KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 49**

Date: **2025 03 25**
File No.: KBG-RG-00614-2023
Judicial Centre: Regina

BETWEEN:

CHANTELLE CHEEKINEW

PLAINTIFF

- and -

THE GOVERNMENT OF SASKATCHEWAN

DEFENDANT

Counsel:

Melanie Anderson, Tina Q. Yang and Naomi Kovak	for the plaintiff
Amanda M. Quayle, K.C., C. Elaine Thompson, K.C. and Mackinley Sim	for the defendant

---

FIAT
MARCH 25, 2025

BERGBUSCH J.

I. Overview

[1] The Government of Saskatchewan has brought a sequencing application in this proposed class action, contending that the Court should rule on the admissibility of the plaintiff's expert evidence as a preliminary matter, before the certification hearing. The Government has also applied for leave to cross-examine the plaintiff's expert, Dr. Lexy Regush, on her qualifications and to strike her report.

[2] The plaintiff and the defendant agree that applications brought by the defendant for production of records and to strike portions of the plaintiff's affidavit in

support of certification should be heard in advance of the certification application. Those applications will be heard on April 25, 2025.

[3] The defendant requests that the strike application be heard at the same time as the other preliminary applications, with cross-examination to take place before the hearing.

[4] The issues for decision on this application are the following:

a. Should the defendant's application to strike the expert report be heard before the certification application?

b. Should the Court grant leave to the defendant to cross-examine Dr. Regush on her qualifications?

[5] In this case, I have determined that fairness, efficiency, and judicial economy favour hearing the strike application as a preliminary motion. In addition, cross-examination of the plaintiff's expert on her qualifications will assist the Court in performing its gatekeeping function and will not produce injustice.

II. Background

[6] The Statement of Claim was issued on March 3, 2023. The plaintiff alleges that the Government operates a system of "birth alerts," where hospitals and/or physicians receive notices containing personal information about pregnant persons. These notices often require the hospital to contact child protection authorities when babies are born. The claim alleges that birth alerts are motivated by speculative child protection concerns, are grounded in discriminatory assumptions, and disproportionately target Indigenous, racialized, and/or disabled pregnant persons. Among other things, the claim alleges that the plaintiff and class members have suffered loss and damage resulting from: breaches of their right to liberty and security of the

person guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* [*Charter*]; breach of their *Charter* right to substantive equality (a claim advanced on behalf of a member subclass); breach of privacy; pain and suffering; injury to dignity, feelings, and self-worth; emotional and psychological harm and distress; loss of a parental relationship with a newborn child, in cases where the child was apprehended; loss of enjoyment of life; and out-of-pocket expenses. The plaintiff seeks, among other relief: an order certifying the action as a class proceeding, pursuant to *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*], and appointing the plaintiff as representative plaintiff of the class; declaratory relief; remedies under ss. 24(1) of the *Charter*; various heads of damages; and injunctive relief.

[7] On September 27, 2023, the plaintiff applied to the Chief Justice for the appointment of a case management judge pursuant to ss. 4(2)(a) of the *CAA*. In a fiat dated October 5, 2023, Popescul C.J. designated Bardai J. (as he then was) to hear the certification application pursuant to Rule 3-90 of *The King's Bench Rules*.

[8] On April 12, 2024, during a case management conference call, Justice Bardai set June 14, 2024 as the deadline for the plaintiff to serve and file her certification application.

[9] On April 30, 2024, following the appointment of Bardai J. to the Saskatchewan Court of Appeal, Chief Justice Popescul designated me the case management judge in his place.

[10] In response to a request by counsel for the plaintiff, I extended the plaintiff's deadline for serving and filing her certification application to July 31, 2024.

[11] On July 31, 2024, the plaintiff filed her certification application and an amended Statement of Claim.

[12] A case management conference call took place on September 3, 2024, during which the Court established a timeline for the defendant to file its materials in response to the certification application, among other things. Following this call, the Local Registrar scheduled the certification hearing for the week of September 15, 2025, in consultation with counsel.

[13] The Government served a Notice of Change of Representation on October 11, 2024. From this point, McDougall Gauley LLP became co-counsel with the Ministry of Justice and Attorney General for the Government.

[14] On November 22, 2024, the defendant served an application for an order to compel the plaintiff to produce documents referred to in the plaintiff's affidavit and to provide the defendant with an authorization enabling the defendant to obtain copies of the plaintiff's medical records from the Regina General Hospital for the period of January 1, 2007 to the present [Production Application].

[15] On December 5, 2024, the defendant filed a second application, seeking orders striking portions of the affidavit of Dr. Regush, including her report, and portions of the plaintiff's affidavit [Strike Application]. The defendant also filed a Notice of Objection to Expert, objecting to Dr. Regush's report on the grounds that the opinions expressed extend beyond Dr. Regush's qualifications, Dr. Regush does not have adequate education, training, or expertise to provide an opinion on the matters discussed in the report, Dr. Regush has not been involved in research or studies relevant to the issues in the report, the report does not contain the certification required by Rule 5-37(3), and the opinions expressed in the report lack threshold reliability.

[16] A further case management conference call took place on December 13, 2024. Counsel for the defendant advised that the Government wishes to apply for several orders in advance of the certification hearing, specifically: (1) for production of medical records referred to by the plaintiff in her affidavit; (2) to strike portions of the

plaintiff's affidavit; and (3) to strike the plaintiff's expert report. Plaintiff's counsel agreed that the first two applications should be heard pre-certification, but not the application to strike the expert report. Accordingly, the defendant was required to bring a sequencing application, which was scheduled for February 12, 2025. The timeline for filing materials responsive to the plaintiff's certification application was suspended.

[17] On December 23, 2024, the defendant filed its sequencing application, seeking an order that the Strike Application be heard concurrently with the Production Application and decided before the defendant is required to file materials in response to the certification application. The defendant also seeks an order permitting the defendant to cross-examine Dr. Regush on her qualifications before the Strike Application is heard and determined.

[18] The Court heard the sequencing application on February 12, 2025. At that time, April 25, 2025, was set as the date to hear the defendant's applications. This decision determines whether the application to strike the plaintiff's expert report will be heard on that date.

III. Positions of the Parties

[19] The Government submits that it will be entitled to cross-examine Dr. Regush on her qualifications in advance of certification; the parties simply disagree about timing. However, as the plaintiff agrees to the Court hearing the balance of the Strike Application and the Production Application in advance of certification, permitting the defendant to cross-examine Dr. Regush on her qualifications and then hearing the application to strike Dr. Regush's expert report at the same time as the other applications will minimize delay and unnecessary cost and promote efficiency and fairness.

[20] The plaintiff submits that no efficiency will be gained by the Court hearing the application to strike Dr. Regush's report and doing so would be unfair to the plaintiff. While the plaintiff agrees that the Production Application and the application to strike portions of her affidavit can be heard without unfairness or delay, the application to strike the expert report is a different matter altogether. The plaintiff submits that the parties previously agreed to a schedule leading up to the certification hearing, which built in time for cross-examination on affidavits. After the defendant retained McDougall Gauley LLP, the plaintiff agreed to extend the defendant's deadline for serving its responding record. The plaintiff submits that the defendant's delay in serving the Production Application and Strike Application is inexplicable. The plaintiff took a pragmatic approach to the Production Application and the application to strike portions of her affidavit.

[21] In response to the merits of the application, the plaintiff submits:

a. The defendant is not prejudiced by having to prepare its responding record in light of the current evidence.

b. The admissibility of Dr. Regush's report cannot be assessed in a vacuum.

c. Striking the expert report will not dispose of the entire proceeding, but it will create the potential for an appeal.

d. There is no compelling reason to depart from the norm that the admissibility of all evidence is dealt with as part of the certification hearing.

[22] In reply, the Government disputes that it had agreed to a firm schedule for pre-certification steps and says that access to the plaintiff's medical records has been a live issue since the schedule was first discussed. The defendant submits the Court can

rule on Dr. Regush's qualifications without considering the entire certification record.

IV. Applicable Law

[23] As a starting point, *The King's Bench Rules* apply to class actions to the extent that the Rules do not conflict with the *CAA*: *CAA*, s 44; Rule 3-89(2).

[24] The Government's application for leave to cross-examine Dr. Regush on her qualifications and to have its application to strike her expert report heard in advance of the certification hearing raises several issues.

A. Sequencing in Class Actions

[25] The leading authority in this jurisdiction regarding sequencing in class actions is *Hoedel v WestJet Airlines Ltd*., 2023 SKCA 135 [*Hoedel*]. Schwann J.A. began her analysis by addressing the traditional view that, in a proposed class action, the certification application should be heard first or at least concurrently with any interlocutory motions. After tracing the history of that concept and reviewing several decisions that carved out exceptions for some preliminary applications, Schwann J.A. rejected a bright line test that the certification application must always be heard first. She concluded at para. 29 that "the Court of King's Bench has the discretion to determine the sequence in which applications and motions in prospective class action proceedings are heard relative to the certification application."

[26] Schwann J.A. next reviewed several formulations of the criteria that guide the Court's exercise of its discretion to determine the sequence for hearing applications in class proceedings. At para. 35, she endorsed the summary provided by the British Columbia Court of Appeal in *British Columbia v The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219, [2021] 10 WWR 606:

> [35] In my view, the more pertinent decision on the matter of sequencing is *Jean Coutu*, where the British Columbia Court of

Appeal distilled the relevant case law into the following, non-exhaustive, list of factors for consideration in such applications:

> [33] Sequencing applications have become increasingly common in proposed class proceedings. Each proposal for a pre-certification motion must be looked at in the specific context of the case. The case law has identified a non-exhaustive list of factors to consider in a sequencing application: *Lieberman et al. v. Business Development Bank of Canada*, 2005 BCSC 389 at para. 16; *Cannon* [2010 ONSC 146] at para. 15; *Li* [2017 BCSC 1616] at para. 18; *Kett v. Mitsubishi Materials Corporation*, 2019 BCSC 2373 at paras. 11–12. Justice Mathews, in *Shaver v. Mallinckrodt Canada ULC*, 2021 BCSC 455, combined and summarized the factors:
>
> > [10] … Combined, the non-exhaustive list of factors is:
> >
> > a) any delay by the plaintiff in proceeding to certification;
> >
> > b) the extent to which a preliminary application may dispose of the whole proceeding or narrow the issues to be determined, taking into account the strength of the applicant's arguments on the proposed applications and the breadth of the applications;
> >
> > c) the cost to the parties of participating in pre-certification procedures and the potential to avoid exposing the defendants to costs of a full certification hearing if the matter will be resolved on the basis of the s. 4(1)(a) [multi-jurisdictional] requirement alone;
> >
> > d) the potential for delay arising from interlocutory appeals;
> >
> > e) the complexity and interplay of the issues that may arise in and between the pre-certification and certification applications;
> >
> > f) whether the outcome of the motion will promote settlement;

> g) the interests of economy and judicial efficiency (including whether the parties agree the motion will be determinative of the s. 4(1)(a) aspect of the certification motion); and
>
> h) the fair and efficient determination of the proceeding.
>
> …
>
> [45] In my view, a judge's discretion as to sequencing ought to be guided by the approach set out in *Pro-Sys* [2008 BCSC 1263] through application of the *Shaver* factors. Each sequencing application must be determined in the context of the particular case before the court and the court's discretion ought to be exercised in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute.

[27] The list of relevant factors is non-exhaustive and no one factor is determinative. The overarching considerations are fairness to all parties, efficiency, and judicial economy: *Hoedel* at para 36.

[28] Saskatchewan judges have decided applications to strike expert evidence pre-certification on many occasions: see, e.g., *Hoffman v Monsanto Canada Inc.*, 2003 SKQB 174, 233 Sask R 112; *Field v GlaxoSmithKline Inc*., 2011 SKQB 16 at paras 50-55, 329 DLR (4th) 290; *Stout v Bayer Inc.*, 2017 SKQB 329, 19 CPC (8th) 416 [*Stout*]; *M.R.L.P. v Canada (Attorney General)*, 2018 SKQB 248; *Wiegers v Apple, Inc*., 2020 SKQB 24; *101050457 Saskatchewan Ltd. v Regina (City)*, 2024 SKKB 61. However, one can also find many instances where judges ruled on the admissibility of affidavit evidence, including expert evidence, concurrently with the certification application: e.g., *Wuttunee v Merck Frosst Canada Ltd*., 2007 SKQB 29, 291 Sask R 161; *Brooks v Canada (Attorney General)*, 2009 SKQB 509, 347 Sask R 158 [*Brooks*]; *Alves v First Choice Canada Inc*., 2010 SKQB 104, 348 Sask R 23; *Dembrowski v Bayer Inc*., 2015 SKQB 286, 482 Sask R 211. Ultimately, each sequencing application must be assessed on a case-by-case basis. That is the approach I will follow in deciding whether the

defendant's application to strike Dr. Regush's expert report should be heard pre-certification.

B. Cross-examination on Affidavits

[29] As for the defendant's request to cross-examine Dr. Regush on her qualifications prior to the Strike Application, this application is subject to Rule 6-13 of *The King's Bench Rules*, which reads:

> 6-13(1) On any application or petition, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making the affidavit.
>
> (2) The party applying for any cross-examination pursuant to subrule (1) shall bear the costs of the cross-examination.

[30] The leading authority governing applications for leave to cross-examine on affidavits is *Wallace v Canadian National Railway*, 2009 SKQB 178 at para 5, 338 Sask R 174. At para. 5, Popescul J. (as he then was) wrote:

> 5 The law with respect to when a court ought to exercise its discretion in favour of a request to permit cross-examination on a deponent's affidavit is well settled. The general principles and criteria considerations gleaned from the jurisprudence in this jurisdiction may be summarized as follows:
>
> 1. There is no inherent right to cross-examine a deponent on his affidavit.
>
> 2. Granting leave to cross-examine on an affidavit is a discretionary remedy.
>
> 3. Permission to cross-examine on the affidavit may be granted by the Court pursuant to Rule 317.
>
> 4. The party making the request must establish that the cross-examination will assist in resolving the issue before the Court and that it will not result in an injustice.

> 5. Leave to cross-examine will be sparingly, and not routinely, granted.
>
> 6. Generally, leave to cross-examine ought only be granted where there is contradictory evidence before the Court; however, in the absence of contradictory evidence, the Court may nonetheless grant leave where there is a sincere and legitimate need for clarification of the information deposed to and that information is solely within the knowledge of the affiant.
>
> 7. Generally, leave to cross-examine on an affidavit ought not be granted on interim applications.
>
> 8. There is no enhanced right of cross-examination under *The Class Actions Act*, SS 2001, c C-12.01. The general principles apply.

Rule 6-13 is materially the same as the former rule (Rule 317 of *The Queen's Bench Rules*).

[31] In *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at para 27, 429 DLR (4th) 269, Schwann J.A. reiterated that leave to cross-examine on affidavits is discretionary and the applicant must show that cross-examination will assist in resolving the issue before the Court and will not result in an injustice.

[32] Many decisions of this Court have considered whether leave to cross-examine on affidavits should be granted in the context of certification applications. Popescul J. (as he then was) observed in *Thorpe v Honda Canada Inc.*, 2010 SKQB 136 at para 12, 352 Sask R 89 that Saskatchewan courts have been generous in exercising their discretion in favour of leave to cross-examine in recognition of the impact of certification orders on the parties and the Court's interest in having as much information about the proposed class action as possible. See also the discussion in *Pointer v Saskatchewan Government Insurance*, 2023 SKKB 90.

[33] In *Bemrose v Manz*, 2023 SKKB 261, Bardai J. (as he then was) summarized the key question in deciding whether cross-examination should be permitted as follows:

> [14] In the context of a class action where the affidavit evidence is put forward in the context of a certification application, the Court must consider whether cross-examination will assist in resolving the issues on certification without giving rise to injustice. Ultimately, the question the Court must answer is "whether the issue proposed to be canvassed on cross-examination is relevant to the question before the Court on the application for certification, and not an issue to be determined at trial". See *Hoffman v Monsanto Canada Inc.*, 2003 SKQB 564 at para 23, 242 Sask R 286.

[34] On the certification application, the plaintiff must demonstrate "some basis in fact" for each of the certification criteria set out at ss. 6(1)(b) to (e) of the *CAA*. Generally, a party seeking to cross-examine affiants in advance of the certification hearing must establish that cross-examination will assist the Court in resolving whether: there is an identifiable class; the claims of the class members raise common issues; a class action would be the preferable procedure for the resolution of the common issues; and there is a person willing to be the representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable plan, and does not have a conflict of interest.

[35] At this stage, the defendant is requesting to cross-examine the plaintiff's expert on her qualifications only. On this point, it is important to bear in mind that the standard of admissibility of expert evidence is the same in certification applications as in any other court proceeding: *Brooks* at paras 39-40; *Stout* at paras 43-46. The Court will have to undertake a two-step inquiry to determine whether the proposed evidence meets the threshold requirements for admissibility. First, the Court must decide whether the evidence meets four criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert: *R v Mohan*,

[1994] 2 SCR 9. Second, the Court must fulfil its gatekeeping function by ensuring that the proposed expert will comply with the duty to provide fair, objective, and non-partisan evidence and by determining whether the potential benefits of admitting the evidence justify the risks of doing so: *White Burgess Langille Inman v Abbott and Haliburton Co.,* 2015 SCC 23 at para 24, [2015] 2 SCR 182.

[36] There is precedent for the Government's request. In *Graham v Hoffmann-La Roche Limited*, 2014 SKQB 304, 455 Sask R 191 [*Graham*], the defendant sought leave to cross-examine the plaintiff's expert on his qualifications and on the reliability of his opinions. Mills J. permitted the defendant to cross-examine the proposed expert on his qualifications only, concluding that Hoffmann-La Roche had raised legitimate questions regarding his expertise. Mills J. held that cross-examination would assist the Court in making the threshold determination whether the expert had the requisite expertise to give opinion evidence in the areas for which his opinion was tendered: *Graham* at paras 25-30.

C. Application to this Case

[37] On the facts in this case, I have concluded that it is appropriate to hear the defendant's application to strike Dr. Regush's expert report in advance of the certification application and to grant the defendant leave to cross-examine Dr. Regush on her qualifications. In the circumstances, the two applications go hand-in-hand. I will first explain my conclusions regarding the sequencing factors and will then briefly give my reasons for granting leave to cross-examine.

[38] First, the plaintiff raises the concern that a pre-certification hearing on the admissibility of Dr. Regush's report may cause delay. However, the defendant's proposal is to cross-examine Dr. Regush for no more than a half-day, in advance of the application to strike her expert report, which will be heard on April 25, 2025, when other applications are scheduled. Permitting the cross-examination to take place before

the hearing and then hearing the application to strike at the same time as other preliminary applications will not delay proceedings in this Court. Further, the risk of potential delay resulting from an interlocutory appeal must be weighed against the benefit from sequencing pre-certification applications in a way that promotes the fair and efficient determination of the certification application as a whole.

[39] Second, the parties are unlikely to incur significant additional cost if the defendant is permitted to cross-examine and to challenge the admissibility of Dr. Regush's report at this stage. The defendant has objected to Dr. Regush's qualifications to provide the opinions in her report already, so this is a live issue that the Court will need to decide either as a preliminary matter or at the certification hearing. Whenever the Court hears this matter, the parties will have to brief the issue and make oral submissions.

[40] Third, the plaintiff's submission that the admissibility of her expert's report can only be determined in context, when the Court is reviewing the entire evidentiary record at the certification hearing, is misplaced. If the defendant were disputing Dr. Regush's report on the footing that this evidence is not relevant or necessary for the Court to decide whether there is "some basis in fact" for the certification criteria, the plaintiff's objection would have merit. Relevance and necessity could not be decided in a vacuum. However, the defendant's proposed application seeks to challenge Dr. Regush's qualifications and her ability to comply with her duty to provide objective and non-partisan evidence. This is a relatively narrow inquiry that does not depend upon the Court having a full appreciation of the larger picture.

[41] Fourth, the plaintiff suggested in her brief of law that Dr. Regush's report might be admissible as participant expert evidence. This category of expert refers to a person who forms "opinions based upon their participation in the underlying events …

rather than because they were engaged by a party to the litigation to form an opinion": *Westerhof v Gee Estate*, 2015 ONCA 206 at para 6, 384 DLR (4th) 343. Whether Dr. Regush can provide evidence under the "narrow scope" (*Wynward Insurance Group v Smith Building and Development Ltd*., 2023 SKCA 57 at para 27, 483 DLR (4th) 51) of this exception to the ordinary notice requirements for expert evidence, will not be settled in this sequencing decision. Regardless, she cannot give **opinion** evidence as a participant expert unless she is properly qualified.

[42] Fifth, the plaintiff submits that hearing the application to strike Dr. Regush's expert report in advance of certification will not narrow the issues at certification. It is correct that the outcome of the application to strike Dr. Regush's affidavit will not be dispositive of one of the certification criteria. However, at some point the Court must rule on the defendant's objection to Dr. Regush's qualifications. In my view, all parties will benefit from knowing at this stage whether Dr. Regush's expert report is admissible. This is preferable to one alternate scenario: the Court concludes after the certification hearing that Dr. Regush is not qualified to provide opinion evidence, leaving a gaping hole in the plaintiff's case for certification. That was the outcome in *Graham v Hoffmann-La Roche Limited*, 2020 SKQB 353 at paras 33-35, 62-74. If the Court rules now that Dr. Regush is not qualified to give opinion evidence, the plaintiff will be able to reassess her strategy for certification. If Dr. Regush is qualified, the plaintiff and the defendant will know that the report will be considered as part of the plaintiff's case for certification.

[43] Other factors identified in *Hoedel*, such as delay by the plaintiff in proceeding to certification or the possibility that a decision on the pre-certification application will promote settlement, do not weigh in favour of hearing the application to strike Dr. Regush's report now. However, looking at the relevant considerations together, I have concluded that ruling on the admissibility of Dr. Regush's report as a preliminary matter, at the same time as the other interlocutory applications, will

promote fairness, efficiency, and judicial economy.

[44] Finally, cross-examination of Dr. Regush on her qualifications prior to the hearing will assist by providing evidence relevant to the application to strike her report. This will enable the Court to fulfill its gatekeeper function. Permitting a half-day cross-examination of Dr. Regush on her qualifications will not result in an injustice or entail significant cost. I encourage counsel to make arrangements for Dr. Regush to be cross-examined by virtual means if possible.

V. Conclusion

[45] The Government has leave to cross-examine Dr. Regush on her qualifications for no more than half a day. The costs of the cross-examination will be borne by the defendant in the first instance.

[46] The Government's application to strike Dr. Regush's report and portions of her affidavit will be heard concurrently with the Production Application and the balance of the Strike Application.

[47] Costs of the sequencing application will be addressed as part of the certification application.

J.
P.T. BERGBUSCH