufactured and supplied a drug that it knows to be unsafe. The actions complained of relate to tortious acts that arise out of an alleged common law duty of care arising from Roche's manufacture and supply of the drug and its role in the Lariam Study. The third party claim is grounded in allegations of tort not in drug regulatory law.

[72] And while the Plaintiffs stress the importance of properly characterizing the main claim, the Prothonotary correctly found, referencing para 32 of *Air Muskoka,* that when applying the *ITO* test to a third party claim, it must be characterized separately from the main claim, although the main claim may assist in ascertaining the essential nature of the third party claim.

[73] The draft third party claim, reproduced in whole the Prothonotary's reasons and set out in part above, explicitly claims contribution and indemnity for any amounts that Canada may be found liable to pay to the Plaintiffs in any of these six actions.

[74] The proposed third party claim references the clinical trial, or safety monitoring study, sponsored by Roche and approved by Health Canada and DND's participation in the trial. It also notes that all Plaintiffs allege that they were ordered to take mefloquine when CAF and DND

knew or ought to have known that mefloquine causes serious neurological and psychiatric side effects. It acknowledges the Plaintiffs' allegations that CAF and DND were aware of the risks of taking mefloquine and willfully concealed them or failed to warn of the risks and failed to screen individuals properly before ordering them to take the drug. The draft third party claim also references the similarities in allegations of breach of duty of care made against Roche and Canada, as co-defendants, in the Dowe Proposed Class Action and those made against Canada in these actions. The claim submits that should the allegations against Roche in the Dowe Proposed Class Action be proven to be true, and assuming causation is established, that Roche would also be partially or entirely responsible for the injuries the plaintiffs allege that they have suffered in these actions. On that basis, Canada brings its third party claim against Roche for contribution and indemnity under the Ontario *Negligence Act*.

[75] Thus, the proposed third party claim clearly articulates the basis of the claims in the main actions, being the alleged improper administration of the drug trial and the use of the drug by DND and CAF in light of its potential side effects. The proposed third party claim seeks contribution and indemnity based on those allegations, not based on an allegation that the drug was inherently unsafe or dangerous.

[76] In my view, it is clear from her reasons that the Prothonotary was aware of the allegations as contained in the third party claim, in the Plaintiffs' main actions in this Court as against Canada, as well as their claims against Canada and Roche, as co-defendants, in the Dowe Proposed Class Action.

[77] For example, in paragraph 2 of her reasons the Prothonotary described the Plaintiffs' actions in this Court:

> [2] The group of actions at issue are, as asserted by the plaintiffs, "mass tort proceedings" brought by former members of the Canadian Armed Forces ("CAF"). The plaintiffs allege that between 1992 and 2017 the CAF and Department of National Defence ("DND") ordered them to take the anti-malarial drug mefloquine before and during deployment to malarial endemic regions when the CAF and DND allegedly knew or ought to have known that the drug caused severe and potentially permanent neurological and psychological health effects. **The plaintiffs assert that Canada owed a duty of care to CAF members and was required to: a) use reasonable care to ensure the safety and well-being of the plaintiffs; b) obtain the informed consent of the plaintiffs before requiring them to take mefloquine; and c) use reasonable care in the operation, administration, prescribing, dispensing, managing, supervising and monitoring of the use of mefloquine.** The plaintiffs allege that Canada was negligent and breached its duty of care; that Canada is liable for negligent misrepresentation by failing to provide information on the risks associated with mefloquine; has breached its fiduciary duty; is in breach of section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"); and is liable for battery and wilful concealment. The proceedings claim declaratory relief as well as general and aggravated damages associated with an alleged breach of statutory and common law duties, damages for violation of the plaintiffs' rights under section 24(1) of the *Charter*, special damages and punitive and/or exemplary damages.
>
> (emphasis added)

[78] Further, in paragraph 46 of her reasons, in the context of discussing the characterization of third party claims, the Prothonotary stated:

> [46] In this case, like in *Dobbie* which involved a third party claim against the manufacturers of Agents White, Orange, and Purple, **Canada seeks to bring a third party claim against the manufacturer and distributor of the drug alleged to have created deleterious health effects.** The allegations proposed against Roche are for contribution and indemnity for the torts alleged against Canada and in particular for the damages asserted as a result of the negligence alleged under the Ontario *Negligence Act*.

The determination of that negligence claim will involve consideration of the alleged duty of care owed by Roche to the CAF members as recipients of the drug. As the basis for its allegations of negligence and contribution, Canada seeks to rely on the allegations made by the proposed class members in the Dowe proposed class action against Roche, which also overlap with the allegations made against Canada in both the Dowe proposed class action and in the Federal Court actions, as set out in Annexes 1 and 2 of Canada's motion materials. **In the Dowe proposed class action, the proposed class members assert that Roche breached its duty of care because**:

> (a) it failed to follow the Lariam Study;
>
> (b) it failed to obtain informed consent from Dowe and the class members to administer Mefloquine;
>
> (c) it failed to obtain consent from Dowe and the class members to participate in the Lariam Study;
>
> (d) it failed to advise Dowe and the Class Members to abstain from alcohol consumption while taking Mefloquine;
>
> (e) it failed to advise Dowe and the Class Members of the risks and side effects associated with Mefloquine;
>
> (f) it failed to administer Mefloquine to Dowe and the class members in a safe and competent manner;
>
> (g) it failed to ensure that Canada was adhering to the Safety Monitoring Study;
>
> (h) it failed to property [*sic*] investigate the side effects associated with Mefloquine;
>
> (i) it continued to supply Mefloqine to Canada when it knew or ought to have known that the Safety Monitoring Study was not being followed;
>
> (j) it failed to ensure proper communication was occurring between Hoffmann and Canada so that Hoffmann and Canada could be advised of the side effects being experienced by Dowe and the class members;

> (k) it supplied a drug to Dowe, the class members and Canada that it knew or ought to have known was unsuitable for military use;
>
> (l) it experimented on Dowe and the class members without their consent;
>
> (m) it provided inaccurate or misleading information to Canada concerning the efficacy of Mefloquine; and
>
> (n) it ignored calls to discontinue the use of Mefloquine.
>
> (emphasis added)

[79] The Prothonotary concluded that none of these claims made against Roche relied on a heightened duty arising from the relationship between Canada and CAF members under the *National Defence Act*. However, what is significant for the purposes of this discussion is that these claims are not about whether mefloquine is unsafe, generally, but concern its administration in the context of the Lariam Safety Monitoring Study and to CAF members as set out. Therefore, based on her reasons, I am not persuaded that the Prothonotary failed to appreciate the core issue of the main actions or mischaracterized the essential nature of the third party claim.

[80] Nor am I persuaded that the Prothonotary erred in her reliance on *Dobbie*. In *Dobbie* Canada submitted a pro forma third party claim against Dow and Monsanto. The plaintiffs alleged that they had sustained injurious health effects from Canada's spraying of the herbicides manufactured by Dow and Monsanto at the CAF Base Gagetown. The third party claim asserted that if Canada was found liable to the plaintiffs for Canada's use of products manufactured by Dow and Monsanto, then Canada would claim contribution and indemnity from those

manufacturers under the common law of negligence and the applicable New Brunswick legislation. Further, that the products listed in the statement of claim were used in a way that Dow and Monsanto knew or ought to have known would be made of the products they manufactured and knew or ought to have known was likely to cause the harm alleged. This Court held that:

> [24] There is no general body of federal law covering the area of the dispute in this case. The Crown's third party claim against the manufacturers Dow and Monsanto is governed entirely by the common law of negligence and New Brunswick's *Tortfeasors Act*, R.S.N.B., c. T-8. The *Tortfeasors Act* is a law passed by the legislature of New Brunswick in relation to property and civil rights in the province under subsection 92(13) of *The Constitution Act, 1867*, for which reason it is not a "law of Canada". Therefore, the Crown's third party claim against Dow and Monsanto does not meet the second and third parts of the *ITO* test and is outside the jurisdiction of the Federal Court.
>
> [25] The plaintiffs submit that the provincial laws are only incidentally necessary to resolve the third party issues. If this were the case, the Court could assume jurisdiction over the third party claim. The Federal Court of Appeal considered this issue in *Stoney Band*. The Chief Justice found the common laws of the province in that case (conversion, conspiracy and negligence) cannot be characterized as "incidentally necessary". Chief Justice Richard held at paragraph 41:
>
> They are, in fact, the very laws under which Canada asserts its entitlement to indemnity, contribution, or damages. Canada's claims are in "pith and substance" based on provincial common law. If anything, it is the federal law component that is incidental to Canada's claims against the third parties.
>
> [26] In *Stoney Band*, Mr. Justice Nadon dissented because he was satisfied that the third party claim was based on the federal *Indian Act* and *Indian Timber Regulations*, which provide the source of the rights and obligations of the parties and therefore support the Federal Court's jurisdiction. This federal statutory framework together with the federal common law of Aboriginal title meant that the third party claim, in the opinion of Mr. Justice Nadon, was based on the laws of Canada. I can make no similar finding in this case. The third party claim at bar is in "pith and substance" based simply

> on the law of negligence and the New Brunswick statutory law with respect to indemnification and contribution by tortfeasors.

[81] In my view, the proposed third party claim in *Dobbie* is similar to Canada's proposed third party claim in this matter. In both cases, the claim is that Canada's usage of a product manufactured by the proposed third party caused the claimed harm to the plaintiffs, and Canada is claiming contribution and indemnity from those manufacturers under the common law of negligence and the applicable provincial contributory negligence legislation. Accordingly, the Prothonotary did not err in her reliance on that decision.

[82] In sum, I am not persuaded, as the Plaintiffs assert, that the Prothonotary misapprehended the essential nature of their actions and, by extension, the proposed third party claim, as simply concerning the manufacture of an inherently unsafe product. Read in context, I do not take the Prothonotary's statement in paragraph 53 of her reasons that she agreed with Canada that the central issue is whether Roche has manufactured and supplied a drug that it knows to be unsafe, to mean that the issue was limited to the inherent overall safety of the drug. She was aware of the context of the Plaintiffs' allegations concerning the administration and usage of the drug by CAF and DND in the main actions and of the content of the proposed third party claim.

[83] Canada submits that whether a drug is unsafe will almost always depend on the context of its usage. I agree. Indeed, it is difficult to think of any drug that would be "inherently safe". Even the most common over the counter drugs will likely not be safe for uses by all people in all circumstances.

[84] And, as the Prothonotary went on to state, the actions complained of in the proposed third party claims are *related to* tortious acts *that arise out of* an alleged common law duty of care *arising from* Roche's manufacture and supply of the drug and Roche's role in the drug trial. Seen in the context of her analysis proceeding this paragraph of her decision, her significant finding was that the third party claim is grounded in allegations of tort, not in drug regulatory law, as will be discussed below.

[85] Thus, while the Plaintiffs seize on one sentence of the Prothonotary's reasons to assert that this establishes that she mischaracterized the essential nature of the third party claim, this submission cannot succeed when that sentence is read in the context of the Prothonotary's reasons as a whole.

ii. Characterization of the third party claim

[86] When considering the characterization of the third party claim the Prothonotary, properly in my view, referred to *Air Muskoka*. There the Federal Court of Appeal stated:

> [57] …the third party claim sounds in contract and tort. While the factual backdrop to the third-party claim may well be the operation, maintenance and management of the Airport by the Municipality, this does not define what the essence of the claim is.
>
> [58] The third party claim is a contractual claim for indemnity as well as a claim for contribution and indemnity in tort and under the Ontario *Negligence Act*. The acts complained of by Air Muskoka in their statement of claim of illegal distress, intentional interference with contractual relations and misrepresentation are all tort-based claims. In its tort claim for contribution and indemnity, the Crown invokes the common law of tort and the provincial *Negligence Act* to seek contribution and indemnity from the Municipality for these torts.

> [59] Since the claims in the third-party claim are founded in tort and contract, as noted in *Peter G. White*, the central issue is whether the parties' rights in respect of the third-party claim arise under and are extensively governed by a detailed statutory framework, sufficient to found jurisdiction in the Federal Court.
>
> [60] Air Muskoka has failed to point to any such framework that governs the parameters of the rights relevant to the third party claim. The aeronautics elements advance by the appellant – the fact that the lease is an aviation document as defined in the *Aeronautics Act*, that the minister of transport possesses authority to approve alterations to fueling facilities and that airport operations are tightly regulated to standards set in the regulations promulgated under the *Aeronautics Act* – are not central elements to the claims advance in the appellants' third party claim.

[87] Based on *Air Muskoka*, the Prothonotary was required to assess whether the *National Defence Act* or the *Food and Drugs Act* constitute a detailed statutory framework that comprehensively governs the parties' rights in respect of the proposed third party claim such that those Acts nourish the Court's jurisdiction.

[88] In that regard, the Prothonotary found that there is no statutory basis in the *National Defence Act* that would ground an extension of any asserted fiduciary duty owed by Canada to CAF members so as to impose such a duty on Roche. Nor was there any evidence of any obligations arising from the *National Defence Act* being imposed on Roche as a result of it providing mefloquine to DND or CAF members (*Arntsen*, para 48 and 50). I see no error in this finding.

[89] Here, in the main actions the Plaintiffs' claim that, as CAF members, Canada owed them a duty of care and that Canada knew or ought to have known that if it carried out its duties negligently it could cause the harm alleged to have been suffered by the Plaintiffs. They assert

that the harm was caused by Canada forcing the Plaintiffs, pursuant to s 126 of the *National Defence Act*, to take mefloquine. They allege that Canada breached that duty of care, including by ordering them to take mefloquine when Canada knew or ought to have known that it was not being administered in a safe context and could have serious and long term adverse health effects, and in its administration of the drug trial. The Plaintiffs claim that Canada's negligence caused them to suffer the claimed damages.

[90] Canada's proposed claim against Roche is grounded in contribution and indemnity should it be established that Roche knew that supplying mefloquine for the uses intended by DND was unsafe. That is, Canada brings its third party claim, founded in negligence, seeking contribution and indemnity from Roche if the Plaintiffs' negligence claims against Canada are well founded.

[91] Thus, as to the central issue of whether the parties' rights in respect of the third party claim arise under and are extensively governed by a detailed statutory framework sufficient to found the jurisdiction of the Court (*Air Muskoka* at para 59; *Peter G. White* at paragraphs 58-60), I note that the Plaintiffs refer to and rely on only s 126 of the *National Defence Act*. That provision states that any CAF member who, having received an order to submit to a vaccination or other immunization procedure, willfully and without reasonable excuse disobeys that order, is guilty of an offence and, on conviction, is liable to imprisonment for less than two years or to less punishment. In my view, while s 126 is part of the "factual backdrop" to, or informs, the third party claim, it does not define the essence of Canada's third party claim against Roche (*Air Muskoka* at para 57). Section 126 alone is not a detailed statutory framework that

comprehensively governs the parties' rights in respect of the third party claim. Canada's claim against Roche could exist independently of the s 126 offence provision that Canada could impose on the Plaintiffs.

[92] In *Stoney Band* the subject statement of claim alleged breaches of various fiduciary duties owed by Canada to the Stoney Band concerning the harvesting of timber on the Stony Band reserve. Canada brought third party claims against certain members of the Stoney Band in their capacity as individuals, loggers and saw mill operators and sought relief based on contribution and indemnity, also pleading provisions of the *Contributory Negligence Act*, *Tort-Feasors Act*, the *Indian Act* and the *Indian Timber Regulations*. The issue before the Federal Court of Appeal was whether this Court had the jurisdiction to hear and determine the third party claims. The Federal Court of Appeal found that Canada had not demonstrated the existence of a detailed statutory framework of federal law under which its claims against third parties arose. Section 18(1) of the *Indian Act* served only to establish the status of Canada to bring the claims against third parties and:

> [37] Unlike the federal statutory scheme on which the cause of action was based in the case of *Rhine* and *Prytula*, *supra*, the applicable provisions of the federal statute and regulations in the present case do not contemplate civil recourse. For example, section 30 of the *Indian Act* makes it a summary offence to trespass on Indian land, while Section 93 of the *Indian Act* makes it a summary offence to remove or to permit anyone to remove, *inter alia*, trees or timber from a reserve. Neither of these sections creates a statutory cause of action for damages. It is well-established that a provision which creates an offence does not create a right of action. Furthermore, there is no tort recognised in Canadian law arising from a statutory breach in and of itself.
>
> [46] Since there is no statutory provision which provides for any direct obligation or direct liability, to assert its claim of damages against the third parties, Canada must necessarily go beyond

> the *Indian Act* and the *Indian Timber Regulations* and invoke the provisions of provincial law and provincial common law.

[93] Similarly, in this matter, s 126 of the *National Defence Act* does not provide the Plaintiffs with a direct cause of action against Canada nor does it provide Canada with a right of action as against Roche.

[94] Indeed, the Plaintiffs in this motion assert that, in their view, the core issue with respect to the third party claim is whether Roche owed and breached a duty of care when supplying a drug forcibly administered to CAF members. However, as the Prothonotary found, there is no statutory basis in the *National Defence Act* that would ground an extension of any asserted fiduciary duty owed by Canada to CAF members so as to impose such a duty on Roche. Nor did the Plaintiffs identify any obligations, arising from the *National Defence Act*, imposed on Roche as a result of it providing mefloquine to DND or CAF members (*Arntsen* para 48 and 50). In my view, any duty of care owed by Roche does not arise from a statutory framework that governs the relationship between Roche and the Plaintiffs and, therefore, the Prothonotary did not err in finding that the allegations against Roche were not nourished by the statutory structure of the *National Defence Act.*

[95] As to the *Food and Drugs Act*, the Prothonotary found that the source of the assertions made against Roche in the third party claim do not depend on the statutory framework of the *Food and Drugs Act* or Roche's compliance with that framework. She found that while that Act sets out certain requirements to establish the safety and the efficacy of drugs for commercialization and requirements for clinical drug testing, those provisions were not being

challenged. Rather, Roche's conduct is being questioned. I understand this to mean that the essence of the allegations against Roche in the third party claim relate to its negligence in the oversight of the clinical drug trial and its supply of the drug for use by CAF members.

[96] When appearing before me, the Plaintiffs pointed to the affidavit of Dr. Tanya Ramsamy, Associate Director, Office of Clinical Trials, Therapeutic Products Directorate at Health Canada, included in the materials that were before the Prothonotary [Ramsamy Affidavit]. The Plaintiffs submit that the Ramsamy Affidavit demonstrates that the *Food and Drugs Act* and its associated Regulations are a detailed statutory scheme governing the parties' rights and nourishing the statutory grant of jurisdiction.

[97] The Ramsamy Affidavit was made in response to a Direction to Attend delivered by the Plaintiffs in response to Canada's stay motion. Among other things, it states that drugs for medical use are subject to federal requirements for development, market authorizations and surveillance. These requirements ensure that drugs that meet the safety, efficacy and quality requirements of the *Food and Drugs Act* and the *Food and Drug Regulations,* which, together "contain a regulatory structure to ensure that drugs meet rigorous health and safety standards before they are approved for sale in the Canadian market". The regulatory regime also includes provisions for the sale and importation of drugs for use in clinical trials in Canada. The Ramsamy Affidavit states that, ultimately, Roche applied to Health Canada for regulatory approval to sell mefloquine, it received its notice of compliance on January 22, 1993 and began to sell the approved drug on the Canadian market in December 1993.

[98] The Plaintiffs do not otherwise specify the subject framework. In my view, while the *Food and Drugs Act* may, as indicated by the Ramsamy Affidavit, provide a statutory framework for the approval of drugs, including the conduct of drug trials, its existence alone does not establish that the parties' rights in the third party claim arise under, and are extensively governed by that statutory framework.

[99] I agree that provisions of the *Food and Drugs Act* governing drug trials will inform any duty or standard of care analysis with respect to the third party claim against Roche and that it will likely be relevant to the establishing of the alleged breaches of such duty of care. However, that is not the test to be met for establishing jurisdiction. Indeed, when appearing before me, the Plaintiffs argued that the alleged breaches of the duty of care owed by Roche are related to – as opposed to arising from – the *Food and Drugs Act* statutory framework. In that regard, I note that the fact that federal law may have to be considered when determining a third party claim is not alone sufficient to establish jurisdiction (*Peter G. White* at para 57; *Windsor (City)* at para 69)

[100] The conduct of the drug trial was governed by the *Food and Drugs Act* which, together with its related regulations, likely imposed certain statutory requirements or obligations on Roche with respect to the manner of conducting the trial. In that regard, it is of note that legislative standards or frameworks are relevant to the common law standard of care, but the two are not necessarily co-extensive (*Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 29). Here the *Food and Drugs Act* framework pertained to and governed the relationship only between Roche and Health Canada and/or Roche and CAF and DND as administrators of the trial. The source of

Canada's claim, and its rights against Roche in the context of the third party claim, arise at common law. Thus, while the *Food and Drugs Act* framework may have to be considered by the decision maker to inform the analysis of the third party negligence claim – including whether Roche took reasonable care in conducting and oversight of the drug trial – that framework is not the source of the third party claim and does not comprehensively govern it. Rather, the claim is governed by the common law and its requirements necessary to establish the tort of negligence. Nor have the Plaintiffs established that any failure to comply with the framework – regulatory non-compliance – gives rise to a statutory right of action by them as consumers of the drug. Thus, the statutory framework informs, but is not essential to the disposition of the third party claim.

[101] In *Stoney Band*, the Federal Court of Appeal rejected Canada's reliance, in the circumstances of that case, on the principle established in *ITO* that "when a case is in 'pith and substance' within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties" and found that:

> [41] In the present proceedings and in the claims as framed by Canada, the provincial common laws of conversion, conspiracy and negligence cannot be characterized as "incidentally necessary to resolve the issues presented by the parties". They are, in fact, the very laws under which Canada asserts its entitlement to indemnity, contribution, or damages. Canada's claims are in "pith and substance" based on provincial common law. If anything, it is the federal law component that is incidental to Canada's claims against the third parties.

And, since there was no statutory provision that provided for any direct obligation or direct liability, the Federal Court of Appeal found that to assert its claim of damages against the third

parties, Canada necessarily had to go beyond the *Indian Act* and the *Indian Timber Regulations* and invoke the provisions of provincial law and provincial common law(para 45 – 46) finding:

> [57] In conclusion, I find that the federal statutory framework created by the interaction of the *Indian Act* and the *Indian Timber Regulations* is insufficiently broad to encompass Canada's third party claims in this case. The Act and the Regulations relied on by Canada are not the source or the foundation of its claim against the third parties. The claims against the third parties are in "pith and substance" based on provincial common law. I must conclude that the Federal Court does not have jurisdiction over Canada's claims against the third parties in these circumstances.

[102] In summary, here, Canada's third party claim is based on negligence and is governed by the common law of tort. Therefore, in pith and substance, the claim is based on provincial common law. In order for this Court to have jurisdiction over the third party claim the necessary nexus between the legal rights and obligations in dispute and federal law must be established. This will be so where the subject federal legislation comprises a detailed statutory framework under which the third party claims arise and are extensively governed (*Peter G. White* at paras 64, 66). In these circumstances, the *Food and Drugs Act* framework pertaining to drug trials informs but does not govern the third party claim. The parties rights under the third party claim do not arise from the framework nor does Canada rely on that framework as the basis of its claim. In my view, the actions will undoubtedly be informed by the federal statutory scheme found in the *Food and Drugs Act* but, in these particular circumstances, the drug trial framework is not the source or foundation of the third party claim.

[103] Accordingly, in my view, the Prothonotary did not err in concluding that the third party claims are grounded in tort, not the statutory or regulatory frameworks of the *National Defence*

Act or the *Food and Drugs Act* and, therefore, that the third party claim falls outside the jurisdiction of this Court.

iii. Fiduciary duty

[104] The Plaintiffs also submit that the Prothonotary improperly and prematurely rejected their submission that Canada owes a fiduciary duty to CAF members. However, I do not understand her reasons as doing so.

[105] The Plaintiffs' written submissions before the Prothonotary are contained in the Plaintiffs' motion record before me. The Plaintiffs submitted before the Prothonotary that even if Canada's proposed third party claim is rooted purely in negligence, and therefore provincial law, the Court should take into account that the relationship at the heart of the lawsuits was between Canada and its soldiers. The Plaintiffs submitted that the core relationship was governed by a complex federal statutory regime and any fiduciary and statutory duties owed to the Plaintiffs by Canada are rooted in federal law. Further, that the essential nature of the Plaintiffs' claim is based on the unique nature of the relationship between Canada and CAF members. The Plaintiffs asserted that this relationship is governed by a common law fiduciary duty owed by Canada to CAF members and the detailed statutory regime from the *National Defence Act*.

[106] In that regard, the Plaintiffs submitted that their situation is analogous to that of the plaintiffs in *Gottfriedson.* The Plaintiffs' core allegation against Canada was that, despite the heightened duties that Canada owes to its soldiers, it implemented a CAF wide policy on mefloquine that caused significant harms to the Plaintiffs. The Plaintiffs' position was that the

issue of Roche's alleged contributory fault could not be determined without consideration of that core allegation in the main claim, of whether Canada conveyed to Roche the heightened duty that Canada had to protect its soldiers and keep them safe and healthy.

[107] This position is reflected in the Prothonotary's description of the Plaintiffs' position at paragraphs 38, 39 and 43 of her reasons. And, in her analysis of the proper characterization of the claim, the Prothonotary noted that in the Dowe Proposed Class Action the plaintiffs asserted that Roche breached its duty of care and listed the allegation made in that regard. The Prothonotary found that none of these assertions made against Roche relied on a heightened duty arising from the relationship between Canada and CAF members under the *National Defence Act*. Further, that the Plaintiffs had not pointed to any statutory basis in the *National Defence Act* that would ground extending Canada's asserted fiduciary duty to CAF members to Roche.

[108] She also noted that in *Scott* the British Columbia Court of Appeal had rejected the expansion of the constitutional "honour of the Crown" doctrine in Aboriginal law as a foundation to support a claim by former CAF members against the Crown. In *Scott*, the Court also rejected that Canada owes CAF members a fiduciary duty in the context of claim for administrative benefits. The Prothonotary did not agree that there was the same *sui generis* relationship at play here as there was in *Gottfriedson* and found that the "correct parallel" was instead to *Air Muskoka* and *Dobbie*.

[109] In my view, the Prothonotary did not dismiss the Plaintiffs' claim regarding Canada's alleged fiduciary duty owed to the Plaintiffs. Rather, she found that the basis for finding that the

Court had jurisdiction in *Gottfriedson* did not apply in the case before her. I am not persuaded that there is any error in that conclusion.

[110] I also note that while the Plaintiffs submit that Roche's duties are impacted by any duty Canada owed the Plaintiffs, that dynamic is not uncommon to claims for contribution and indemnity. It does mean that Canada's alleged fiduciary duty extends to Roche. Similarly, while the Plaintiffs submit that the Prothonotary erred by failing to recognize that the main claims and the third party claims must be considered together, that they are inextricably linked, that they are tethered, bound or tied together, that the third party claim cannot be determined without referring to or understanding the relevant federal law, in my view the Prothonotary recognized that aspects of federal law will have to be considered and will inform the third party claim. However, that was not the test to be met, and she properly applied *ITO*. I am also not persuaded that Roche's liability cannot be "unbundled" from Canada's and that this establishes the jurisdiction of this Court or that the Prothonotary erred in principle by failing to appreciate that Roche's liability to the Plaintiffs is bound up in the same factual matrix as the claim against Canada. The Prothonotary's reasons demonstrate that she appreciated the context provided by the main actions when she assessed the Court's jurisdiction over the third party claims.

[111] Finally, as to the Plaintiffs' submissions that the Prothonotary erred in failing to consider the history and purpose of the Federal Court in her jurisdictional analysis, in my view this is of no merit. In support of this position, the Plaintiffs refer to paragraph 78 of the dissent in the Supreme Court's decision in *Windsor (City)* which describes the history of and objectives of the establishment of the Federal Court. However, the following paragraph states that "[a] broad

construction of the Federal Court's statutory grant of jurisdiction cannot exceed Parliament's constitutional limits and intrude on provincial sphere of competence. In *ITO*, this Court set out a test for determining the Federal Court's jurisdiction, of which a statutory grant of jurisdiction forms only a part…". The majority in *Windsor (City)* reaffirmed the *ITO* test for determining this Court's jurisdiction.

[112] While the Plaintiffs may be correct that these actions are well suited for the Federal Court, they have not pointed to any authority indicating that the history and purpose of the Federal Court are a requisite consideration when determining this Court's jurisdiction. The Prothonotary applied the *ITO* test in determining if the Court has jurisdiction over the proposed third party claims and did not err in failing to consider the history and purpose of the Federal Court.

Issue 3: Did the Prothonotary err by refusing the Plaintiffs' request to permit them to amend their statements of claim prior to staying the actions?

Plaintiffs' position

[113] The Plaintiffs point out that, as part of their alternate requested relief before the Prothonotary, they requested that if a stay was to be granted it be delayed for 30 days to allow the Plaintiffs to amend their statements of claim. In their submissions in this motion appealing the Prothonotary's decision, the Plaintiffs submit that the amendments would expressly limit their claims to Canada's proportionate share of liability thereby obviating the need for the stay. However, that the Prothonotary not only refused to grant the requested relief, but also, of her own accord, denied leave to amend the statements of claim. The Plaintiffs submit that the

Prothonotary erred in law by imposing a leave requirement when none existed. Pursuant to Rule 200 of the *Federal Court Rules*, because pleadings have not closed, they do not need to seek leave to amend their statements of claim; they may do so as of right.

[114] The Plaintiffs also submit that the Prothonotary's order was unreasonable as it is common and permissible for plaintiffs to amend their pleadings to limit third party claims, even during motions regarding those claims. Therefore, the Prothonotary also erred in principle when denying the Plaintiffs the opportunity to amend their pleadings before the stay becoming effective.

Defendant's position

[115] Canada points out that the Plaintiffs did not provide any particulars about the proposed amendments in their submissions to the Prothonotary and submits that in the absence of any evidence there can be no basis upon which to interfere with her decision. Further, the proposed draft amended statement of claim which the Plaintiffs have included as part of their motion record in this appeal was not before the Prothonotary and, therefore, ought not to be admitted in evidence. Canada submits that the Plaintiffs could have amended their statements of claim before the Prothonotary heard the stay motion but failed to do so and that the request made during the stay motion came too late and included no particulars.

[116] Nor was the Plaintiffs' request for alternative relief a motion under Rule 200 and the Prothonotary did not treat it as such. Rather, the Prothonotary exercised her discretion to deny the request for alternative relief based on the paucity of submissions and the lack of details as to

the nature of the amendments sought. Finally, Canada submits that the Court should not accept the Plaintiffs' assertion that the proposed amendments would change the outcome of the s 50.1 stay motion. Had the motion proceeded on the basis of amended pleadings, different or additional arguments would have been made and what might have been decided based on different facts or pleadings is not the proper subject of this appeal.

Analysis

[117] As indicated above, the Plaintiffs' written submissions before the Prothonotary were limited. Under the heading "Order Sought", the Plaintiffs requested that Canada's motion be dismissed and:

> 92. In the alternative, if this Court is inclined to grant the Defendant's motion pursuant to s 50.1 of the *Federal Courts Act*, the Plaintiff's respectfully request that they be granted 30 days' indulgence to file amended statements of claim before these actions are stayed.

[118] The written submissions that were before the Prothonotary do not otherwise address this point and when appearing before me counsel for the Plaintiffs advised that this issue was not further addressed before the Prothonotary.

[119] In her reasons, under "Alterative Relief", the Prothonotary stated:

> [66] As part of their motion the plaintiffs have included a request that if a stay is granted under section 50.1 of the *Federal Courts Act*, that they be granted leave to amend their statements of claim before the actions are stayed. I see no reason to grant leave for amendment at this stage based on the submissions made and without further detail as to the nature of amendments sought. Accordingly, the request for alternative relief is denied.

[120] Based on the above, it appears that there may have been a disconnect between what the Plaintiff sought as alternative relief and what the Prothonotary understood as the Plaintiffs' requested alternative relief. The Plaintiffs appear to request that, in the event the Prothonotary intended to grant the stay, she advise them of her intended decision and then delay issuing the stay for 30 days, during which time they would amend their statements of claim. The Prothonotary appears to have been of the view that the Plaintiffs sought leave to amend the statements of claim before a stay was issued and, as the Plaintiffs had not substantiated the basis for any amendments, leave was denied at that stage.

[121] I would first note that there is nothing in the record before me demonstrating that the Plaintiffs offered any explanation to the Prothonotary as to the content or intent of the amended pleadings. In this appeal, the Plaintiffs include a proposed amended statement of claim. However, I agree with Canada that the general rule is that an appeal from the order of a Prothonotary is to be decided on the basis of the material that was before the Prothonotary. The Plaintiffs point to no exceptional circumstance that would merit the admission of the proposed amended statement of claims as new evidence (*Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151at para 15, 49).

[122] That said, absent any case management order or direction to the contrary, and Canada has not directed me to any such case management requirement, I agree with the Plaintiffs that pursuant to Rule 200 they were entitled to amend their pleadings as of right as the pleadings had not closed. The Prothonotary in her reasons states she sees no reason to grant leave for amendment at this stage based on the submissions made and without further detail. The

Prothonotary may have misapprehended the request for an "indulgence" as a request for leave to amend the pleadings. In any event, I agree that she erred in finding that leave to amend was required. Her reasons also do not indicate that leave was a case management requirement. This aspect of her decision, on either the correctness or palpable and overriding error standard, cannot stand.

[123] Whether or not leave was required to amend the statements of claim, the Prothonotary was requested to make a discretionary decision as to whether or not to *delay the coming into effect* of the stay to permit the amendment of the statements of claim. In the absence of any explanation as to why the delay was required or details as to how the amendments would cure the lack of jurisdiction, the Prothonotary would not have erred had she refused the delay on that basis.

[124] Moreover, the Plaintiffs' request for alternative relief, as framed, could not have succeeded. In their submissions on appeal, the Plaintiffs state that they "should have been afforded the requested opportunity to make the necessary amendments *prior to the stays becoming effective*". Such proposed amendments "would eliminate the need for, and possibility of, claims against Roche or other third parties, and thus would eliminate the possibility of stays of these Actions pursuant to s 50.1 of the *Federal Courts Act*, and safeguard the jurisdiction of the Federal Court to determine the claims". It appears that the Plaintiffs essentially wanted the Prothonotary to make a decision on the stay motion, advise them if she was granting or denying it, and if the decision was unfavourable to the Plaintiffs, i.e. the stay was to be granted, that she "delay" her decision for 30 days within which they would amend the pleadings in an effort to

overcome the jurisdiction concern. The difficulty with this is that a decision would have already been made to grant the stay. Simply delaying the coming into effect of the stay would not change that decision. In effect, the Plaintiffs appear to have hoped for a new and different decision based on a change of circumstance – the submission of proposed amended pleadings – occurring after the motion was heard and decided but not yet in effect.

[125] In support of their submission that the Prothonotary erred by refusing to delay implementing the stay, the Plaintiffs submit that parties commonly amend pleadings to eliminate the possibility of third party claims, referencing the Federal Court of Appeal decision in *Gottfriedson* (paras 6 to 9) and *J.K. v. Ontario*, 2017 ONCA 902 [*J.K.*]. However, I am not persuaded that these decisions assist the Plaintiffs.

[126] In *Gottfriedson*, the Federal Court of Appeal noted that the Case Management Judge in the matter below, Justice Harrington, had granted the plaintiffs leave to amend their statement of claim to make it clear that no compensation was being sought from the Crown with respect to any fault attributable to the religious organizations. The plaintiffs had since filed their amended statement of claims and the Case Management Judge had granted a further motion, brought by the third party religious organizations, striking out the third party claims on the ground that the Crown had no cause of action against them based on the amendments.

[127] It is, however, perhaps more helpful to consider Justice Harrington's actual decision in *Gottfriedson v Canada*, 2013 FC 546 [*Gottfriedson* FC]. This dealt with the motion by the Crown seeking to have an action stayed pursuant to s 50.1 as the Crown intended to claim

indemnity and contribution to the religious orders. In response to the motion, the plaintiffs argued that the Court had jurisdiction over the proposed third parties and, in any event, that they intended to amend the statement of claim to limit recovery from the Crown to the extent that it was severally liable, that is, to the extent that it was found to be liable and not entitled to indemnity from the proposed third parties. Justice Harrington noted that the plaintiffs submitted a draft which they were prepared to issue without change. He concluded that the Court did have jurisdiction over the Crown's proposed third party proceedings and therefore dismissed the stay motion. As to the amendment of the statement of claim, Justice Harrington stated:

> [40] Had it not been for the fact that this matter was under case management, the plaintiffs would have unilaterally amended their Statement of Claim. Rule 200 of the *Federal Courts Rules* permits a party, without leave, to amend its pleadings at any time before another party has pleaded thereto. The Crown has not yet pleaded to the Statement of Claim. To the extent that leave may be required, which I doubt, leave shall be given.

[128] Justice Harrington ordered that the plaintiffs were at leave to serve and file the amended statement of claim, as it appeared in their motion materials, within 15 days of his decision. He also considered the argument of the plaintiff and the proposed third parties that, as a result of the proposed amendments, the Crown had no cause of action. In effect, that the Crown be enjoined from filing a third party statement of claim. Justice Harrington found that it would be premature to strike a third party claim before it was filed. All that was at issue before him was whether the principal action should be stayed. The plaintiffs and third parties subsequently brought a successful separate motion seeking to strike the third party claims on the basis of the amended pleadings (*Gottfriedson v Canada*, 2013 FC 1213).

[129] In *J.K*, also relied upon by the Plaintiffs, the issue before the Ontario Court Appeal was whether it was plain and obvious that the Crown's third party claim had no reasonable prospect of success and was properly struck without leave to amend. The Court allowed the appeal and also concluded that it was possible for the plaintiff to amend his amended statement of claim so that the Crown's third party claim would have no reasonable prospect of success. After such amendment, the Crown's third party claim could be properly struck.

[130] In neither of these cases did the party opposing the stay seek to delay the implementation of the stay, if granted, to permit them to file amended pleadings to essentially ground a further challenge, within the already heard stay motion, to the appropriateness of or need for the stay.

[131] Here the Plaintiffs could have provided, as a part of a request for alterative relief, a proposed amended statement(s) of claim as a part of their response to the stay and made representations in the motion to explain that the intended effect of the amendment would be to negate the need for a stay by removing the jurisdiction concern. They could then have requested alternate relief, being that if the Prothonotary determined a stay was warranted then, rather than granting the stay, that she require the Plaintiffs to file the amended statement(s) of claim in the form submitted in the motion, or otherwise, within a specified time frame – thereby negating the need for the stay.

[132] Had a draft and supporting argument been provided, the Prothonotary would have been in a position to assess the effect of the proposed amendments, including submissions made in response by Canada. It would then have been open to the Prothonotary to find that, based on the

proposed third party claim, a stay was warranted but to instead accept the alternative request for relief by the Plaintiffs, requiring them to file the amended statement(s) of claim in the form submitted in the motion within a specified time frame thereby negating the need for a stay.

[133] However, the Plaintiffs made a tactical choice not to submit a proposed amended statement of claim and supporting submissions or to seek this form of alternative relief.

[134] In conclusion on this issue, based on the submissions before me, I find that the Prothonotary erred in finding that leave to amend the statements of claim was required. Regardless, the relief the Plaintiffs actually requested, being that the Prothonotary delay the effectiveness of the stay for 30 days so that they could amend their pleadings, would not have changed the outcome of the motion as the Prothonotary would have already made a decision to grant the stay. Amending the pleadings, with leave or as of right, would not have had the effect of changing that decision.

[135] As to costs, the Prothonotary ordered that as no costs were requested by Canada on the motion before her, there would be no order as to costs. Similarly, in this motion Canada has not sought costs and accordingly no order for costs will be made.

ORDER IN T-724-19, T-725-19, T-726-19, T-1319-19, T-1320-19, and T-1321-19

THIS COURT ORDERS that

1. This motion is dismissed; and

2. There is no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-724-19, T-725-19, T-726-19, T-1319-19, T-1320-19 AND T-1321-19
DOCKET:	T-724-19
STYLE OF CAUSE:	SHAUN WILLIAM ARNTSEN ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AND DOCKET:	T-725-19
STYLE OF CAUSE:	DAVID BONA EL AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AND DOCKET:	T-726-19
STYLE OF CAUSE:	CHRISTIAN MCEACHERN ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AND DOCKET:	T-1319-19
STYLE OF CAUSE:	STEPHEN BOULAY ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AND DOCKET:	T-1320-19
STYLE OF CAUSE:	ALLAN ALEXANDER ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AND DOCKET:	T-1321-19
STYLE OF CAUSE:	WILLIAM AITKEN ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	DECEMBER 15, 2020
ORDER AND REASONS	STRICKLAND J.
DATED:	JANUARY 14, 2021

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