

WHICH COMES FIRST: THE CHICKEN OR THE EGG?

THE ORDER AND APPROPRIATENESS OF PRE-CERTIFICATION MOTIONS



AND YET THE QUESTION REMAINED:
"WHO CAME FIRST?"

Ward Branch and Luciana Brasil
Branch MacMaster
Barristers & Solicitors
Suite 1210 777 Hornby Street
Vancouver, B.C. V6Z 1S4
Telephone: (604) 654-2999
Facsimile: (604) 684-3429
Email: wbranch@branmac.com

Introduction

There has been a long-running debate in class actions as to how the certification motion should interact with other interlocutory motions.

The motivations of the two sides of the debate are reasonably clear. The plaintiff's wish is to proceed immediately to class certification so that all class members are aware of the status of the case (the benign reason) and/or maximize settlement pressure on the defendant (the malign reason).

Conversely, defendants want to clear away the procedural underbrush to simplify the certification hearing (the benign reason) and/or delay the proceedings to such an extent that the case becomes uneconomic for class counsel (the malign reason).

While the motivations have been clear, the case law has not been. There has been little consistency, and no comprehensive set of guidelines.

Fortunately, last week in the B.C. Supreme Court, the ideal case arose in which all these issues were canvassed, and a coherent theory developed.¹

Thankfully, one of our firm's associates was on hand, and was able to secure a transcript of the proceedings.

¹ This is not true. We are making this up.

No. Z99999
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

W. BRANCH

PLAINTIFF

AND:

JOE'S PARK 'N FLY INC.

DEFENDANT

Brought Pursuant to the *Class Proceedings Act R.S.B.C. 1996, c.50*

TRANSCRIPT OF PROCEEDINGS

MADAM JUSTICE SOLOMON

Counsel, before we begin, let me just make sure I have the facts straight. Mr. Branch makes the following allegations.

Mr. Branch was returning from a week long vacation in Disneyland with his wife, three kids, three life-size Mickey Mouse stuffed toys and two grandparents. They arrived in Vancouver at approximately 11 p.m. His party was exhausted from a long trip, and they were anxious to get home. They arrived at the shuttle bay of the arrivals terminal, where it was absolute chaos. There were at least 100 people milling around, a good proportion of which were waiting for the defendant's service to return them to their cars. It is alleged that the defendant failed to budget for the appropriate number of returning arrivals.

The first bus went forward to the front of the shuttle bay area, filled with customers (which unfortunately did not include Mr. Branch's party of seven (ten if you count the Mickey Mice)), and departed. Thinking that the "system" must be for the bus to move to

the front of the bay to pick up those at the front of the line, the plaintiff's moved towards that area.

The second bus came. Unlike the first bus, the young male driver parked at the end of the line. This driver proceeded to open his doors and let those people who had most recently arrived in the bay onto the bus. Mr. Branch's party tried their best to weave their way back through the chaos to the back of the line. They did not make it before the bus was filled. Mr. Branch asked the young driver what exactly the system was. The driver responded that "there was no system". Mr. Branch asked him what they were supposed to do, as it was a cold night, and the young children were starting to get uncomfortable. This young fellow responded that "there was nothing he could do". Mr. Branch expressed his dissatisfaction with the service and indicated that they would be complaining to management, at which point the young man responded with a parting shot of "Go for it!", and drove off.

At this point Mr. Branch determined the safest thing to do was remain at the back of the line. Even though there was apparently no system, hopefully the drivers maintained consistency in their lack of a system. Alas, this was not to be. The next older driver drove up 10 minutes later. Mr. Branch attempted to hail him down from the back of the line. He opened the door slightly. This driver apparently had a system which had not been communicated to his young apprentice. He said that he could not stop at the back of the line, but that he must go on to the front of the line, where he can "park nicely". He then closed the door and drove to the front of the line. A fresh crop of people start to board. At this point, Mr. Branch attempted to force his way to the front of the line again. However, his efforts were thwarted by the passengers at the front of the line. Mr. Branch was punched in the nose by one of the boarding passengers. He also tripped over a piece of luggage, and sustained a dislocated kneecap. Mr. Branch's party was finally able to board the next bus.

Mr. Branch makes a claim for breach of contract and claims pursuant to the *Business Practices and Consumer Protection Act*.² He has started this action as a class proceeding on behalf of all other customers who have had to wait more than ½ hour for the bus to arrive at the shuttle bay terminal, alleging that this violated the express or implied terms of the contract, or the representations made in advertising that state: "From the carousel to your car door in ½ hour or less!"

I understand that the defendant has filed a variety of motions, and that this case management conference has been called to address the order of these motions.

I. LOVE DELAY, Q.C. (COUNSEL FOR THE DEFENDANT):

That is correct my lady.

Park 'N Fly applies for directions concerning the timing of the hearing of the following motions, which have been filed and served:

² *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2S1

- (1) an application for particulars;
- (2) an application that this court does not have jurisdiction over this claim because they are within the exclusive competence of the Federal Court of Canada;
- (3) an application for an order striking the Plaintiff's claim on the ground that it does not disclose a cause of action as against Park 'N Fly;
- (4) an application for a declaration that the claims of the Plaintiff are barred based on limitation grounds; and
- (5) an application for summary trial pursuant to Rule 18A of the *Rules of Court*³.

Park 'N Fly submits that there is no reason to delay the hearing of its applications until after the hearing of the certification application. Doing so would only serve to materially increase the costs of Park 'N Fly and delay the ultimate disposition of this case.

The fact that this action is framed as a proposed class action should have no impact on the court's assessment of the suitability of this action for summary trial, nor should it affect the ability of the defendants to bring any other interlocutory applications. The words "*brought pursuant to the Class Proceedings Act*" on the face of a pleading do not confer any special powers upon a proposed class proceeding. Until such time as the action is certified, a proposed class action is to be treated in the same way as an individual action⁴.

The wording of the *Class Proceedings Act*⁵ clearly supports this position, as noted in *Edmonds v. Accton Super Save Gas*⁶, at para. 12:

In my view an action commenced as an intended class proceeding is, prior to certification, an ordinary action governed by the Rules of Court. The Act defines "class proceeding" as a proceeding certified as a class proceeding. Therefore until so certified, the action is an ordinary proceeding to which the Rules of Court apply. I note that even after certification section 40 provides that the Rules of Court continue to apply to the extent they are not in conflict with the Act. [Emphasis added]

³ Rule 18A of the *British Columbia Supreme Court Rules of Court* (the "Rules of Court") or Rule 20 of the *Ontario Rules of Civil Procedure* (the "Rules of Civil Procedure")

⁴ See *Hoy v. Medtronic, Inc.*, [2000] B.C.J. No. 2862 (Q.L.), 2000 BCSC 1902 ("Medtronic"), at para. 3 and *Edmonds v. Accton Super Save Gas* (1996), 5 C.P.C. (4th) 105 (B.C.S.C.) ("Edmonds")

⁵ *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "BC CPA") and *Class Proceedings Act*, S.O. 1992, c. 6 (the "Ontario CPA")

⁶ *Edmonds*, supra at FN 4.

Although the Plaintiff has brought a certification application, the hearing is only scheduled to take place in December 2004. As a result, this action is presently no different than any other civil action, subject to the ordinary *Rules of Court*.

Further, there is nothing in the *Rules of Court* or in the *Class Proceedings Act* requiring that the certification hearing be the first step taken in a proposed class proceedings action. This point was specifically argued in *Edmonds*⁷, *supra*:

The real issue to be decided is whether, as contended by the plaintiff, in an action commenced as a class proceeding the first step of the action must be a certification hearing.... [at para. 12]

... However I do not believe there is any reason to suspend the operation of Rule 34 simply because the action is filed as an intended class proceeding. In my view parties ought to be actively encouraged to bring applications under Rule 34 prior to certification hearings in appropriate cases. [para. 15.]

I conclude therefore that there is no bar to the bringing of a Rule 34 application in these two cases prior to the certification hearings. [para. 17.]

On the contrary, the fact that an action is a proposed class action, bound to acquire – if certified – “*significantly greater administrative procedures that are both time-consuming and costly for the litigants and the court*” mitigates in favour of simplifying and defining the action as much as possible. As noted by Madam Justice Saunders in *Davies, Mailhot and Marshall v. Hounsell, Pearson et al*⁸ (at para. 19):

It is always incumbent upon parties to take all reasonable steps to resolve a case with expedition. This is particularly so when a case is expected to be long and some of the issues are of no concern to some parties. To hear the points of law which are the subject of this application is a reasonable step.

This approach is consistent with the purpose of our *Rules of Court*, which is expressly set out as being to “*secure the just, speedy and inexpensive determination of every proceeding on its merits*”⁹.

If an action is unable to withstand a challenge before certification, it should not be allowed to proceed any further. To do so would only serve to postpone the inevitable.

⁷ *Edmonds, supra*, at FN 4

⁸ *Davies, Mailhot and Marshall v. Hounsell, Pearson et al* [1996] B.C.J. No. 444, (March 5, 1996, B.C.S.C., Vancouver Registry No. C932927)

⁹ *Rules of Court*, Rule 1(5). See also equivalent provision in *Rules of Civil Procedure*, Rule 1.04(1)

1. Application for Particulars:

Park ‘N Fly seek an Order that the Plaintiff provide further and better particulars of his claim, pursuant to Rule 19(16) of the *Rules of Court*¹⁰.

The Plaintiff cannot hide behind the fact that his action is a proposed class proceeding in order to avoid having to provide particulars of his claim:

[the Plaintiff] cannot resist an otherwise legitimate demand for particulars solely on the basis that this is a potential class proceeding.

*Kimpton v. Canada (Attorney General)*¹¹, at para. 28

On the contrary, although it is true that the Plaintiff did not acquire special powers by framing his claim as a proposed class proceeding, he did acquire special obligations, such as the obligation to provide full particulars of his claim. Our courts have accepted that, in an application to certify a class action, the particulars of the claim are of central importance because the court is required to assess the suitability of the action as a class action:

...That exercise requires information traditionally supplied through particulars – the nature of the case and issues to be tried – as well as whether, in the words of s. 4(2)(a) of the [British Columbia Class Proceedings] Act, “questions of fact or law common to the members of the class predominate over any questions affecting only individual members”. That assessment cannot be made in an information vacuum.

*L.R. v. Her Majesty the Queen in Right of the Province of British Columbia*¹², cited with approval in *Medtronic*¹³, *supra*, at para. 6.

The benefits of having well-defined pleadings in advance of certification are not lost on our courts:

The particulars sought ... will assist in focusing attention on the issues to be met at trial independently of the certification process. Coincidentally, the particulars will enhance and clarify the existing pleading making it easier for the parties and the court to focus on certification issues.

*Kimpton*¹⁴, *supra*, at para. 34

¹⁰ The equivalent Ontario provision is Rule 21 of the *Rules of Civil Procedure*

¹¹ *Kimpton v. Canada (Attorney General)* [2002] B.C.J. No. 87 (Q.L.), 2002 BCSC 67 (“Kimpton”)

¹² *L.R. v. Her Majesty the Queen in Right of the Province of British Columbia*, [1998] B.C.J. No. 2588 (Q.L.) (“Rumley”)

¹³ *Medtronic*, *supra*, at FN 4

¹⁴ *Kimpton*, *supra*, at FN 11

*Scott v. TD Waterhouse Investor Services (Canada) Inc*¹⁵, 2000 BCSC 1786

Examples of cases where the court ordered the plaintiff to provide further and better particulars prior to the certification application include:

- *Harrington v. Canada (Minister of Health)*¹⁶: this was a proposed class proceeding brought against the Minister of Health and other parties in relation to silicone gel breast implants. The plaintiff alleged, inter alia, that the Minister of Health's failure to prohibit the sale of the implants amounted to a representation that these implants were safe. The Minister had requested particulars of these allegations, and was not satisfied with the response. The court ordered the plaintiff to provide further and better particulars of the allegations.
- *Alford v. Canada (Attorney General)*¹⁷: the plaintiffs, who were holders of different classes of fishing licenses, brought proposed class proceedings concerning government authority over and management of fishery. The defendants applied for particulars regarding various matters plead, including the nature of the duty alleged to be owed to the fishers, the statutes, regulations and constitutional provisions that supported the claim, and the facts supporting the allegation of wrongful reallocation and depletion of fish stocks. The court ordered the plaintiff to provide some of the particulars requested.

2. Jurisdictional Challenges

Quebec courts have accepted that fundamental issues such as jurisdictional questions should be addressed before certification. For example, in *Societe Asbestos Ltee c. Lacroix*¹⁸, the Quebec Court of Appeal found that a jurisdictional motion was sufficiently fundamental to the conduct of the litigation that it should be heard first. A similar approach has been adopted in many other cases.¹⁹

¹⁵ *Scott v. TD Waterhouse Investor Services (Canada) Inc.*, 2000 BCSC 1786 (“Scott”)

¹⁶ *Harrington v. Canada (Minister of Health)*, [2003] B.C.J. No. 2198 (Q.L.), 2003 BCSC 1436 (“Harrington”)

¹⁷ *Alford v. Canada (Attorney General)*, [1999] B.C.J. No. 1937 (Q.L.)(S.C.)

¹⁸ *Societe Asbestos Ltee c. Lacroix*, [2004] J.Q. No. 9410 (Quebec C.A.)

¹⁹ *Galarneau c. Canada (Procurateur general)*, 2004 FC 718, *Roy v. Fonds d'aide aux recours collectifs* (unreported, October 3, 1997, Montreal 500-02-056186-971, Court of Quebec), *Syndicat canadien de la fonction publique, section locale 2601 v. Mont-Royal (Ville)*(unreported, October 1, 1998, Montreal 500-06-000025-961, Que. S.C.), *Carrier v. Quebec* (unreported, October 1, 1998, Montreal 500-06-000048-971, Que. S.C.), appeal dismissed 100 A.C.W.S. (3d) 5 (C.A.) and *Peres v. Le Procureur general du Quebec*, [2004] J.Q. No. 188 (S.C.).

3. Application to Strike Pleadings

At any stage of a proceeding, the courts may order that a pleading be struck out on the grounds that it discloses no reasonable claim, and that the proceedings be dismissed²⁰. The determination of this type of challenge is made based on the pleadings, and no evidence is admissible²¹.

There are no limitations as to when an application to strike out pleadings may be brought. On the contrary, the parties are directed to bring their application “promptly”²².

The test considered by the court in an application to strike pleadings the basis that the pleadings do not disclose a cause of action is the same test that is considered by the court in the cause of action portion of the certification hearing.²³ That being the case, there is no downside for the Plaintiff in having this application proceed in advance of certification. Mr. Branch will need to know the answer one way or another, as each and every certification criteria must be met in order for the case to be certified.

In contrast, if Park ‘N Fly has to await the full certification motion to argue the point, it will have to incur the onerous cost of preparing full certification materials. In particular, it will be obliged to comply with the requirement to produce all material facts relevant to certification, including information concerning all past lawsuits, class size, common issues and individual issues²⁴.

There is no question that certification is generally a very onerous and costly undertaking. What is then the benefit of awaiting certification before the cause of action challenge is advanced? If the pre-certification challenge is not successful, the case will proceed to certification, with the important distinction that the Plaintiff will have already established the cause of action requirement as against Park ‘N Fly. If the pre-certification challenge is, however, successful, Park ‘N Fly will be extracted from the proceedings and will not be forced to incur the costs of defending certification.

There is ample precedent to determine an application to strike pleadings in advance of certification:

²⁰ See Rules 19(24)(a) of the *Rules of Court* and Rule 21.01(b) of the *Rules of Civil Procedure*.

²¹ See Rules 19(27) of the *Rules of Court* and Rule 21.01(2)(b) of the *Rules of Civil Procedure*

²² See Rule 21.02 of *Rules of Civil Procedure*. The *Rules of Court* do not contain any similar language.

²³ See s. 4(1)(a) of the BC CPA and s. 5(1)(a) of the Ontario CPA.

²⁴ See s.5(4) and (5) of the BC CPA and to a lesser extent, s. 5(3) of the Ontario CPA

- *Price v. British Columbia*²⁵: this was a proposed class action brought by the Plaintiff, a disabled glasscrushing machine operator employed by the Liquor Distribution Branch, against the Provincial Crown. The Plaintiff's claim was founded on governmental abuse of power, in that she claimed that the Provincial Crown's decision not to discontinue the use of glasscrushers was motivated by an improper motive. The court noted that abuse of power by government itself is not a tort known to the common law, and proceeded to consider the plaintiff's claim as it might be amended to plead misfeasance in public office. Still, the court concluded that the decisions made by the employees of the Liquor Distribution Branch were not in the category of conduct that falls within the ambit of the tort of misfeasance in public office, and struck out the statement of claim.
- *FGM Holdings Ltd. v British Columbia (Workers' Compensation Board)*²⁶: this was a proposed class action challenging the legality of regulation enacted to control the exposure of workers to second-hand smoke by regulating smoking in the workplace. The regulation had since been struck down, but the plaintiff claimed damages for the period of time between the date the regulation was enacted and when it was struck down. The defendant brought an application to strike the pleadings on the basis they did not disclose a cause of action. The court agreed, noting that statutory breach was not actionable by itself and the mere breach of a notice provision could not give rise to a claim in damages. There was no pleading of material facts to support a claim in negligence. In any event, there was no duty of care in respect of the exercise of legislative functions. Allegations of bad faith or malice did not support a claim in negligence where there was no duty of care. The remedy available was setting aside the Regulation, which had already occurred.
- *Pauli v ACE INA Insurance*²⁷: this was the Alberta counterpart of the auto deductibles class action. The defendants applied for a ruling on a point of law prior to certification. The court decided that a certain statutory condition of the Alberta Insurance Act permitted the deduction of a deductible, even in cases of total loss, and the action was dismissed.

A similar approach is endorsed by the Ontario courts. Examples of cases where the court has struck pleadings for failure to disclose a cause of action include *Shaw v. BCE Inc.*²⁸, *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*²⁹ and *Hughes v. Sunbeam Corp. (Canada) Ltd.*³⁰

²⁵ *Price v. British Columbia*, [2001] B.C.J. No. 2284 (Q.L.), 2004 BCSC 1494

²⁶ *FGM Holdings Ltd. v British Columbia (Workers' Compensation Board)*, [2000] B.C.J. No. 1630 (Q.L.), 2000 BCSC 1188

²⁷ *Pauli v ACE INA Insurance*, 2003 ABQB 107 ("Pauli")

²⁸ *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (S.C.J.) and [2003] O.J. No. 5481 (S.C.J.)

²⁹ *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) ("Ragoonanan")

For the reasons outlined above, Park ‘N Fly submits that its application to strike should proceed before and independent of certification. Alternatively, Park ‘N Fly submits that cause of action requirement should be severed from the remainder certification criteria, and considered in advance of same. As authority for this compromise position, Park ‘N Fly relies upon the decision of the BC Supreme Court in *MacKinnon v. Money Mart and others*³¹ and *Carom v. Bre-X Minerals Ltd.*³².

4. Limitations Issue

If Mr. Branch does not have a cause of action at all because he is out of time, he cannot hide behind the fact that someone else in his proposed class may still have time to sue. Obviously if that other person wants to sue, he or she is free to bring an action and seek to certify same. However, at the present time, that is not the case. The only person who has indicated an intention to sue is Mr. Branch, and he has failed to do so within the time limits imposed by the Limitations Act. Adding the words “*Brought pursuant to the Class Proceedings Act*” are not sufficient to save his expired claim.

The case law supports Park ‘N Fly’s position. In *Stone v. Wellington*³³, the Ontario Court of Appeal upheld the decision of the motions judge dismissing the action on the basis that the Plaintiff’s claims were statute-barred in advance of certification. In doing so, the Court of Appeal expressly rejected the Plaintiff’s submission that prior to certification, an action could not be dismissed on grounds personal to the representative plaintiff. Relying on s. 35 of the Ontario CPA, the Court explained (at para. 8):

...the rules [of Court] apply to an action as this as they do in any action. Rule 20 permits these motions to be brought after the delivery of the statements of defence. That is precisely what happened here.

The Court also noted that the statutory scheme contemplated that the claims of the class members should raise common issues, and further, that the representative plaintiff be a member of the class. Hence, the continuation of an action in circumstances where the personal circumstances of the representative plaintiff brought him or her outside the class would be inconsistent with this legislative requirement (at paras. 9 and 10).

³⁰ *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2000), 101 A.C.W.S.(3d) 471 (Ont. S.C.J.), appeal dismissed (2002), 219 D.L.R. 4th 467 (Ont. C.A.).

³¹ *MacKinnon v. Money Mart and others*, 2004 BCSC 140

³² *Carom v. Bre-X Minerals Ltd.*(1998), 20 C.P.C. (4th) 187 (Ont. Ct. (Gen. Div.)).

³³ *Stone v. Wellington*, [1999] O.J. No. 1298 (Ont. C.A.)(Q.L.)

5. Summary Trial

The *Rules of Court* authorize any party to apply for summary trial of an issue or generally in a variety of proceedings, including an action in which a defence has been filed, such as the present case³⁴.

The only time limit imposed by the *Rules of Court* in relation to when an application for summary trial can be brought relates to the trial date: the summary trial application must be heard at least 45 days before the date set for trial in the proceeding. This is clearly inapplicable in this case, as we are nowhere near securing a trial date³⁵. Hence, the fact that there is a certification hearing scheduled in relation to this case should be of no consequence to Park 'N Fly's ability to bring its summary trial application.

Our courts have had no hesitation to efficiently toss out claims that have no merit in advance of certification, be it by way of summary trial or by deciding a point of law which disposes of the action:

- *Royster v. 3584747 Canada d.b.a. Kmart et al.*³⁶: this was a proposed class action brought in relation to the allegedly wrongful termination of a number of Kmart employees. The defendants applied for summary trial pursuant to Rule 18A of the *Rules of Court*. The court had directed that the summary trial application proceed in advance of the certification application, and subsequently dismissed the plaintiff's claim.
- *Azevedo v. Legal Services Society*³⁷: this was a proposed class action brought on behalf of all lawyers who acted on behalf of legal aid clients. The plaintiff alleged that the defendant had breached the terms of their contract by refusing to repay certain holdbacks from legal aid fees. The defendant applied for summary trial of the plaintiff's claim in advance of certification, arguing that there was no unequivocal promise to repay the holdbacks in the various contracts. The court found in favour of the defendant's position and dismissed the Plaintiff's application. This decision was upheld on appeal.

³⁴ See Rule 18A of the *Rules of Court* and Rule 20 of the *Rules of Civil Procedure*.

³⁵ See Rule 18A(1.1) of the *Rules of Court*. The *Rules of Civil Procedure* do not contain any time limits.

³⁶ *Royster v. 3584747 Canada d.b.a. Kmart et al.* (January 19, 2001, B.C.S.C., Vancouver Registry No. A992095)

³⁷ *Azevedo v. Legal Services Society*, [1998] B.C.J. No. 547(C.A.)(Q.L.), supplementary reasons re: costs [1998] B.C.J. No. 664 (C.A.)(Q.L.)

- *Dahl v Royal Bank of Canada*³⁸: this was a proposed class action brought in relation to allegedly unlawful interest rates. Prior to certification, the defendants applied for and obtained a decision on 3 points of law which were determinative of the action. The decision was set aside on appeal, but not on the basis that it was premature to hear the application. Indeed the Court of Appeal suggested that it should have been considered as an 18A application.³⁹

In this case, a determination that the Waiver operates as an effective bar to the plaintiff's claim will dispose of the entire action. Why, then, should Park 'N Fly be put through the expense of a certification hearing? And in the unlikely event that the case is certified, why should Park 'N Fly be compelled to issue notice to everyone in the world, thereby damaging its commercial reputation, if the case can be shown to be ill-founded with a modicum of evidentiary proof?

It is trite that the *Class Proceedings Act* is a procedural statute, and does not confer any substantive rights. Delaying Park 'N Fly's summary trial application will not miraculously remedy the case advanced by the Plaintiff. If Mr. Branch is unable to withstand an 18A attack before certification, he will also not be able to withstand it after certification.

Conclusion

Park N' Fly submits that policy, statutory and case law considerations support its request to have the limitations challenge and the applications for summary trial and to strike the Plaintiff's pleadings heard in advance of certification:

- a) On a policy basis, the Plaintiff's claim remains an individual action until such time as it is certified as a class proceeding. As a result, there is no policy reason why it should deserve any special treatment;
- b) Similarly, on a statutory basis, the CPA applies only after the Plaintiff's case is certified. Until then, the Plaintiff's case is not a class proceeding and all the rules apply. There are no exceptions provided for in the statute; and

³⁸ *Dahl v Royal Bank of Canada* [2003] B.C.J. No. 1291 (Q.L.), 2003 BCSC 839, rev'd on other grounds [2004] B.C.J. No. 1596 (Q.L.), 2004 BCCA 419

³⁹ The appellants argued that the chambers judge erred in deciding the question of law based only on the facts set out in the pleadings. They argued that evidence in the form of the contracts between the defendant and the cardholders, and between the defendant and the merchants was necessary in order to determine the legal relationship among the three parties. The appellants submitted that the case should be referred to the trial list. The Court of Appeal found that it would be premature and unjust to dismiss the action without reviewing the applicable contracts (at para. 11) and remitted the matter for rehearing on evidence of contracts (at para. 70). The Court of Appeal noted, however, that "this case is an ideal candidate for the summary trial procedure provided in Rule 18A of the *Rules of Court*, where the contracts and any other relevant evidence may be put before the Court in affidavit form" (at para. 71). There was no criticism whatsoever of the fact that the application was brought in advance of certification.

- c) On a case law basis, and as demonstrated above, the courts have clearly recognized the benefit of clearing away the unmeritorious claims early on in the proceedings so that neither the courts nor the defendants would be forced to incur any unnecessary time or resources.

SHOME DAMONEY (COUNSEL FOR THE PLAINTIFF)

My Lady, the Defendant is clearly simply trying to delay the effort to reach the certification motion, defeating the purpose of the *Class Proceedings Act*.

The Plaintiff submits that these applications should be heard as follows:

- a) The jurisdictional challenge and the application to strike pleadings should be heard as part of the certification hearing; and
- b) The remainder of the applications should be heard after the certification hearing.

This is the most efficient use of the parties' and the court's resources given the interrelationship of the issues raised by some of the applications and the policy behind the *Class Proceedings Act*.

In *Hollick v. Toronto (City)*⁴⁰, the Supreme Court of Canada explained that the main purposes of the *Class Proceedings Act* are:

- a) to promote the effective and economical use of the judicial system;
- b) to make the court system more accessible to the public; and
- c) to modify the behaviour of potential defendants who might otherwise be tempted to ignore public obligations.

Although it is true that a case only becomes a "class action" when it is certified, the Plaintiff submits that the court cannot artificially and arbitrarily ignore the objectives outlined above when making procedural and substantive decisions about the conduct of a proposed class action before certification. This was recently emphasized by the B.C. Court of Appeal in *MacKinnon v. Instaloans Financial Solutions Centres (Kelowna) Ltd.*⁴¹, where the Court stated:

⁴⁰ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68 ("Hollick"), at para. 15

⁴¹ *MacKinnon v. Instaloans Financial Solutions Centres (Kelowna) Ltd.*, 2004 BCCA 472, at para. 33

It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the *Class Proceedings Act* expressly provides that the Rules of Court apply. It does so, however, with the caveat “to the extent those rules are not in conflict with this Act”. I think it is also clear that an action commenced under the *Class Proceedings Act* is, even before the certification application, more than just “any old action”: it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.

The consideration of access to justice is of particular importance in this initial stage of the proposed class action. Justice delayed is justice denied.

Access to justice must be considered from the perspective of the proposed class’ lawyer. Class counsel is the tool used to achieve access to justice. The *Class Proceedings Act* provides the necessary incentive to class counsel to bring a case that would not otherwise be brought on an individual basis.

In agreeing to take a modest – and uneconomical – individual case on as a class proceeding, the lawyer will be assuming a tremendous amount of risk in relation to his or her fees and disbursements. This risk is offset by the possibility that, if the case is certified, and if the class is successful, the lawyer will get paid from the award made to the entire class.

Allowing a myriad of pre-certification applications to proceed in advance of certification only serves to materially increase the costs and the amount of risk for the class counsel, which before certification will also include an exposure to costs to the other parties, thereby making it less and less likely that anyone will be willing to take a case on as a class action. Simply put, class counsel must know where they stand at an early date. If there is a risk that they will be required to incur substantial costs without knowing whether they are acting for a class, the access to justice vehicle employed by the *Class Proceedings Act* is undermined.

The importance of an early determination as to whether or not the case will be certified as a class proceeding is reflected in the requirement in the *Class Proceedings Act* that the certification application be brought within 90 days of the Statement of Defence⁴². Taking into account the comprehensive advance evidentiary disclosure obligations imposed by the *Class Proceedings Act*, the practical effect of this tight time line is to ensure that certification is the first motion.

Even some of the cases relied upon by Park ‘N Fly acknowledge the policy problems associated with allowing applications to proceed in advance of certification. In *Pauli*⁴³, the court required that the defendants sign an undertaking that they would be bound by

⁴² BC CPA, s. 2(3), Ontario CPA, s. 2(3)

⁴³ *Pauli, supra*, at FN 27

the resolution of the ruling on a point of law as a condition of allowing the application to proceed before certification. Similarly, in *Dahl*⁴⁴ the court made the defendant undertake not to seek costs against the individual plaintiff of their merits motion heard prior to certification. It must be noted that Park ‘N Fly is not offering to provide any such assurances in the present case.

A further general concern that arises when certification is delayed is the issue of limitation periods. In British Columbia, limitation periods continue to run against members of the proposed class other than the representative plaintiff. Only when the action is certified will the limitation periods cease running as of the date of the commencement of the action⁴⁵. Until the case is certified, class members are left in a state of uncertainty in terms of the steps necessary to protect their limitation periods. Delaying the certification hearing only serves to magnify this uncertainty. Indeed, the court in *Bouchanskaia v. Bayer Inc.*⁴⁶ agreed to issue its reasons on certification at an earlier date as a result of this concern.

1. Application for Particulars

The starting point in considering the timing of Park ‘N Fly’s application for particulars is to review the purpose served by particulars in any given case. Our courts have repeatedly held that particulars are designed to enable a party to know the case he or she has to meet.

There is no question that Park ‘N Fly knows the case it has to meet. Its US parent was the subject of an almost identical class action launched in the US. The issues here are clear, and the defendant knows what the case is about. This is simply a tactical effort to drive 3 months of delay into the process.

2. Jurisdictional Challenge

There is no reason why this issue could not be considered as part of the certification hearing.

3. Application to Strike Pleadings:

As Park ‘N Fly correctly notes, the test that is considered by the court in the context of an application to strike pleadings is the same test that has to be considered in the context of the cause of action requirement for certification. That being the case, it does not make sense to duplicate the work and have the same issue considered twice by the courts.

⁴⁴ *Dahl, supra*, FN 38

⁴⁵ BC CPA, s. 39

⁴⁶ *Bouchanskaia v. Bayer Inc.* (2003), 124 A.C.W.S. (3d) 877, 2003 BCSC 1306

This issue strikes at the very essence of the CPA, and in the submission of the Plaintiff, should be considered as part of the certification process, where related determinations such as the adequacy of the Plaintiff as a representative plaintiff will be made.

This approach was endorsed in *Brogaard v. A.G. of Canada*⁴⁷ and *Pauli*⁴⁸. In *Brogaard*, the defendant applied to dismiss the plaintiff's claim for failure to disclose a cause of action, and sought to convince the court that a two-stage bifurcated approach should be adopted. The court rejected the defendant's submissions in this respect, and held:

I agree with the Plaintiff's counsel that judicial economy and efficiency mitigates against a bifurcated proceeding in this case. Accordingly, the issue of whether the plaintiffs have established a viable cause of action should be determined at the same time as the certification issues.

Further, in the unreported case management decision in *Bouchanskaia v. Bayer*, the court agreed that a 19(24) motion that would not resolve the entire case should not proceed in advance of certification.

4. Limitations Issue

The issue of limitation periods is inherently individualistic and is traditionally a matter left for resolution at stage 2 of the class proceeding, or alternatively, as part of the certification application. This position is supported by numerous decisions, such as: *Endean v. Canadian Red Cross Society*⁴⁹, *Pausche v. British Columbia Hydro & Power Authority*⁵⁰, *Harrington v. Dow Corning*⁵¹ and *Hague v. Liberty Mutual Insurance Co.*⁵².

5. Summary Trial

Attempting to determine this case on the merits and the evidence prior to class certification completely undermines the purpose of the class action.

⁴⁷ *Brogaard v. A.G. of Canada* (2001) Van. Reg. No. L013317 (S.C.)

⁴⁸ *Pauli*, supra, FN 27

⁴⁹ *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.)

⁵⁰ *Pausche v. British Columbia Hydro & Power Authority*, [2001] 11 W.W.R. 385, 81 B.C.L.R. (3rd) 221, appeal dismissed 2002 BCCA 62

⁵¹ *Harrington v. Dow Corning* (1996), 22 B.C.L.R. (3d) 97 (S.C.), aff'd 193 D.L.R. (4th) 67

⁵² *Hague v. Liberty Mutual Insurance Co.* (2001), 17 C.P.C. (5th) 316 (Ont. S.C.J.).

First, it is not fair to resolve the case on the evidence, when the Plaintiff is denied access to the full array of the defendant's documents. In *Endean v. Canadian Red Cross Society*,⁵³ the court denied the Plaintiff's request for production of documents, deferring the defendants' obligation to produce a list of documents that were relevant to the merits of the case. This approach has been followed in a number of cases⁵⁴. As such, determining the case on the evidence prior to certification is asking the Plaintiff to fight the war with one hand tied behind its back.

Furthermore, what is the benefit of having the ultimate merits question answered for the Plaintiff only in advance of certification? Regardless of what the answer will be, it will not dispose of the claims of the potential thousands of class members. Even if the court determines that the Waiver operates as an effective bar to the Plaintiff's action, that finding will not preclude the other proposed class members from bringing individual actions against Park 'N Fly for the very same claim. While it is true that Park 'N Fly may have a good precedent on which to rely, it will still be required to expend costs and resources defending against these other claims. The resulting waste of the court's time is self-evidence.

Conversely, if the determination is made after certification, it will be binding upon each and every class member, regardless of the outcome. The logical benefits of proceeding in this manner were not lost on the legislator, as the basic premise of the CPA is that common issues are resolved after certification.

The case law supports delaying the hearing of an application for summary trial until after certification. In *Moyes v. Fortune Financial*⁵⁵, the court refused to allow a defendant's summary judgment application prior to certification. Noting policy concerns and the benefits of obtaining class-wide binding effect, the court concluded:

I am of the general view that the first order of business in a proposed class proceeding ought, in the normal course, to be the hearing and determination of certification.

The approach in *Moyes* has been followed in a number of cases, including *Garipey v. Shell*⁵⁶ and *Piro v. Novopharm*⁵⁷.

⁵³ *Endean v. Canadian Red Cross Society*, (1997), 68 A.C.W.S. (3d) 817 (B.C.S.C.)

⁵⁴ *Samos Investments Inc. v. Pattison*, [2001] B.C.J. No. 578, 2001 BCSC 440, *Kimpton v. Canada (Attorney General)*(2002), 97 B.C.L.R. (3d) 110, 2002 BCSC 67, *Caputo v. Imperial Tobacco Ltd.* (1997), 148 D.L.R. (4th) 566, 34 O.R. (3d) 314 (Gen. Div.), *Anderson v. Wilson* (1996), 18 O.T.C. 79 (Ont. Ct. (Gen. Div.)) and *Milgate Financial Corp. v. BF Realty Holdings Ltd* (1997), 74 A.C.W.S. (3d) 348 (Ont. Ct. (Gen. Div.)).

⁵⁵ *Moyes v. Fortune Financial*, [2001] O.J. No. 4455 (Ont. S.C.J.)("Moyes")

⁵⁶ *Garipey v. Shell*, [2003] O.J. No. 33 (S.C.)("Garipey")

⁵⁷ *Piro v. Novopharm*, 2004 QJ 7142

In *Gariepy*, one of the defendants brought an application for summary judgment while the plaintiff's appeal of the decision denying certification was pending. The plaintiffs contended that the application for summary judgment should await the determination of their appeal. The court adjourned the application for summary judgment with direction that it not be brought back on for hearing until all appeals respecting the issue of certification were finally disposed of. Similarly, in *Piro* the court held that a merits attack should not be allowed to proceed prior to certification.

MADAM JUSTICE SOLOMON

Thank you for your able submissions counsel.

In my view, the general policy should be that the certification motion should be the first motion in the action, for the policy reasons outlined by the Plaintiff. However, there are necessarily a number of exceptions that should apply under this general rule.

First, motions for particulars should proceed first. It is important that the pleadings be clear and settled before the certification motion takes place. It is only through a proper pleading that the court can assess the true nature of the action, and the likely future conduct of the litigation. However, the court must carefully guard against allowing this tool being used for delaying the proceeding by strictly enforcing the test.

Second, jurisdictional challenges should be heard in advance of certification. The evidentiary obligations imposed on the parties are quite onerous. This cost should not be incurred unless the court's jurisdiction is properly grounded.

Third, motions to strike based on the pleadings should only be heard prior to certification if they will completely dispose of action. Otherwise, they should be heard in conjunction with the application. Given that the motion here may completely dispose of the action, it should be allowed to proceed in advance of certification.

Fourth, limitation issues should generally be deferred until after the common issues trial. However, I would caution the plaintiff's that limitation concerns may affect my assessment of whether the plaintiff is an appropriate representative, and may also affect my consideration of whether a class action is a preferable procedure. If limitation issues are likely to be a major problem for a great majority of the class, then it may be that individual issues will necessarily predominate. See *Royal-Black v. Quebec* (Feb 22, 1999, 400-06-00001-965) (Que.S.C.) and *Daniels v. Canada*, [2003] 6 WWR 82 (Q.B.), 2003 SKCA 25, leave to appeal refused 2003 SCCA 223.

I find that summary trials based on evidence should not be heard prior to certification, particularly given the evidentiary restrictions imposed against Plaintiff's in advance of certification.

Given the mixed outcome, there will be no order as to costs. Thank you.