Federal Court  Cour fédérale

Date: 20230119

Docket: T-1355-21

Citation: 2023 FC 81

Ottawa, Ontario, January 19, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

LUC BESSETTE

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND MINISTRY OF HEALTH OF BRITISH COLUMBIA

Defendants

ORDER AND REASONS

I. Overview

[1] The Defendants, who I will refer to as "British Columbia," appeal the September 23, 2022, order of Associate Judge Tabib, sitting as Case Management Judge [CMJ], refusing to bifurcate this patent proceeding. For the reasons given below, I conclude CMJ Tabib did not err in law and did not make an overriding and palpable error either in applying that law to

the evidence before her or in exercising her discretion not to grant bifurcation. The appeal is therefore dismissed.

II. Issues and Standards of Review

[2] British Columbia's arguments on this appeal raise the following primary issues:

A. Did the CMJ apply the wrong legal test by requiring British Columbia to file quantitative evidence of time and cost savings that would arise from bifurcation?

B. Did the CMJ err by misapprehending or ignoring relevant evidence of the benefits of bifurcation?

[3] The appellate standards of review apply to this Court's review of an associate judge's decision: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 2, 66–79, citing *Housen v Nikolaisen*, 2002 SCC 33. Questions of law, including those extricable from findings of mixed fact and law, are reviewed on the correctness standard. Questions of fact and questions of mixed fact and law with no extricable question of law are reviewed on the palpable and overriding error standard: *Hospira* at para 66, citing *Housen* at paras 19–37; *Bauer v Canada*, 2021 FCA 198 at para 11. These same standards apply to discretionary decisions, despite the Supreme Court of Canada having used somewhat different, but equivalent, language in describing the standard of review of such decisions: *Hospira* at paras 67–79, citing *Imperial Manufacturing Group Inc v Decor Grates Incorporated*, 2015 FCA 100 at paras 25–27, 29 and *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 95.

[4] Importantly, the Court's role on appeal is not to determine whether it would exercise its discretion in respect of bifurcation in the same or a different way as the CMJ. It is simply to assess whether the CMJ erred in law or made a palpable and overriding error of fact or mixed fact and law in exercising her discretion.

III. Analysis

A. *The CMJ did not apply the wrong legal test*

(1) Context of the bifurcation motion

[5] This is a patent infringement action. Dr. Luc Bessette asserts that British Columbia's electronic health records system, known as CareConnect, and its underlying infrastructure infringe two of his patents pertaining to the electronic management of health records. Dr. Bessette brought an earlier proceeding in this Court against the Attorney General of Quebec and the Régie de l'assurance maladie du Québec (Court File No T-975-16) in respect of the same two patents. On consent, that proceeding was bifurcated such that discovery and trial of liability issues (notably whether the patents were valid and infringed) were conducted before the quantification of damages was addressed. After trial of the liability portion, Justice LeBlanc, then of this Court, allowed Dr. Bessette's action in part, finding claims in the two patents to be valid and infringed: *Bessette v Quebec (Attorney General)*, 2019 FC 393 at paras 546, 551. An appeal and the subsequent quantification portion of the trial were later settled in February 2021.

[6] This action was commenced in August 2021. As a result of a stay on consent to allow British Columbia to review the matter and explore potential resolution, pleadings closed in

April 2022. British Columbia raised its intention to seek bifurcation of the proceeding in July 2022 and filed its motion in August 2022.

[7] In support of its request to bifurcate, British Columbia filed affidavits from Wade Bailey, an Enterprise Architect under Digital Health at the British Columbia Provincial Health Services Authority; Dr. Christine S. Meyer, an economist experienced in the evaluation of damages in intellectual property matters; and Amy L. Jobson, a paralegal with counsel for British Columbia. Mr. Bailey and Dr. Meyer were cross-examined on their affidavits.

[8] The core of British Columbia's motion was that the liability and quantification issues in this action are particularly complex given the number of patent claims at issue and the architecture of its electronic health records system. CareConnect interacts with 20 to 25 different provincial and regional systems, and communicates with them in different ways and in respect of various types of health records. It has also undergone a number of software changes over time. Dr. Bessette asserts a total of 42 claims of the two patents, which have different expiry dates, while the pleadings also raise issues with respect to the applicable limitation period. British Columbia argues that all of these factors mean that multiple potential liability findings might be made, both substantively and temporally. This might include, for example, findings that some aspects of the system infringe while others do not. British Columbia argued that bifurcation would save time and costs for the parties and the Court, as it would allow the quantification of damages to be directed only to the Court's actual liability findings, rather than having to address all of the possible liability scenarios that might be the result of trial.

[9] Dr. Bessette resisted British Columbia's motion and provided his own affidavit in response. Dr. Bessette's objection to bifurcation was based primarily on the time and cost associated with getting to an ultimate judgment. His concerns were based in part on his experience in the litigation involving Quebec, which was ultimately settled almost two years after judgment on the liability phase. Dr. Bessette noted that unlike British Columbia, he did not [TRANSLATION] "necessarily have the luxury of time," given that he was 67 years of age. Dr. Bessette was also cross-examined.

(2) The CMJ's decision dismissing the bifurcation motion

[10] CMJ Tabib heard British Columbia's bifurcation motion on September 22, 2022, and dismissed it for reasons given from the bench. A written order was issued the following day, setting out the reasons given at the hearing, edited for syntax and ease of understanding.

[11] As the CMJ noted, the parties did not dispute that the applicable law required the moving party to establish to the Court's satisfaction "that bifurcation would more likely than not lead to [the] just, expeditious and least expensive determination of the issues, whatever the outcome on liability." She found that British Columbia had "not come close" to meeting this test.

[12] The CMJ was not satisfied that the evidence put forward by British Columbia showed that bifurcation (a) would lead to an earlier trial on liability, meaning that the complete resolution of the matter would be extended by at least 18 months if Dr. Bessette succeeded on liability; (b) would likely shorten the time needed to conduct discoveries on quantification issues; or (c) would yield a substantial savings in the preparation of expert reports on quantification or trial

time spent on that issue so as to outweigh the "inherent inefficiencies of bifurcation." In reaching her conclusion that British Columbia had not shown that bifurcation was warranted, the CMJ found Dr. Meyer's opinion to be "entirely theoretical," as it was based on unjustified assumptions about the calculation of a reasonable royalty and the existence of non-infringing alternatives.

(3) The CMJ's reasons show no error of law on the applicable test

[13] Motions to bifurcate proceedings are brought pursuant to Rule 107 of the *Federal Courts Rules*, SOR/98-106, which allows the Court to "at any time, order the trial of an issue or that issues in a proceeding be determined separately." The general approach to such motions has not changed since it was formulated in *Illva Saronno SpA v Privilegiata Fabbrica Maraschino "Excelsior"*, [1999] 1 FC 146 (TD). Referring to the general principle enunciated in Rule 3 of the *Federal Courts Rules*, Justice Evans, then of this Court, described the approach as follows:

> On a motion under rule 107, the Court may order the postponement of discovery and the determination of remedial issues until after discovery and trial of the question of liability, if the Court is satisfied on the balance of probabilities that in the light of the evidence and all the circumstances of the case (including the nature of the claim, the conduct of the litigation, the issues and the remedies sought), severance is more likely than not to result in the just, expeditious and least expensive determination of the proceeding on its merits.
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> [Emphasis added; *Illva Saronno* at para 14.]

[14] This approach, which reflects the general principle in Rule 3, has been adopted on numerous occasions by this Court and has been approved by the Federal Court of Appeal: see *e.g.*, *Value Village Market (1990) Ltd v Value Village Stores Co*, 1999 CanLII 8906 (FC) at

para 5; *Apotex Inc v Bristol-Myers Squibb Co*, 2003 FCA 263 at paras 3, 7, 10; *South Yukon Forest Corp v Canada*, 2005 FC 670 at para 4; *Wi-Lan Inc v Apple Canada Inc*, 2022 FC 276 at para 4. While Rule 3 has recently been amended to refer to the least expensive "outcome" rather than "determination" and to make express reference to the principle of proportionality, this does not fundamentally affect the overall approach to bifurcation motions.

[15] As Dr. Bessette notes, bifurcation of an action represents a departure from the "basic right of a litigant to have all issues in dispute resolved in one trial": *Apotex* at para 7, citing *Elcano Acceptance Ltd v Richmond, Richmond, Stambler, Mills*, 1986 CanLII 2591 (ON CA); *Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5 at para 17; *T-Rex Property AB v Pattison Outdoor Advertising Limited Partnership*, 2019 FC 1004 at para 18. The default process for actions under the *Federal Courts Rules* is that all issues are heard and determined together in a single trial: *Federal Courts Rules*, Part 4. Avoiding multiple discoveries, trials, and appeals means that it will "normally be more efficient to require all the issues in a proceeding be determined together rather than separately": *Illva Saronno* at para 15; *Value Village* at para 6.

[16] At the same time, the *Federal Courts Rules* provide for flexibility in the appropriate case, through processes such as the pre-trial determination of issues, severance, or bifurcation: *Federal Courts Rules*, Rules 106–107, 213–215, 220: *Realsearch* at para 12. The "basic right" is thus qualified by the Rules and the Court's ability to control its processes to promote just, timely, and affordable access to justice: *Farmobile, LLC v Farmers Edge Inc*, 2022 FC 22 at para 112, citing *Tracbeam, LLC v Bell Mobility Inc*, [2019] FCJ No 1615 at paras 16–18, in turn citing *Hryniak v Mauldin*, 2014 SCC 76 at para 2. Nonetheless, as bifurcation remains a departure from the

default of a single trial of all issues, the onus is on the moving party to justify this departure: *Apotex* at para 7.

[17] As British Columbia submits, bifurcation is reasonably common in complex patent litigation, to the extent that counsel often consent to a bifurcation order: see *Apotex* at paras 8–9. Indeed, in some cases trial judges may find that a case should have been bifurcated when it was not: *Paid Search Engine Tools, LLC v Google Canada Corporation*, 2022 FC 519 at paras 25–27. However, this does not change the fact that the inquiry on a bifurcation motion is specific to the particular litigation before the Court, and depends on the evidence put forward with respect to the circumstances of that litigation: see *Realsearch* at para 17.

[18] British Columbia does not challenge the CMJ's restatement of the ultimate question on a bifurcation motion, set out at paragraph [11] above. Rather, it argues that the CMJ erroneously elevated the standard of proof in reaching the conclusion that they had not satisfied their onus, by effectively requiring *quantitative* evidence of the specific savings that would be achieved through bifurcation and not simply *qualitative* evidence showing that savings would be achieved. British Columbia points to the final paragraph of CMJ Tabib's reasons, which reads as follows:

> Finally, even assuming that quantification issues were in fact narrowed and simplified by bifurcation and that there would be no wasteful overlap, it is impossible to fathom from the record the magnitude of the potential savings; even the Defendants concede that. Saving a few days of trial, and even as much as $100,000$ in expert costs would not outweigh the inherent inefficiencies and costs of a bifurcated proceeding. It is not enough to show that trying liability first would lead to some narrowing of the issues and some saving of time. If that were the case, every action would be bifurcated. The savings must be substantial and must outweigh the inherent inefficiencies of bifurcation. This, the Defendants have not shown.

[Emphasis added.]

[19] British Columbia argues the CMJ's decision effectively and erroneously requires a party seeking bifurcation to quantify the particular amount of savings that would be achieved, which it says is essentially impossible at the early stages of litigation at which a bifurcation motion is most common and most beneficial.

[20] I cannot agree, for two reasons. First, I do not read the CMJ's reasons as imposing any particular criteria for the evidence that must invariably be presented on a bifurcation motion. The circumstances of each litigation, and the factors speaking in favour of or against bifurcation in a given case, are necessarily different in each case. The evidence sufficient to satisfy the Court that it should exercise its discretion to order bifurcation may therefore be different from one case to the next. The CMJ was providing her assessment in the context of the evidence presented in this case, which she found insufficient to warrant bifurcation.

[21] Second, there is nothing in the CMJ's reasons that suggest she understood it to be a requirement that a party, or British Columbia in particular, present specific quantitative evidence of the precise amount of savings that would be achieved. Rather, she noted that the record did not give any indication of the "magnitude" of the savings to allow the Court to assess whether those savings were enough to "outweigh the inherent inefficiencies of bifurcation." I see no error in this approach.

[22] Where, as here, the primary benefit alleged to arise from bifurcation is in the form of timing or cost efficiencies or savings, it is incumbent on the moving party to satisfy the Court

that those expected efficiencies or savings are sufficient to justify bifurcating the proceeding. This Court has described the relevant factor as "whether there will be a substantial saving of costs" [emphasis added], although the timing of those costs may also be relevant: *T-Rex* at paras 19, 30.

[23] As a result, and as the CMJ pointed out, it is not enough for a party seeking a bifurcation order to simply show that *some* efficiencies or savings may or will be realized. Any such efficiencies or savings must be sufficient to justify the requested bifurcation order in the circumstances of the case, when considered with all other relevant factors, including the inefficiencies of multiple trials and a litigant's basic, if qualified, right to a single trial.

[24] As the CMJ's reasons highlight, it is difficult for the Court to assess whether alleged efficiencies or savings in time or cost are sufficient to justify bifurcation without at least some sense of the magnitude of those savings. Contrary to British Columbia's suggestion, this is not new or a departure from prior jurisprudence. In *Realsearch*, the Court of Appeal noted that the defendants' supporting affidavit provided no evidence specific to the litigation regarding the expected length of discoveries or trial, such that there was "uncertainty as to the extent to which the duration of discoveries and trial will be reduced by the rule 107 order" [emphasis added]: *Realsearch* at para 17.

[25] Similarly, in *Value Village*, Justice Reed noted that the issue was not just whether there would be an overall savings in cost and time but "the extent to which" such savings would result from bifurcation, finding in that case that damages issues would not "appreciably" lengthen the

discovery process: *Value Village* at paras 9–12. In *Illva Saronno*, Justice Evans considered estimates of the number of days of discovery and the potential trial time, ultimately finding that the defendants had not met their burden: *Illva Saronno* at paras 16–20.

[26] This is not to say that a moving party's evidence must precisely or exactly quantify the anticipated savings in time or cost. As British Columbia fairly notes, it may be difficult to do so early in the course of litigation. However, this difficulty does not mean that the moving party is relieved of its burden to demonstrate that the expected efficiencies are sufficient to justify the requested bifurcation order in the particular case. This may involve a degree of estimation or extrapolation from experience. As Dr. Bessette suggests, it might involve evidence based on initial efforts to approximate the anticipated scope of documentary production and or length of discovery. It might involve estimates of savings in expert fees, the amount of time or resources a party will have to dedicate to documentary discovery, or the anticipated length of trial time dedicated to different issues. As set out above, the evidence may be different in different cases, and the motions judge will apply their experience and judgment in assessing whether that evidence satisfies them that bifurcation is more likely than not to lead to the just, expeditious, and least expensive outcome of the proceeding.

[27] I therefore conclude that no error of law arises from the CMJ's concerns that the record did not show the "magnitude of the potential savings" and that the moving party must show that the savings are substantial enough to outweigh the inherent inefficiencies of bifurcation. Rather, these concerns are consistent with the jurisprudence on bifurcation motions. Nor do I take the CMJ's references to a "few days of trial" and "even as much as $100,000$ in expert costs" to set

out any precise standard of requisite costs savings or require that a party put a specific time or dollar figure on the anticipated savings. The weighing and balancing process on a bifurcation motion is not so mathematical. Rather, I read these references simply to be examples given by the CMJ to illustrate the broader point that any costs savings must be shown to outweigh other cost inefficiencies.

[28] Having correctly stated the approach to bifurcation motions, the CMJ's reasons do not show that she applied any different or incorrect test in her evaluation of British Columbia's bifurcation motion.

B. *The CMJ did not ignore or misapprehend the evidence*

[29] British Columbia further argues the CMJ ignored or misapprehended relevant aspects of its qualitative evidence regarding the time and cost savings of bifurcation. In particular, it challenges the CMJ's statements that there was "no evidence" to establish that bifurcation would likely shorten the time to conduct discoveries on quantification, and that the expert opinion of Dr. Meyer was "entirely theoretical." It argues the CMJ did not direct herself to key elements of the evidence before her, notably Mr. Bailey's affidavit, the pleadings, Dr. Bessette's statements on cross-examination, and a damages evaluation report Dr. Bessette relied on in the context of resolving the damages component of the earlier litigation involving Quebec [the PwC report]. Having considered British Columbia's arguments, I am not satisfied the CMJ made a palpable and overriding error, or any extricable error of law, in her assessment of the evidence.

(1) Evidence of reduction in discovery on quantification issues

[30] The CMJ found there was "no evidence on record that establishes that bifurcation would likely shorten the time needed to conduct discoveries on quantification issues." British Columbia submits this is a palpable and overriding error, arguing there was evidence on the record showing that discovery on quantification issues would be shortened. For the following reasons, I am not persuaded British Columbia has established that the CMJ's "no evidence" statement was in error.

[31] I note at the outset that the CMJ's statement appears consistent with British Columbia's own arguments made to the CMJ at the hearing of the motion. Based on the transcript of those arguments, filed in the record on this appeal, British Columbia did not point to any evidence showing there would be any material reduction in discovery on quantification issues. To the contrary, British Columbia made the following submission:

> And I want to emphasize that this is less about particular numbers of days of discovery, particular numbers of days of trial time. Surely there will be an [e]ffect on those if we have a bifurcation proceeding, but discoveries are not scheduled. We don't have deadlines for subsequent steps in a case. We don't have a trial date. It's very difficult to predict with certainty whether it would be one, or two, or six, any particular number more or less.
>
> What we're really focused on here is the extent of the expert case, the complexity of the scenario modelling that needs to happen, the amount of effectively guess work the experts would need to do in a non-bifurcated proceeding because of the multiplicity of liability scenarios that[] everybody's done with pleadings. And there will be follow on effects for the length of the trial and for the other steps of the proceeding.
>
> [Emphasis added.]

[32] Later in the hearing, British Columbia made submissions that discovery on quantification would be reduced by bifurcation because it could focus only on the benefit derived from aspects of the system found to infringe. However, it again pointed to no particular evidence speaking to either the nature of the facts that would go to quantification of the benefit—as opposed to the existence of the benefit or technical elements of the system, which would be covered in the liability portion of the proceeding in any event—or to the resulting reduction in discovery time related to quantification.

[33] British Columbia now argues that there was evidence that shows there would be a reduction in discovery time on quantification issues, and that the CMJ erred in not referring to it. It points to Dr. Bessette's Statement of Claim, which seeks damages for infringement arising from various aspects of the CareConnect system. It notes that Dr. Bessette claims a reasonable royalty for infringement based on the "quantitative and qualitative benefits resulting from the use of the Inventions by the Government of British Columbia." The Statement of Claim says these benefits were estimated in a report prepared by Booz Allen Hamilton, which identified benefits from different aspects of the system, including those related to reducing adverse drug events, and reducing unnecessary radiologic and laboratory tests. British Columbia argues Mr. Bailey's affidavit regarding the multiple components of CareConnect and Dr. Meyer's evidence regarding the nature of the reasonable royalty calculation support its argument that bifurcation would reduce the length of discovery by limiting it to the particular elements of CareConnect, and the particular time frames, if any, found to infringe Dr. Bessette's patents.

[34] The difficulty with this submission is that none of the evidence British Columbia points to speaks directly to any expectations regarding the length of necessary examinations for discovery on damages quantification, nor how those examinations would be shortened through bifurcation. The evidence also does not speak to the expected volume of documentary productions in different scenarios. Mr. Bailey provides information regarding CareConnect, its infrastructure and architecture, and its changes over time. Many of these issues will no doubt have to be addressed by the parties and the Court in addressing infringement. However, Mr. Bailey's affidavit provides no evidence about what information or documents British Columbia has in its possession, power, or control that are relevant to the quantification of any benefit arising from use of CareConnect or, more particularly, aspects of CareConnect alleged to infringe Dr. Bessette's patents.

[35] Nor does Dr. Meyer's affidavit speak directly to the question of discovery or the differences in the amount of discovery that would be necessary on quantification issues. Not surprisingly, given her area of expertise, Dr. Meyer's affidavit speaks to the process of evaluating reasonable royalty damages, based on a hypothetical negotiation for a license to the patents. She notes that one of the things that would be considered in that context would be "the expected benefits, if any, to the Defendants resulting from the licensing," including various reduced costs, and the availability of other technology. However, she does not speak to whether, or the extent to which, discovery on those issues might be shortened if quantification were postponed until after a trial on liability.

[36] In essence, British Columbia asks the Court to extrapolate from the complexity of CareConnect's architecture and the list of issues relevant to license negotiations to a conclusion that there would be a reduction in the amount of discovery necessary on quantification issues if the outcome on liability were already known. It may be that a degree of inference or extrapolation is possible in the appropriate case based on the Court's experience regarding discoveries. However, the CMJ's "no evidence" statement is precisely qualified. She did not say that there was no evidence from which some conclusions about discovery might be drawn. She said there was "no evidence on record that establishes that bifurcation would likely shorten the time needed to conduct discoveries on quantification issues." I cannot conclude based on the evidence on the record that the CMJ erred in saying so. Nor can I conclude in the circumstances that the CMJ erred in not drawing any extrapolated inferences about savings in discovery from the evidence, particularly in light of British Columbia's submissions.

[37] I also find unpersuasive British Columbia's reliance on the Booz Allen Hamilton report referred to in the pleadings, and on the PwC report prepared in the context of negotiations with Quebec. Again, beyond the general question of the potential complexity of quantification, neither report speaks to, either directly or indirectly, the extent of discovery that would be needed in respect of quantification in this action, or how that would be affected by bifurcation. Notably, British Columbia made no mention of either report in its submissions to the CMJ. Indeed, British Columbia went so far as to argue that Dr. Bessette's work to date on quantification in British Columbia was "essentially recycled from the previous Quebec proceeding, a proceeding which involved a completely different system, different parties, different kind of hearing, it's an entirely different context." Having expressly sought to minimize the relevance of quantification

evidence arising from the Quebec proceeding in arguments before the CMJ, it is surprising that British Columbia now suggests that the CMJ erred in not referring to that evidence.

(2) Dr. Meyer's evidence

[38] British Columbia argues the CMJ misapprehended the expert evidence of Dr. Meyer, and erred in describing it as "entirely theoretical." British Columbia argues that Dr. Meyer's opinion was based on the pleadings, the patents, and Mr. Bailey's affidavit, and it was therefore not "entirely theoretical."

[39] While I am not persuaded that the CMJ made any palpable and overriding error, or any extricable error of law, in her assessment of Dr. Meyer's evidence, I need not address British Columbia's arguments on these issues in detail, given the CMJ's subsequent conclusion regarding the extent of any demonstrated efficiencies.

[40] As set out in paragraph [17] above, after discussing Dr. Meyer's evidence, the CMJ went on to find that "even assuming that quantification issues were in fact narrowed and simplified by bifurcation" [emphasis added], the record did not show the magnitude of any such savings so as to justify bifurcation. In my view, this conclusion shows no error.

[41] Even taking Dr. Meyer's evidence at face value, it gives no sense of the extent to which the time or cost of preparing and presenting expert evidence would be reduced. This is notable, given that Dr. Meyer states that her mandate was to "offer opinions, based on the pleadings, about the likely scope of work for determining a reasonable royalty in this action" [emphasis

added] in each of two scenarios, namely with or without bifurcation. Despite this mandate, the amount of information available to Dr. Meyer only allowed her to provide general statements such as that "the scope of work would increase with the number of potential liability scenarios considered" and that determining a reasonable royalty without a prior finding of liability "is likely to be a cumbersome exercise." Dr. Meyer notes that the number of claims at issue, the number of components of CareConnect alleged to infringe, and the various potentially relevant dates mean there could be many different liability scenarios. She states that each additional scenario "results in an incremental increase in the time required for analysis and drafting of reports." However, she is unable to give any sense of the extent of this increase, simply noting that the amount of additional time required for each scenario will vary.

[42] Such broad and general evidence is aptly summarized by the CMJ as giving no sense of the magnitude of anticipated savings in time or cost that would allow the Court to assess whether bifurcation is justified. Regardless of whether Dr. Meyer's evidence is considered "theoretical" or not, there is no palpable and overriding error in the CMJ's assessment that it does not establish that bifurcation would yield enough time or cost benefits in expert evidence on quantification to outweigh the inefficiencies of a single trial or justify a departure from the single trial default.

IV. Conclusion

[43] To succeed on a motion for bifurcation, the moving party must satisfy the Court, based on evidence relevant to the particular proceeding, that the circumstances justify a departure from the usual procedure that all issues are determined in a single trial since bifurcation is more likely than not to lead to the just, expeditious, and least expensive outcome of the proceeding. Where

the primary advantage advocated by the moving party is a saving in time and cost, the evidence must show that such savings are likely to be sufficient to outweigh the disadvantages of conducting separate proceedings. In exercising her discretion to decline to bifurcate the proceeding, the CMJ set out and applied the correct approach to bifurcation motions, and made no palpable and overriding error in her assessment of the evidence. There is no basis for the Court to interfere with that exercise of discretion and the appeal is therefore dismissed.

[44] The parties agree that costs of the appeal should be fixed and awarded to the successful party. Dr. Bessette proposed that those costs be fixed at $3,500, while British Columbia proposed that they be fixed at $2,500. Based on my assessment of the nature of the appeal, the complexity of the issues, and the nature of the work involved, costs will be fixed at $3,000.

ORDER IN T-1355-21

THIS COURT ORDERS that

1. The appeal is dismissed.

2. Costs are awarded in favour of the plaintiff in the inclusive amount of $3,000, payable forthwith.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1355-21
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