IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Middleton v. TELUS International (Cda) Inc.*, 2025 BCSC 1611

Date: 20250821
Docket: S248620
Registry: Vancouver

Between:

Kayne Michael Middleton

Plaintiff

And

TELUS International (Cda) Inc., Jeffrey Puritt, Vanessa Kanu, Gopi Chande, Michael Ringman, Beth Howen, Darren Entwistle, Josh Blair, Madhuri Andrews, Olin Anton, Navin Arora, Doug French, Tony Geheran, Sue Paish, Carolyn Slaski and Sandra Stuart

Defendants

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

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for the Plaintiff:	S.J. Jaworski C.K.B. Harman
Counsel for the Defendants:	K.L. Kay M. Shahid
Place and Date of Hearing:	Vancouver, B.C. August 6, 2025
Place and Date of Judgment:	Vancouver, B.C. August 21, 2025

Table of Contents

Overview

[1] On December 12, 2024, the plaintiff filed a proposed class action against the defendants, advancing three causes of action:

a) secondary market liability under s. 140.3 of the *Securities Act*, R.S.B.C. 1996, c. 418 [*SA*];

b) liability under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]; and

c) liability for negligent misrepresentation under the common law.

[2] Section 140.8 of the *SA* states that no action may be commenced under s. 140.3 without leave, and provides in part:

> **Leave to proceed**
>
> **140.8** (1) No action may be commenced under section 140.3 without leave of the court granted upon motion with notice to each defendant.
>
> (2) The court may grant leave only where it is satisfied that
>
> (a) the action is being brought in good faith, and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[3] In this case, the plaintiff filed a petition seeking leave under s. 140.8 concurrent with its notice of civil claim ("NOCC").

Issue

[4] The sole question to be determined on this application is whether the leave petition and the certification motion can and should be presented to the Court in a single hearing or whether two separate hearings are required.

Discussion

The legal framework

[5] It does not appear that any court in this province has considered and determined the issue that is the subject of this application. The parties differ not only

with respect to the order that ought to be made, but also with respect to the legal framework that ought to be applied.

[6] The plaintiff submits that the Court ought to apply the well-known factors in *British Columbia v. The Jean Coutu Group (PJC) Inc*. 2021 BCCA 219 [*Jean Coutu*] which are typically applied to resolve sequencing issues in proposed class proceedings.

[7] The defendants submit that the authorities regarding sequencing apply to pre-certification applications sought to be brought by defendants, such as motions to strike, jurisdictional motions, evidentiary objections and summary judgment applications. They say that the *Jean Coutu* framework is inapplicable to leave applications under s. 140.8 of the *SA* because the leave application is not a pre-certification application sought to be advanced by the defendants; rather it is a statutory requirement imposed upon the plaintiff.

The defendants' arguments regarding B.C. law and practice

[8] Following on their position stated above, the defendants advance two arguments based not on the *Jean Coutu* factors but rather on B.C. law and practice.

[9] First, the defendants argue that under B.C. law, because "no action for a secondary market claim may be commenced without leave, an attempt to do so in an extant notice of civil claim or amendment to it results in a nullity because the party asserting it has no capacity to bring the claim": see *Larouche v. Pure Gold Mining Inc.*, 2024 BCSC 1889 at paras. 113–115.

[10] Similarly, they cite the decision in *Rosetim Investments Inc. v. BCE Inc.*, 2010 SKQB 24 at para. 14 for the proposition that "unless and until leave has been granted pursuant to s. 136.4 of the Act, there is no cause of action for secondary market disclosure which could be considered at the certification hearing."

[11] At least partly because of this Court's decision in *Larouche,* these propositions are no longer particularly controversial, but it is unclear how or to what

extent they assist in answering the issue before this Court. If the defendants' argument is that as a matter of law, the leave petition and the certification motion cannot be heard together because the plaintiff is not entitled to seek to certify the secondary markets claim until leave is granted, I am not persuaded by it.

[12] As the plaintiff points out, a party is required to obtain leave under the securities legislation in Ontario before it may proceed with a secondary market claim there, but that fact does not preclude leave applications and certification motions from being heard together there. The parties are agreed that in Ontario, there are some cases that involve combined hearings and others that involve separate hearing. In my view, although there is no valid action that can proceed to certification until leave is granted, that proposition does not preclude the two applications from being heard sequentially at the same hearing.

[13] Second, the defendants argue that British Columbia practice is for leave to be determined in advance of certification. However, it is unclear on what basis that argument is made. There is no affidavit evidence proffered in support of this proposition.

[14] The defendants rely on the decision in *0116064 B.C. Ltd. v. Alio Gold Inc.*, 2019 BCSC 1829 but in that case Associate Judge Elwood (as he then was) expressly declined to determine whether the leave application in that case would be heard at the same time or separately from the certification motion: see paras. 22–24. They also cite *Larouche* but, in that case, Justice Walker did not address the issue of sequencing at all.

[15] There cannot be a general practice in this province regarding the sequencing of leave petitions and certification motions because, as the defendants observe, there is only one B.C. decision in which a leave application under the *SA* has been heard and determined: *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 2275. In that case the leave petition was heard separately from the certification motion but not as the result of a contested decision. In any event, one case does not constitute a practice.

Assessment of the *Jean Coutu* factors

[16] Given that I have rejected the defendants' arguments above and there is no other apparent basis upon which to choose between the two alternatives in this case, it is appropriate in my view to have regard to the considerations set out in *Jean Coutu*.

[17] The non-exhaustive list of factors is:

a) any delay by the plaintiff in proceeding to certification;

b) the extent to which a preliminary application may dispose of the whole proceeding or narrow the issues to be determined, taking into account the strength of the applicant's arguments on the proposed applications and the breadth of the applications;

c) the cost to the parties of participating in pre-certification procedures and the potential to avoid exposing the defendants to costs of a full certification hearing if the matter will be resolved on the basis of the s. 4(1)(a) requirement alone;

d) the potential for delay arising from interlocutory appeals;

e) the complexity and interplay of the issues that may arise in and between the pre-certification and certification applications;

f) whether the outcome of the motion will promote settlement;

g) the interests of economy and judicial efficiency (including whether the parties agree the motion will be determinative of the s. 4(1)(a) aspect of the certification motion); and

h) the fair and efficient determination of the proceeding.

[18] Although all of the factors ought to be considered, it is clear on the authorities that not all the factors will necessarily apply in any one case. As stated in *Jean Coutu* at para. 34:

> [34] The judge's task is not to weigh all the factors on each application. The factors are not a checklist to be reviewed by rote. Whether any individual factor need be considered will depend on the application the judge is considering. …

[19] In this case, there is no allegation that the plaintiff has delayed in proceeding to certification. In my view, assessing the remaining factors broadly, there are two paramount considerations, one of which supports hearing the leave application and the certification motion separately, and one of which supports hearing them together.

The potential for delay arising from separate appeals

[20] The consideration which weighs most heavily in favour of the plaintiff's position on this application is factor (d) from *Jean Coutu*: the potential for delay arising from separate appeals.

[21] In support of his argument on this issue, the plaintiff relies on the decision of the Ontario Superior Court of Justice in *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 1924 [*Sino-Forest*]. Although *Sino-Forest* was decided long before *Jean Coutu*, the Court in *Sino-Forest* considered factors similar to those set out in *Jean Coutu* in the exercise of its discretion: see para. 77.

[22] *Sino-Forest* appears to be the only reported Canadian case which addresses the sequencing of leave applications under securities statues and certification motions directly. In that case, the Court ordered a combined hearing, stating:

> [80] … the sequential approach being advocated by the defendants is unfair to the plaintiffs and to the proposed class and will impede fulfilling the purposes of the class proceedings legislation, which are, first and foremost, access to justice, secondarily, judicial economy and thirdly, behaviour modification, all the while providing due process and fairness to all parties. Unfortunately, the suffocating expense of motions in class actions … along with the excruciating delays and the additional costs of the inevitable leave to appeal motions and appeals that follow class action orders is a serious

> barrier to achieving the purposes of the legislation for both plaintiffs and defendants and a substantial disincentive to class counsel employing the legislation for other than the huge cases that would justify the litigation risks.
>
> [81] As night follows day, if I agreed to schedule sequentially, there would be a ten-day leave motion, followed by the unsuccessful party launching the appeal process which will take several years to resolve. Whatever the outcome of the appeal, the action will return to the Superior Court for the certification motion of the claims not referable solely to liability for secondary market disclosure.

[23] The plaintiff also cites the decision in *Browne v. Horizons ETF Corp.*, 2022 ONSC 3441, wherein the Court was required to decide whether a motion to amend would be heard together with a leave application and the certification motion. Although the parties in that case do not appear to have sought separate hearings for the leave application and the certification motion, and therefore the judge's discussion as it applies to the issue before this Court is at least partly *obiter*, his reasons are of some assistance. He held:

> [5] My inclination is to have the three motions heard together. That way, if there is to be any appeal it can be an appeal of any or all of the motions together. As case management judge, I have discretion under the CPA to schedule these matters as efficiently as possible. It seems to me that scheduling them together is not only the most expeditious way to proceed, but is the best way to foster access to justice under the circumstances.
>
> [6] I do not see any legal impediment to hearing the three motions at the same time. As Plaintiffs' counsel point out, courts are authorized to hear and determine a motion for certification on the basis of a proposed amended statement of claim: *Brake v. Canada (Attorney General)*, 2019 FCA 274. By the same logic, there is no reason that a court cannot hear and determine a motion for leave to proceed on the basis of a proposed amended statement of claim. The leave argument, like the certification argument, will in any case involve the question of whether the pleadings demonstrate a viable cause of action.
>
> [7] This overlap in arguments makes hearing the motions together the best option. There is nothing to be gained by replaying these arguments on separately scheduled motion days, and much to be lost in terms of time, potentially separate appeals, etc. I would prefer to avoid what Justice Strathy has called "litigation by installment": *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 at para. 15.

[24] In my view, the passages cited above, and in particular the concerns expressed in both *Sino-Forest* and *Browne* regarding delays caused by separate appeals, are apposite to this case.

[25] In response to the plaintiff's argument based on *Sino-Forest*, the defendants observe that *Sino-Forest* was decided before *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18 wherein the Supreme Court of Canada clarified that the test for leave is not akin to the pleadings test required on a certification motion, as had previously been held by some courts.

[26] The defendants appear to suggest that the Court in *Sino-Forest* would have reached a different conclusion if it been aware of the law as stated subsequently in *Theratechnologies.* However, this suggestion is not borne out by the Court's decision in *Sino-Forest.*

[27] In my view, the Court in *Sino-Forest* refused to order separate hearings primarily because of its concerns regarding delays arising from separate appeal processes. The clarification of the law by the Supreme Court of Canada in *Theratechnologies* would not have impacted those concerns.

[28] Regarding relative efficiencies, the Court in *Sino-Forest* held:

> [84] The defendants argue that there will be no efficiencies in a sequential ordering of the motions because the criteria for leave differs from the certification criteria, as does the burden of proof for these motions. However, courts are obliged to have the perspicacity to be able to deal with different criteria and different onuses of proof but, more to the point, the evidentiary footprint for the leave and certification motions are the same, and it makes for little efficiency for the parties and little judicial economy to have the evidence and argument for leave and for certification heard more than once.

[29] As a result of *Theratechnologies*, the proposition that "the evidentiary footprint for the leave and certification motions are the same" may be subject to some doubt. Nonetheless, in my view, there must be some overlap and some efficiency gained by having the two hearings together. At least some of the underlying facts and evidence will be common to both the leave petition and the certification motion.

[30] If the two issues are dealt with sequentially in the same hearing, rather than being separated by what might be years as occurred in *Tietz*, counsel will avoid having to prepare the case for hearing a second time and the Court will avoid having

to familiarize itself with the case more than once. To this extent, it is my view that the passage set out above from *Sino-Forest* continues to have some force.

[31] On the issue of delays caused by separate appeals, the plaintiff refers to the B.C. case of *Tietz v. Cryptobloc Technologies Corp*., a class action wherein claims were advanced against several companies and their directors and officers for conspiracy, negligent or fraudulent misrepresentation, as well as secondary market liability under s. 140.3 of the *SA*. (*Tietz* gave rise to at least seven decisions of this Court and the Court of Appeal; the leave decision rendered by this Court is indexed at 2021 BCSC 2275.) The plaintiff submits that *Tietz* is a demonstration of how separate hearings and therefore separate appeals can result in long delays.

[32] In *Tietz*, the proposed class action was filed in July 2019 and the plaintiff sought leave pursuant to s. 140.8 of the *SA* in February 2020. Following several evidentiary hearings and a motion to strike, this Court heard the plaintiff's leave application in April and May 2021, and issued reasons in November 2021. The Court of Appeal heard an appeal from the evidentiary decisions and the leave application in June 2022 and issued reasons in September 2022. There was an unsuccessful leave application to the Supreme Court of Canada and a further application to the Court of Appeal for "clarification" of its 2022 reasons.

[33] In December 2023, the certification motion was heard, and in July 2024 this Court issued its decision certifying the action as a class proceeding. I am advised by plaintiff's counsel that the certification decision has been appealed, and that the appeal has been heard and is presently under reserve.

[34] The upshot of this procedural history is that in *Tietz* almost three years passed between the hearing of the leave application and the hearing of the certification motion. More than four years has now passed since the leave application and the certification motion has not been finally determined. It appears likely that if the leave application and the certification were heard together in April and May 2021, or shortly thereafter, this proceeding would now have been entirely resolved with all appeals having been exhausted some time ago.

Impact of the leave petition's outcome on the certification motion

[35] The consideration that weighs most heavily in favour of the defendants' position on this application is that the outcome of the leave petition may significantly narrow or change the nature of the certification hearing.

[36] The defendants submit that "the determination of the Petition for leave to commence the *Securities Act* claim will have a substantial impact on any consideration of the procedural question of certification, including (among other things) the identification and articulation of any common issues to be tried in a class proceeding and whether a class action is the preferable procedure for the determination of the claim". This consideration is probably best captured by factor (b) in *Jean Coutu*, but also by factors (c), (e) and (g).

[37] In support of their argument on this issue, the defendants ask, rhetorically: why wouldn't the plaintiff want to understand what claims are left before the certification hearing? The defendants observe that the plaintiff in his NOCC alleges that secondary market liability flows from 13 core documents, 12 non-core documents and 8 public oral statements.

[38] The defendants submit that it would be unfair, particularly to the defendants who are individuals, to require them to prepare for both a leave application and a certification hearing at the same time. The defendants submit that the leave requirement set out in s. 140.8 is a "robust deterrent screening mechanism" (per *Tietz v. Cryptobloc Technologies Corp., 2*021 BCSC 186 at para. 12), and that a leave petition involves a serious evidentiary inquiry. They submit that to argue a leave petition and a certification hearing together would be "a massive exercise in inefficiency".

[39] From this submission, I understand the defendants to be saying that hearing both matters together would cause the parties to have to prepare arguments and materials for the certification hearing that might ultimately be unnecessary.

Disposition

[40] Ultimately, the two considerations described above are mostly irreconcilable, and neither a combined hearing nor separate hearings is a perfect choice.

[41] There is no doubt that hearing the leave petition and the certification motion together would result in inefficiencies. If a combined hearing is ordered, the parties will have to prepare materials and make arguments contemplating different alternative scenarios, depending on whether leave is granted and in respect of what claims, because they will not know the outcome of the leave petition when preparing their materials for certification or when arguing the certification motion. If the leave application is refused, much of the work on the certification motion will have been incurred unnecessarily.

[42] On the other hand, hearing the leave petition and certification motion separately gives rise to the concerns regarding separate appeals and long delays described in *Sino-Forest* and *Browne.* Although this Court is not bound by those decisions, I find them persuasive. *Sino-Forest* is particularly impactful being the only decision known to the parties to have previously addressed the issue before this Court directly.

[43] At the end of the day, I must exercise my discretion in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute: *Jean Coutu* at 37.

[44] In my view, at least in the circumstances of this case, the inefficiencies and wasted cost and work that may result from hearing the leave petition and the certification motion together are outweighed by the need to achieve a timely resolution of the dispute and the efficiencies to be achieved by a combined hearing. Relative timeliness and those efficiencies may be gained by avoiding two separate appeal processes, by the overlap between the submissions and evidence to be advanced during that hearing and by avoiding the need for counsel and the Court to undertake two separate hearings, potentially years apart from each other.

Conclusion

[45] For the reasons stated, the leave petition and the certification motion herein shall be heard and determined in a combined hearing.

[46] Costs of this application shall be in the cause.

"Loo J."