

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sibble v. Google LLC*,
2025 BCSC 537

Date: 20250324
Docket: S208705
Registry: Vancouver

Between:

Harondel J. Sibble

Plaintiff

And

Google LLC, Google Canada Corporation and Alphabet Inc.

Defendants

Before: The Honourable Madam Justice Tucker

Reasons for Judgment (Application regarding Notices to Admit)

Counsel for the Plaintiff:

R.L. Coad
S.M. McConnell

Counsel for the Defendants:

T.M. Cohen, K.C.
A. Borrell
T.D. Paulson

Place and Date of Hearing:

Vancouver, B.C.
February 28, 2025

Place and Date of Judgment:

Vancouver, B.C.
March 24, 2025

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I. Introduction

[1] This decision addresses an application filed by Harondel Sibble (the “Plaintiff”) on February 13, 2025. The proceeding is a putative class action against Google LLC, Google Canada Corporation and Alphabet Inc. (collectively, the “Defendants”).

[2] The Plaintiff has not yet had his action certified under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA]. An eight-day hearing on certification is set to begin on June 2, 2025.

[3] This application concerns two notices to admit served by the Plaintiff on the Defendants under Rule 7-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [Rules]. The Defendants served two written statements in response.

[4] The Plaintiff applies to strike the Defendants’ response statements as scandalous, frivolous, vexatious, or otherwise constituting an abuse of process. Further to the order striking the responses, the Plaintiff seeks an order that the truth of the facts and the authenticity of the documents sought under the notices are deemed to have been admitted. As an alternative to deemed admissions, the Plaintiff seeks orders permitting the Defendants to deliver proper response statements, but also giving the Plaintiff leave to cross-examine David Monsees (one of the Defendants’ affiants).

[5] The Defendants oppose all orders sought.

II. Procedural History

[6] A Notice of Civil Claim was filed by the Plaintiff on August 17, 2020.

[7] On July 9, 2021, the Plaintiff filed an amended Notice of Civil Claim.

[8] On February 1, 2022, in a decision indexed as *Reid v. Google LLC*, 2022 BCSC 158, the Plaintiff was granted carriage and a competing action was stayed. On September 8, 2023, the Court of Appeal dismissed an appeal from that decision: *Kett v. Google LLC*, 2023 BCCA 350.

[9] On December 19, 2023, the Plaintiff filed a Second Amended Notice of Civil Claim (the “ANOCC”).

[10] The ANOCC alleges trespass, conversion, invasion of privacy, intrusion upon seclusion, breach of the *Competition Act*, breach of consumer protection laws, and unjust enrichment. The class includes all residents of Canada (except those in the Quebec Class) who used a “Google Service” (defined broadly to include Android, Chrome, Google Search, Google Maps, and Gmail) or visited a “Third-party Website” for personal purposes, from November 1, 2008 to the date of judgment.

[11] On April 23, 2024, following a judicial case management conference, I made an order (“Case Plan Order”) establishing a pre-certification hearing timetable.

[12] Among others, the Case Plan Order set the following terms:

- a) The Defendants will deliver their responding materials to the certification application on or before October 4, 2024;
- b) The certification application will be scheduled for eight (8) days commencing June 2, 2025;
- c) The Plaintiff will deliver his reply, if any, to the Defendants’ Response to Civil Claim within 21 days of delivery of the Response to Civil Claim;
- d) The Plaintiff will deliver any reply materials to the certification application on or before December 4, 2024;
- e) Any cross-examination on affidavits, if ordered or agreed to by all parties, will be completed by February 21, 2025; and
- f) The Plaintiff will deliver his written submissions for the certification application on or before March 21, 2025.

[13] The dates in subparagraphs (c) through (f) above were set by agreement of the parties. The Case Plan Order allowed those particular terms to be amended by agreement of the parties.

[14] The Plaintiff filed his certification application and materials on May 3, 2024. Various affidavits were filed in support, including affidavit #1 of Greg McMullen made on January 8, 2024 (the “McMullen Affidavit”).

[15] In a decision dated September 16, 2024 and indexed as 2024 BCSC 1716, I dismissed the Defendants’ application for document production by the Plaintiff and ordered that the Defendants were to deliver their Response to Civil Claim at the same time as their response to the certification application.

[16] A further judicial management conference was held on October 4, 2024. At that conference, the Defendants sought an extension of time limits under the Case Plan Order. The terms of the Case Plan Order were amended as follows:

- a) The Defendants will deliver their responding materials to the certification application and their response to civil claim on or before October 18, 2024; and
- b) The Plaintiff will deliver any reply materials on the certification application on or before December 18, 2024.

[17] On October 18, 2024, the Defendants delivered their Response to Civil Claim, their response to the certification application and several affidavits in support, including an unsworn copy of affidavit #1 of David Monsees (the “Monsees Affidavit”). On October 22 and 23, 2024, the Defendants delivered several further affidavits in support of their response to the certification application, including a sworn version of the Monsees Affidavit. On October 30, 2024, the Defendants delivered a further affidavit in support of their response to the certification application.

[18] On December 11, 2024, the Plaintiff served a notice to admit setting out various requested admissions and attaching 11 documents (“NTA #1”). NTA #1 seeks admissions with respect to regulatory and legal proceedings against Google LLC. It seeks admissions of fact relating to Google LLC’s party status in various proceedings and to various agreements. It also seeks admissions of authenticity with respect to the 11 attached documents, which include foreign judicial decisions, a settlement agreement, consent decrees, and a regulatory report (the “NTA #1 Documents”).

[19] On December 18, 2024, the Plaintiff delivered his reply materials to the certification, including affidavit #1 of Kiran Badesha made on December 17, 2024 (the “Badesha Affidavit”). The NTA #1 Documents are attached to the Badesha Affidavit. Some were also attached to the McMullen Affidavit.)

[20] Also on December 18, 2024, the Plaintiff advised the Defendants that he intended to rely on the Defendants’ response to NTA #1 in support of the certification application.

[21] Finally, by separate letter on December 18, 2024, the Plaintiff wrote the Defendants asserting the response affidavits sworn by employees of the Defendants did not comply with the s. 5(5)(b) of *CPA*. Section 5(5)(b) requires a person filing a certification application or a person served with a certification application and filing an affidavit in response to:

... swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding[.]

[22] As an example of non-compliance with s. 5(5)(b), the Plaintiff noted that the Monsees Affidavit did not attach certain documents that were listed as exhibits in an Arizona proceeding, *State of Arizona, ex rel. Mark Brnovich, Attorney General v. Google, LLC*, No. CV2020-006219, Superior Court of the State of Arizona in and for the County of Maricopa (the “Arizona Proceeding”). The Plaintiff asserted that some of the Arizona Proceeding exhibits contained facts material to the certification

application, yet had not been included in the affidavits sworn by the Defendants' employee in this proceeding.

[23] On December 23, 2024, the Defendants served their response to NTA #1 ("Response #1).

[24] Response #1 featured a preamble stating that the service of NTA #1:

... was improper and ineffective, as it was not part of the procedure and pre-hearing steps that was agreed to or ordered by the court. The Defendants deny the requested admissions in their entirety for that reason. In the alternative, the Defendants further respond to [NTA #1], as reflected in the "Responses" that follow...

[25] Following the preamble, Response #1 separately addresses each request for admission set out in NTA #1. The following examples are illustrative of the individual requests and the form of the Defendants' responses:

1. The document attached as "Schedule A" is an authentic copy of a Memorandum of Opinion, issued by Judge Amit P. Mehta of the United States District Court, District of Columbia, dated August 5, 2024, in Case No. 20-cv-3010 (APM) and Case No. 20-cv-3715 (APM) ("Judgment").

Response: Denied. This is not a proper request for admission. Further, the underlying document attached to the Notice to Admit as Schedule "A" is irrelevant and inadmissible.

2. The Judgment was entered in a proceeding in which Google, LLC was a defendant.

Response: Denied. This is not a proper request for admission. Further, the underlying document on which it is premised is inadmissible and the requested admission is irrelevant.

[26] On January 10, 2025, the Defendants wrote asking the Plaintiff to confirm that he was not contemplating cross-examination on affidavits, noting that "the timeline for achieving that has likely passed." On January 12, 2025, the Plaintiff wrote that he would get back to the Defendants regarding cross-examination and asked whether they would be seeking any cross-examination of the Plaintiff's affiants.

[27] On January 16, 2025, the Plaintiff served a second notice to admit ("NTA #2"). It requests admissions to a number of facts. Generally speaking, the

admissions of fact sought in NTA #2 are related to admissibility (e.g., that the Privacy Commissioner of Canada is a public official; that certain documents were made and kept in the ordinary course of business). NTA #2 also requests admissions of authenticity with respect to 20 attached documents (the “NTA #2 Documents”), consisting of a guideline document created by the Office of the Privacy Commissioner of Canada (the “OPCC Guidelines”), and a notice and 18 documents identified as having been filed in the Arizona Proceeding.

[28] The NTA #2 Documents are attached to the Badesha Affidavit. The Badesha Affidavit attaching the NTA #1 and #2 documents identifies the documents as having been filed in foreign proceedings (including the Arizona Proceeding) and/or as documents publicly available on the internet, identifying the website from which they were obtained.

[29] On January 17, 2025, the Plaintiff wrote advising the Defendants that the only affiant the Plaintiff wished to cross-examine was Mr. Monsees, but that cross-examination of Mr. Monsees might not be necessary if the Defendants would reconsider and admit authenticity under NTA #1 and #2.

[30] On January 30, 2025, the Defendants served a response statement to NTA #2 (“Response #2”). Response #2 followed a similar approach to Response #1. There was a preamble asserting NTA #2 was improper and ineffective. In the alternative, the Defendants denied each factual admission sought and denied each admission of authenticity sought. The Defendants further asserted that the facts for which admissions were sought under NTA #2 were inadmissible, irrelevant, and/or involved legal conclusion, and that the documents for which authenticity admissions were sought were irrelevant and inadmissible.

[31] Also on January 30, 2025, the Defendants wrote the Plaintiff advising that they did not intend to seek cross-examination on affidavits, except by way of cross-application if the Plaintiff applied. The Defendants advised that they did not consent to cross-examination of Mr. Monsees. The Defendants also stated that it was too

late to seek cross-examination in compliance with the Case Plan Order deadline for completion of all cross-examinations (i.e., February 21, 2025).

[32] On February 6, 2025, the Defendants agreed to extend the deadline for the completion of cross-examination under the Case Plan Order until the hearing of the present application.

[33] On February 13, 2025, the Plaintiff filed the present application.

[34] The application was heard on February 28, 2025.

III. Notices to Admit

[35] Notices to admit are governed by Rule 7-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], which reads in part:

Notice to admit

(1) In an action in which a response to civil claim has been filed, a party of record may, by service of a notice to admit in Form 26, request any party of record to admit, for the purposes of the action only, the truth of a fact or the authenticity of a document specified in the notice.

Effect of notice to admit

(2) Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in a notice to admit is deemed to be admitted, for the purposes of the action only, unless, within 14 days after service of the notice to admit, the party receiving the notice to admit serves on the party serving the notice to admit a written statement that

- (a) specifically denies the truth of the fact or the authenticity of the document,
- (b) sets out in detail the reasons why the party cannot make the admission, or
- (c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.

...

Unreasonable refusal to admit

(4) If a responding party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document specified in a notice to admit, the court may order the party to pay the costs of proving the truth of the fact or

the authenticity of the document and may award as a penalty additional costs, or deprive a party of costs, as the court considers appropriate.

...

Application for order on admissions

(6) An application for judgment or any other application may be made to the court using as evidence

(a) admissions of the truth of a fact or the authenticity of a document made

(i) in an affidavit or pleading filed by a party,

(ii) in an examination for discovery of a party or a person examined for discovery on behalf of a party, or

(iii) in response to a notice to admit, or

(b) admissions of the truth of a fact or the authenticity of a document deemed to be made under subrule (2)

and the court, without waiting for the determination of any other question between the parties, may make any order it considers will further the object of these Supreme Court Civil Rules.

IV. Positions

A. Plaintiff

[36] The object of the Rules is to “secure the just, speedy and inexpensive determination of every proceeding on its merits”: Rule 1-3. The Plaintiff asserts that in furtherance of this object, he served the NTAs for the specific purpose of facilitating the determination of the certification application.

[37] The Plaintiff says the Responses provided are meritless and non-responsive and, as such, are scandalous, frivolous, vexatious, or otherwise an abuse of process within the meaning of Rule 9-5(1).

[38] The Plaintiff submits that Rule 7-7 distinguishes between a denial of a fact, which does not require specific reasons, and a refusal or inability to admit a fact, which requires reasons. The Plaintiff contends that although the Responses purport to set out denials, the Court can and should recognize that these denials are, in reality, unsupported refusals to admit.

[39] The Plaintiff says that where there is a refusal or inability to admit, “the question becomes whether the explanation given is sufficient and whether the party took adequate steps to inform themselves before responding”: *Yen v. Ghahramani*, 2023 BCSC 1421 at para. 29. The Plaintiff asserts that the Defendants were obliged to provide reasons for their refusals to admit but instead provided repetitive responses that effectively amount to a “blanket” response. The Plaintiff contends that blanket and perfunctory responses have been found to be inappropriate and a failure to comply with the response requirements under the Rule 7-7.

[40] The Plaintiff submits that because the Responses are non-compliant in the ways set out above, the Responses are frivolous. The Plaintiff also contends that the admissions sought under the NTAs were uncontroversial and that because the Defendants have refused to make “reasonable concessions”, the Responses are scandalous and vexatious.

[41] The Plaintiff submits that Rule 7-7 does not preclude a party from seeking pre-trial remedies with respect to the filing of an improper response to a notice to admit: *Douez v. Facebook, Inc.*, 2023 BCSC 1224 at para. 14. The Plaintiff also submits that the Court has previously, under a pre-trial application, ordered deemed admissions as a remedy: *Luu v. Wang*, 2009 BCSC 860 at paras. 93–97. The Plaintiff asks the Court to strike the Responses as improper and order deemed admissions to have been made as a result.

[42] In the alternative, the Plaintiff argues that this is a case in which it would not be appropriate to merely strike the Responses improper and let the Defendants serve new responses, as was done in *The Whalen Company v. Olympic International Agencies*, 2017 BCSC 1771 [*Whalen*]. The Plaintiff argues that if deemed admissions are not ordered as sought, then the Court should require the Defendants to serve new responses, but additionally grant the Plaintiff leave to conduct cross-examination on the Monsees Affidavit.

[43] As an example of a remedy further to striking having been ordered, the Plaintiff points to *Bene (Oval) Development Ltd. v. 1148538 B.C. Ltd.*, 2020 BCSC

1608 [*Bene*], where the Court struck an improper response to a notice to admit and gave the serving party leave to serve interrogatories addressing the requests under its notice to admit. The Plaintiff seeks cross-examination as a remedy further to striking the Responses, but suggested in argument that the Court might also consider granting leave for interrogatories as an alternative further remedy, as was done in *Bene*.

[44] Further to its alternative submission on remedy, the Plaintiff submitted that the factors that guide the court's discretion in allowing cross-examination on an affidavit, as set out in *Stephens v. Altria Group, Inc.*, 2021 BCCA 396 at paras. 5–10, favour allowing the cross-examination of Mr. Monsees as a further remedial order. (I note, however, that there is no stand-alone application for cross-examination of Mr. Monsees. Cross-examination is specifically sought as a remedy further to an order striking the Responses.)

B. Defendants

[45] The Defendants contend that the Plaintiff's attempt to use notices to admit for the purposes of a class action certification hearing is inappropriate. They assert that compelling a putative class action defendant to make admissions under a notice to admit prior to certification is inconsistent with the burden placed on a putative representative plaintiff under s. 4(1) of the *CPA*.

[46] The Defendants also object to the pre-certification service of notices to admit on the basis that notices to admit are a method of discovery. They point to the fact that Rule 7-7 is found in Part 7 (Procedures for Ascertaining Facts) of the *Rules*, along with, for example, discovery and inspection of documents, examinations for discovery, and interrogatories. The Defendants argue that if the Court finds that notices to admit can be served prior to certification, the availability of notices should be subject to the same or similar restrictions as are placed on other forms of discovery prior to certification. The Defendants say that notices to admit, like pre-certification document discovery, should be of restricted availability and require a party seeking to use them to satisfy the court that their use is warranted in the

circumstances and for purposes of certification: *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 [*Mentor*].

[47] The Defendants also contend that the delivery of the NTAs is inconsistent with the terms of the Case Plan Order. They say that the Case Plan Order does not contemplate the service of NTAs, and that the service of NTAs prior to the certification hearing is foreclosed, by implication, from its omission. They also argue that the Plaintiff's service of the NTAs actively impairs the efficiency of the Case Plan Order and introduces delay into the timeline established by Case Plan Order.

[48] The Defendants also submit that the order for deemed admissions sought by the Plaintiff under this application would be unfairly prejudicial to the Defendants, as their response materials on the certification application are already filed and, accordingly, their opportunity to provide evidence and argument addressing matters touching on the deemed admissions has already passed. The Defendants note that, in contrast, all of the NTA #1 and #2 Documents were available to the Plaintiff prior to the filings of his certification materials, and that the Plaintiff had the opportunity to gather and file, as part of its case, whatever affidavit evidence it wished to in order to authenticate the NTA Documents or establish their admissibility.

[49] In any event, the Defendants say their Responses do comply with Rule 7-7, and thus there are no grounds on which to strike them. While the Responses also set out a number of refusals, as a primary position the Responses deny the truth of each and every fact and the authenticity of each and every document.

[50] The Defendants say that even if the Responses are found to be improper, the only appropriate remedy in the circumstances is an order directing the Defendants to file responses that comply with Rule 7-7.

[51] Finally, the Defendants submit that the Plaintiff's request for an order to cross-examine Mr. Monsees is purely tactical. They submit that the Plaintiff has not established that he meets the criteria for obtaining cross-examination on an affidavit (e.g., that he has failed to identify any conflict on a material fact germane to certification), and the correspondence shows the Plaintiff had no genuine intention of

seeking any cross-examination within the time period set out by the Case Plan Order.

V. Analysis

[52] Broadly speaking, there are two issues for consideration:

- a) Whether the service of the NTAs was proper; and, if so,
- b) whether the Responses are proper.

[53] I find it helpful to consider the Responses first. In this particular case, the propriety of the Responses significantly informs the parties' arguments regarding the propriety of the use of notices to admit.

A. Propriety of the Responses

[54] In *Ceperkovic v. MacDonald*, 2016 BCSC 939, Justice Dillon described the purpose of a notice of admit (omitting citations):

[30] The purposes of the notice to admit are multiple. The primary purpose is to “save both the Court and litigants the time and expense involved in proving the authenticity of documents or in proving facts” ... The rule is intended to eliminate issues altogether from a case or to facilitate proof of issues that cannot be eliminated ... Thus, the notice to admit can isolate important factors from a strategic and cost efficient perspective ... It enables the parties to “prepare for an efficient trial focused on what is disputed” ... The notice to admit obviates the necessity and expense of calling evidence at trial ... Ultimately, it is a means to foster the timely adjudication of a claim on its merits ...

[55] Rule 7-7 distinguishes between a denial of truth or authenticity, for which no reasons need be provided, and a refusal or inability to admit, both of which require reasons: *Yen* at para. 29.

[56] A serving party may apply to strike a response to a notice to admit as improper: *Douez* at para. 14. This was successfully done in *Douez* (in part) and in *Whalen* and *Bene*. In these cases, the responses filed were alleged to be improper in the sense that the responses failed to comply with the requirements of Rule 7-7(2).

[57] In *Douez* and *Whalen*, the responding parties provided reasons for refusing to admit (set out in the response as objections to the requests for admission), and the court adjudicated whether the specific objections made were proper. Neither case involved denials.

[58] In *Douez*, after reviewing the reasons for refusal, Justice Iyer rejected several of the responding party's objections (see paras. 22–34, 37–40), but confirmed the propriety of one objection (paras. 17–21). The responding party was ordered to respond again and either admit or deny the requests for admission for which it had merely provided improper objections.

[59] In *Whalen*, the responding party set out no denials and to chose instead “rely entirely upon the protection by Rule 7-7(2)(c) against what would otherwise result in deemed admissions” (para. 30). In the case Justice Weatherill was able to conclude, on the face of the response statement and pleadings, that there was no basis for the refusals set out (paras. 33–37). Justice Weatherill struck the response as improper, but allowed the responding party to provide a further response (para. 49).

[60] In *Bene*, the responding party set out clear denials in its response statement, but then later wrote the serving party stating that the denials were actually refusals to admit. Associate Justice Harper agreed that that correspondence had effectively transformed the initial denials into refusals to admit (para. 19). Following the transformation, the notice to admit failed to comply with Rule 7-7 as no reasons for refusals were provided (para. 25). She struck the response as frivolous, but declined to deem admissions to have been made, stating that it would be fairer to direct the responding party to provide a further response. However, went on to conclude that in the circumstances of the case, it would be more efficient to give the plaintiff leave to convert the admissions sought into interrogatory questions (paras. 30–31).

[61] The Plaintiff relies on *Bene* for the proposition that the court can assess the reasonableness of a denial and, if it finds the denial to be unreasonable in the circumstances, treat the denial as a refusal to admit for purposes of Rule 7-7. That is not what was done in *Bene*. Associate Justice Harper did not find that there was

anything improper about the original bare denials, nor did she purport to assess whether the initial denials were made “reasonably” in the circumstances. Rather, Associate Justice Harper recognized that the responding party had itself, by its later correspondence, transformed the denials into refusals, rendering the response improper.

[62] The Plaintiff’s reliance on *Luu* as a case in which the Court ordered deemed admissions in response to improper responses is also misplaced. There, the responding party responded with specific denials to some requests for admissions, but failed to respond *in any way* to the requests addressing the authenticity of the documents attached. Justice Pearlman, noting that there was no assertion that the failure to respond to those requests was inadvertent, found that the failure to respond to those specific requests gave rise to deemed admissions regarding authenticity. Justice Pearlman did not order deemed admissions because the responding party had responded improperly. Where there is a complete failure to respond, Rule 7-7(2) operates to deem admissions to have been made.

[63] While the Court undoubtedly has the authority to strike a response statement for failure to comply with Rule 7-7 and decline to permit any further response to be provided, the cases before me suggest that the Court is generally inclined to view that as a draconian measure. I think it fair to observe that such an order is very unlikely to be made absent exceptional circumstances. There are none here.

[64] More importantly, however, in the Responses, the Defendants specifically deny the authenticity of each and every document and the truth of each and every fact for which admissions were sought under the NTAs.¹

[65] The Plaintiff has provided no authority for the proposition that an unequivocal and unqualified bare denial of the truth of a fact or the authenticity of a document is

¹ Subject only to a subsequent email under which the Defendants revised their position by advising that they did not dispute the authenticity of the OPCC Guideline.

anything other than a proper response. To the contrary, as noted by Associate Justice Harper in *Bene*, a denial is all that is required:

[16] The defendant was entitled to respond to the notice to admit by simply invoking “denied” as Rule 7-7(2)(a) permits. The response is not sworn evidence and requires no justification for the position taken. If the position is unreasonable, the only recourse is an award of costs pursuant to Rule 7-7(4).

[66] Here, the Defendants did, after setting out their denials, also set out objections (i.e., relevance, admissibility, calls for legal conclusion) as reasons for refusal in respect to individual requests for admission. Nothing in those additional objections altered or qualified the nature of the denials. The objections set out in the alternative in the Responses here do negate or undermine the Defendants’ denials under Rule 7-7(2)(a). They are true alternative objections.

[67] Finally, while “denied” is repeated throughout the Responses, that repetition does not render them flawed as “blanket” or “perfunctory” responses. Denied means denied. There is no need to resort to a thesaurus to draft a proper response under Rule 7-7(2)(a). Nor does “denied” need any explanation or supporting detail. The function of a denial in a response statement is to clearly convey to the serving party that the burden of proof on the point in question remains as it was prior to service of the notice to admit. A simple “denied” fully discharges that function.

[68] The Defendants have set out proper denials in the Responses under Rule 7-7(2)(a) and the application to strike cannot succeed.

[69] I note that the Plaintiff does take issue with the merit of the alternative objections set out in accordance with Rule 7-7(2)(c). While *Whalen* and *Douez* show that the propriety of some Rule 7-7(2)(c) objections can be determined on an interlocutory application, I am of the view that all of the Rule 7-7(2)(c) objections here are properly left for consideration at the certification hearing and/or trial. For a discussion of the merits of leaving reasons for refusals for consideration in a fuller context: see e.g. *Nouhi v. Pourtagi*, 2021 BCSC 1779 at paras 53–55 (in the context of Rule 7-7(2)(b) refusal).

B. Service of the NTAs

[70] The *Rules* apply to class proceedings to the extent that they are not in conflict with the *CPA*: *CPA*, s. 40. The Defendants have not identified any provision of the *CPA* that conflicts with Rule 7-7.

[71] The Defendants had filed a Response to Civil Claim before the NTAs were served. Thus, the action under the ANOCC met the condition for serving a notice under Rule 7-7(1). Further, Rule 7-7(6) expressly states that a party can rely on an admission (actual or deemed) made pursuant to a notice to admit in respect to an application for judgment or *any* other application.

[72] The Defendants contend that permitting a putative class action plaintiff to service notices to admit under Rule 7-7 prior to certification is inconsistent the allocation of the burden of proof on the plaintiff under s. 4 of the *CPA*: *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 at para. 115, aff'd *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72; *LaSante v. Kirk*, 2023 BCCA 28 at para. 61. However, admissions obtained under a notice of admit are evidence and, as such, may assist the plaintiff in discharging the burden, but do not impact the allocation of the burden.

[73] In my view, there is no conflict for purposes of *CPA*, s. 40.

[74] In the alternative, the Defendants submit that notices to admit are tools of discovery and should, as such, be of restricted availability in putative class actions in the same way that, for example, pre-certification document discovery is restricted.

[75] The British Columbia courts have held that the delay and expense entailed in allowing broad document discovery to occur prior to certification would undermine the objectives of the *CPA*, and have therefore tailored the availability of discovery in a way that reflects the role that certification plays in *CPA* proceedings, and the nature of the burden on the plaintiff at that stage: *Mentor* at para. 35. The result is a set of principles under which pre-certification discovery of documents is only available on a restricted basis. Those principles were outlined in *Mentor*.

[38] The following principles emerge from the British Columbia case law: (1) there is limited scope for document production prior to a certification hearing, (2) any application for pre-certification production must focus on the certification criteria, (3) the onus is on the applicant to show that document production is necessary to inform the court's assessment of the certification criteria, and (4) that onus cannot be discharged by bare assertions that documents may be relevant to the certification criteria—the applicant must be precise in their request and explain how the requested documents will inform the issues on certification. To that I would add that principles of proportionality and fairness to the parties may also be at play. The question of whether production should be ordered is contextual and fact-specific.

[76] I agree with the Defendants that the nature of class proceedings, the role of certification in the class proceeding process, and the objectives of the *CPA* must all be taken into account, along with the objectives of the *Rules* themselves, in considering how Rule 7-7 should operate in the context of class proceedings.

[77] However, I do not accept the Defendants' characterization of notices to admit as primarily tools of discovery. Rather, I agree with the observation of O'Leary, J. (as he then was) in *Canadian Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1994), 168 A.R. 126, 1994 CanLII 9096 (AB KB) [*Southern Petroleum*] at para. 16.

There, he stated:

The Notice to Admit Facts, although I have not been able to find a history of it, is not, in my view, primarily a discovery tool. It is a proof tool. Discovery undoubtedly involves proof of facts, that is developing evidence which can be used to prove facts at trial. That is only one use for discovery, that is oral discovery and discovery of documents. Notices to Admit Facts are not, in my view, primarily designed to discover the truth of matters but, rather, to obviate the necessity and expense of calling evidence at trial. This is, I believe, a traditional view and there is certainly no authority for it.

[78] (Notably, the quote set out above refers specifically to notices to admit as tools of proof *at trial*. I do not read the reference to proof at trial as a qualification on his essential observation that a notice to admit is primarily a tool of proof. In *Andriuk v. Merrill Lynch Canada Inc.*, 2013 ABQB 422, Justice Martin (as she then was) described Justice O'Leary's reference to "proof at trial" as an *obiter* reference: paras. 17–19. I agree with that description.)

[79] Rule 7-7(6) expressly states that admissions made or deemed under notices to admit can be relied upon as proof in *any* application. Allowing admissions made

under a notice to admit to be relied upon as proof in a certification application is entirely consistent with the objectives of the *Rules*.

[80] Like our Rule 7-7, Rule 6.37 of the *Alberta Rules of Court*, Alta Reg. 124/2010, also provides that admissions made pursuant to notices to admit can be relied upon in “applications” generally. In *Andriuk*, Justice Martin commented as follows with regard to that aspect of the Alberta rule:

[21] Rule 6.37(8) expressly states that a Notice to Admit can be used in “applications” as well as “originating applications, summary trial or trial”. “Application” is not a term with a defined meaning but it is used to apply to a variety of proceedings. Parties seek admissions to obviate the need to prove that fact in issue and this has value at various points in the litigation process. While a Notice to Admit may be useful, as noted in *Southern Petroleum*, to crystallize certain facts after discovery and before the trial begins, it is also useful at other times, including the beginning. Among the express purposes of the new rules is the intention to help parties and courts identify the real issues in dispute and to facilitate the quickest means of resolving a claim at the least expense (see rule 1.2(1)(2)). A Notice to Admit advances these purposes and is not, on its face, or by intention limited to proof of evidence at trial.

[Emphasis added.]

[81] I agree with that observation. The Defendants have identified no policy reason why the ability to serve a notice to admit should be restricted or otherwise limited in the context of a class proceeding, either before or after certification. Admissions are efficient.

[82] The reasons given for refusals or inability to admit can be challenged by application under Rule 7-7 and ruled proper or improper, although the court may instead conclude that this assessment should be left for consideration in a fuller context at a later point in the litigation process. Where improper reasons are given with respect to a refusal or inability to admit, the court may direct further response, as was done in *Whalen*, or another procedure, as was done in *Bene*. Where denials are properly set out, the responding party exposes themselves to cost consequences, and the litigation otherwise proceeds.

[83] All of those steps are directed at improving efficiency and none of those steps are incompatible with either the certification hearing process or the subsequent trial of any action. (Notably, *Douez* involved the trial of a certified class action.)

[84] *Andriuk* was a putative class action. (Notably, unlike Rule 7-7, Alberta's Rule 6.37(8) allows a notice to admit to be filed prior to a defendant's filing a statement of defence.) In *Andriuk*, a notice to admit was served not only prior to certification, but prior to the filing of a statement of defence. The defendant applied to have the notice to admit struck. Justice Martin similarly concluded that the use of notices of admit under the Alberta Rules was fully compatible with a class action proceeding:

[24] There is no therefore no reason to set aside this Notice to Admit. Does the fact that this action is taken pursuant to the *C.P.A.* change this conclusion? In my view it does not. The *C.P.A.* provides that the Rules of Court continue to apply in s.41(1). Certification is an "application" and while it is not merits based, some evidentiary foundation is required for at least four of the five statutory criteria. *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, 2001 CarswellOnt 3577, *Windsor v. Canadian Pacific Railway* 2006 ABQB 348 (CanLII), [2006] 8 W.W.R. 672, 60 Alta. L.R. 56.

[25] Even if none of the 61 matters in the Notice to Admit are relevant to either application [i.e., an application by the defendant to remove plaintiff's counsel due to conflict of interest and the plaintiff's application for certification], which is not the case, rule 6.37 is sufficiently wide to allow a party to seek admissions to be used at trial even before a statement of defence has been filed. There is no reason why such an approach should not apply to an action filed under the *C.P.A.*, especially since, if certification fails, the matter will proceed as an individual action. There is also no basis on which to defer the response to the Notice to Admit until after the certification application.

[85] This same conclusion follows on consideration of the *CPA* and the *Rules*.

[86] Finally, given the findings above, I find that serving the NTAs was neither contrary to nor inconsistent with the terms of the Case Plan Order.

[87] The Case Plan Order specifically included terms setting timelines with respect to the defendant's intended document production application, as well as a deadline for completing any cross-examination on affidavits related to the certification application. Those timelines set mileposts for moving the certification application toward its hearing date. Those matters were specifically addressed by the Case Plan Order because they are time-consuming steps and guardrails are warranted to

ensure the certification hearing is able to proceed on the set dates. It is primarily the time-consuming and inter-related nature of those steps, and the related risk of delays, that warrants their inclusion in the Case Plan Order.

[88] The fact that the Case Plan Order did not address notices to admit does not, by implication, mean that that the Case Plan Order prohibited service of notices to admit. The service of notices to admit and corresponding filing of response statements under Rule 7-7 can run concurrently with the Case Plan Order timeline without causing any delay. The concurrent use of Rule 7-7 has, in fact, the potential to introduce efficiencies.

[89] Finally, given that denials are proper responses in accordance with Rule 7-7(2)(a), there is no merit to the Defendants' assertion that the timing of the service of the NTAs was in any way prejudicial to them.

VI. Disposition

[90] The Responses set out denials that accord with Rule 7-7(2)(a). The Responses, accordingly, are responses that comply with Rule 7-7.

[91] The application to strike the Responses as improper is dismissed.

[92] There is no need to address the cross-examination of Mr. Monsees as a remedy further to a striking of the Responses. I pause to note, however, that in my view there are issues as to whether it would be an appropriate further remedy in any event.

[93] The Defendants are entitled to the costs of the present application as costs in the cause.

“Tucker J.”