IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Roy v. The Calgary Airport Authority,* 2025 BCSC 481

Date: 20250319
Docket: S193490
Registry: Vancouver

Between:

Brian Roy

Plaintiff

And:

The Calgary Airport Authority, Edmonton Regional Airports Authority, Prince George Airport Authority Inc., Vancouver Airport Authority, Victoria Airport Authority, Winnipeg Airports Authority Inc., Greater Moncton International Airport Authority Inc., Gander International Airport Authority Inc., St. John's International Airport Authority, Halifax International Airport Authority, Greater London International Airports Authority, Ottawa Macdonald-Cartier International Airport Authority, Greater Toronto Airports Authority, Aéroports de Montréal, Aéroport de Québec Inc., Regina Airport Authority, Saskatoon Airport Authority, Fredericton International Airport Authority, Saint John Airport Inc., and Charlottetown Airport Authority Inc.

Defendants

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

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:	S. Lin A. Majidi S. Cheong
Counsel for the Defendants:	N. Rabinovitch M. Fleming E. Irving S. Chang
Place and Dates of Hearing:	Vancouver, B.C. September 4 – 6, 2024
Place and Date of Judgment:	Vancouver, B.C. March 19, 2025

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Introduction

[1] These reasons for judgment pertain to preliminary cross-applications in an intended class proceeding brought by Brian Roy against several Canadian airports.

[2] The first application was brought by the three defendants who are based in British Columbia, and who refer to themselves as “the B.C. Defendants” (the remaining defendants refer to themselves as the “Non-B.C. Defendants” and I will refer to all the defendants collectively as “the Defendants”). The B.C. Defendants seek an order striking Mr. Roy’s claim because he is not – nor has he ever been – a resident of British Columbia, as required by s. 2(1) of the *Class Proceedings Act*, R.S.B.C 1996, c. 50 [*CPA*]. The B.C. Defendants also assert that Mr. Roy’s claim should be struck as an abuse of process. In support of this position, they point to various aspects of Mr. Roy’s claim and the manner in which he has pursued it, including what they characterize as attempts to circumvent the requirements of s. 2(1) of the *CPA*.

[3] Mr. Roy acknowledges that he does not satisfy the residency requirement in the *CPA*. He submits that this defect can be remedied by adding a B.C. resident as a plaintiff. He applies to add Benjamin Scott, who is a member of the intended class and a resident of B.C., as a plaintiff. He disputes the B.C. Defendants’ characterization of his conduct as an abusive effort to circumvent the statutory residency requirement, and asserts that he is merely attempting to address a defect in his pleadings.

[4] During the hearing of these cross-applications, the parties agreed to adjourn an alternative application brought by the B.C. Defendants seeking to strike substantial portions of Mr. Roy’s pleadings in the event I decline to strike his claim in its entirety.

Background

[5] On March 25, 2019, Mr. Roy, a pilot (now retired) and resident of Nova Scotia, filed the original Notice of Civil Claim as an intended class proceeding. The

claim concerns certain fees known as Airport Improvement Fees (“AIFs”) and Passenger Facility Fees (“PFFs”); collectively, “the Fees”. Mr. Roy alleges that, contrary to agreements that establish and govern the Fees, the Defendants wrongly charged the Fees to airline employees and their family members who travelled through airports operated by the Defendants using an employee travel pass. Additionally, Mr. Roy alleges that, in an attempt to conceal the wrongfulness of the charges, the Defendants refused to disclose the governing agreements when he sought to confirm whether he was being properly charged. The proposed class is defined as including all individuals who travelled through a Defendant’s airport using an airline employee travel pass and paid an AIF and/or PFF. The Notice of Civil Claim seeks damages for Mr. Roy and the intended class members on the bases of contract, unjust enrichment, tort, and the *Competition Act*, R.S.C. 1985, c. C-34.

[6] Paragraph 4 of the original Notice of Civil Claim expressly discloses that Mr. Roy is a resident of Nova Scotia.

[7] On March 26, 2019, the day after filing the Notice of Civil Claim in this Court, Mr. Roy filed a substantially identical claim in the Federal Court. On June 7, 2019, his counsel advised the Defendants that he intended to hold the B.C. claim in abeyance while he pursued the Federal Court claim. At the time, he viewed the Federal Court as the preferred forum because he anticipated that some of the Defendants would challenge the territorial jurisdiction of this Court, which they subsequently did.

[8] None of the Defendants (all of whom are represented by the same counsel) expressly objected to Mr. Roy holding this claim in abeyance pending the outcome of the Federal Court claim; they maintained silence on that issue. However, they challenged the Federal Court’s subject-matter jurisdiction; a position that was later affirmed in another case, *Donaldson v. Swoop Inc.*, 2020 FC 1089, just days before the issue was scheduled to be heard in Mr. Roy’s case. As a result, at a hearing on November 30, 2020, the parties consented to an order dismissing Mr. Roy’s Federal Court claim, “without prejudice to [Mr. Roy] continuing, refiling, filing and/or

recommencing [the claim] before a provincial superior court": *Roy v. Calgary Airport Authority*, 2020 FC 1105.

[9] Mr. Roy then turned his attention to the B.C. claim. On April 8, 2021, he filed an application in this Court without notice to the Defendants, seeking leave to amend the Notice of Civil Claim and renew it for a further six months. That application was granted, and Mr. Roy filed an Amended Notice of Civil Claim ("ANOCC") on April 28, 2021. The only change in the ANOCC was the removal of the *Competition Act* as part of the legal foundation for the claim.

[10] On July 28, 2021, Mr. Roy delivered a copy of the ANOCC to the Defendants. The Defendants say this was the first notice they had of Mr. Roy's intention to proceed with the B.C. claim but, as noted, the consent dismissal order in the Federal Court expressly noted that possibility.

[11] Roughly ten months later, on June 3, 2022, the Defendants' counsel wrote to Mr. Roy's counsel indicating that they had instructions to apply to strike the B.C. claim, although they did not disclose the ground(s) for such an application. Mr. Roy's counsel responded to confirm that Mr. Roy intended to proceed with the B.C. claim. Mr. Roy's counsel indicated that they were not surprised that the Defendants were "requesting a motion to strike" and that sequencing should be addressed following the appointment of a case management judge. The Defendants did not object to that approach.

[12] In July 2022, Mr. Roy filed a requisition seeking the assignment of a case management judge. I was assigned to the matter roughly eight months later, on March 24, 2023, after Mr. Roy followed up on the status of his requisition.

[13] On March 23, 2023, Mr. Scott contacted Mr. Roy's counsel to express his interest in being added to the claim as a B.C.-resident plaintiff. Mr. Roy has sworn an affidavit to explain the delay in identifying a B.C.-resident member of the intended class who was willing to act as an additional plaintiff. I discuss Mr. Roy's affidavit in a separate section below.

[14] On April 19, 2023, the Defendants wrote to Mr. Roy enclosing a copy of an unfiled application to strike the claim for lack of a B.C.-resident plaintiff. The application was brought in the names of the B.C. Defendants only because the Non-B.C. Defendants wished to avoid attorning to this Court's jurisdiction. This was the first time the residency requirement was raised as a barrier to Mr. Roy advancing the claim in this Court. Mr. Roy's counsel responded by advising the Defendants that they had identified a B.C. resident willing to be added as a plaintiff.

[15] On May 4, 2023, Mr. Roy's counsel advised the Defendants' counsel that Mr. Roy intended to file an application to add a B.C.-resident plaintiff. By this time, I had been appointed case management judge.

[16] The B.C. Defendants filed their application to strike on July 4, 2023.

[17] An initial case management conference had been scheduled for July 6, 2023. On July 5, 2023, the parties adjourned that appearance by consent, advising that they were hoping to resolve or narrow the procedural disputes between them.

[18] The first judicial management conference was ultimately held on August 9, 2023. Counsel could not agree on how to sequence the several preliminary applications that had by then been identified, resulting in the need for a sequencing hearing. The next day, counsel for the Defendants submitted a request to schedule that hearing, with the earliest dates proposed in November 2023. The parties were offered dates for the sequencing hearing in October, November, and December of 2023, as well as January, February, and March of 2024. Ultimately, the parties selected February 23, 2024, more than six months after I had directed a sequencing hearing be held. From the communications between counsel and Supreme Court Scheduling, it appears that this delay was the result of the schedules of counsel on both sides.

[19] On February 9, 2024, Mr. Roy filed his application to add Mr. Scott.

[20] At the sequencing hearing on February 23, 2024, several applications, including Mr. Roy's application to add Mr. Scott as a plaintiff, were scheduled to be heard over three days in late June 2024.

[21] On April 2, 2024, Mr. Roy filed a Further Amended Notice of Civil Claim ("FANOCC") which included several additions relative to the ANOCC. The B.C. Defendants say that substantial portions of these additions should be struck; however, as mentioned above, the parties agreed to adjourn this aspect of the B.C. Defendants' application. The only addition to the FANOCC that is relevant to the present applications is the inclusion of an alternative pleading to the *CPA*; specifically, if this Court declines to certify the action as a class proceeding, then Mr. Roy seeks to have it proceed under Rule 20-3, which the FANOCC characterizes as permitting "representative proceedings" or "common law class actions." The B.C. Defendants submit that this alternative pleading is another effort to circumvent s. 2(1) of the *CPA*, and therefore supports their assertion that Mr. Roy's claim should be struck as an abuse of process.

[22] In late May 2024, at the request of counsel for both sides, the June 2024 hearing dates were released and the applications were finally heard in September 2024.

Mr. Roy's Affidavit

[23] On February 19, 2024, Mr. Roy swore an affidavit which he subsequently filed and delivered to the Defendants. The affidavit purports to explain his delay, between September 1, 2022 and March 23, 2023 (when Mr. Scot came forward), in identifying a B.C. resident willing to serve as a plaintiff. According to Mr. Roy's affidavit, shortly after September 1, 2022, he became aware of this Court's decision in *MM Fund v. Excelsior Mining Corp.*, 2022 BCSC 1541 [*MM Fund BCSC*], in which the plaintiff, a trust based in Ontario, was ordered to remove all reference to the *CPA* from its pleadings for failing to comply with the residency requirement in s. 2(1) of the *CPA*. Mr. Roy deposed that "immediately after" learning of *MM Fund BCSC*, he took steps to identify colleagues residing in B.C. who would be willing to join his claim as an

additional plaintiff. Despite speaking with “a number” of colleagues, including one unnamed individual who initially expressed interest, he deposed that no one was willing to act as a co-plaintiff before Mr. Scott came forward. In his affidavit, Mr. Roy states his belief that many of his colleagues are interested in the lawsuit, but are concerned that joining it could have potential financial or employment consequences.

[24] On June 26, 2024, by consent of the parties, Mr. Roy was cross-examined on his affidavit. During the cross-examination, Mr. Roy’s counsel objected to several questions and Mr. Roy did not answer them.

[25] The B.C. Defendants object to the admissibility of Mr. Roy’s affidavit. Specifically, they argue that it contains inadmissible hearsay, speculation, and opinion evidence. The B.C. Defendants also take issue with Mr. Roy’s approach to the cross-examination, although they have not applied to compel answers to the questions Mr. Roy’s counsel objected to.

[26] It is not necessary for me to rely on Mr. Roy’s affidavit evidence about his attempts, between September 2022 and March 2023, to identify someone willing to be added as an additional plaintiff because, even without his explanation, it is my view that the post-September 2022 delay does not weigh against his position on these applications. In the circumstances, it is not necessary to say anything more about the B.C. Defendants’ objections to Mr. Roy’s affidavit or their criticism of his counsel’s approach to the cross-examination.

Positions of the Parties

[27] To ground the parties’ submissions, it is helpful to set out the material portions of s. 2 of the *CPA*:

> **Plaintiff's class proceeding**
>
> **2** (1) A resident of British Columbia who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class.
>
> (2) The member who commences a proceeding under subsection (1) must

> (a) make an application to the court for an order
>
> (i) certifying the proceeding as a class proceeding [...]
>
> (4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.
>
> [Emphasis added]

[28] It is not controversial that Mr. Roy is not – and has never been – a resident of B.C. It is the consequence of his failure to meet the residency requirement in s. 2(1) of the *CPA* that is in issue.

[29] The B.C. Defendants submit that Mr. Roy does not have standing to pursue a class proceeding in this province. They point out that Mr. Roy cannot rely on s. 2(1) because he is not a resident of this province. He also cannot rely on s. 2(4) for standing because that section is only available to "a person who is not a member of the class" (emphasis added), and Mr. Roy is a member of the intended class. They submit that an intended class proceeding commenced by a plaintiff who does not have standing is fatally flawed, and must be struck in its entirety.

[30] In the alternative, the B.C. Defendants submit that Mr. Roy should be required to amend his claim to remove all references to the *CPA*, effectively converting his claim from an intended class proceeding into an individual action.

[31] Mr. Roy submits that the usual tests for adding a party under Rule 6-2(7) of the *Supreme Court Civil Rules* apply notwithstanding s. 2(1) of the *CPA,* and that granting his application to add Mr. Scott as a plaintiff will fully resolve the standing issue.

[32] Further, Mr. Roy submits that the conduct of the B.C. Defendants precludes them from raising the residency issue now, either because it amounts to waiver or because the doctrine of estoppel applies.

[33] In the alternative, Mr. Roy submits that the standing defect may be remedied by a later application under s. 2(4) of the *CPA*. He submits that if his application to add Mr. Scott is dismissed, he should be given an opportunity to apply, in

conjunction with the certification application, for certification of a person who is not a member of the class as representative plaintiff pursuant to s. 2(4).

[34] Beyond the standing issue, the B.C. Defendants submit that Mr. Roy's claim should be struck for abuse of process. They say that it was an abuse of process to file the claim because it is substantially similar to the Federal Court claim, the claim has only a minimal connection to B.C., and Mr. Roy lacks standing to bring it. According to the B.C. Defendants, the abusive nature of the claim has been compounded by Mr. Roy's attempts to "circumvent" the residency requirement in s. 2(1). In sum, the B.C. Defendants submit that the claim should be struck in its entirety to denounce what they characterize as tactics that exploit jurisdictional advantages and avoid legislated standing requirements.

[35] Mr. Roy disagrees that any of his conduct constitutes an abuse of process. He submits that it is not improper to file parallel proceedings in the Federal Court and a provincial superior court when the Federal Court's subject-matter jurisdiction is anticipated to be in issue. He asserts that *MM Fund BCSC*, affirmed by the Court of Appeal in *MM Fund v. Excelsior Mining Corp*., 2024 BCCA 163 [*MM Fund BCCA*], settled the law on standing under the *CPA*, and prior to that decision it was not clear that his non-residency amounted to a true lack of standing to bring a class proceeding in B.C. The conduct the B.C. Defendants characterize as attempts to circumvent the *CPA* is described by Mr. Roy as good faith efforts to address a flaw in his pleadings once he became aware of it.

[36] Mr. Roy also raised a potential standing issue created, he argued, by the B.C. Defendants filing an application to strike the claim against all the Defendants, including the Non-B.C. Defendants who have not joined the application. Ultimately, Mr. Roy abandoned this argument at the hearing and I will say no more about it.

Analysis

a) Is Mr. Roy's lack of standing to commence a class proceeding under the *CPA* fatal to the claim such that it must be struck in its entirety or limited to an individual action?

[37] Again, there is no dispute that Mr. Roy is not and never has been a resident of B.C. and, as a result, he does not meet the residency requirement in s. 2(1) of the *CPA*. The B.C. Defendants submit that this defect cannot be remedied retroactively by adding a B.C.-resident plaintiff because they say an intended class proceeding commenced by a party who is not a resident of B.C. is a nullity. Additionally, they say that adding Mr. Scott as a plaintiff will not remedy the problem because s. 2(2) of the *CPA* provides that the person who "commences" the proceeding must bring the certification application, and Mr. Roy commenced the claim.

[38] The first question is whether Mr. Roy's failure to meet the residency requirement in s. 2(1) of the *CPA* renders the action a nullity.

[39] I start by observing that the modern approach is to treat procedural errors or defects as irregularities, not nullities: *Ari v. Insurance Corporation of British Columbia*, 2021 BCCA 180 at paras. 45–66. In *Ari*, the failure to obtain leave to issue a third party notice later than the *Rules* permitted did not render the third party notice a nullity. Similarly, in *Alexis v. Duncan*, 2015 BCCA 135, the Court of Appeal held that the addition of a party by amendment of a notice of civil claim, without leave, did not render the amendment a nullity; although in the absence of a cross-application for an order adding the party, the amended notice of civil claim was set aside.

[40] The consequence of failing to comply with the s. 2(1) residency requirement was considered most recently in *MM Fund BCCA.* The central question in that case was whether the plaintiff – a trust managed by a company based in Ontario but with certain connections to B.C. – was a "resident" of B.C. as required by s. 2(1).

[41] The Court of Appeal expressly characterized s. 2(1) of the *CPA* as a standing provision that limits the entitlement to initiate class proceedings to residents of this

province who are members of the proposed class. The Court commented on the purpose of the residency requirement, emphasizing the public interest in such a limitation:

> [74] Section 2(1) of the *Class Proceedings Act* is a standing provision. By its clear language, it limits standing to commence a putative class action on behalf of class members to residents of British Columbia who are members of the proposed class.
>
> [75] Contrary to MM's submission, in my view, there is nothing in the structure of the *Class Proceedings Act* that suggests the residency requirement in s. 2(1) is "a remnant" from a previous iteration which created a "dual regime for class member participation based on residency". Nor does anything suggest that the residency requirement in s. 2(1) is a mere "technicality".
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> …
>
> [79] To repeat, the three principal goals of class actions are behaviour modification, judicial economy, and access to justice. Behaviour modification is facilitated by encouraging actual and potential wrongdoers to account for "the harm they cause or might cause to the public"; judicial economy, by avoiding unnecessary duplication in judicial work; access to justice, by providing a fair, economical process to resolve the claims of class members and, where established, a just, effective remedy: *Finkel* at para. 13 (emphasis added in *MM Fund BCCA*).
>
> [80] The purpose of a standing provision is to delineate who is entitled to bring an action to court for decision. As I noted at the outset, limitations on standing may be necessary for many reasons. These include helping to ensure the effective operation of the court system as a whole and prevent it from becoming overburdened: *Downtown Eastside Sex Workers* at paras. 1, 26.
>
> [81] In my view, the purpose of s. 2(1) of the *Class Proceedings Act* is to limit standing to bring a putative class action to the British Columbia courts for decision to members of the public of British Columbia, namely, British Columbia residents. Although, as discussed in *Harrington CA* and reflected in the *Class Proceedings Act*, non-residents may be entitled to "piggyback" onto such claims and thus gain access to this attractive forum, s. 2(1) is intended to limit entitlement to initiate them to members of the public served by the courts of British Columbia.

[42] In *MM Fund BCCA,* the Court of Appeal affirmed the conclusion of this Court, finding that a trust or corporation is a "resident" under s. 2(1) when its central management and control takes place in B.C.: para. 83. In *MM Fund BCSC,* the plaintiff's certification application was struck because the plaintiff did not meet this

requirement, and it was ordered to amend its pleadings to remove all reference to the *CPA.* The appeal was dismissed.

[43] In *MM Fund*, there was no cross-application to add a B.C.-resident plaintiff. While the chambers judge noted the possibility of the plaintiff later applying to amend if a B.C.-resident class member was identified (*MM Fund BCSC* at para. 33), the question of whether that remedy was indeed available was not decided. Thus, while *MM Fund BCCA* makes clear that s. 2(1) of the *CPA* is a true standing provision that restricts the entitlement to pursue a class proceeding under the *CPA* to B.C. residents who are class members, it is not authority for the proposition that an intended class proceeding initiated by a plaintiff who is not a resident of B.C. is a nullity.

[44] To the contrary, it is apparent from *MM Fund BCCA* that such a claim is not a nullity, as it may continue as an individual proceeding. Unlike in *Zynik Capital Corporation v. Faris et al.*, 2004 BCSC 1032, a case relied on by the B.C. Defendants, Mr. Roy, like the plaintiff in *MM Fund*, did not lack capacity to commence a claim at all.

[45] Further, in *Birrell v. Providence Health Care Society,* 2009 BCCA 109*,* the Court of Appeal upheld an order of this Court (2007 BCSC 668) adding two plaintiffs to an intended class proceeding to remedy the original plaintiff's lack of standing. In that case, the plaintiff was a resident of B.C. but she was not and never had been a member of the intended class, which is also required by s. 2(1).

[46] For these reasons, I conclude that Mr. Roy's lack of standing to pursue a class proceeding under the *CPA* does not render the claim a nullity.

[47] This brings me to the B.C. Defendants' submission that under s. 2 of the *CPA*, if a claim was not "commenced" by a B.C. resident, it cannot proceed under the *CPA.* They submit that *MM Fund BCCA* interpreted s. 2(1) as restricting the ability to *initiate* a class proceeding to residents of B.C. and they point to s. 2(2) of the *CPA,* which provides that the person who "commences" the proceeding must

apply for certification. The B.C. Defendants say that adding Mr. Scott as a plaintiff cannot change the fact that the claim was initiated by Mr. Roy contrary to s. 2(1), and it would be contrary to s. 2(2) for Mr. Scott to apply for certification because it was Mr. Roy who commenced the claim.

[48] I am not persuaded by this argument. It reflects an overly restrictive construction of s. 2 of the *CPA* that is at odds with the well-established approach of interpreting and applying the *CPA* in a generous fashion given the class proceeding objectives of judicial economy, access to justice, and behaviour modification: *Endean v. British Columbia*, 2016 SCC 42.

[49] Further, even if the construction urged by the B.C. Defendants was correct, the defect could still be remedied by backdating an order to add Mr. Scott as a plaintiff to the date the claim was initiated; that is, by adding him as a plaintiff *nunc pro tunc* (literally, “now for then”).

[50] The power to backdate orders flows from the court’s inherent jurisdiction, and is recognized by procedural rules like R. 13-1(8) in the B.C. *Rules*, which provides that an order “unless the court otherwise orders, takes effect on the day of its date”: *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [*Green*].

[51] The B.C. Defendants submit that permitting the addition of Mr. Scott as a plaintiff would render the s. 2(1) residency requirement meaningless because it would allow non-B.C. residents to commence class actions in B.C. as placeholder or token plaintiffs, and then belatedly cure the defect by substituting or adding a B.C.-resident plaintiff. I do not agree. The residency requirement is not rendered meaningless by permitting the addition of a plaintiff in order to comply with it. There may be cases where a token non-resident plaintiff is used to gain some inappropriate tactical advantage but that is appropriately considered when assessing the test for adding a plaintiff under Rule 6-2(7) (discussed below).

[52] Similarly, the residency requirement is not rendered meaningless by adding a plaintiff by way of a *nunc pro tunc* order. The test governing a court’s discretion to

make *nunc pro tunc* orders (also set out below) requires careful consideration of the circumstances, adding further protection against the use of token plaintiffs and other abuses of the court's process.

b) Should Mr. Roy's lack of standing be remedied by adding Mr. Scott as a plaintiff and, if necessary, doing so *nunc pro tunc*?

[53] I turn now to the question of whether it is appropriate in the circumstances of this case to exercise my discretion, under Rule 6-2(7), to add Mr. Scott as a plaintiff and, if necessary because of the word "commence" in s. 2, whether it is appropriate to do so *nunc pro tunc*.

[54] The material portions of Rule 6-2(7) provide:

> **Adding, removing or substituting parties by order**
>
> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> ...
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[55] In *Madadi v. Nichols*, 2021 BCCA 10, Justice Fisher discussed the scope and operation of R. 6-2(7) and the differences between subrules (b) and (c):

> [21] Rule 6-2(7)(b) has been interpreted narrowly, as being concerned with remedying defects in the proceedings. A plaintiff applicant must establish either that the proposed defendant "ought to have been joined as a party" or that their "participation in the proceeding is necessary": *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 16–17; *Alexis v. Duncan*, 2015 BCCA 135 at para. 15; and *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69 at para. 36.

[22] Rule 6-2(7)(c) is broader and therefore more commonly relied upon. A plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. This threshold is low. It is generally expressed as establishing a real issue between the parties that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45 [*Neilson Architects*]; *Strata Plan LMS 1816 v. Acastina Investments Ltd*., 2004 BCCA 578 [*Acastina*]; and *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.) [*Binstead*]. I would define a frivolous issue as an issue that does not go to establishing the cause of action, does not advance a claim known to law, or serves no useful purpose and would be a waste of the court's time and public resources. This is similar to the considerations for determining whether a claim should be struck as "unnecessary, scandalous, frivolous or vexatious" under Rule 9-5(1)(b): see, for example, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 65, citing in *Willow v. Chong*, 2013 BCSC 1083 at para. 20.

[23] This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: *Neilson Architects* at para. 45, citing *Acastina* and *Binstead*. Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether the plaintiff has a possible cause of action against the proposed defendants. The pleadings must set out material facts sufficient to establish a real and not frivolous issue between the plaintiff and the proposed defendants: *Neilson Architects* at paras. 60, 62, and 75.

[24] If this requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in the proceeding. It is in relation to this issue that evidence is more commonly provided. This is a discretionary decision, which discretion must be exercised judicially, and in accordance with the evidence adduced and the guidelines established in the authorities. In *Letvad*, this court adopted a list of factors to be considered from T*eal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A), a decision that addressed the amendment of pleadings after the expiry of a limitation period. These factors include the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the proposed new cause of action: *Teal Cedar* at para. 67; *Letvad* at para. 29; see also *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 21. In the context of adding parties, the last *Letvad* factor may be more accurately described as the extent of the connection, if any, between the existing claim and the parties to be added.

[25] The existence of a limitation defence is an important factor, as such a defence is extinguished if the proposed defendant is added: *Limitation Act*,

> R.S.B.C. 1996, c. 266, s. 4(1)(d), repealed and replaced with *Limitation Act*, S.B.C. 2012, c. 13, s. 22(1)(d); and *Anonson v. North Vancouver (City)*, 2017 BCCA 205 at para. 13. However, this is not determinative. In *Neilson Architects*, this court adopted the following approach to considering a limitation defence (at para. 47):
>
> > If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.

[56] It cannot be said that Mr. Scott ought to have been named as a plaintiff from the outset or that his participation is necessary to ensure that Mr. Roy's claim against the Defendants, or some of them, may be effectively adjudicated. Mr. Scott's claim in relation to the Fees is independent from Mr. Roy's claim and nothing requires his presence to fairly determine Mr. Roy's claim. Therefore, if Mr. Scott is to be added, the broader requirements of R. 6-2(7)(c) must be met.

[57] There can be no dispute that the threshold requirement of a real question or issue between Mr. Scott and another party has been met. Like Mr. Roy, at the material time Mr. Scott was a pilot employed by Air Canada who paid the Fees in the course of commuting to work and when travelling using an employee travel pass. The claim he seeks to advance is the same in all material respects as the claim that Mr. Roy has advanced.

[58] The next question is whether it would be just and convenient to add Mr. Scott in light of the factors identified in *Madadi*, which include the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claim and the party to be added.

[59] I will start with the last factor mentioned, the extent of the connection between Mr. Scott and the existing claim. This factor weighs heavily in favour of adding him as a plaintiff. As mentioned, his claim is identical in all material respects to Mr. Roy's claim.

[60] I turn now to the extent of the delay and any explanation for the delay.

[61] To recap, Mr. Roy commenced the action on March 25, 2019, with a Notice of Civil Claim that expressly disclosed that he is a resident of Nova Scotia. The next day he commenced the Federal Court action, and just over two months later his counsel advised the Defendants that he intended to hold the B.C. claim in abeyance pending the outcome in Federal Court. He did this because of the uncertainty over the Federal Court's subject matter jurisdiction. When the Federal Court action was dismissed by consent in November 2020, following the release of a decision that confirmed it lacked subject matter jurisdiction, Mr. Roy turned his attention to the B.C. claim.

[62] Mr. Roy says that upon becoming aware of the *MM Fund BCSC* decision in September 2022, he made efforts to locate a B.C. resident who would be willing to be added as a plaintiff in this proceeding. In April 2023, the Defendants advised Mr. Roy that they intended to apply to strike the claim for lack of a B.C.-resident plaintiff. Mr. Roy then advised that he intended to apply to add a B.C.-resident plaintiff. The Defendants filed their application to strike in July 2023. Mr. Roy filed his application to add Mr. Scott in February 2024, shortly before the sequencing application.

[63] Given the significance Mr. Roy attaches to the release of *MM Fund BCSC*, it is helpful to consider the extent of delay over two periods:

- first, the roughly three-and-a-half years from March 2019, when the Notice of Civil Claim was initially filed in this Court, to September 2022, when *MM Fund BCSC* was released; and

- second, since September 2022.

[64] During the first 20 months of the first period, Mr. Roy focussed on the Federal Court claim and held the B.C. claim in abeyance. He submits that there was nothing improper about this given the uncertainty about the Federal Court's subject matter jurisdiction, and that until *MM Fund BCSC* was released it was reasonable for his counsel to view the residency requirement in s. 2(1) as a technicality that could

easily be addressed at a later date, if necessary. In this regard, Mr. Roy points to the following:

- His approach of filing simultaneous claims in a provincial superior court and the Federal Court has been characterized as proper and indeed prudent where there is uncertainty about the Federal Court's subject matter jurisdiction: *Coastal Float Camps Ltd. v. Jardine Lloyd Thompson Canada Inc.*, 2014 FC 906 at para. 21.

- In *Lee v. Direct Credit West Inc.,* 2014 BCSC 462, the s. 2(1) residency requirement in the *CPA* was not strictly enforced.

- In *Tucci v. Peoples Trust Company,* 2017 BCSC 1525, the initiation of a class proceeding by a plaintiff who was not a B.C. resident was not fatal to the claim, which was ultimately certified after a B.C.-resident plaintiff was added by consent.

- In *Jiang v. Peoples Trust Company*, 2018 BCSC 299*,* the plaintiff's failure to prove that she was a B.C. resident at the certification hearing did not result in the certification application being dismissed; rather, the claim was certified subject to her residency in B.C. later being proved.

- Other procedural aspects of the *CPA* such as the requirement to apply for certification within 90 days of the close of pleadings are routinely ignored.

- The Defendants' own conduct suggested the lack of a B.C. resident was not of concern to them. In this regard, Mr. Roy emphasizes that the Defendants waited four years from the time the original Notice of Civil Claim was filed and close to two years after becoming aware that the B.C. claim would be pursued to raise the issue; in the course of challenging the jurisdiction of the Federal Court, they made submissions to the effect that it was reasonable to expect that Mr. Roy would proceed in B.C.; and they signed the consent order dismissing the Federal Court action without prejudice to Mr. Roy

> continuing his claim in this Court. Mr. Roy submits that had he known that the Defendants would take what he views as an overly formalistic approach to the residency requirement, he could have and would have found a B.C.-resident plaintiff much earlier.

[65] The B.C. Defendants challenge Mr. Roy's explanation for the delay in the period prior to the release of *MM Fund BCSC*. They emphasize the following:

- The practice of filing substantially identical class proceedings in multiple jurisdictions has been found to be an abuse of process, in some circumstances. They say the delay caused by Mr. Roy holding this claim in abeyance pending the outcome of his claim in Federal Court cannot be viewed as reasonable.

- The wording of s. 2(1) is clear and the law on standing under the *CPA* was settled well before *MM Fund BCSC*. In this regard, in addition to *Jiang,* a case in which one of Mr. Roy's lawyers was involved, they cite *Ernewein, Bonneau v. General Motors of Canada*, 2004 BCSC 1462, *Dominquez v. Northland Properties Corporation*, 2012 BCSC 539, *Ewert v. Canada (Attorney General)*, 2016 BCSC 962, *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, and *Bhangu v. Honda Canada Inc.* 2021 BCSC 2381. They imply that Mr. Roy filed this claim knowing that his lack of standing rendered it fatally flawed.

- Although the s. 2(1) residency requirement was not enforced in *Lee*, that case involved unique circumstances that do not exist here. Specifically, the contracts in question contained a choice of forum clause in B.C. and it did not appear that any class members were B.C. residents, such that insisting on compliance with s. 2(1) could have precluded the claim from being advanced anywhere. Further, in *Lee* the defendants did not object to the absence of a B.C.-resident plaintiff.

- Although the plaintiff who commenced the proceeding in *Tucci* was not a B.C. resident, and a B.C. resident was later added, this was done by consent.

- In this case, there is "ample evidence of the existence of B.C. residents [who could have served as plaintiff]".

[66] The first point listed above overlaps with the B.C. Defendants' submissions about abuse of process, and I engage in a comprehensive discussion of that argument later in these reasons. For now, it is sufficient to say that I am not persuaded that this is a case where filing substantially identical claims in multiple jurisdictions is an abuse of process. Rather, it was a reasonable approach in the circumstances.

[67] It cannot be disputed that the s. 2(1) residency requirement is obvious from even a cursory reading of the *CPA*. However, I did not take Mr. Roy's counsel to be suggesting that they were not aware of it at all. Rather, the argument advanced on Mr. Roy's behalf is that until *MM Fund BCSC,* which resulted in a certification application actually being dismissed due to the failure of the plaintiff to meet the residency requirement, his counsel considered the residency requirement to be a technicality and assumed it could be addressed later, as a routine matter. In these circumstances, they elected to commence this claim in Mr. Roy's name for convenience, as it was intended that he would be the plaintiff in the Federal Court claim.

[68] The B.C. Defendants correctly observe that there were several decisions of this Court, prior to *MM Fund*, where the s. 2(1) residency requirement was expressly mentioned. However, most of those (*Ernewein*, *Dominquez*, *Ewert*, and *Bhangu*) were decisions on or following successful certification applications where, in the course of addressing the s. 4(1)(e) requirement for an appropriate representative plaintiff, it was simply observed that the s. 2(1) residency requirement had been met. In other words, none of those cases involved an objection to certification based on a failure to meet the residency requirement.

[69] *Lee* and *Tucci* are examples of cases where, with the consent of the defendants, the initial plaintiff's failure to meet the residency requirement was not a barrier to certification. Of course, it would not have been reasonable for Mr. Roy to simply assume the Defendants in this case would consent to the addition of a B.C.-resident plaintiff. However, I accept that the position taken by the Defendants in the Federal Court to the effect that B.C. was the more appropriate jurisdiction may have contributed to his counsel's somewhat casual approach to the residency requirement in s. 2(1).

[70] In all the circumstances, it is my view that the delay up to September 2022 when *MM Fund BCSC* was released, does not weigh against Mr. Roy's position in the just and convenient analysis.

[71] I am also satisfied that the delay since September 2022, does not weigh against Mr. Roy's position, even without considering Mr. Roy's evidence about his attempts to identify a colleague who would be willing to be added as an additional plaintiff.

[72] Although two years passed between September 2022, when *MM Fund BCSC* was released, and September 2024, when these applications were heard, this was largely due to the schedules of counsel on both sides. For the first seven months of this two year period, no steps were taken as the parties waited for the appointment of a case management judge. The first judicial management conference was not held until August 2023, roughly a year before the applications were heard. Several preliminary applications were identified by the parties and they disagreed about the sequencing of those applications, which necessitated a contested sequencing hearing that was not held until February 2024, despite earlier dates being offered to the parties. The original dates set for the hearing of these applications (late June 2024) were adjourned (to September 2024) at the request of counsel and by consent. In all the circumstances, the blame for the delay since September 2022 cannot be laid at Mr. Roy's feet alone.

[73] In summary on the question of delay, the delay in Mr. Roy applying to add Mr. Scott does not weigh against his position on the question of whether Mr. Scott should be added as a plaintiff. There is no evidence that suggests that he was intentionally dilatory in bringing on the application to add Mr. Scott after the release of *MM Fund BCSC*. In the circumstances, delay is a neutral factor in the just and convenient aspect of the R. 6-2(7)(c) analysis.

[74] The limitation period factor is also neutral in this case because Mr. Scott has claims that are clearly within the limitation period.

[75] I turn now to the degree of prejudice caused by the delay.

[76] The B.C. Defendants did not claim that they would suffer any actual prejudice if Mr. Scott is added as a plaintiff. No doubt, this is because they have been aware of the claim and the prospect of a class proceeding since at least 2019, shortly after this action and the Federal Court action were commenced. Despite there being a defect in each (lack of subject matter jurisdiction in the Federal Court action and Mr. Roy's residency in this action), the two actions put the Defendants on notice with respect to claims on behalf of numerous potential class members.

[77] The B.C. Defendants submitted, in the course of their abuse of process arguments, that it is unfair to allow Mr. Roy to achieve the suspension or "tolling" of limitation periods provided by ss. 38.1 and 39 of the *CPA*, by filing a claim in B.C. and then holding it in abeyance while pursuing a claim in Federal Court. I address this in more detail later. For now, I observe that while it may be improper to use a "token" plaintiff (that is, a plaintiff who is known not to have a legitimate claim) to gain the advantage of the tolling provisions in the *CPA*, Mr. Roy is not a token plaintiff. He very clearly is a member of the intended class and he seeks to advance what he views as a legitimate claim. Further, as the Defendants have conceded, there were B.C.-resident class members available who could have served as plaintiff from the outset. In these circumstances, there does not appear to have been any real tactical advantage gained by initiating the claim in Mr. Roy's name instead of in the name of a B.C.-resident class member.

[78] In contrast, not allowing the addition of Mr. Scott would prejudice class members because they would lose the benefit of the potential suspension of limitation periods back to 2019, which, under ss. 38.1 and 39 of the *CPA*, crystalizes if a certification application is heard. As discussed below, this must be given significant weight. If the substitution of Mr. Scott is not permitted, many claims may be lost to a limitation defence.

[79] For these reasons, I have concluded that it is just and convenient to add Mr. Scott as a plaintiff.

[80] For similar reasons, it is appropriate to do so *nunc pro tunc* if that is necessary to comply with s. 2 of the *CPA*.

[81] A non-exhaustive list of factors which may favour granting a *nunc pro tunc* order was identified in *Green*. In that case, the issue was whether a *nunc pro tunc* order should be made to save a claim that was otherwise barred by statute, and the factors are framed in that context. With that in mind, the factors are set out in para. 90 as follows:

a) The opposing party will not be prejudiced by the order;

b) The order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;

c) The irregularity is not intentional;

d) The order will effectively achieve the relief sought or cure the irregularity;

e) The delay has been caused by an act of the court; and

f) The order would facilitate access to justice.

[82] This list is non-exhaustive, and no factor is determinative: *Green* at para. 90.

[83] As I have already discussed, a reasonable explanation has been provided for the delay in addressing Mr. Roy's failure to meet the residency requirement in s. 2 of

the *CPA;* Mr. Roy did not gain any tactical advantage by initiating the claim in his name rather than in the name of a B.C.-resident plaintiff; there is no prejudice to the Defendants; and, if the construction of s. 2 urged by the Defendants is correct, not granting the order *nunc pro tunc* would prejudice those class members whose claims ultimately depend on the suspension of limitation periods under ss. 38.1 and 39 of the *CPA.* In these circumstances, the timing of the addition of Mr. Scott is an irregularity and adding him as a plantiff, *nunc pro tunc*, would facilitate access to justice.

[84] Before turning to the next issue, I wish to briefly address two points raised by Mr. Roy. First, Mr. Roy submitted that, because of their conduct, either the Defendants waived the s. 2(1) residency requirement, or they should be estopped from applying to strike the claim. Mr. Roy submits that this waiver/estoppel is a "complete answer" to the application to strike for lack of standing. I am not persuaded by this submission.

[85] The essential elements of waiver are that the waiving party had full knowledge of the deficiency they might have relied upon, and an unequivocal intention to relinquish that right. The intention may be inferred by conduct: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at 499–500, 1994 CanLII 100; *Kypriaki Taverna Ltd. v. 610428 B.C. Ltd.*, 2021 BCSC 1711 at paras. 15–16.

[86] Estoppel by conduct applies when it would be unconscionable to allow a defendant to benefit from their conduct. Often, the defendant's problematic conduct will be "blameworthy" in the sense of being deliberate or reckless, although this is not an essential element of the doctrine: *Desbiens v. Smith*, 2010 BCCA 394 at para. 39.

[87] Leaving aside the question of whether it is possible for a party to waive a statutory provision in which there is a substantial public interest (see *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1989 CanLII 98 at 1315–16; *Tataryn v. Diamond & Diamond*, 2023 ONSC 6165 at para. 20), the evidence does not establish an unequivocal and

conscious intention on the part of the Defendants to waive the residency requirement, or unconscionable conduct on the part of the Defendants. While the Defendants' conduct does not rise to the level of waiver/estoppel, their failure to raise any objection on the basis of Mr. Roy's residency for four years, the position they advanced in Federal Court, and the wording of the consent dismissal order of the Federal Court action all form part of the mix of circumstances that cause me to conclude that delay is a neutral factor in determining whether it is just and convenient to allow the addition of Mr. Scott.

[88] Second, because I have concluded that Mr. Roy's lack of standing is appropriately addressed by adding Mr. Scott, it is not necessary to comment on the argument that Mr. Roy should be given the opportunity to apply, at the certification hearing, for the appointment of a representative plaintiff who is not a member of the class under s. 2(4) of the *CPA*, or on the relationship between ss. 2(1) and 2(4).

c) Should Mr. Roy's claim be struck in its entirety for abuse of process?

[89] Rule 9-5(1)(d) of the *Rules* provides that a claim may be struck if it is an abuse of the court's process:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[90] The abuse of process doctrine is a broad and flexible mechanism that can be applied in a variety of contexts to prevent the court's procedures from being misused in ways that bring the administration of justice into disrepute. In all its applications, the primary focus of the doctrine is the integrity of the court's adjudicative functions,

rather than the interests of the parties: *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63 at paras. 35, 37, 43; *Este v. Esteghamat-Ardakani*, 2018 BCCA 290 at para. 83.

[91] In an abuse of process analysis, the court must consider the party's conduct on a case-by-case basis and in the totality of the circumstances. Conduct that may be abusive in one context may be permissible in another: *Hafichuk-Walkin et al v. BCE Inc et al,* 2016 MBCA 32 at para. 41, citing *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 51; *BCE Inc. v. Gillis*, 2015 NSCA 32 at para. 36; *Bear v. Merck Frosst Canada & Co,* 2011 SKCA 152 at para. 41.

[92] While the doctrine has been applied across a variety of contexts, it is clear that only egregious conduct by a party will warrant the summary dismissal of an action. As Justice Arbour described it in *Toronto (City)*, the proceedings must be "unfair to the point that they are contrary to the interest of justice" and constitute a "misuse of its procedure, in a way that would … bring the administration of justice into disrepute": at paras. 35, 37. The party alleging abusive conduct bears a heavy onus: *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.*, 2022 BCSC 33 at para. 45, aff'd 2023 BCCA 375; *Hare v. Lit*, 2013 BCSC 33 at paras. 24–25.

[93] The Defendants identify the following factors, in combination, as constituting an abuse of process:

- "forum-shopping" by commencing more than one proceeding in different jurisdictions, sometimes referred to as filing a protective action;
- the use of a plaintiff who has only a minimal connection to B.C. and who selected this jurisdiction for perceived strategic benefits;
- commencing the claim with a token plaintiff as a "placeholder", despite knowing he did not have standing to do so, in order to seek an improper advantage; and
- taking a variety of steps to "circumvent" the residency requirement.

[94] In their responding written submissions, the B.C. Defendants clarified that "it is not the filing of a protective action *per se* which [they] say is an abuse of process". They conceded that the filing of a protective action may be appropriate in some circumstances. They explained that it is the filing of a protective action where the plaintiff has no standing to file the claim in the first place that is at the heart of their abuse of process argument.

[95] I will address each factor individually and then cumulatively, bearing in mind the high threshold for establishing abuse of process.

[96] In the context of intended class proceedings, courts have warned that the practice of filing substantially identical claims in numerous jurisdictions may constitute an abuse of process. Decisions in this line of authorities have held that while filing multiple actions is not inherently an abuse of process, this practice can be an indicator that the claim was filed for an improper and abusive purpose: *Hafichuk-Walkin* at paras. 39–40; *Gillis* at para. 35.

[97] For example, when substantially identical claims are filed for the purpose of securing carriage for plaintiff's counsel, rather than to advance the interests of the putative class, this practice "smacks of an abuse of process": *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 at para. 37, 2008 CanLII 37911 (O.N.S.C.). See also *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896 at para. 83; *Gillis* at paras. 69–74.

[98] Another example of an improper purpose is the filing of substantially identical claims in multiple jurisdictions for the purpose of securing an opportunity to re-litigate issues should they be decided unfavourably in the first jurisdiction. The intended class proceedings in *Hafichuk-Walkin* and *Gillis* were both struck in their entirety on this basis: *Hafichuk-Walkin* at paras. 56, 60; *Gillis* at paras. 38–41, 84.

[99] However, as mentioned, there may be legitimate reasons to file substantially identical claims in more than one jurisdiction. A class proceeding that is one of multiple, similar claims will not be an abuse of process unless it can be shown that it

was filed for no legitimate purpose: *Fantov v. Canada Bread Company, Limited,* 2019 BCCA 447 at para. 71; *Hafichuk-Walkin* at para. 40; *Tanchak v. British Columbia*, 2024 BCSC 644 at paras. 12–14.

[100] There is no question that when this claim was filed, Mr. Roy's counsel intended to file a substantially identical claim in Federal Court and then hold this claim in abeyance until the Federal Court's subject matter jurisdiction was determined. Mr. Roy's counsel recognized they would be faced with jurisdictional challenges no matter what forum they selected: a claim in any provincial superior court against all the Defendants would be met with challenges to territorial jurisdiction by some of the Defendants, while a claim in Federal Court would be met with a challenge to subject matter jurisdiction. The only way to avoid a jurisdictional challenge would be to file claims in multiple provincial superior courts, which would be obviously inefficient. The decision was made to proceed first in Federal Court and to prosecute the claim in this Court only if subject matter jurisdiction proved to be a barrier in Federal Court, but to file the claims simultaneously to guard against the expiration of limitation periods and secure the potential for tolling under ss. 38.1 and 39 of the *CPA* in case it became necessary to proceed in this Court. In these particular circumstances, the filing of the two claims simultaneously cannot be characterized as abusive.

[101] This claim was not filed with no intention of advancing it and only for the purpose of securing carriage for plaintiff's counsel or to otherwise advance the interests of plaintiff's counsel. The purpose was not to preserve the opportunity to relitigate issues decided against Mr. Roy in another forum. Rather, the intention was to ensure there would be an adjudication on the merits, somewhere, for the class members. The purpose of filing simultaneously was to protect claims of the putative class from being defeated without a determination on the merits, which would potentially occur if limitation periods expired while the anticipated challenge to the Federal Court's subject matter jurisdiction remained extant. As noted in *Coastal Float Camps* at para. 21, this is not an abuse of process; to the contrary it is a prudent course of action.

[102] I turn now to Mr. Roy's connection to B.C.

[103] It does not appear to be disputed that the vast majority of the Fees paid by Mr. Roy were paid in Nova Scotia, where he resides, and in Toronto and Montreal, out of which cities he was based.

[104] The B.C. Defendants object to the use of a plaintiff who has only a minimal connection to B.C. and who they say selected this jurisdiction for perceived "procedural advantages". They referred to B.C.'s "favourable class action regime" without much particularization, but I assume this includes the favourable costs rules here that limit a plaintiff's exposure to adverse costs rulings.

[105] The B.C. Defendants submit that in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 1993 CanLII 124, the Supreme Court of Canada "established that if a party seeks out jurisdiction simply to gain a juridical advantage rather than based on a real and substantial connection between the case and the jurisdiction, this is ordinarily condemned as forum shopping". This topic is discussed at 920, the material portion of which actually reads:

> If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available. [emphasis added]

[106] In other words, leaving aside for the moment the residency requirement in s. 2(1) of the *CPA*, Mr. Roy would have a legitimate claim to B.C.'s favourable class action regime provided his case has a real and substantial connection to this province.

[107] It is specifically alleged in the FANOCC that Mr. Roy paid AIFs to the Defendant Vancouver Airport Authority, among others. It would appear there is a real and substantial connection between B.C. and the facts he has alleged against

the Vancouver Airport Authority. While it is open to some of the Defendants to challenge this Court's territorial competence or ask the Court to decline jurisdiction on *forum non conveniens* grounds, neither the fact that Mr. Roy could have commenced the claim in another province nor the fact that the quantum of his claims against other Defendants is greater than the quantum of his claim against the Vancouver Airport Authority renders it abusive for him to choose the forum that he perceives to offer procedural advantages.

[108] The B.C. Defendants argue that Mr. Roy knowingly circumvented the residency requirement in s. 2(1) "to seek an improper advantage". However, the nature of the allegedly "improper" advantage remains obscure.

[109] For example, the B.C. Defendants submitted that:

- Mr. Roy's filing of a "placeholder claim so [he] could attempt to pursue the claim in a more attractive forum, namely the Federal Court", was abusive;
- the practice of rushing to commence overlapping actions to claim turf and secure carriage for law firms is abusive; and
- Mr. Roy included a claim for breach of the *Competition Act* in an attempt to establish jurisdiction in the Federal Court and then, in the consent order dismissing the Federal Court action, he acknowledged the *Competition Act* claim did not disclose a cause of action.

[110] I do not find that any of these points suggest an effort to obtain an improper advantage by circumventing the residency requirement. To the first point, I have already explained that Mr. Roy had a legitimate purpose for filing the two claims essentially simultaneously, and there is nothing abusive, *per se*, about a plaintiff prioritizing the forum the plaintiff considers to be most attractive. To the second point, there is no evidence that Mr. Roy's counsel filed overlapping actions to secure carriage for their law firm. Finally, even if it was improper on some level for Mr. Roy to initially plead the *Competition Act* only for the purpose of attempting to establish

Federal Court jurisdiction, this did not flow from Mr. Roy's so-called "circumvention" of the *CPA*'s residency requirement.

[111] The advantage Mr. Roy obtained from commencing this claim was access to the favourable class proceedings regime in this jurisdiction and the potential tolling of limitation periods for the class members. The question is whether securing those advantages using a plaintiff who was known not to be a resident of B.C. is an abuse of process in the circumstances of this case.

[112] In *Birrell*, the defendants opposed an application to substitute two new plaintiffs for the original plaintiff in an intended class proceeding after it was discovered that the original plaintiff was not a member of the putative class and therefore did not meet one of the two requirements in s. 2(1). The defendants argued that "a non-existent claim should not be permitted to act as a shell vehicle to which other potentially more legitimate plaintiffs can be added at will" (at para. 107). Justice Russell endorsed the Defendants' concerns, referring to the Ontario case of *Giuliano v. Allstate Insurance Co*. (2003), 66 O.R. (3d) 238, 2003 CanLII 64297 (O.N.S.C.), cited in *Birrell* under a different style of cause, *Segnitz v. Royal & Sun Alliance Insurance Co. of Canada*. As in *Birrell*, the plaintiff in *Giuliano* discovered after filing an intended class proceeding that he was not a member of the putative class, and sought to have several confirmed class members added as plaintiffs. The Court granted the application but offered the following comments at para. 22.

> [22] Before moving on […] I should deal with the defendant's legitimate concern about the naming of token representative plaintiffs to toll the limitation period. I agree that such a practice would constitute an abuse of process, but there is no evidence to support any finding that that was the intention of counsel in this case. In my view, the presence of such evidence might well constitute sufficient grounds for refusing to add or substitute a party and could also attract appropriate costs consequences for the offending counsel.

[113] After quoting para. 22 of *Guiliano,* Russell J. commented:

> [62] Although that case was decided in Ontario, the issues discussed and principles applied are highly relevant in British Columbia. In particular, the fact that sections 38.1 and 39 of the *Class Proceedings Act* have the effect of suspending the limitation period for all class members, if a certification

> application is dismissed or if the proceeding is certified, means that the concern regarding the use of token representative plaintiffs, to act as litigation vehicles for others with legitimate claims, is similarly applicable in this province. Such a practice is to be avoided.

[114] However, Russell J. held that these concerns must be balanced with the principle that while a proposed class proceeding is subject to the ordinary *Rules*, the *Rules* are to be applied in the context of considering the proceeding's potential future as a class action (at paras. 58–69). As stated by Russell J. at para. 70, "while a court must not permit persons to act as litigation vehicles for others […] the *Rules of Court* should be applied to a proposed class proceeding by considering the claims of the class as a whole, rather than just the named plaintiff". She noted that if the claim was unable to proceed many class members would be prejudiced by the expiration of limitation periods (paras. 123–124). Ultimately, an order was granted substituting the new plaintiffs for the original plaintiff, and this was upheld by the Court of Appeal.

[115] While I accept that using a person who does not have a legitimate claim as a token plaintiff to gain a tactical advantage may well constitute an abuse of process, Mr. Roy is not properly characterized as a "token" plaintiff. As already observed, he is a member of the intended class and he seeks to advance what he views as a legitimate claim.

[116] Further, as discussed, there is no appearance of *male fides* on the part of plaintiff's counsel in the selection of Mr. Roy as plaintiff for this claim. In the course of determining that it would be just and equitable to add Mr. Scott as a plaintiff, I have accepted that this claim was commenced by Mr. Roy, despite the s. 2(1) residency requirement, because until the release of *MM Fund BCSC,* plaintiff's counsel considered the residency requirement to be a technicality that could be rectified later as a routine matter, and Mr. Roy was used as plaintiff for convenience as it was intended he would be the plaintiff in the Federal Court action.

[117] Finally, as the Defendants have conceded, there were B.C.-resident class members available who could have served as plaintiff from the outset. Thus, there

does not appear to have been any tactical advantage gained by initiating the claim in Mr. Roy's name instead of in the name of a B.C.-resident class member.

[118] In these circumstances, the use of Mr. Roy as plaintiff, despite s. 2(1), is not an abuse of process.

[119] The B.C. Defendants argue that permitting the addition of a new plaintiff to cure the standing defect "would amount to a condonation of the Plaintiff's abuse of process". They argue this would "incentivize future intentional breaches of the *CPA* by non-resident Plaintiffs". They cite *Bear*, where the situation was referred to as a "revolving door of representative plaintiffs who serially advance certification application after certification application until they (perhaps) find one that succeeds" (para. 74). The B.C. Defendants say this "guidance applies equally, if not with more force to the present situation".

[120] It should go without saying that the situation here bears no resemblance to that in *Bear*. There is no revolving door of plaintiffs here and no attempt to relitigate issues already decided.

[121] For the reasons I have already expressed, in this case it is just and equitable to add Mr. Scott as a plaintiff in order to remedy the defect in the claim that arises from Mr. Roy's lack of standing. It follows that Mr. Roy's seeking of that relief is not an abuse of process.

[122] I reject the notion that this conclusion would incentivize future intentional breaches of the *CPA*. As discussed, abuse of process is a case-specific doctrine. Whether intentional breaches of the *CPA* by future plaintiffs in other cases amount to abuse of process will depend on the specific circumstances of those future cases. In any event, I cannot see what incentive the conclusion would create given there does not appear to have been any tactical advantage gained by initiating the claim in Mr. Roy's name instead of in the name of a B.C.-resident class member.

[123] I also reject the assertion that pleading Rule 20-3 as an alternative to the *CPA* is an effort to circumvent the *CPA*. Leaving aside the question of whether a

representative proceeding is available in the circumstances of this case, the FANOCC is clear that the plaintiff only intends to rely on Rule 20-3 if the effort to certify the claim under the *CPA* proves unsuccessful. This cannot be said to "circumvent" the *CPA*.

[124] Finally, the B.C Defendants assert that Mr. Roy has attempted to circumvent the residency requirement by asserting that he will apply to certify the claim pursuant to s. 2(4) of the *CPA* despite the clear wording of that provision which provides the Court may certify a person "who is not a member of the class", pointing out that both Mr. Roy and Mr. Scott are members of the proposed class.

[125] This assertion reflects a misunderstanding of Mr. Roy's submission in relation to s. 2(4). He did not suggest that he could ask the Court to certify him or Mr. Scott as representative plaintiff under s. 2(4). His argument was that he could ask the Court to certify someone else, who is not a class member, under s. 2(4) as a means of avoiding the consequences of failing to meet the s. 2(1) residency requirement. Whether s. 2(4) could be used to cure a plaintiff's failure to meet s. 2(1) is not directly before me and I will not say more about it. For now, it is sufficient to point out that the B.C. Defendants have misunderstood Mr. Roy's argument in this respect.

[126] As discussed, in an abuse of process analysis, the court must consider the party's conduct in the totality of the circumstances. I have started the analysis by examining each aspect of Mr. Roy's conduct that has been criticized. Having done so, the question remains whether the cumulative effect of this conduct meets the high threshold of abuse of process, which requires egregious conduct rending the proceedings unfair to the point that they are contrary to the interests of justice.

[127] I have no difficulty concluding that this high threshold has not been met. The only conduct on the part of Mr. Roy that could potentially be criticized was the commencement of the claim in his name despite the express language of s. 2(1). I have concluded that it would be just and equitable in this case to add Mr. Scott to cure that defect. It follows that the conduct the B.C. Defendants complain about falls far short of abuse of process.

Conclusion

[128] Mr. Roy's application to add Mr. Scott as a plaintiff is granted.

[129] The application of the B.C. Defendants to strike the claim in its entirety as an abuse of process is dismissed.

"Warren J."