Federal Court  Cour fédérale

Date: 20200916

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

Citation: 2020 FC 898

Toronto, Ontario, September 16, 2020

PRESENT: Case Management Judge Angela Furlanetto

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

I. Background

[1] These reasons arise from a motion brought by the Attorney General of Canada ("Canada") to stay the herein actions pursuant to sections 50.1 and 50(1)(a) and (b) of the *Federal Courts Act*.

[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.

[3] Allegations on behalf of former members of the CAF relating to their alleged ordered use of mefloquine were first raised in a class action commenced against Canada and the manufacturer of mefloquine, Hoffmann-La Roche Limited ("Roche"), in the Ontario Superior Court in 2000 (*Smith* v. *Barry Armstrong and the Attorney General of Canada and Hoffmann-La Roche Limited* (Court File No.: CP-1737/00). In that proceeding, the representative plaintiff, Mr. Smith, alleged that the requirement that he and other members of the CAF deployed to Africa take mefloquine constituted battery, negligence and a breach of fiduciary duty. The claim alleged damages in the amount of four billion dollars for the alleged injuries suffered from taking the drug. The claim was subsequently amended to include an allegation for breach of rights under the *Charter*. On April 17, 2018, the action was dismissed for delay some seventeen years after it was commenced.

[4] On January 18, 2019, a new proposed class action was commenced in the Ontario Superior Court against Canada and Roche under the name of the representative plaintiff, John Dowe (*John Dowe* v. *The Attorney General of Canada and Hoffmann-La Roche Limited* CP-18-0224-00CP ("Dowe proposed class action"). The statement of claim seeks damages for negligence, breach of fiduciary duty, battery and violation of the plaintiff's and class members' rights and freedoms under sections 7 and 12 of the *Charter* and in accordance with section 24(1) of the *Charter*. The claim also seeks punitive damages.

[5] The same counsel who represent the plaintiffs in these Federal Court actions also now represent the plaintiffs in the Dowe proposed class action.

[6] When this counsel took over the Dowe proposed class action, they issued an amended statement of claim on April 9, 2019, adding *inter alia* a claim for non-pecuniary damages for loss of care, guidance and companionship, including for wrongful death, special damages under section 61 of the *Family Law Act,* arising from the addition of Mr. Dowe's spouse and children as representative plaintiffs to the claim, allegations of wilful concealment, as well as adding to the members of the class and scope of the class.

[7] On July 16, 2019, Canada delivered a Notice of Intent to Defend in the Dowe proposed class action. The plaintiffs have indicated that they intend to discontinue the Dowe proposed class action, at least as it relates to Roche, and to otherwise hold the proceeding in abeyance. However, as of the date of these reasons no evidence has been filed on this motion indicating that the Dowe proposed class action has been discontinued against Roche or that leave for a discontinuance has been sought. Similarly, there is no evidence of any formal order for abeyance.

[8] The statements of claim in the T-724-19, T-725-19 and T-726-19 Federal Court actions were issued on May 1, 2019 on behalf of eight plaintiffs. Three additional claims, T-1319-19, T-1320-19, T-1321-19, were issued on August 14, 2019, adding one hundred and eighty-seven plaintiffs. The six actions are being case managed as a group, but are not otherwise consolidated. They have been brought as proposed mass tort proceedings and not as a class action. Counsel for

the plaintiffs has indicated that further actions are anticipated involving hundreds of additional proposed plaintiffs and has referred to the proceedings as being divided into three groups: a) those relating to former CAF members who served in Somalia during the 1990s; b) those relating to former CAF members who served in regions of Africa during the mid-1990s; and c) those relating to former CAF members who served in Afghanistan. As commenced, the proceedings name Canada as the only defendant.

[9] On September 26, 2019, Canada indicated its intention to initiate a third party claim against Roche in respect of the proceedings. Roche is the manufacturer and distributor of mefloquine. Prior to the approval for sale of mefloquine on the Canadian market, mefloquine was available as part of a clinical trial known as the Lariam Safety Monitoring Study. During the time period at issue in these proceedings, Roche provided the DND and the CAF with mefloquine as part of this study.

[10] The Dowe proposed class action includes allegations against Roche, as co-defendant, for negligence and breach of duty of care and claims damages against Roche.

[11] By this motion Canada seeks to stay the Federal Court actions on two bases:

1. Pursuant to section 50.1 of the *Federal Courts Act*, that Canada has a stated intention to bring a third party claim against Roche over which Canada asserts that this Court does not maintain jurisdiction; and

2. Pursuant to section 50(1)(a) and (b) of the *Federal Courts Act*, that there is already a proposed class action proceeding ongoing in the Ontario Superior Court of Justice (Dowe proposed class action) that was commenced prior to these actions, which Canada asserts is overlapping and to which Canada asserts the plaintiffs in the Federal Court actions could be added. Canada asserts that it would be in the interests of justice to proceed with the plaintiffs' allegations in the Ontario Superior Court either within the existing proposed class action or as separate claims, as this Court will have full jurisdiction over all allegations made.

[12] The plaintiffs oppose the relief requested. On the first ground for a stay raised under section 50.1 of the *Federal Courts Act*, the plaintiffs assert that Canada has not demonstrated a genuine intention to commence a third party claim and that it has not been demonstrated that the third party claim is outside the jurisdiction of the Federal Court. The plaintiffs contend that the heart of the proceedings involves the relationship between Canada and its soldiers, which it asserts is governed by a federal statutory scheme and that any fiduciary and statutory duties owed are rooted in federal law. The plaintiffs also rely on the federal statutory scheme of the *Food and Drugs Act* as relating to the third party claim.

[13] On the second ground for a stay raised under section 50(1)(a) and (b) of the *Federal Courts Act*, the plaintiffs assert that the Dowe proposed class action is not duplicative or an adequate alternative. They contend that putative class members maintain a right to pursue their own individual actions and that the plaintiffs do not want to be joined as class members of the Dowe proposed class action.

[14] For the reasons that follow, I will allow Canada's motion under section 50.1 of the *Federal Courts Act* and will stay the Federal Court actions such that they may be recommenced as set out under section 50.1(2).

II. Section 50.1 of the *Federal Courts Act*

[15] Section 50.1 of the *Federal Courts Act* states that:

Stay of proceedings	**Suspension des procédures**
50.1 (1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction.	**50.1 (1)** Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande reconventionnelle ou procéder à une mise en cause pour lesquelles la Cour n'a pas compétence.
Recommence in provincial court	**Reprise devant un tribunal provincial**
(2) If the Federal Court stays the proceedings under subsection (1), the party who instituted them may recommence the proceedings in a court constituted or established under a law of a province and otherwise having jurisdiction with respect to the subject-matter of the proceedings.	**(2)** Le demandeur dans l'action principale peut, après le prononcé de la suspension des procédures, reprendre celles-ci devant le tribunal compétent institué par loi provinciale ou sous le régime de celle-ci.

Although a party seeking to raise section 50.1 of the *Federal Courts Act* will need to establish the elements of this section, once established section 50.1 is mandatory. The purpose of section 50.1 is to ensure that issues for determination in litigation against the Crown are not split between the Federal Court and provincial courts: *Stoney Band* v. *Canada (Minister of Indian & Northern Affairs)*, 2006 FCA 553 at para 25 ("*Stoney Band*"). For a stay to be issued under section 50.1, Canada must establish that: a) it has a desire to institute third party proceedings; and b) 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*").

A. *The Desire to Institute Third Party Proceedings*

[16] In order to demonstrate that there is a genuine desire to institute third party proceedings, the Court will consider: 1) the evidence of the desire to commence the third party proceeding; 2) whether the information provided about the third party claim is clear or if it is vague and un-particularized; and 3) whether the third party claim has any possible likelihood of success: *Dobbie supra* at para 11.

[17] In this case, Canada asserts that it will be initiating a third party claim against Roche. It has provided a draft third party claim as part of its motion materials. The stated intention to proceed with a third party claim was made prior to the pleadings closing and any statements of defence being filed. The timing was made without delay and supports a desire to institute third party proceedings.

[18] The draft third party claim makes the following claims and assertions:

1. The defendant, Her Majesty the Queen in Right of Canada (Canada), claims against Hoffmann-La Roche Limited (Roche) for:

   a) Contribution and indemnity for any amounts which Canada may be found liable to pay to the plaintiffs in any of the six (6) following actions: (T-724-19; T-725-19; T-726-19; T-1319-19; T-1320-19; and t-1321-19), including any amounts allowed for interest and costs;

   b) Canada's costs of defending the main actions; and

   c) Canada's costs of this third party claim.

2. Roche is a corporation incorporated to the laws of Canada. Roche conducts business in Mississauga, Ontario as a manufacturer and distributor of pharmaceutical drugs, including the anti-malarial drug mefloquine. At all material times, Roche manufactured and distributed mefloquine, sold under the trade name Lariam.

3. Mefloquine was approved in January 1993 by Health Canada for the prevention and treatment of malaria and was introduced to the Canadian market in December 1993.

4. As of August 1990, mefloquine was available to all Canadians through a clinical trial (referred to as a Safety Monitoring Study or SMS) sponsored by Roche and approved by Health Canada. At the time, mefloquine was already on the market in the United Kingdom, the United States and many other countries in the world.

5. The SMS was intended to ensure that the Canadian public travelling to various areas with chloroquine resistant malaria had access to mefloquine under controlled conditions. Under the SMS, safety data was to be collected on all travelers who received meflquine under the provisions of the study and that information was to be provided to Roche by the study investigators. Roche was required to report to Health Canada on a regular basis the status of the trial and all adverse drug reactions.

6. The Department of National Defence (DND) participated in the SMS from March 1991 to February 1992. During this time, ninety six (96) CAF members received mefloquine through the study.

7. One hundred and ninety-five (195) plaintiffs allege that between 1992 to 2017, while they members of the Canadian Armed Forces (CAF), the CAF and DND ordered them to take mefloquine before

being deployed to the malaria-endemic regions (*e.g.*, Somalia and Afghanistan).

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 case 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 breachs 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.

14. Canada proposes that this third party claim be tried concurrently with or immediately following the trial of the main actions in the City of Toronto.

[19] The plaintiffs assert that there is insufficient detail provided in the proposed third party claim to support a genuine interest in pursuing the claim. It complains that there are no material facts of the allegations that form the basis of the claim to be able to assess what Roche is alleged to have done or the negligence asserted.

[20] As noted in *Dobbie supra* at para 14, 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.

[21] In this case, Canada relies on the allegations that the former CAF members have already themselves made in the Dowe proposed class action against Roche for negligence and breach of duty of care as the rational basis for its third party claim. As noted above, both Canada and Roche are named defendants in the Dowe proposed class action.

[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.

[23] The plaintiffs also take issue with the fact that statements of defence have not yet been filed in the Federal Court actions. However, there is no requirement to issue statements of defence in advance of raising section 50.1 of the *Federal Courts Act*: *Gottfriedson* v. *Canada (Attorney General)*, 2013 FC 546 at para 6.

[24] I agree with Canada; the basis for the proposed third party claim is set out in sufficient detail in the motion materials.

[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.

[26] On the basis of the materials filed and the facts at issue, it is my view that there is a genuine desire on behalf of Canada to institute third party proceedings on the basis of the allegations proposed.

B. *Is the Proposed Third Party Claim Outside of the Jurisdiction of the Court*

[27] For a proceeding to be within the jurisdiction of the Federal Court it must satisfy the following three-part test set out in *ITO-International Terminal Operators* v. *Miida Electronics*, [1986] 1 SCR 752 at 12 ("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*.

[28] To satisfy the first part of the ITO-test, there must be a federal statute that grants jurisdiction to the Federal Court to deal with the issues in the claim.

[29] In the proposed third party claim, the Crown seeks to claim third party relief against Roche as the manufacturer of mefloquine. The allegations made are non-criminal and civil in nature.

[30] Subsection 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 Attorney General of Canada claims relief. It is not disputed by Canada that the first part of the ITO-test is satisfied.

[31] However, the statutory grant of jurisdiction is limited to those matters satisfying the balance of the ITO-test being causes governed by an existing body of federal law essential to

their disposition, which law is a "law of Canada" within the meaning of section 101 of the *Constitution Act, 1867*: *Dobbie supra* at para 22. As stated in *Stoney Band* v. *Canada (Minister of Indian & Northern Affairs)*, (2005), 337 N.R. 265 (F.C.A.), the second and third parts of the ITO-test overlap.

[32] In order for the second and third parts of the ITO-test to be met, federal law must be the law upon which the plaintiffs' cases are based; it must be essential to the disposition of the causes of action and must nourish the jurisdiction under subsection 17(5) of the *Federal Courts Act*: *Kigowa* v. *Canada (C.A.)*, [1990] 1 F.C. 804 at para 17; *Windsor (City)* v. *Canadian Transit Co*., 2016 SCC 54 at para 66-69 ("*Windsor City*"). Under the second and third parts of the ITO-test the analysis is contextual.

[33] In determining whether a claim meets the requirements of the ITO-test, it is necessary to 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 supra* at para 26; *744185 Ontario Inc*. v. *Canada*, 2020 FCA 1 at para 31 ("*Air Muskoka*").

[34] As summarized in *Peter G. White Management Ltd*. v. *Canada (Minister of Canadian Heritage)*, 2006 FCA 190 at para 58:

> […] the Federal Court has jurisdiction over a case which is in "pith and substance" based on federal law and, may apply provincial law incidentally in the course of resolving the litigation: *ITO-International Terminal Operators*, at pages 781-782. Conversely, if the case is in "pith and substance" based on provincial common law, it is not within federal jurisdiction, even if it incidentally requires the determination of a question of federal law: *Stoney Band*, at paragraph 57.

[35] When applying this 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 supra* at para 32.

[36] In this case, the third party claim alleges contribution and indemnity for any damages awarded against Canada in the Federal Court actions (paragraph 1a)). It further claims contribution and indemnity under the *Negligence Act* of Ontario, R.S.O. 1990, c. N.1 as amended (paragraph 13).

[37] Canada contends that the third party claim is rooted in the common law of negligence and is governed by the Ontario *Negligence Act*. It asserts that there is no existing body of federal law or "law of Canada", which is essential to the disposition of the case and which nourishes the grant of jurisdiction in this Court.

[38] The plaintiffs assert that Canada's argument is flawed as it is premised on the fact that the third party claim is rooted purely in negligence and does not consider the relationship that is at the heart of the Federal Court actions, which the plaintiffs assert is between Canada and its soldiers. The plaintiffs assert that the allegations made are grounded in Canadian military law and the common law fiduciary duty that Canada owes to the members of the CAF as governed by the statutory regime of the *National Defence Act* and associated regulations, which is federal in nature: *MacKay* v. *The Queen*, [1980] 2 SCR 370 at p. 397.

[39] As argued by the plaintiffs, the legal duties owed to CAF members, whether statutory or common law duties, are federal in nature. The plaintiffs assert that CAF members were ordered to take mefloquine pursuant to s. 126 of the *National Defence Act*, which provides that:

> 126. Every person, who on receiving an order to submit to inoculation, re-inoculation, vaccination, re-vaccination, other immunization procedures, immunity tests, blood examination or treatment against any infectious disease, wilfully 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.

[40] The plaintiffs contend in their evidence that it is a CAF policy not to seek written, informed consent when preventative drugs or vaccines are prescribed as this is not compatible with these operational requirements.

[41] The plaintiffs further assert that the allegations made are based on the law regarding clinical trials of pharmaceutical drugs under the *Food and Drugs Act* and associated regulations, which are also Federal in nature.

[42] According to the plaintiffs, the DND and CAF failed to follow the necessary protocols imposed by the *Food and Drugs Act* and its associated regulations, regarding the Lariam Safety Monitoring Study, including with respect to the distribution of the drug and obtaining informed consent from those taking the drug.

[43] The plaintiffs seek to parallel this case to that before the court in *Canada (Attorney General)* v. *Gofftriedson*, 2014 FCA 55 ("*Gottfriedson*"), a case involving the fiduciary duty owed by Canada to indigenous Bands and their members in association with the residential

school policy. In that case, Canada issued a third party claim against various religious organizations who operated the residential schools and sought a stay of the Federal Court action. The Federal Court dismissed the motion for stay stating the following:

> [37] Although the third party claims make no reference to the Crown's fiduciary obligation and the honour of the Crown, the heightened duty which is cast on the Crown in its dealings with Aboriginal peoples will be central to these proceedings. Simply claiming that the religious organizations contributed to the loss of identify caused by the residential schools policy begs the question as to the standard against which their conduct will be measured in determining whether they are also at fault.
>
> [38] While we do not have before us the statement of defence to be filed by the religious organizations, the outcome will necessarily turn in great part if not exclusively on the written and oral agreements which the religious organizations are alleged to have breached, and the steps taken by the Crown to insure that the heightened duty which it owed to the Indian day students and the plaintiff Bands was conveyed to the organizations charged with the operation of the Indian residential schools.
>
> [39] Beyond the *sui generis* relationship between the Crown, the plaintiff Bands and their members, the *Indian Act* and in particular sections 114 and following, are also at the core of both the main action and the third party claims. These provisions, and their predecessors, make Canada responsible for the education of Indian day students. The religious organizations were retained by Canada in order to fulfill this responsibility.
>
> …
>
> [43] …the issue will turn on whether the Crown conveyed to the religious organizations the heightened duty that it had to educate Indian day students so as to preserve their identity. This determination will be wholly guided by the agreements entered into by the Crown and the religious organizations under the authority of the *Indian Act*. The alleged contributory fault of the religious organizations, if any, depends on this determination.

[44] Canada argues against this analogy and raises the *Air Muskoka* case in support of its arguments. *Air Muskoka* was a case involving a business operating out of leased premises

located within the Muskoka airport on lands originally leased from the Crown and later transferred to the Municipality of Muskoka. The Municipality had signed an indemnity agreement to the Crown relating to damages the Crown might sustain as a result of the Municipality's failure to perform any actions pursuant to any agreement consequent to the transfer. In the action, Air Muskoka sued only the Crown for alleged tortious conduct by the Municipality in failing to adequately manage the airport, breaching its fiduciary and contractual obligations to it and acting with disregard to its rights as a tenant. Canada brought a third party claim seeking contribution and indemnity from the Municipality under the indemnity agreement and the Ontario *Negligence Act* and sought to stay the proceeding under s. 50.1 of the *Federal Courts Act*.

[45] In upholding the decision under appeal which had granted the stay, the Federal Court of Appeal made the following comments about the characterization of the third-party claim:

> [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.

[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 Melfloquine;

(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 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.

[47] None of these assertions made against Roche rely on a heightened duty arising from the relationship between Canada and CAF members under the *National Defence Act*.

[48] Indeed, there is no statutory basis in the *National Defence Act* that the plaintiffs have pointed to that would ground an extension of any asserted fiduciary duty of Canada to CAF members to impose such a duty on Roche.

[49] As raised by Canada, in the recent B.C. Court of Appeal decision in *Scott* v. *Canada (Attorney General)*, 2017 BCCA 422 at para 68-73, the Court 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 and rejected the concept of a fiduciary obligation owed by the Crown to CAF members in the context of the claim that had been made for administrative benefits.

[50] In this case, there is no evidence of any obligations arising from the *National Defence Act* being imposed on Roche as a result of it providing mefloquine to the DND or CAF members. In my view, the allegations against Roche are not nourished by the statutory structure of the *National Defence Act*.

[51] I agree with Canada, I do not consider there to be the same *sui generis* relationship at play in this case as at issue in *Gottfriedson*. The correct parallel is to *Air Muskoka* and *Dobbie* and not to *Gottfriedson*.

[52] Further, the source of the assertions made against Roche do not depend on the statutory framework of the *Food and Drugs Act* or Roche's compliance with this framework. While the *Food and Drugs Act* sets out certain requirements to establish the safety and efficacy of drugs for

commercialization and requirements for clinical drug testing, these provisions are not being challenged. Rather, it is the conduct of Roche that is being questioned.

[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.

[54] The proposed third party claim, in my view, falls outside the jurisdiction of this Court.

[55] While my conclusion on section 50.1 is sufficient to dispose of this motion, I will provide the following further analysis under sections 50(1)(a) and (b) of the *Federal Courts Act* for completeness.

III. Sections 50(1)(a) and (b) of the *Federal Courts Act*

[56] Sections 50(1)(a) and (b) of the *Federal Courts Act* state as follows:

Stay of proceedings authorized	**Suspension d'instance**
50 (1) The Federal Court of Appeal or Federal Court may, in its discretion, stay proceedings in any cause or matter	**50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or	**a)** au motif que la demande est en instance devant un autre tribunal;
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	**b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[57] A stay under section 50(1)(a) will only be granted in the clearest of circumstances. The party seeking a stay must demonstrate that the continuation of the proceeding sought to be stayed will cause prejudice or injustice (not merely inconvenience or extra expenses) to the defendant, and would not cause an injustice to the plaintiff*: White v. E.B.F. Manufacturing Ltd.,* 2001 FCT 713; *Canada (Attorney General) v. Cold Lake First Nations*, 2015 FC 1197 at para 14 ("*Cold Lake First Nations*").

[58] In considering whether a stay should be granted the Court will consider whether the facts alleged, the legal issues raised and the relief sought are similar or the same in both proceedings and whether there is a possibility of inconsistent findings in both courts. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to justice and adjudication of claims. Priority ought not to be necessarily given to the first proceeding over the second, or vice versa: *White supra; Cold Lake First Nations supra* at para 14.

[59] The plaintiffs assert that the Dowe class action is not duplicative of the present proceedings as the individual plaintiffs involved in the Federal Court actions are not parties to the Dowe proposed class action. As asserted by the plaintiffs, the argument under section

50(1)(a) assumes that the plaintiffs in the Federal Court proceedings would join the class proceeding as members. However, putative class members always maintain the right to pursue their own individual actions and cannot be forced or presumed to join a class proceeding.

[60] The plaintiffs assert that the Dowe proposed class action is not an adequate alternative and is a less preferable vehicle to litigate the plaintiffs' claims. In this case, counsel for the plaintiffs assert that the plaintiffs named in the Federal Court actions do not wish to join the Dowe class action proceeding.

[61] I have reviewed the allegations made in the Dowe proposed class action and the present Federal Court proceedings. Such allegations are similar and overlapping. It is clear that a determination of the Dowe proposed class proceeding would present findings that would have a bearing on the allegations made in these actions and vice versa.

[62] However, on the basis of the materials filed before me, I cannot conclude that section 50(1)(a) has been satisfied, particularly as there is no evidence that the class members in the Dowe proposed class action will include the plaintiffs named in the Federal Court actions. Rather, the evidence suggests that the plaintiffs do not wish to participate in the Dowe proposed class action. Forcing the plaintiffs to proceed as members of the proposed class action would be an injustice and contrary to the principles associated with the right to opt out of certification: *1250264 Ontario Inc.* v. *Pet Valu Canada Inc.*, 2013 ONCA 279 at para 41-42.

[63] I note that the position of Canada as emphasized in their reply submissions is not that the plaintiffs should have to pursue their claims through the Dowe proposed class action. Rather, the argument is that because there is already a proceeding in the Ontario Superior Court against Canada and Roche dealing with the same issues that it would be in the interests of justice (section 50(1)(b)) that this litigation proceed in that Court.

[64] I agree that it may be preferable and most efficient to have any stand alone claims made in the same court as the Dowe proposed class action to seek to avoid inconsistent findings. However, in my view a decision to stay the Federal Court actions under section 50(1)(b) on this basis is premature as the Dowe proposed class action has not yet progressed or even achieved certification.

[65] The means for relief in this case is under section 50.1 of the *Federal Courts Act* and is grounded in the jurisdictional issues raised by the third party claim. It is on this basis that I grant the relief requested.

IV. Alternative Relief

[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.

**ORDER in T-724-19, T-725-19,
T-726-19, T-1319-19, T-1320-19, T-1321-19**

THIS COURT ORDERS that:

1. The motion is allowed in part. The Federal Court actions in T-724-19, T-725-19, T-726-19, T-1319-19, T-1320-19 and T-1321-19 are hereby stayed pursuant to section 50.1 of the *Federal Courts Act*.

2. The request for leave to amend the statements of claim is denied.

3. As no costs were requested by Canada on this motion, there shall be no order as to costs.

"Angela Furlanetto"
Case Management 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 ET 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:	VIA VIDEO CONFERENCE AT TORONTO, ONTARIO
DATE OF HEARING:	MAY 27, 2020
ORDER AND REASONS:	CASE MANAGEMENT JUDGE ANGELA FURLANETTO

DATED: SEPTEMBER 16, 2020

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