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MOTIONS TO STRIKE—2014
PAPER 6.1

The Veritable Grand Slam
Motions to Strike in Class Proceedings

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THE VERITABLE GRAND SLAM
MOTIONS TO STRIKE IN CLASS PROCEEDINGS

I. Overview

1. Where the pleadings filed in a proposed Class Proceeding disclose no cause of action the defendants may apply for leave to strike either pre-emptively pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules or as part of the certification application pursuant to s. 4(1)(a) of the *Class Proceedings Act* ("*CPA*").

2. Whether a defendant should seek to apply to strike the claim in advance of the certification hearing or at the certification hearing itself is a strategic consideration that depends upon the particular facts of any given case.

3. This paper will consider the differences between an application to strike pursuant to Rule 9-5(1)(a) and s. 4(1)(a) of the *CPA* and the pros of cons associated with applying to strike before or as part of the certification application.

II. Analysis

A. The Test Itself

4. Pursuant to s. 4(1)(a) of the *CPA*, the Notice of Civil Claim ("NOCC") must disclose a cause of action in order for the action to be certified as a class proceeding.

5. The test for determining if the pleadings disclose a cause of action is the same test applied on an application to strike an action as disclosing no reasonable claim under Rule 9-5(1)(a) of the Supreme Court Civil Rules: the question is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, it should be struck out.

Elder Advocates of Alberta Society v. Alberta, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 20

6. The "plain and obvious test" was explained by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (S.C.C.), [1990] 2 S.C.R. 959 at para. 33:

> … [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case…

7. In *Pearson v. Boliden Ltd.*, 2002 BCCA 624 (CanLII), 2002 BCCA 624 [*Pearson*] at para. 39 Madam Justice Newbury noted:

> [39] This court has ruled, however, that *Hunt v. Carey* does not mean that difficult questions of *law* should not be decided in an application to strike pleadings under R. 19(24): see the judgment of Taylor J.A. for the Court in *Kripps. v. Touche Ross & Co.*, 1992 CanLII 923 (B.C.C.A.), (1992) 94 D.L.R. (4th) 284. By analogy, the same would be true of an application to certify a class action, where by implication the action may not proceed unless the pleadings disclose a cause of action. Taylor J.A. observed further in *Kripps*:
>
> > It seems to me that a court is not bound to refuse relief under Rule 19(24) simply because the relevant area of law is uncertain, that is to say, because it seems possible another court might come to a different conclusion on the law. Every aspect of the common law is necessarily the product of evolution, and this process must continue if the common law is to serve its purpose. It would be wrong that those against whom action is brought in an area of law which happens to be in an active state of development should for that reason alone be required to bear the cost of inquiry into the facts before the court will decide whether the claim is one which calls for an answer. … To say that it is not obvious "at once" beyond reasonable doubt that a claim, as pleaded or as it might be amended, is in law "bound to fail", is something very different from saying, as did the House of Lords in *Donoghue v. Stevenson*, [1932] A.C. 562, that the plaintiff, if she proved the facts which she averred, would be entitled to succeed.
>
> [emphasis added in *Pearson*]

8. This sentiment was further expressed by Madam Justice Newbury, in decertifying the class proceeding, in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 [*Wakelam*] at para. 64:

> … scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context. Certainly the *Hunt v. Carey* test is an easy one to meet, but it is not surmounted in *all* cases. As recent decisions of the Supreme Court of Canada discussed below illustrate, it is likely to be beneficial to all concerned, including the justice system, if such questions are directly addressed when raised at an early stage, rather than left for a trial that may never take place, or for another court in another case.

9. There are two aspects of the test: whether the pleadings actually plead the constituent elements of a cause of action; and, even if the constituent elements of a cause of action have been plead, is the claim bound to fail.

B. The Burden of Proof

10. Unlike an application pursuant to Rule 9-5(1)(a), the onus to show that a cause of action exists falls upon the party bringing the class action as opposed to the party challenging the proceeding: *Matthias v. British Columbia Medical Assn.*, 2013 BCSC 251 at paras. 35-36; *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429 at para. 20.

11. The differing onus is unlikely to have any bearing on the outcome of the decision, other than perhaps in those cases that are on the tipping point. In those cases, the fact that the burden is on the party bringing the class action, combined with the gate-keeper function of the court on a certification application discussed below, may assist in tipping the scale in favour of striking the claim.

C. No Discretion if No Cause of Action

12. Another distinction between motions to strike under s. 4(1)(a) of the *CPA* and Rule 9-5(1)(a) is that, on a s. 4(1)(a) application, the court does not retain residual discretion to allow the claim to proceed where the court concludes that there is no cause of action disclosed.

13. Under s. 4(1)(a) of the *CPA*, if no reasonable cause of action is made out, an action cannot be certified as a class proceeding, and the court need not consider the remaining factors in s. 4. In *MacFarlane v. United Parcel Service Canada Ltd.*, 2010 BCCA 171 [*MacFarlane*], Levine J.A. (for the court) held:

> [21] … the burden is on the plaintiff to show that the pleadings disclose a cause of action. If, on the pleadings, there is no claim, then, as the chambers judge found here, there is no utility in a class (or any) proceeding. Nor can there be any utility in the court hearing the application for certification considering the other factors set out in s. 4(1) of the *Class Proceedings Act*, such as whether there are common issues, or whether a class proceeding is the preferable procedure.

14. In these circumstances the court is compelled to strike the claim.

15. The purpose of imposing this requirement as a precondition to certification was explained by McLachlin C.J.C. in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods—efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be—on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments

> are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

16. It is particularly important for the court to exercise its gatekeeper function in "weeding out" claims that are bound to fail in the context of putative class proceedings, which Esson C.J.S.C. (as he then was) cautioned "have the potential for becoming monsters of complexity and cost": *Tiemstra v. Insurance Corp. of British Columbia* (1996), 22 B.C.L.R. (3d) 49 at para. 20 (S.C.), aff'd 38 B.C.L.R. (3d) 377 (C.A.).

17. This distinction weighs in favour of the motion to strike being heard at the time of the certification application.

D. The Impact of the Balance of the Test for Certification on the Determination of Whether a Cause of Action Exists

18. Section 4 of the *CPA*, provides that an action may not be certified as a class proceeding unless a plaintiff establishes *all* of the following five mandatory criteria:

> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> (e) there is a representative plaintiff who
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

19. The criteria in s. 4 of the Act are directed at assessing the overall efficacy, manageability, and fairness of a class proceeding. The burden on a certification application rests with the plaintiffs, who must establish "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25 ("*Hollick*").

20. The court acts as a gatekeeper to screen claims that are not appropriate for certification. "The certification motion is intended to screen claims that are not appropriate for class action treatment, at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation": *Robertson v. Thomson Corp.*, [1999] O.J. No. 908 at para. 4.

21. As stated in *Thorburn v. British Columbia (Ministry of Public Safety and Attorney General)*, 2012 BCSC 1585 at para. 117:

> The goal of the CPA is to be fair to both plaintiffs and defendants … it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency.

22. The importance of certification as a meaningful screening device was recently reaffirmed by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 103:

> The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

23. That means that at the certification application there is almost always evidence which addresses the merits of the cause of the action plead. While this evidence is not to be considered in determining whether a cause of action has been made out, there is no doubt that it will sometimes influence the court's conclusion as to whether a cause of action is raised on the pleadings.

24. In *Matthias v. British Columbia Medical Association*, 2013 BCSC 251, for example, the court made reference to the materials before the court at the certification application in concluding that the pleadings failed to disclose a cause of action.

E. The Standard for Review of the Decision

25. There is also currently on the case law an apparent difference in the standard of review between an order to strike pleadings under Rule 9-5(1) of the Supreme Court Civil Rules and an order to certify a class action under s. 4(1)(a) of the *CPA*.

26. The question of whether pleadings disclose a cause of action has been held by the courts to be a question of law attracting the correctness standard of review. This principle has been expressly articulated by the BC Court of Appeal in *Wells Cartage Ltd. v. Goodyear Aerospace Corp.*, 1987 CanLII 2625 (B.C.C.A.), where Esson J.A. stated that "[t]he question whether a new cause of action was raised is, of course, not essentially a matter of discretion, but rather one of law."

27. Accordingly, it is not surprising then that the BC Court of Appeal has applied the correctness standard to s. 4(1)(a) of the *CPA*. In *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 [*Koubi*], Neilson J.A. stated:

> [15] The question of whether Ms. Koubi's pleadings disclose a cause of action as required by s. 4(1)(a) of the *Class Proceedings Act* is a question of law, reviewable on a standard of correctness. The threshold is not high, however, and a pleading will be struck only if it is plain and obvious that it discloses no reasonable cause of action and cannot succeed: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 (CanLII), 2011 SCC 24 at para. 20, 2011 SCC 24 (CanLII), [2011] 2 S.C.R. 261.

28. This was again confirmed in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 [*Wakelam*], at para. 8.

29. Section 4 also expressly limits the discretion of the court in ordering certification since an action "must" be certified where the necessary criteria are established. The Court of Appeal has found that the inverse is true as well. Where no cause of action is established, the court will refuse certification without even considering the other factors set out in s. 4(1) of the *CPA*. This point is illustrated by Levine J.A. in *MacFarlane* as noted above.

30. However, these principles do not entirely preclude the exercise of discretion under s. 4 of the *CPA*. A judge has some measure of discretion in assessing the circumstances relevant to the certification criteria. In particular, considerable discretion is granted to the question of whether a class proceeding is the preferable procedure under clause (d).

31. Following *Koubi*, this discretion does not extend to the question of whether a cause of action has been disclosed in the pleadings. Further, appellate intervention is warranted where the Court of Appeal is persuaded that, in exercising his or her discretion of whether to certify, the certification judge erred in principle or was clearly wrong.

32. In spite of the fact that the Court of Appeal has repeatedly held that the correctness standard applies to the question of whether a cause of action was raised, recent reasons from the Court of Appeal suggest that a different standard may apply to appeals from a decision pursuant to Rule 9-5(1)(a). In *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 [*Timberwolf*], D. Smith J.A. outlined the standard of review which applies to the entirety of Rule 9-5(1):

> [19] It should also be noted that an order under R. 9-5(1) is a discretionary order for which deference must be given absent an error of law or principle or a failure of the judge to consider or weigh all of the relevant circumstances. The standard of review for discretionary orders was summarized by Chief Justice Finch in *Stone v. Ellerman*, 2009 BCCA 294 (CanLII), 2009 BCCA 294, 92 B.C.L.R. (4th) 203, leave to appeal ref'd [2009] S.C.C.A. No. 364 in this manner:
>
> > [94] Discretionary powers must be exercised in accordance with what the judge thinks the justice of the situation requires. Judicial discretion is constrained by factors or principles that must be weighed and balanced as between the competing interests, but no rule of law dictates the result. Accordingly, an appellate court will not interfere with an exercise of judicial discretion unless it can come to the clear conclusion that it was wrongly exercised in that no weight or insufficient weight has been given to relevant considerations (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3 at 76-77, 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193) or that on other grounds it appears that the decision may result in injustice (*Taylor v. Vancouver General Hospital*, [1945] 4 D.L.R. 737 at 743, [1945] 3 W.W.R. 510, 62 B.C.R. 42 at 50 (C.A.)).

33. In *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91 [*Flynn*], the Court of Appeal applied this principle to a case dealing with whether the pleadings properly disclosed a cause of action pursuant to Rule 9-5(1)(a). In that case, Frankel J.A., citing *Timberwolf*, stated that "a decision made on a pre-trial application to strike pleadings is entitled to deference as it involves the exercise of judicial discretion."

34. In a paper written for the CLEBC Civil Litigation Conference 2014, by the writer and Daniel Byma, possible explanations for this distinction were suggested. First, the court may be making an implicit and subtle distinction between the permissive language of Rule 9-5 of the BC Rules and the compulsory language of s. 4(1) of the *CPA*, although this distinction does not appear to be explicitly addressed in any of the court's reasons. Second, the court in *Flynn* may have overextended a broad application of the deferential standard to Rule 9-5, to which clause (a) should stand as an exception. For a more fulsome review of these possible explanations the reader is referred to the paper "Questioning Your Standards."

35. This distinction was brought to the Court of Appeal's attention in *Jer v. Royal Bank of Canada*, 2014 BCCA 116 [*Jer*]. The Court of Appeal applied the standard of correctness to the decision of the Certification Judge made pursuant to s. 4(1)(a) of the *CPA* but did not comment upon the distinction in the law. The Court of Appeal stated:

> [87] Although she expressly sought to avoid a determination on the merits at the certification hearing, the judge must be held to have concluded that the pleadings disclose a cause of action in conversion. The issue before us is whether it can be said that she erred in law in concluding that the allegations in the pleadings were sufficient to support the claims made against the financial institutions for the tort of conversion.
>
> …
>
> [108] In my view, it is plain and obvious on the pleadings that the claim in conversion against the financial institutions in the circumstances alleged in this case, is bound to fail. There is, in my view, no arguable case in support of such a claim. It was an error to certify this cause of action, leaving for resolution at trial the question whether the facts as pleaded could substantiate a claim in conversion.
> …

36. To the extent that *Flynn* is followed on an application pursuant to Rule 9-5(1)(a), this distinction in the standard of review also weighs in favour of the application to strike being heard at the time of the certification application.

F. Costs

The CPA Provides:

> 37(1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2(2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.
>
> (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
>
> (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
>
> (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
>
> (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.
>
> (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

37. The *Class Proceedings Act* provides protection to plaintiffs with respect to costs orders, but not prior to the certification application. The statute gives no direction to the court as to the awarding of costs if the proceedings are dismissed prior to the application for certification. It follows that when the action is dismissed prior to the application for certification the ordinary rule applies, namely, that costs follow the event. Of course, this is subject to the proper exercise of judicial discretion to bring about a different result. In *The Consumers' Association of Canada v. Coca-Cola Bottling Company et al.*, 2007 BCCA 356 (CanLII), the summary trial judge exercised her discretion by applying the ordinary rule with variation as to the scale of costs recoverable by some of the groups of defendants.

38. Thus, the potential for obtaining costs may motivate a defendant to apply for leave to bring a motion to strike pre-certification.

G. And So the Timing

39. Obviously, as a defendant, if you believe that you have a strong argument that there is no cause of action you want to have the application heard as soon as possible to stop the exorbitant costs associated with a class proceeding. Further, as discussed above, proceeding in advance of the certification motion has the additional advantage of a potential costs award against the representative plaintiffs, if you are successful.

40. As noted by Kirkpatrick J. (as she then was) in *Royster v. 3584747 Canada Ltd. d/b/a Kmart Canada Ltd.* (19 January 2001), Vancouver A992095 at para. 19 (B.C.S.C.):

> … There can be no doubt that, once certified, class actions transform an individual action into a proceeding that has significantly greater administrative procedures that are both time-consuming and costly for the litigants and the court. Thus, the court must be careful to scrutinize such claims and be assured that the time, effort, and expense is justified.

41. In the writer's experience, the enhanced administrative procedures and increased costs start prior to certification of a proposed class proceeding. If a proposed class proceeding discloses no cause of action, the sooner a defendant can extricate themselves from the "monster of complexity and cost" the better.

42. The court has broad powers to make orders regarding the conduct of the proceeding, and the decision whether to permit pre-certification applications is discretionary.

43. In *Watson v. Bank of America Corporation*, 2012 BCSC 146 [*Watson*], Chief Justice Bauman, as he then was, considered sequencing an application to strike pursuant to Rule 9-5(1) pre-certification. In declining to allow the application to proceed in advance of the certification application, he reviewed the decision of Justice Slade on such a motion in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593 (CanLII), 2009 BCSC 1593 [*Kwicksutaineuk*].

44. In *Kwicksutaineuk*, Justice Slade also declined to allow a motion to strike to proceed before the certification hearing. At paras. 73 and 74 he stated:

> [73] To permit the Province to bring an application to strike based on arguments of collateral purpose would set the stage for multiple rounds of proceedings through various levels of court.
>
> [74] Issues over whether the plaintiff has satisfied the requirements of s. 4 are not to be dealt with piecemeal in advance of the certification hearing. For the most part, the bases on which the Province seeks leave to apply to strike do just that.

45. At paras. 59-62 of Justice Slade's reasons he summarized the jurisprudence as follows:

> [59] 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 CanLII 10884 (ON SC), (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 (CanLII), 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: *Consumers' Association et al. v. Coca-Cola Bottling Company et al.*, 2005 BCSC 1042 (CanLII), 2005 BCSC 1042 at paras 67-68, 46 B.C.L.R. (4th) 137.

[60] Recently, Laing C.J.Q.B. canvassed the case-law on pre-certification applications in *Holland v. Canada (Agriculture, Food and Rural Revitalization)*, 2009 SKQB 334 (CanLII), 2009 SKQB 334 at para. 8, distilling the following principles:

> The case law is reasonably uniform that only motions which are likely to dispose of a litigation, or more efficiently address the objectives of *The Class Actions Act*, should be heard and determined prior to the certification hearing. *Vide: Attis v. Canada (Minister of Health)* 2005 CanLII 10884 (ON SC), (2005), 75 O.R. (3d) 302 (Ont. S.C.J.); *Baxter v. Canada (Attorney General)* (2005), 139 A.C.W.S. (3rd) 627 (Ont. S.C.J.); *Anderson v. Canada (Attorney General)*, 2008 NLTD 166 (CanLII), 2008 NLTD 166, 301 D.L.R. (4th) 399; and *Morrison Estate v. Nova Scotia (Attorney General)*, 2009 NSSC 198 (CanLII), 2009 NSSC 198, [2009] N.S.J. No. 293 (QL). Ottenbreit J. (as he then was) recently reviewed the issue of when it is appropriate to hear motions prior to the certification motion in the recent decision of *Alves v. MyTravel Canada Holidays Inc.*, 2009 SKQB 77 (CanLII), 2009 SKQB 77, [2009] S.J. No. 113 (QL), and concluded the hearing of motions preliminary to the certification motion are exceptional.

[61] Authorities from other provinces have held that a defendant must provide a "compelling reason" or demonstrate "exceptional circumstances" to receive an exemption from the general rule that the certification motion should be the first matter heard: *Alves v. MyTravel Canada Holidays Inc.*, 2009 SKQB 77 (CanLII), 2009 SKQB 77 at para. 32; *Bellows v. Quik Cash Ltd.* 2004 NLSCTD 191 (CanLII), (2004), 241 Nfld. & P.E.I.R. 224 at para. 28 (Nfld. S.C.); *Gay v. Regional Health Authority 7*, 2009 NBQB 101 (CanLII), 2009 NBQB 101 at para. 18.

[62] There is authority for the hearing of pre-certification motions in British Columbia in appropriate circumstances: *Nelson v. Merck*, 2006 BCSC 1549 (CanLII), 2006 BCSC 1549 at para. 23. As Myers J. held in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2008 BCSC 1263 (CanLII), 2008 BCSC 1263, no absolute rule can be laid down on when the Court will entertain and decide pre-certification motions. Each pre-certification motion must be looked at in the specific context of the case before the Court. Where the preliminary motion is time sensitive, would benefit all parties, further the objective of judicial efficiency, or have the potential to dispose of the litigation or more efficiently address the general policy objectives of class proceedings, it may be appropriately heard before the certification motion: Baxter, at para. 14. In the context of a jurisdictional challenge the defendants sought to bring prior to a certification hearing in *Lieberman v. Business Development Bank of Canada*, 2005 BCSC 389 (CanLII), 2005 BCSC 389 at para. 17, leave to appeal ref'd 2005 BCCA 268 (CanLII), 2005 BCCA 268, Davies J. provided a helpful catalogue of factors to consider when the court is asked to exercise its discretion to entertain pre-certification applications:

> A non-exhaustive list of the factors that will likely have to be considered in exercising that discretion will include: the cost to

> the parties of participation in Class Proceedings Act pre-certification procedures; the strength of a defendant's jurisdictional arguments and the extent to which a preliminary application may dispose of the whole of the proceeding; the potential for delay arising from interlocutory appeals; the complexity of the evidentiary and legal issues that may arise in both the jurisdictional and certification applications; and, the interplay between the issues on both [the certification and preliminary application]. [emphasis in original]

46. In reaching his decision in *Watson*, Chief Justice Bauman also cited *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 (CanLII) [*Cannon*] in which Justice Strathy declined to order that a strike motion be heard prior to the certification application. At paras. 14 and 15 of Cannon, Justice Strathy stated:

> A scheduling issue of this nature is a matter that falls within the court's discretionary jurisdiction under s. 12 of the *Class Proceedings Act*, 2002, S.O. 1992, c. 6 ("C.P.A."):
>
> > The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
> >
> > Without being exhaustive, some of the factors that I consider relevant to the exercise of my discretion include:
> >
> > (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).

47. At paras. 23-30 of *Watson*, Chief Justice Bauman concluded:

> [23] Justice Strathy was particularly concerned that the strike motion would result in delays, inefficiencies and additional costs in light of the real possibility of an appeal by the unsuccessful party. That was certainly the case in an early proceeding which I managed: *Samos Investments v. Pattison et al.*, 2001 BCSC 440 (CanLII), 2001 BCSC 440. It was also the concern expressed by Patterson J. in another Ontario case: *Cecile et al. v. RetroFoam of Canada Incorporated et al.*, 2010 ONSC 3457. Justice Patterson cited Chief Justice McMurtry's admonition against "litigation by installments" in *Garland v. Consumers' Gas Co.* 2001 CanLII 8619 (ON CA), (2001), 57 O.R. (3d) 127 (Ont. C.A.), aff'd 2004 SCC 25 (CanLII), 2004 SCC 25:

> 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.

[24] Here, the strike motion is based largely on the premise that, at least in respect of the Interchange Fee, the putative class members are in the position of indirect "purchasers" who enjoy no cause of action against Visa, MasterCard or the Issuing Banks:

> *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187 (CanLII), 2011 BCCA 187; leave to appeal granted [2011] S.C.C.A. No. 236 [*Sun-Rype*]
>
> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186 (CanLII), 2011 BCCA 186, leave to appeal granted [2011] S.C.C.A. No. 396 [*Microsoft*]

[25] The motion is further advanced on the ground that the conspiracy pleadings are hopelessly vague and lacking in particulars "and so devoid of specificity that the Defendants should not be called upon to answer …".

[26] The plaintiff joins issue on each of these essential submissions and strongly submits, in particular, that the "indirect purchaser" argument is not applicable on the facts and the law that will be developed in this proceeding.

[27] I turn to consider the factors suggested by Justice Strathy, as guiding the exercise of the Court's discretionary jurisdiction under s. 12 of the *CPA*.

[28] The application, if successful, might, indeed, substantially narrow the issues to be determined, but it would not, it seems, prevent the plaintiff from advancing the claims in respect of fees paid directly to the Acquirers.

[29] Turning to factors (b) and (d), in my view, there is a strong likelihood of delays and costs associated with this motion. There would undoubtedly be an appeal taken (or sought) by the unsuccessful parties, and I have no doubt that it would, in the defendants' case at least, lead to applications to the Supreme Court of Canada.

[30] Further, much, if not all, of the argument on the strike motion would simply duplicate the "cause of action" argument under s. 4(1)(a) of the *CPA* at the certification hearing. I agree with the plaintiff that in the circumstances of this case, there is a strong argument, based on encouraging judicial efficiency and cost containment (factor (e)), to resist effectively bifurcating the certification process by hiving off judicial treatment of one of the certification considerations to a pre-certification application.

48. The suggestion that applications to strike for no cause of action should not be heard prior to certification as the arguments will be duplicative if the certification motion succeeds seems doubtful as, if they are not successful on the application to strike pursuant to Rule 9-5(1)(a), the same arguments are unlikely to be made again at the certification stage. There are certification hearings in which defendants concede that there is a cause of action disclosed on the pleadings.

49. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2006 BCSC 1047 (ultimately appealed to the SCC 2013 SCC 57), the court allowed a motion to strike to proceed prior to the certification application, however, in that case the parties agreed that the decision on the application to strike

would also be treated as a decision in respect of the requirement under s. 4(1)(a) of the *CPA* and, additionally, agreed that no costs would be payable in respect of the application to strike. (paras. 2-3 of BCSC decision; para. 7 of SCC decision)

50. Further, if a claim is totally bizarre and obviously devoid of any merit whatsoever, the court will likely exercise its discretion in favour of hearing an application to strike pre-certification. *Dempsey et al. v. Envision Credit Union et al.*, 2006 BCSC 750 is one such example. In circumstances such as these, where the pleadings may cause embarrassment or business interruption, it is preferable to bring the application in advance of certification. This allows the defendants to get rid of the claim more expeditiously and to seek costs to deter the commencement of frivolous claims in the future.

51. Even if you can get permission to bring the application, however, if your defence is one that is assisted by having the court hear some of the facts, you may want the advantage of the representative plaintiffs' having to establish some basis in fact for each of the certification requirements proceeding simultaneously with your motion. There is also the advantage of the stated role of the court as gate-keeper in hearing the certification motion that may tip the balance on at application to strike being heard simultaneously with the certification motion.

52. Each case will turn on its own facts and circumstances. The strategic decision as to whether and when to bring the application to strike should take the above factors into consideration, which will, hopefully, assist in making the appropriate decision clearer.

III. Conclusion

In summary, motions to strike on the basis that no cause of action is disclosed are not often successful in the class proceeding context. However, when they are it is the equivalent of a grand slam. Therefore, due consideration should be given to whether the pleadings disclose a cause of action, and, if you conclude that there is a good argument that they do not, whether it is preferable to seek to bring an application to strike pre-certification or as part of the certification application.