IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bahraini v. Cineplex Inc.,*
2025 BCSC 1384

Date: 20250721
Docket: S240406
Registry: Vancouver

Between:

Amir Hossein Bahraini

Plaintiff

And

Cineplex Inc. and Cineplex Entertainment Limited Partnership

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment on Sequencing

Counsel for the Plaintiff:	S. Jaworski J. Giovannetti
Counsel for the Defendants:	L. Plumpton J. Gotowiec
Place and Date of Hearing:	Vancouver, B.C. June 13, 2025
Place and Date of Judgment:	Vancouver, B.C. July 21, 2025

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I. INTRODUCTION

[1] Before me is an interlocutory application in this proposed "drip fee" consumer class action. It asks the Court to determine the following issues:

a) When the defendants' proposed application to strike should be heard, and

b) Which version of the Notice of Claim should be considered on such an application?

II. FACTUAL BACKGROUND

[2] The plaintiff filed his Notice of Civil Claim on January 22, 2024. The plaintiff alleged that the defendants ("Cineplex") breached sections 52 and 54 of the *Competition Act*, R.S.C. 1985, c. C-34 by not including its Online Booking Fee in the initial price represented to class members for movie tickets sold through its online booking platforms.

[3] On February 13, 2024, the plaintiff, by consent, amended his pleading to correct the name of one of the defendants (the "ANOCC").

[4] On March 8, 2024, the plaintiff sent a letter to Cineplex requesting that they advise within 30 days of their intention to bring any pre-certification applications. Cineplex responded on May 2, 2024, indicating their intention to apply to strike the plaintiff's claims under Rule 9-5(1)(a) or (b).

[5] On May 14, 2024, the plaintiff sent a letter to Cineplex enclosing a draft Further Amended Notice of Civil Claim that proposed to add a claim for unjust enrichment (the "Draft FANOCC").

[6] On July 10, 2024, the parties attended a case planning conference and began the process of requesting the assignment of a case management judge.

[7] In July 2024, Cineplex's former counsel advised the plaintiff that they would be on sabbatical from mid-August to mid-November, but that Cineplex would aim to deliver an unfiled motion to strike and supporting materials by late November or

early December. The plaintiff acquiesced to this timeline, but requested that the strike application be delivered no later than December 13, 2024. The plaintiff agreed to provide their position on the sequencing of such motion to strike in relation to their own intended amendment application by December 20, 2024, and the application to further amend itself by January 17, 2025.

[8] Plaintiff's counsel explained at the hearing that they made a tactical decision at that time not to use their so-called "free amendment", so that it could be held in reserve for possible use at a later time.

[9] Over the summer of 2024, the Competition Tribunal held on reserve the Commissioner of Competition's application regarding a parallel allegation that Cineplex was engaging in reviewable conduct under ss. 74.01(1) and 74.01(1.1) of the *Competition Act* through its representation of its Online Booking Fee. On September 23, 2024, the Competition Tribunal issued its decision in *Cineplex - Reasons for Order and Order*, 2024 Comp Trib 5, 2024 CanLII 93716, finding that Cineplex was in breach of the *Competition Act*. The Tribunal ordered Cineplex to make changes to its website and mobile app. It also imposed a nearly $40-million administrative monetary penalty (representing the aggregate amount of the Online Booking Fee collected from its introduction in mid-2022 through to the end of 2023). Cineplex has appealed the Tribunal's order to the Federal Court of Appeal.

[10] Cineplex changed counsel in October 2024. In late October, the plaintiff wrote to confirm whether Cineplex still intended to comply with the agreement made with prior counsel on timing of the delivery of the intended applications. The plaintiff was advised that the application to strike remained under consideration.

[11] In November 2024 and March 2025, plaintiff's counsel sent follow-up correspondence to Supreme Court Scheduling regarding the parties' request for the assignment of a case management judge.

[12] On December 13, 2024, Cineplex sent the plaintiff an unfiled notice of application to strike the plaintiff's pleading. Cineplex characterizes this unfiled

document as being “final”, although it did not formally communicate that characterization to the plaintiff at the time. Since the notice of application was unfiled, it did not constitute service pursuant to Rule 8-1(7) of the *Supreme Court Civil Rules*.

[13] On January 6, 2025, the plaintiff informed the defendants that they intended to make further amendments to the claim beyond those earlier identified in the Draft FANOCC and that they now planned to use their free amendment under Rule 6-1(1) rather than filing an application to amend. On January 16, 2025, the plaintiff served a filed Further Amended Notice of Civil Claim (the “FANOCC”) on Cineplex. In the FANOCC, the plaintiff added claims under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and consumer protection legislation in Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island, and Newfoundland and Labrador. The plaintiff also added a claim for unjust enrichment. At the hearing, plaintiff’s counsel accepted that they had reversed course on their earlier decision not to exhaust their “free amendment”.

[14] On April 1, 2025, the parties were informed that I had been assigned to manage this proceeding.

III. ANALYSIS

A. SEQUENCING

[15] This first issue can be resolved summarily. There is only one proposed application before the Court that is ready to proceed - the defendants’ application to strike. Except in extraordinary cases, a plaintiff in a class proceeding should not be allowed to delay the hearing of a defendant’s application in favour of a certification application that has not yet been filed.

[16] The certification application should generally be the first application heard in a proposed class proceeding. That is clear from the fact that the legislators assumed that this application would be heard within 90 days: *Class Proceedings Act*, R.S.B.C.

c. 50, s. 2(3)(a). However, the plaintiff must take the initiative to make this happen. They need to prepare and deliver certification materials as soon as practicable.

[17] I appreciate that there may be legitimate reasons not to file a certification application in certain cases. However, I do not think there was sufficient reason in this case for the plaintiff not to have put himself in a position where a true contest existed between two extant applications. There may have been some strategic advantage to waiting for the Competition Tribunal decision. But that decision was issued on September 23, 2024. There has been more than enough time to prepare certification material responsive to that decision.

[18] It is possible that the plaintiff was lulled into a state of complacency by the defendants' situation, including the delays created by Cineplex's change in counsel. But at the end of the day, it falls on the plaintiff to move their case forward. There was never a formal standstill agreement.

[19] As such, I find it unnecessary to conduct a comprehensive evaluation of the factors set out in *British Columbia v. The Jean Coutu Group (PJC) Inc*., 2021 BCCA 219 and other cases for determining the appropriate sequencing between certification and non-certification motions. In this sequencing fight, the plaintiff failed to bring their certification application to the main event.

B. PLEADING CHOICE

[20] The defendants argue that their application should be determined by evaluating the ANOCC rather than the FANOCC. I disagree, for the following reasons:

a) The plaintiff had the right to make a "free amendment" without the consent of the defendants. Their amended pleading has been filed and should be treated as the operative document absent a clear reason not to do so.

b) The defendants' argument in favour of using an "out of date" pleading is quite technical: should the rights of the parties be determined based on the pleading as it was when a motion to strike is delivered?

c) For the reasons expressed below, I find it unnecessary to rule on whether formal delivery of an application to strike necessarily "freezes" the pleading to be considered on such an application. However, I would note that it would be quite artificial to consider an application based on a pleading no longer in effect at the time the application is argued. I appreciate the potential for prejudice in such a situation, but that prejudice seems best addressed on a case-by-case basis, rather than through a strict rule. I appreciate the concerns underlying the extra-provincial case law relied upon by the defendants – it can seem unfair to have a new pleading thrust upon you at the last moment after you have developed your legal strategy based on an earlier pleading. However, in the context of this case, any prejudice is mitigated in that I will certainly ensure the defendants have adequate time to prepare for the hearing of their application. This will enable them to consider the implications of the new pleading fully. Indeed, Cineplex's counsel at the hearing was already in a position to advise that the defendants were unlikely to challenge the viability of the latest provincial consumer protection claims advanced. Furthermore, any prejudice can also be addressed as part of the costs evaluation.

d) In the context of a proposed class proceeding, there is potential prejudice to a group beyond the parties themselves that the Court must consider – the absent proposed class members. Where possible, a court should try to avoid having failings by class counsel fall at the feet of the absent proposed class. Here class counsel took a bit longer to prepare their improved pleading than they should have, and complexities developed from the "flip-flop" in pleading strategy. However, I am reluctant to lay such relatively minor failings at the feet of the absent class.

e) Most importantly, the defendants never formally filed and served their application to strike prior to the filing of the FANOCC. As such, the extra-provincial case law relied upon by the defendants is not strictly applicable.

f) Furthermore, even if the case law had been directly relevant, courts in BC have not yet decided to adopt the same approach: *1127551 B.C. Ltd. v. Prior Properties Inc.,* 2023 BCCA 222 at paras. 18-24.

g) Although there may have been loose counsel understandings or assumptions about who would do what when, I am not in a position to enforce any of these on the basis of the record before me.

h) In any case, the law in British Columbia in relation to applications to strike brought in the context of class proceedings is that such motions are considered based on the pleadings as they may reasonably be amended: *Kimpton v. Canada (Attorney General)*, 2002 BCSC 1645 at paras. 6-8*; McMillan v. Canada Mortgage and Housing Corporation*, 2007 BCSC 1475 at para. 18; *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 23; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44-45; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17; *Sharifi v. WestJet Airlines Ltd*., 2022 BCCA 149 at paras. 35-40; *Trotman v. WestJet Airlines Ltd*., 2022 BCCA 22 at paras. 48, 66; *WestJet v. Gauthier*, 2025 BCCA 134 at para. 63; *Class Actions in Canada*, *2nd Edition* (Toronto: Thomson Reuters) (loose-leaf updated 2025), at § 4:3. Here, I accept that the FANOCC qualifies as a reasonably amended pleading.

[21] For all these reasons, I direct that the defendants' application be determined on the basis of the allegations made in the FANOCC.

IV. CONCLUSION

[22] The defendants have leave to obtain a full day for the hearing of their application to the strike on the first date convenient to the parties and the Court. The

application will be considered on the basis of the Further Amended Notice of Civil Claim.

[23] Given that the results were mixed, each party will bear their own costs, unless either party seeks to make further submissions.

"The Honourable Mr. Justice Branch"