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VANCOUVER  
SUPREME COURT SCHEDULING

No. VLC-S-S-112003  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

MARY WATSON

PLAINTIFF

**AND:**

BANK OF AMERICA CORPORATION, BMO FINANCIAL GROUP, BANK OF NOVA SCOTIA, CANADIAN IMPERIAL BANK OF COMMERCE, CAPITAL ONE FINANCIAL CORPORATION, CITIGROUP INC., FÉDÉRATION DES CAISSES DESJARDINS DU QUÉBEC, MASTERCARD INTERNATIONAL INCORPORATED, NATIONAL BANK OF CANADA INC., ROYAL BANK OF CANADA, TORONTO-DOMINION BANK, AND VISA CANADA CORPORATION

DEFENDANTS

**SUBMISSIONS OF THE PLAINTIFF  
(Timing of Defendants' Motion to Strike)**

**INTRODUCTION**

1. This action is a proposed class action which was commenced by the plaintiff filing a Notice of Civil Claim on March 28, 2011, on her behalf, and on behalf of proposed classes described as follows:
  - a. All British Columbia resident persons who, during some or all of the period commencing March 28, 2001 and continuing through to the present (the "Class Period"), accepted payments for the supply of goods or services by way of Visa credit cards pursuant to the terms of merchant agreements (the "Visa Class") and
  - b. All British Columbia resident persons who, during some or all of the Class Period, accepted payments for the supply of goods or services by way of MasterCard credit cards pursuant to the terms of merchant agreements (the "MasterCard Class").
2. As this is a proposed class action, it was assigned to the Chief Justice for management.
3. A First Case Planning Conference was held on October 21, 2011. In preparation for the First Case Planning Conference, the plaintiff delivered to the defendants an agenda which included, among other things, a proposed

timeline for the hearing of the plaintiff's certification application (the "Certification Motion") and for exchange of certification material.

4. At the First Case Planning Conference, the defendants indicated they wished to bring certain motions to strike. On December 8, 2011, the defendants delivered an unfiled and joint Notice of Application seeking to strike the plaintiff's Notice of Civil Claim (the "Strike Motion").
5. The plaintiff submits that the Strike Motion should be heard concurrently with the Certification Motion, for the following reasons, each of which is discussed in greater detail below:
  - a. the structure of the *Class Proceedings Act* expresses a "clear indication" that certification is the first motion heard;
  - b. the Strike Motion is in the nature of a cause of action attack, which is precisely what must be considered at the Certification Motion pursuant to s 4(1)(a) of the *Class Proceedings Act*;
  - c. access to justice and judicial efficiency imperatives favour hearing the Certification Motion first;
  - d. the Strike Motion, even if successful, will not dispose of the entirety of the Plaintiff's claims;
  - e. hearing the Strike Motion first raises the potential for multiple appeals and for "litigation by instalments" in a manner that has been expressly rejected in earlier decisions;
  - f. the Strike Motion does not have merit;
  - g. hearing the Certification Motion first will not materially prejudice the defendants, but hearing the Strike Motion first will substantially prejudice plaintiff and the absent class members; and
  - h. hearing the Strike Motion first creates significant costs exposure, which is contrary to the express language and underlying purposes of the *Class Proceedings Act*.
  - i. the pre-certification costs threat.

## **GENERAL PRINCIPLES**

6. The class proceedings statutes of the common law provinces contain essentially identical provisions mandating that, absent leave to the contrary, the certification application should be brought within certain established timelines. In Ontario and in British Columbia, this timeline consists of 90 days

from the date the statement of defence or reply has or should have been filed, whichever is later.

*BC Class Proceedings Act*, RSBC 1996, c 50 (the "BC CPA"), s 2(3).

*Ontario Class Proceedings Act*, SO 1992, c 6, s 2(3).

7. Based on these provisions, Courts have repeatedly ruled that in a class action, the certification motion should usually be the first motion heard.
8. The British Columbia Supreme Court has confirmed and adopted the approach taken in many Ontario cases. For example, in *Kwicksutaineuk/Ah-Kwa Mish First Nation v British Columbia (Agriculture and Lands)* the Court stated:

As a general rule, the certification motion ought to be the first procedural matter to be heard and determined in an intended class proceeding: *Attis v. Canada (Minister of Health)*, (2005) 75 O.R. (3d) 302 at para. 7 (S.C.J.); *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (S.C.J.); *Gay v. Regional Health Authority* 7, 2009 NBQB 101 at para. 13, 343 N.B.R. (2d) 331. This rule is premised in part on the basis that the brief 90 day period for bringing a certification application in class proceedings legislation is indicative of a legislative intent that certification precede other preliminary motions. This legislative intent underpins section 2(3) of the CPA: *Consumer's Association et al v Coca-Cola Bottling Company et al*, 2005 BCSC 1042 at paras 67-68, 46 BCLR (4<sup>th</sup>) 137.

*Kwicksutaineuk/Ah-Kwa Mish First Nation v British Columbia (Agriculture and Lands)*, 2009 BCSC 1593 at para 59.

9. The Ontario jurisprudence is as follows:
  - a. In *Baxter v Canada*, Justice Winkler, as he then was, wrote:

Although the CPA does not expressly require the certification motion to be the first order of business, the 90 day time-frame imposed by section 2(3) provides a clear indication that the certification motion should be heard promptly and normally be given priority over other motions.

*Baxter v Canada*, [2005] OJ No 2165 (SCJ) at para 9.

- b. In *Attis v Canada*, Justice Winkler, as he then was, wrote:

As a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined. This may be inferred from s. 2(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) which provides that a certification motion shall be made within 90 days after the last statement of defence, except with leave of the Court. While this time limit is more often observed in the breach in that it is rarely achieved in practice, it does serve to emphasize the rationale for an early determination of certification because of the ramifications of the CPA to the proceeding, not the least of which is the binding effect on the class members of the determination of the common issues in a common issues trial.

*Attis v Canada*, [2005] OJ No 1337 (SCJ) at para 7.

10. Justice Nordheimer applied the same reasoning in *Moyes v Fortune Financial* when he ruled that certification should precede a summary judgment motion:

The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that that reality detracts from the intent to be drawn from the section.

The rationale for having the certification motion determined first is that it fulfills the objective of having an early determination of whether the action is going to move forward as a class proceeding, with the consequent binding effect on the members of the class, or whether the action will constitute and determine only the claim of the named plaintiff.

*Moyes v Fortune Financial*, [2001] OJ No 4455 (SCJ) at paras 8 and 9.

11. In *McNaughton Automotive Ltd v Co-Operators General Insurance Co*, Justice Haines granted the plaintiffs’ motion to hear the certification motion together with a number of motions brought by defendants under Rules 20 and 21. His Honour stated:

It is apparent from counsels’ submissions that many of the issues to be argued are common to both the certification motions and the rule 20 and 21 motions. Therefore, although there are a large number of motions, the factual underpinnings are similar and the legal issues identical. In my view, the best way to proceed is to hear all these motions together . . .

*McNaughton Automotive Ltd v Co-Operators General Insurance Co*, [2002] OJ No 2026 (SCJ) at para 8.

12. In *Cannon v Funds of Canada Foundation*, Justice Strathy ordered that the proposed Rule 21 motion be brought at the same time as the certification motion. In this key decision, Justice Strathy articulated the following relevant factors that a Court may consider when deciding whether to hear a Rule 21 motion before the certification motion:
- a. whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
  - b. the likelihood of delays and costs associated with the motion;
  - c. whether the outcome of the motion will promote settlement;
  - d. whether the motion could give rise to interlocutory appeals and delays that would affect certification;
  - e. the interests of economy and judicial efficiency; and
  - f. generally, whether scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding (s 12).

*Cannon v Funds of Canada Foundation*, 2010 ONSC 146 at para 15.

13. Faced with an application to consider a motion prior to certification, the Court must carefully examine the circumstances of the case and determine whether they are sufficiently compelling to warrant a departure from the norm.

*Hagdhust v British Columbia Lottery Corporation*, 2011 BCSC 772 at para 13.

*Alves v My Travel Canada Holidays Inc*, 2009 SKQB 77, at para 31.

## **THE NATURE OF THE STRIKE MOTION**

14. The Strike Motion is an unnecessary step because the court is required, pursuant to s 4(1)(a) of the *Class Proceedings Act*, to address the issue of whether the plaintiff’s pleadings disclose a cause of action.
15. Section 4(1)(a) of the *Class Proceedings Act* expressly states that “[t]he court must certify a proceeding as a class proceeding on an application under section 2 or three” if, among other conditions, “the pleadings disclose a cause of action”. When conducting the 4(1)(a) analysis, the court applies the *Hunt v Carey Canada* test.

16. The Strike Motion is simply a challenge to the plaintiff's cause of action. It is essentially identical to the analysis that the *Class Proceedings Act* mandates be conducted at the Certification Hearing. This is acknowledged by the defendants themselves at paragraph 2 of the Factual Basis portion of their Notice of Application, where they explain:

The principal basis for [the Strike Motion] is that the Plaintiff cannot, as a matter of law, maintain a claim for costs or harm that, as alleged, is indirect or passed to the Plaintiff.

17. In the Legal Basis portion of the Notice of Application, the defendants assert that the plaintiff's claims "*do not disclose a cause of action*" and that they are barred as a matter of law.
18. The defendants seek to have the Strike Motion "*proceed and be determined prior to the Plaintiff's application seeking to certify this proceeding as a class proceeding...*" (at para 1). However, they offer no basis for severing the case in this manner.
19. The Strike Motion is brought pursuant to Rules 9-5(1)(a) through(c) of the *Supreme Court Civil Rules* (the "New Rules"). Rules 9-5(1)(a) through (c) of the *New Rules* are essentially identical to Rules 19(24)(a) through (c) of its predecessor *Supreme Court Rules of Court* (the "Old Rules").
20. The analysis employed by the Court in determining whether a pleading discloses a cause of action for the purposes of certification is the same as that employed by the Court in considering a motion to strike pursuant to either Rule 19(24)(1)(under the Old Rules) or Rule 9-5(1)(under the New Rules). In both cases, the Court must utilize the "plain and obvious" test laid down by the Supreme Court of Canada in *Hunt v Carey Canada Inc*, [1990] 2 SCR 954:

It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The test is similar to the onus on a defendant to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the Rules of Court...

*Brogaard v Canada (Attorney General)*, 2002 BCSC 1149 at para 30.

*MacKinnon v Instalozans Financial Solution Centres (Kelowna) Ltd*, 2004 BCCA 472, at para 36.

21. Therefore, whether or not the defendants raise an issue with respect to the causes of action asserted, section 4(1)(a) of the BC CPA requires the Court to consider and determine whether the pleadings disclose a cause of action.

22. In considering whether or not the pleadings disclose a cause of action for the purposes of certification, the Court must presume the facts alleged in the pleadings are true. This is exactly the same approach the defendants accept will be employed in the consideration of their Strike Motion:

...for the purposes of this Application and pursuant to applicable law, the material facts alleged in the Notice of Civil Claim are taken to be true (at para 5).

23. Given that the legislature specifically directed that a determination of whether the pleadings disclose a cause of action should take place as part of the certification motion, the defendants must provide compelling reasons why the Court should exercise its discretion to sever the certification hearing into two separate hearings. They have not done so. Indeed, the basic reasons raised by the defendants would apply to every class proceeding in which s. 4(1)(a) was in issue.

*Lieberman v Business Development Bank of Canada*, 2005 BCSC 389 at para 16.

#### **ACCESS TO JUSTICE AND JUDICIAL EFFICIENCY**

24. As the plaintiff's action is a proposed class action (and therefore, more than an ordinary action; rather an "action with ambition"), the plaintiff submits that the decision whether to sever the Certification hearing must take into account the well-established objectives of the class proceedings legislation, two of which are access to justice and judicial efficiency (the third, behaviour modification, is not germane to this submission).

*MacKinnon v Instaloans Financial Solution Centres (Kelowna) Ltd*, 2004 BCCA 472, at para 33.

25. Certification is the process by which access to justice takes shape. Certification evens the playing field. Certification lets all parties know the stakes.
26. Recognizing certification's fundamental importance, the legislator directed that certification should take place at an early stage in the proceedings. As indicated above, the default rule is that certification should occur within 90 days. More broadly, the Court must also be cognizant of the broader need to secure the "just, speedy and inexpensive determination".

*Samos Investments Inc v Pattison*, 1999 CanLII 1710 (BCSC), at para 17.

Rule 1-3(1) of the New Rules.

BC CPA, s 2(3).

27. There is no question that if the Strike Motion is considered prior to the balance of certification, it will create substantial delays to the certification process, and therefore, to the exercise of access to justice. In *Samos Investments Inc v Pattison*, 2001 BCSC 440, after allowing certain unsuccessful attacks to proceed in advance of certification, the Court noted (at para 2):

It is sufficient to say that those motions, which I ordered heard before the application for certification under the *Class Proceedings Act*, RSBC 1996, c 50, have considerably delayed the plaintiff.

28. As explained by Winkler J., as he then was, in *Attis, supra*, “*the prejudice arising from delay in a class proceeding is even more pronounced*” (at para 12).
29. Judicial economy is also front and centre in a decision whether to sever the section 4(1)(a) requirement from the rest of the certification hearing.
30. Allowing the Strike Motion to proceed prior to the Certification Motion will create two hearings where one will suffice and is intended. This will have a deleterious effect on judicial economy as follows:
- a. no doubt more days of court time will be utilized for two separate hearings than for one, resulting in the following:
    - i. Chief Justice Bauman will have to clear more days from his juridical calendar to deal with the hearings;
    - ii. more hearing days will mean more days occupying a court room and more clerk time. Both of these are scarce resources and will necessarily detract from other cases waiting for a courtroom and a clerk;
  - b. separate filings for two separate hearings will occupy more registry time which is also a scarce resource and will necessarily detract or slow other registry work.
31. While it may seem hyperbolic to talk about days of court time in the context of this case and within the system as a whole, the reality is that judicial resources are scarce and the purpose of class actions is to create efficiencies. It is well known that cuts to the registry staff require clerks and registry staff to double up on duty. Burdening these scarce resources with unnecessary duplicity in terms of filings and court time should not be countenanced in one class action or in 20 class actions unless there are very good reasons to do so.

32. Two hearings take more time and resources from all parties than the one hearing anticipated in the legislation. It also means the case moves more slowly as a whole.

## THE SCOPE OF THE MOTION

33. The fact that a motion has the potential to dispose of the claim does not, in and of itself, entitle the moving party to have it heard prior to certification. In refusing to allow motions to strike to proceed prior to certification, Ottenbreit J. of the Saskatchewan Court of Queen's bench reasoned:

...I am not certain that generally speaking, timing decisions for motions should be based on the question of whether motions would terminate proceedings against a specific defendant. There are many motions, particularly the ones made by the defendants in this proceeding which end up terminating the proceedings by way of dismissal – striking or staying. Otherwise the defendants would not be making these applications prior to the certification. This in my view is not a determining factor. These motions may still result in the termination of proceedings but at or concurrently with the certification application.

*Alves v My Travel Canada Holidays Inc*, 2009 SKQB 77, at para 28.

34. In the following cases, the proposed motion had the potential to dispose of the entire action. In each, the Court ordered that certification go first, or that the motions proceed at the same time.

*Alves v My Travel Canada Holidays Inc*, *supra*.

*McNaughton Automotive v Co-Operators General Insurance Co*, *supra*.

*Cannon v Funds of Canada Foundation*, 2010 ONSC 146.

35. In any event, on the basis of the pleadings, even accepting the defendants' theory that the plaintiff's claim is indirect against non-acquirers (which the plaintiff does not accept), the plaintiff has plead that certain defendants operate acquirers. This means that, even if the Strike Motion is successful, it would only resolve part of the claim. Where the motion is only likely to dispose of part of the claim, the Court is even less likely to allow pre-certification motions to proceed.

Amended Statement of Claim at paras 4, 5, 7, 10-13, 19, and 23.

*Durling v Sunrise Propane Energy Group*, Endorsement of Justice Cullity, delivered October 27, 2009 (Ont SCJ).

*Cecile v Retrofoam of Canada Inc*, 2010 ONSC 3457 at para 13.

*Nette v Stiles*, 2009 ABQB 153 at paras 18-19.

*Osmun et al v Cadbury Adams Canada Inc et al*, Ontario Superior Court of Justice File No 08-CV-347263PD2, unreported direction of Strathy J, October 18, 2011.

## THE POTENTIAL FOR MULTIPLE APPEALS

36. The contentiousness of the issues – both cause of action and the other certification requirements – mean that appeals are also a certainty. All of the contentious certification issues should be dealt with by the trial court in one hearing and by the appeal court in one hearing.
37. The “poster child” of the dangers of allowing an action to proceed in instalments is *Garland v Consumer’s Gas Co*, 2004 SCC 25, an action which took two trips to the Supreme Court of Canada and 10 years to finally arrive at a determination on the merits and settlement certification. As the Court ultimately concluded:

In this context, a note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of Court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

*Garland v Consumer’s Gas Co*, 57 OR (3d) 127 (CA) at para 76, cited with approval by SCC: 2004 SCC 25 at para 90.

See also *Garland v Consumer’s Gas Co* (1995), 22 OR (3d) 451 (Gen Div), aff’d (1996), 30 OR (3d) 414 (C.A.), rev’d [1998] 3 SCR 112; [2000] OJ No 1354; aff’d (2001), 19 BLR (3d) 10 (Ont. CA), rev’d 2004 SCC 25; (2006), 38 CPC (6<sup>th</sup>) 70.

38. To hear a Strike Motion before certification is contrary to Chief Justice Winkler’s statement that the “first order of business” should be the Certification Motion. To do as the defendants suggest will promote inefficiency, squander judicial resources, create litigation by instalment and increase costs for all parties for the following reasons:
  - a. while the decision on the Strike Motion is pending, the defendants will undoubtedly argue that they should not be required to file any responding material in the Certification Motion. Therefore, the balance of the certification process cannot even begin until the final disposition of the motion;

- b. whatever the result of the Strike Motion, there will likely be an appeal (or an attempt to appeal);
  - c. win or lose, the defendants will likely argue that the prosecution of the Certification Motion should be adjourned until final disposition of the appeal process; and
  - d. if the Strike Motion is heard separate and apart from the Certification Motion, there will likely be a separate appeal route created distinct from any appeal or motion for leave to appeal from the decision on the Certification Motion.
39. In *Cannon, supra*, Justice Strathy expressed concerns about the delays, inefficiencies and additional costs associated with a proposed Rule 21 motion. He stated that if the motion was brought before the certification motion, the unsuccessful party would probably appeal or seek leave to appeal which would result in delays to the certification motion. Justice Patterson voiced similar concerns in *Cecile, supra*. The same concerns exist here.

*Cannon v Funds of Canada Foundation, supra*, at para 19.

*Cecile v Retrofoam of Canada Inc, supra*, at paras 13-14.

40. Conversely, if the Strike Motion and the Certification Motion are heard together, any appeals that may be launched can also proceed together. The issue of whether or not the plaintiff's claims discloses a cause of action will be placed only once before each Court.
41. Given the virtual certainty of appeals and motion for leave to appeal, the admonition against "litigation by instalments" strongly encourages the concurrent scheduling of the Strike Motion with the Certification Motion.

*Garland v Consumers' Gas Co* (2001), 57 OR (3d) 127 (CA) at 152, aff'd 2004 SCC 25.

*McNaughton Automotive Ltd v Co-Operators General Insurance Co, supra*, at para 9.

## **THE MERITS OF THE DEFENDANTS' MOTION**

42. The Court cannot assume there is no merit in the plaintiff's claim as justification for hearing the Strike Motion before certification. Indeed, the merits should not be a consideration at all on the question of sequencing. None of the cases cited by the defendants make the merits of the competing motions a factor to be considered in the analysis. In fact, the opposite point is expressly made in *Attis*, on which they rely:

However, despite the submissions of counsel at the case conference on the merits of the intended motion of Dow Corning, the issue on this case conference is not the relative merit or otherwise of the motion, but rather whether the motion to strike the Third Party Claim ought to be heard and determined prior to the hearing of the certification motion.

*Attis, supra*, at para 6.

43. However, given that the defendants have raised merits issues, the plaintiff notes the following:
- a. The plaintiff's pleadings are such that the class members are direct purchasers from a conspiracy that includes the defendants and other unnamed acquirers; Original Notice of Civil Claim, paras 41 and 47; Amended Notice of Civil Claim, paras 44 and 50;<sup>1</sup>
  - b. The plaintiff's pleadings implicate certain named defendants as acquirers: Original Statement of Claim, paras 5, 10, 12, 13, and 22; Amended Statement of Claim, paras 4, 5, 7, 10-13, 19, and 23;
  - c. As such, even a decision of the Supreme Court of Canada upholding *Sun-Rype* and *Microsoft* will not be dispositive of the issue in this case;
  - d. Even if it were clear that this was only an indirect purchaser class:
    - i. The plaintiff has plead that the acquirers were under a prohibition to sue, and as such the claim would likely come under the exceptions to the *Illinois Brick* line of cases<sup>2</sup>; and
    - ii. Further, and in any event, the granting of leave by the Supreme Court of Canada in *Sun Rype* and *Microsoft* makes it virtually impossible for the Defendants to argue that it is, at present, "plain and obvious" that the plaintiff's claim cannot succeed;

*Law Society of Upper Canada v Ernst and Young* 2003 CanLII 14187 (ONCA) at para 50.

*Hutchingame v Johnstone*, 2006 BCCA 353 at para 7.

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<sup>1</sup> The defendants express consternation that as the plaintiff learns more about the case, she amends to reflect the improving knowledge and to strengthen the pleading (defendants' factum paras 4-6, 19-20). It is common for a claim to strengthen as the plaintiff learns more. The defendants agreed to argue this motion on the basis of the proposed amended pleading.

<sup>2</sup> *Freeman v San Diego Assn of Realtors*, 322 F 3d 1133 (2003, 9<sup>th</sup> Cir) at paras 26-27; Amended Notice of Civil Claim, para 40.

*Carley Estate v Allied Signal Inc*, 1997 CanLII 2870 (BCCA) at para 8.

- e. In relation to the complaint on the conspiracy allegation, the plaintiffs allegations are reasonably particularized, particularly given the early stage of the proceeding. The defendants have not asked the plaintiff to provide further particulars of any of the allegations.

*Stone Paradise Inc v Bayer Inc*, 2005 CarswellOnt 8274.

The plaintiff rejects the defendants' claim that the plaintiff has misrepresented the terms of the Visa Rules and MasterCard Rules in the proposed Amended Notice of Civil Claim. The paragraphs must be read in their full context. In particular paragraphs 25, 26, and 38 of the Amended Notice of Civil Claim should be read in conjunction. In any event, the Strike Motion is not an appropriate time to resolve evidentiary disputes.

## **THE LACK OF PREJUDICE**

44. The defendants argue that it is unfair that they be required to expend time and resources in having to participate in the Certification Motion. But any cost cannot be evaluated in a vacuum, nor can it be evaluated on the assumption that their proposed motion will be successful.
45. The certification process is not designed to drive "substantial litigation costs and expert costs". Rather, it is intended to be a procedural motion ideally dealt with within 90 days of the filing of the defence or reply, which includes restrictions on the amount of evidence one should have to file on a certification motion.

*Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503 at paras 63-69.

*Fanshawe College of Applied Arts & Technology v LG Philips LCD Co*, 2011 ONSC 2484 at paras 35-36.

46. If the defendants are inclined to incur unnecessary litigation expense for a procedural motion, that cannot be considered unfair prejudice that would support a unique scheduling order.
47. On the other side of the costs ledger, there also will be substantial costs associated with hearing a severed motion in advance of the Certification Motion. This preliminary motion, with the need for facta and a separate attendance, is the initial instalment of these costs.

## THE COSTS THREAT

48. In terms of prejudice to the plaintiff, by effectively severing the s 4 certification test, the defendants undermine the key costs protection provided by the *Class Proceedings Act*. Those protections were clearly intended to apply to the examination of whether the pleadings disclose a cause of action, as the inquiry was deliberately included in the cost-exempt certification process
49. Prior to certification, the plaintiff remains exposed to costs for any interlocutory motions. Those costs can be substantial, especially in multi-party litigation.

*Edmonds v Acton Super-Save Gas Stations Ltd*, [1996] BCJ No 2051 at para 8.

*The Consumers' Association of Canada et al v Coca-Cola Bottling Company et al*, 2006 BCSC 1233, aff'd 2007 BCCA 356.

50. Therefore awarding costs on a pre-certification motion that is identical to an element of the certification test directly undercuts the access to justice mandate of the *Class Proceedings Act*.

*Samos Investments Inc v Pattison*, 2002 BCCA 442 (CanLII), (2002), 216 DLR (4th) 646, 2002 BCCA 442, paras 23-28.

51. The risk of exposure to costs is not hypothetical in this case, as the defendants have expressly sought costs of their Strike Motion.

## DEFENDANTS' AUTHORITIES

52. The defendants' authorities are of limited assistance. In particular:
  - a. Only *Dahl*, *Consumers Association*, *Smith*, *Hassum*, *Shaw* and *Hurst* are cases where a motion to strike was heard prior to certification;
  - b. In each of *Smith*, *Shaw*, *Hurst*, and *Hassum*, there was no indication that the plaintiffs took issue with the timing of the defendants' motion to strike;
  - c. In *Dahl*, the point of law motion that was considered prior to certification was overturned on appeal on the basis that it was premature and unjust to dismiss the action without reviewing the contracts. The Defendant also agreed to restrict their ability to seek costs on the first motion (2003 BCSC 839 at para 88). The second motion, which was successful, was a summary trial motion. (at para 37);

- d. In *Consumer's Association*, the motion that was considered prior to certification was a summary trial motion, and not a motion to strike;
- e. In *Attis*, Chief Justice Winkler, as he then was, denied the request by the defendant and by the third party that the third party's motion to strike the Third Party notice be heard prior to the certification application;
- f. In *Microsoft*, the motions before the court were motions to preclude the plaintiffs from relying on certain material in an upcoming certification application and for leave to cross-examine some of the affiants. Further, the court confirmed that "it is true that a certification motion is to be heard as soon as possible and as efficiently and fairly as possible" (at para 16), but allowed the motions to proceed before certification because they dealt with "the admissibility of a substantial body of evidence to which a party would want to respond" prior to the certification hearing (also at para 16);
- g. In *Martin*, the motion before the court was a motion for summary judgment, and not a motion to strike. The Motions Judge denied the defendants' request to consider their motion prior to certification, and instead held that "the certification motion should be the first procedural motion heard and decided" (at para 3). The Divisional Court agreed and refused to interfere with the Motions Judge's decision;
- h. In *Baxter*, Winkler J., as he then was, refused to allow the motions to strike brought by the Third Party to proceed prior to the certification hearing; and
- i. In any event, each case turns on its own facts.

## THE PAUSE REQUEST

53. In the face of a statutory obligation to move towards certification, the defendants cannot simply ask for a "pause". They should be required to bring on a formal stay application, supported by evidence. The defendants have not sought a stay in their Notice of Application.

Defendants' Notice of Application, Part 1.

54. The test for granting a stay of proceedings pending appeal is the same as the test applied for granting an interlocutory injunction. The onus is the applicant to establish that there is some merit in the appeal in the sense that there is a serious question to be tried, that irreparable harm would be occasioned to the applicant if the stay were not granted and that, on balance, the inconvenience

to the applicant if the stay were to be refused would be greater than the inconvenience to the respondent if the stay were granted. The defendants have not even attempted to meet this test. They have not filed a motion asking for a stay or adjournment, and there is no evidence filed that is relevant to the issue.

*RJR — MacDonald Inc v Canada (Attorney-General)* 1994 CanLII 117 (SCC), [1994] 1 SCR 311.

The defendants rely on the decision of Mr. Justice Masuhara in *Pro-Sys Consultants Ltd v Infineon Technologies AG*, but that decision is entirely distinguishable. In *Pro-Sys*, the case had been certified as a class proceeding and set for trial. The court was addressing pre-trial discovery issues in light of the possibility that indirect purchasers, the bulk of the class in that case, might not have a cause of action following the *Microsoft* and *Sun-Byte* decisions. Unlike this motion, the court in *Pro-Sys* had, and considered, extensive evidence relevant to the case management issues that were before it. In two related decisions the court did not “pause” the entire action, but rather slowed certain steps in the litigation, and ordered other significant pre-trial steps and discovery to continue.

*Pro-Sys Consultants Ltd v Infineon Technologies AG, and others*, 2011 BCSC 1128.

*Pro-Sys Consultants Ltd v Infineon Technologies AG, and others*, 2011 BCSC 1447.

55. The “pause” issue was squarely addressed by Mr. Justice Strathy in *Osmun v Cadbury Adams Canada Inc.*, and others. The circumstances underpinning that decision are identical to those in the case at bar. The defendants in a price-fixing class action sought a pre-certification pause pending the Supreme Court of Canada’s decision in *Microsoft* and *Sun-Byte*. The plaintiffs said that a certification schedule should be set. Justice Strathy analyzed the benefits and prejudices that applied to the parties, and the administration of justice, and agreed with the plaintiffs. He set a certification schedule without prejudice to the right of the defendants to bring a motion for a stay of the proceeding on a proper record.

*Osmun v Cadbury Adams Canada Inc, and others*, Scheduling Order, September 20, 2011.

56. In any event, given the fact that the SCC’s determination will not be determinative in this case because of the nature of the pleadings, there is even more reason to reject a pause. Unlike in *Pro-Sys* and *Osmun*, in this case there are arguably no indirect purchasers.

## CONCLUSION

57. The plaintiff acknowledges that in some instances the Courts have allowed motions to strike to proceed prior to certification. The plaintiff submits that those cases involved exceptional circumstances which justified the departure from the well-established norm of having the certification hearing be the first substantive step in a proposed class proceeding.
58. In this case, there are no such circumstances, and the overlap between the Strike Motion and the Certification Motion dictate that the two motions should proceed concurrently. Proceeding otherwise would lead to inevitable delays and waste of resources, both judicial and otherwise, in particular where even a successful motion might not have a fully dispositive effect to the plaintiff's claims.
59. For the reasons outlined above, the plaintiff submits that the Strike Motion and the Certification Motion should be heard concurrently.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: January 6, 2012



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