COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ramrup v. Rayner,*
2026 BCCA 187

Date: 20260504
Dockets: CA50433; CA50435; CA50437;
CA50438; CA50439

Docket: CA50433

Between:

Pamela Ramrup

Appellant
(Defendant/Third Party)

And

Danielle Rayner

Respondent
(Plaintiff)

And

Harjinder Singh Dhaliwal, John Doe #1,
Quantum Properties Tamarind Westside Inc.,
Quantum Properties Inc.,
Quay Pacific Property Management Ltd.,
Elite Fire Protection Ltd.,
City of Abbotsford, Abbotsford Fire Rescue Service,
ABC Co. #1, Stantec Consulting Ltd.,
ABC Co. #3, ABC Co. #4, Wesley Friesen,
John Doe #3, John Doe #4 and John Doe #5

Respondents
(Defendants/Third Parties)

- and -

Docket: CA50435

Between:

Elite Fire Protection Ltd.

Appellant
(Defendant)

And

Danielle Rayner

Respondent
(Plaintiff)

And

Harjinder Singh Dhaliwal, John Doe #1,
Quantum Properties Tamarind Westside Inc.,
Quantum Properties Inc.,
Quay Pacific Property Management Ltd.,
City of Abbotsford, Abbotsford Fire Rescue Service,
ABC Co. #1, Stantec Consulting Ltd.,
ABC Co. #3, ABC Co. #4, Wesley Friesen,
John Doe #3, John Doe #4 and John Doe #5

Respondents
(Defendants/Third Parties)

- and -

Docket: CA50437

Between:

Quantum Properties Tamarind Westside Inc.
and Quantum Properties Inc.

Appellants
(Defendants/Third Parties)

And

Danielle Rayner

Respondent
(Plaintiff)

And

Harjinder Singh Dhaliwal, John Doe #1,
Quay Pacific Property Management Ltd.,
Elite Fire Protection Ltd.,
City of Abbotsford, Abbotsford Fire Rescue Service,
ABC Co. #1, Stantec Consulting Ltd.,
ABC Co. #3, ABC Co. #4, Wesley Friesen,
John Doe #3, John Doe #4, John Doe #5
and Pamela Ramrup

Respondents
(Defendants/Third Parties)

- and -

Docket: CA50438

Between:

Quay Pacific Property Management Ltd.

Appellant
(Defendant/Third Party)

And

Danielle Rayner

Respondent
(Plaintiff)

And

**Harjinder Singh Dhaliwal, John Doe #1,
Quantum Properties Tamarind Westside Inc.,
Quantum Properties Inc., Elite Fire Protection Ltd.,
City of Abbotsford, Abbotsford Fire Rescue Service,
ABC Co. #1, Stantec Consulting Ltd.,
ABC Co. #3, ABC Co. #4, Wesley Friesen,
John Doe #3, John Doe #4, John Doe #5
and Pamela Ramrup**

Respondents
(Defendants/Third Parties)

- and -

Docket: CA50439

Between:

Stantec Consulting Ltd.

Appellant
(Defendant)

And

Danielle Rayner

Respondent
(Plaintiff)

And

**Harjinder Singh Dhaliwal,
Quantum Properties Tamarind Westside Inc.,
Quantum Properties Inc.,
Quay Pacific Property Management Ltd.,
Elite Fire Protection Ltd., City of Abbotsford,
Abbotsford Fire Rescue Service, Wesley Friesen
and Pamela Ramrup**

Respondents
(Defendants/Third Parties)

Before: The Honourable Mr. Justice Abrioux
The Honourable Justice Riley
The Honourable Justice Gomery

On appeal from: Orders of the Supreme Court of British Columbia, dated January 13, 2025 and March 17, 2025 (*Rayner v. Dhaliwal*, 2025 BCSC 44 and 2025 BCSC 461, Abbotsford Docket S02954).

Counsel for the Appellant, Pamela Ramrup (CA50433); and as Respondent (CA50437, CA50438, and CA50439:	F.R. Cabanos I. De Bortoli
Counsel for the Respondent, Danielle Rayner:	I.C. Ashley
Counsel for the Appellant, Elite Fire Protection Ltd. (CA50435); and as Respondent (CA50433, CA50438, CA50437):	M. Colwell
Counsel for the Appellants, Quantum Properties Tamarind Westside Inc. and Quantum Properties Inc. (CA50437); and as Respondents (CA50433, CA50435, CA50438, CA50439):	J.B. Maryniuk A.D.R. Delmonico
Counsel for the Appellant, Quay Pacific Property Management Ltd. (CA50438); and as Respondent in CA50433, CA50435, CA50437 and CA50439:	T.S. Newnham Z. Klassen
Counsel for the Appellant, Stantec Consulting Ltd. (CA50439); and as Respondent (CA50433, CA50435, CA50437, CA50438):	M. Milne
Place and Date of Hearing:	Vancouver, British Columbia February 17, 2026
Place and Date of Judgment:	Vancouver, British Columbia May 4, 2026

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Justice Riley
The Honourable Justice Gomery

Summary:

The plaintiff-respondent, Ms. Rayner, commenced an action in which she sought damages arising from a fire in an apartment building in which she resided. She brought an application in the Supreme Court to have the action converted into a class proceeding on behalf of all owners and tenants in the building who sustained damages in the fire. The chambers judge, in the exercise of his discretion, granted the application and converted the action to a class proceeding. After the decision, various defendants sought "clarification" of how the judge's reasons would affect the "commencement of proceedings" for the purpose of tolling the limitation date under s. 38.1 of the Class Proceedings Act, RSBC 1996, c. 50 [CPA]. The judge held that the limitation date was suspended on the date the respondent filed her notice of civil claim.

On appeal the appellants challenge the decision on three grounds being that the judge erred: 1) in failing to properly apply the legal framework for the conversion of an action to a class proceeding; 2) granting leave to file a Further Amended Notice of Civil Claim which did not comply with the requirements of the CPA; and 3) determining that the "commencement of the proceedings" for the purposes of s. 38.1 of the CPA was the date of the filing of the Notice of Civil Claim, being October 3, 2022.

Held: Appeal allowed solely on the issue of the date of the commencement of proceedings for the purposes of s. 38.1 of the CPA with the respondent being granted leave to file a Second Further Amended Notice of Civil Claim. The chambers judge did not err in the weighing of factors to exercise his discretion to convert the action to a class proceeding. Nor was it a prerequisite for the respondent to articulate common issues or a class definition with greater specificity at this point, on the facts of this case. However, the date of commencement of proceedings has an intrinsic nexus with the limitation period. Resolving those issues requires a more complete record and it was premature to determine that issue at the conversion application.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal provides this Court, for the first time, with the opportunity to consider the framework that applies when an application is brought to convert an individual action into a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[2] The plaintiff-respondent, Ms. Rayner, seeks to advance a representative claim on behalf of persons who sustained damages from a fire that occurred on May 3, 2022, in a residential condominium building located in Abbotsford, BC.

[3] In reasons for judgment indexed as *Rayner v. Dhaliwal*, 2025 BCSC 44 (the "RFJ"), the judge granted Ms. Rayner's application, allowing her to advance her individual action as a class proceeding. She was granted leave to file a further amended notice of civil claim, which provides in the style of cause that the action is a class proceeding (the "FANOCC").

[4] After the RFJ were rendered, the City of Abbotsford and Abbotsford Fire Rescue Service on behalf of various defendants, requested "clarification" of the judge's intentions in the RFJ with respect to how the conversion to a class proceeding interacted with the limitation period. Following receipt of further submissions, the judge, in supplemental reasons for judgment indexed as *Rayner v. Dhaliwal*, 2025 BCSC 461 (the "Supplementary RFJ"), decided that the date of the "commencement of the proceedings" for the purposes of s. 38.1 of the *CPA* was October 3, 2022—the date Ms. Rayner first filed her notice of civil claim ("NOCC").

[5] The judge's order encompasses both the RFJ and Supplementary RFJ. The appellants challenge the order on three bases, being that he erred: (1) by failing to properly apply the legal framework to convert an action to a class proceeding; (2) by allowing the claim to be converted to a class proceeding even though the FANOCC failed to identify common issues or define a class, and therefore did not advance a reasonable claim; and (3) by selecting October 3, 2022 as the applicable date for the "commencement of proceedings" for the purposes of section 38.1 of the *CPA.*

[6] In *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at paras. 8–16, Justice Kirkpatrick described the technical nature of class proceedings and explained that plaintiffs must be careful in drafting pleadings to articulate common issues that advance their claims. As I shall explain, this appeal illustrates the difficulties that can arise, in the context of an application to convert an individual claim into a class proceeding, when Kirkpatrick J.A.'s warning is not heeded.

[7] For the reasons that follow, I would allow the appeal to the limited extent of vacating para. 4 of the order, which sets the date for the commencement of the proceedings under s. 38.1 of the *CPA* as October 3, 2022.

[8] I would also grant leave to Ms. Rayner to file a second further amended notice of civil claim in accordance with these reasons.

Background

[9] On May 3, 2022, a fire occurred at a residential apartment building, the "Tamarind", which is located in Abbotsford, BC. The respondent, Ms. Rayner was a tenant in a unit in the Tamarind at the time of the fire. She alleges that the fire was caused by a cigarette, propane tank, or both, on the balcony of a nearby unit. She alleges that both potential causes were in contravention of the strata corporation's bylaws.

[10] Eleven days after the fire, a law firm—that has since become Ms. Rayner's counsel—sent an email invitation to approximately 30 Tamarind residents to discuss a potential class proceeding. Three days later, the meeting occurred.

[11] On October 3, 2022, Ms. Rayner's counsel filed the NOCC, which was subsequently amended to add and substitute certain parties (the "ANOCC"). The NOCC and ANOCC did not invoke the *CPA*.

[12] In the ANOCC, Ms. Rayner alleges that as a result of the fire, she, together with "the other residents and/or owners", suffered loss or damage to their possessions, and incurred expenses for relocating from the Tamarind. The ANOCC alleges that the defendants were liable, as follows:

a) Harjinder Singh Dhaliwal, Pamela Ramrup, and/or John Doe #1 caused the fire by smoking or using a propane tank in violation of strata bylaws.

b) Quantum Properties Tamarind Westside Inc. and Quantum Properties Inc., ABC Co. #1, Stantec Consulting Ltd., Wesley Friesen, and John Doe #3 negligently constructed the Tamarind such that the spread of the fire was exacerbated.

c) Elite Fire Protection Ltd., ABC Co. #3, ABC Co. #4, John Doe #4, and John Doe #5 had either negligently inspected the building or represented that inspections had been completed when they had not.

d) Quay Pacific Property Management Ltd., ABC Co. #3, ABC Co. #4, John Doe #4, and John Doe #5 negligently managed the Tamarind, including not enforcing strata bylaws prohibiting smoking or storing propane tanks on balconies.

e) The City, ABC Co. #1, ABC Co. #4, Mr. Friesen, and John Doe #5 negligently failed to ensure the Tamarind had adequate fire suppression, and failed to inform the Tamarind's residents, tenants, owners and visitors that the City did not have adequate fire suppression tools to fight a fire originating on the balconies of the Tamarind.

f) Abbotsford Fire Rescue negligently failed to respond in a timely way and take all reasonable steps to extinguish or limit the spread of the fire.

[13] On October 28, 2022, Ms. Rayner's counsel commenced a separate action on behalf of two owners of a unit in the Tamarind.

[14] Between April 30, 2024, and May 1, 2024, Ms. Rayner's counsel, acting on behalf of other tenants and owners of units in the Tamarind, commenced 15 additional actions for damages arising as a result of the fire. At the time of the conversion application, 17 actions had been filed in relation to the Tamarind fire. Ms. Rayner's counsel is plaintiff's counsel on all of them. Several of the actions were filed on May 1, 2022, that is two days before the expiry of the two-year limitation period established by s. 6(1) of the *Limitation Act*, S.B.C. 2012, c. 13.

[15] Ms. Rayner applied on August 2, 2024 to amend the ANOCC to convert her individual action into a class proceeding. If the application were granted, Ms. Rayner's claim would encompass the other tenants' and owners' claims, including both the plaintiffs in the other 16 actions, and those who had not commenced actions. She attached her proposed FANOCC to the application. The only difference between the FANOCC and the ANOCC was the addition of the words "Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50" in the style of cause.

[16] The judge ordered that Ms. Rayner's action be converted into a class proceeding and that the commencement date of the proceeding for the purposes of s. 38.1 of the *CPA* was October 3, 2022, being the date Ms. Rayner filed the NOCC.

[17] I shall review the relevant portions of the chambers judgments when I consider the specific grounds of appeal.

On appeal

[18] The appellants frame the issues on appeal as whether the judge erred in:

a) failing to properly apply the legal framework for the conversion of an action to a class proceeding;

b) granting leave to file the FANOCC since the proposed pleading lacks the requisite collective claims to advance a class proceeding under the *CPA;* and

c) determining that the "commencement of the proceedings" for the purposes of s. 38.1 of the *CPA* was the date of the filing of the NOCC, being October 3, 2022.

[19] It is not in dispute that it is within a judge's discretion to order that pleadings may be amended such that an action is converted into a potential class proceeding. The appellants argue, however, that in the circumstances of this case, the judge made either errors of law in his application of the applicable framework or erred in principle in the exercise of discretion when he considered the applicable factors.

[20] Ms. Rayner's position is that the judge made no reviewable errors in the exercise of his discretion and that his findings in both the RFJ and the Supplementary RFJ as reflected in the order are entitled to deference.

Legal framework

[21] Section 2 of the *CPA* permits a resident of British Columbia who is a member of a class of persons to commence a proceeding in the British Columbia Supreme Court on behalf of the members of that class.

[22] Rule 22-3(6) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, requires that if a plaintiff intends to seek class certification, the style of cause must include the words “Brought under the *Class Proceedings Act*”. This Rule also permits these words to be added if a certification order is subsequently granted.

[23] Justice Skolrood (as he then was) interpreted that Rule to mean that the Supreme Court of British Columbia has jurisdiction to permit an action to be converted to a class proceeding by way of an amendment to the pleadings: *Great Canadian Gaming Corporation v. British Columbia Lottery Corporation*, 2017 BCSC 574 at paras. 47–48 [*Canadian Gaming*]. I agree with that conclusion.

[24] In the RFJ, the judge summarized the framework for a conversion application:

> [19] The parties accept that the Court has discretion to convert an action to a class proceeding. I agree. In *Great Canadian Gaming Corporation v. British Columbia Lottery Corporation*, 2017 BCSC 574 [*Canadian Gaming*], Justice Skolrood (as he then was) held that to prohibit, in any circumstance, the conversion of an action to a class proceeding by way of an amendment to the notice of civil claim would “run counter to the principles of flexibility and efficiency underlying class proceedings”: para. 47. As such, it is settled law that this Court has the jurisdiction to grant the relief sought by the plaintiff in this case. The question then is whether I should exercise that discretion.
>
> [20] In *Canadian Gaming*, at paras. 51 and 52, Skolrood J. helpfully articulated the factors a court should consider when determining if a regular action should be converted to a class proceeding. The non-exhaustive list of relevant factors includes:
>
> a) the history of the proceedings;
>
> b) the length and reason for the delay in seeking to convert the action;
>
> c) the expiry of any limitation periods;
>
> d) the presence or absence of other prejudice to either party;
>
> e) the likelihood or otherwise of a proper class eventually being defined;
>
> f) the conduct of the parties; and
>
> g) whether conversion is consistent with, or would advance, the overriding objectives of a class proceeding, namely judicial economy, access to justice and behavior modification.
>
> [21] Justice Skolrood also held that the significance of any one factor will vary depending upon the circumstances of each case: *Canadian Gaming* at para. 52.
>
> [22] Before considering these factors, I acknowledge that while at its core this is an application to amend pleadings, which often requires an applicant only to meet a low threshold to be successful, in the case at bar, given the

> plaintiff seeks an amendment of the pleadings to convert the action to a class action, different considerations apply. These different considerations result in an additional and, therefore a more onerous, hurdle to be met for the Court to grant the amendment: *Lou v. London Life Insurance Company*, 2017 ONSC 4188 at para. 26.

[25] The parties agree that the *Canadian Gaming* factors articulate the applicable framework. Some of the parties on appeal, however, referred to those factors as a "test". To be clear, they are not a legal test: *Canadian Gaming* at paras. 38, 48, 51–52, 61–62. I do accept, however, that they constitute an analytical framework, as a non-exhaustive list of factors to be considered by the court on an application to convert an individual action into a class proceeding. This analysis—at its core, and as the chambers judge correctly observed—involves an exercise of judicial discretion: *Canadian Gaming* at para. 38.

Standard of review

[26] A judge has the authority to allow amendments to a pleading: *Supreme Court Civil Rules*, R. 6-1. That authority is discretionary and entitled to deference on appeal: *Gadsby v. British Columbia (Attorney General)*, 2021 BCCA 161 at para. 34.

[27] And yet, as Saunders J.A. observed for a unanimous five justice division of this Court in *MacKinnon v. Instaloans Financial Solutions Centres (Kelowna) Ltd.*, 2004 BCCA 472:

> [33] It is true that in one sense the action, before certification, is an ordinary action…I think it is also clear that an action commenced under the ***Class Proceedings Act*** is, even before the certification application, more than just "any old action": it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.
>
> [Underline emphasis added.]

[28] It follows, in my view, that a conversion application is not "any old" amendment application and the "ambition" to warrant conversion should be reflected in the conversion analysis. That said, the judge's authority to permit conversion remains discretionary nonetheless: *Canadian Gaming* at paras. 33–38.

[29] An issue falls within a judge's discretion if its resolution depends on the judge's assessment, within set boundaries of what is fair and just in a particular case, based on the facts and the law: *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 33. Discretionary decisions are entitled to a high degree of appellate deference. As Justice Dickson explained in *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations),* 2021 BCCA 322:

> [87] … This Court will not interfere with a judge's exercise of discretion simply because we might have exercised discretion differently. Rather, this Court will only interfere with a discretionary decision if, in exercising the discretion, the judge erred in principle, gave no or insufficient weight to relevant considerations, considered an irrelevant factor or made a decision that is so clearly wrong as to amount to an injustice: *Grewal* at paras. 13–15; *Kish* at para. 34.

[30] The appellants' arguments that raise alleged errors of law invoke a standard of review of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

Discussion

Introduction

[31] The thrust of this appeal is about the manner in which the judge exercised his discretion in light of the *Canadian Gaming* factors. Viewed through this lens, the second and third issues—being the sufficiency of pleadings, and pronouncement of the commencement date—overlap to some extent with the first, being whether the judge erred in his application of the *Canadian Gaming* factors.

[32] Since the appellants assert that the judge made specific errors in law or errors in principle in relation to the second and third grounds, I will first consider the judge's analysis of the *Canadian Gaming* factors in his exercise of discretion. I will then address what the appellants say are the issues of law that relate to the second and third grounds of appeal.

1. Did the judge err in failing to properly apply the legal framework for the conversion of an action to a class proceeding?

The RFJ

[33] The judge, having set out the background, turned to the exercise of his discretion in deciding whether Ms. Rayner's action should be converted to a class

proceeding. To this end, he listed, then considered the *Canadian Gaming* factors. Although the appellants challenge the judge's analysis and conclusions regarding all the factors, it is clear to me that the primary challenge is to the question of the limitation period and the extent to which it impacted the other factors. Accordingly, I shall focus on the limitation-related issues.

[34] The judge found that the length and reason for delay militated against converting the action to a class proceeding in some ways. While the delay was not inordinately lengthy, Ms. Rayner did not discharge her onus to explain why a class proceeding was not commenced shortly after the meeting with counsel 14 days after the fire. Moreover, 22 months elapsed between Ms. Rayner filing the NOCC on October 3, 2022, and bringing her conversion application on August 2, 2024.

[35] The judge stated that the lapse of the limitation period weighed against conversion. However, he accepted that this was but one factor for his consideration. In his view, it did not "advance the administration of justice to punish potential class members with legitimate claims on the basis of actions of legal counsel": RFJ at para. 32. Even though Ms. Rayner provided no reason for the delay, this was not determinative as to whether the conversion application should be granted.

[36] The judge then considered in some detail the expiration of the limitation period and the potential for resulting prejudice. He found that the expiry of the limitation period "is significant and favours not converting the action to a class proceeding".

[37] The judge acknowledged the appellants' argument that the conversion application was an attempt by Ms. Rayner's counsel "to manoeuvre around the limitation period to allow additional individuals to participate in the lawsuit".

[38] In the judge's view, it was not the expiration of the limitation period "in and of itself" that needed to be considered; it was whether the delay caused prejudice to the appellants. In this case, they had been served with 17 notices of civil claims before the expiration of the limitation period. He observed that the appellants would "almost certainly" mount the same defence against each claim. Accordingly, the expiry of the limitation period did not cause a significant prejudice to the appellants.

[39] The judge then turned to the question of the likelihood of certification. He decided a class could be defined, despite the proceeding containing two proposed subclasses (owners and tenants). Those two subclasses shared a common issue—negligence and damages arising from the fire.

[40] He held that any conflicts in the class definition from Ms. Ramrup and Mr. Dhaliwal being both members of the class and defendants could be solved through them being "carved-out" during the certification process.

[41] Finally, the judge assessed whether conversion of the action was consistent with, or would advance, the overriding policy objectives of the *CPA*. He concluded:

a) Significant judicial economy would be obtained by converting the action to a class proceeding. Hearing all 17 filed actions—either separately or as consolidated hearings—would be less efficient than conversion to a class proceeding.

b) The potential for increased access to justice for individuals impacted by the fire weighed heavily in favour of converting the action to a class proceeding. There were 124 units in the Tamarind, yet only 17 claims filed. There was no direct evidence about the level of interest in a class proceeding among people affected by the fire who had not yet filed claims. However, the fact that one lawyer—who represented the plaintiffs in all 17 actions—brought the application for conversion, indicated that there was consensus among at least those individuals that a class proceeding would be attractive. There was also no evidence that the class members were not interested in litigating collectively.

c) This case would better accomplish the goals of behaviour modification as a class proceeding, rather than a conventional action.

[42] In the result, the judge granted Ms. Rayner's application to convert her individual action to a class proceeding. She was granted leave to file her FANOCC "in the form attached as Schedule 'A' to the Notice of Application with any modifications referenced during the oral hearing" (emphasis added) and to bring an

application for an order certifying the proceeding: RFJ at para. 75. Apparently, through oversight, the language I have emphasized was not included in the entered order. Ms. Rayner filed the FANOCC as it appeared in Schedule ‘A’, with no additional modifications.

The appellants’ positions

[43] In this Court, the appellants focus on the judge’s consideration of the *Canadian Gaming* factors. In my view, some common themes emerge, so it is not necessary to consider in detail their various challenges to the judge’s exercise of discretion.

[44] Quantum and Elite, for example, refer to the judge failing to “properly weigh” the factors. Quantum submits the judge erred in “not giving greater weight to the unexplained delay in light of the expiry of the limitation periods”. Elite argues in part that “there is no evidence that any individual lacks access to justice”. Ms. Ramrup submits that the judge erred “in finding that there was, in fact, prejudice to the potential class members who did not otherwise file a notice of civil claim before the expiry of the limitation period”. Quay and Stantec make similar arguments.

Analysis

[45] I would not accede to this first ground of appeal since it challenges the judge’s exercise of discretion.

[46] In my view, it was entirely open to the judge to make the findings he did, for the reasons set out in the RFJ. And to the extent the appellants submit, for example, that there was “no evidence” that individuals lacked access to justice or that putative class members would be prejudiced, I would find that these were reasonable inferences for the judge to draw from the record.

[47] An example may assist in making this point. The expiry of the limitation period was clearly a very important factor in the exercise of the judge’s discretion. Although the appellants challenge other aspects of the judge’s analysis, they focus on the limitation period. They appear to submit, without saying so explicitly, that Ms. Ramrup’s lawyer’s conduct leading to the expiry of the limitation period ought to

have dominated the analysis and resulted in the dismissal of the application. But it is evident that a missed limitation period is but one element in the exercise of discretion. The *Canadian Gaming* factors are merely considerations, each of which is not independently determinative of whether conversion should be granted. In the result, I would conclude that it was not a reviewable error for the judge to find that the missed limitation period did not overwhelm the other factors.

[48] There are circumstances in which claims may be advanced after the expiry of limitation periods, because it would be unjust to accede to a limitation defence. By analogy, the expiry of a limitation period is not independently conclusive in an analysis under Rule 6-2(7) of the *Supreme Court Civil Rules*. That Rule permits a new party to be added or substituted in a proceeding—even after the expiry of the limitation period—where it is "just and convenient" to do so: *Madadi v. Nichols*, 2021 BCCA 10 at para. 25. The factors under R. 6-2(7) are much like those in *Canadian Gaming*, in that the expiry of limitation periods is only one factor to be balanced in the exercise of discretion: *Madadi* at para. 24. Indeed, the factors under R. 6-2(7) (in the context of substituting a representative plaintiff) supported the conclusion in *Canadian Gaming* that limitation periods are only but a relevant factor in conversion applications: *Canadian Gaming* at para. 51, citing *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 at para. 90. I would agree with this analysis.

[49] It is "settled law" that the factors under R. 6-2(7), will, under ordinary circumstances, also engage s. 22(1) of the *Limitation Act*: *Anonson v. North Vancouver (City)*, 2017 BCCA 205 at para. 13. Section 22(1) allows for parties to file counterclaims, third party proceedings, claims of set off, and for the addition or substitution of parties, even if the limitation period has expired, as long as the additional claims are "relating to or connected with" an existing claim.

[50] As with an application for joinder of parties under R. 6-2, or an application for consolidation under R. 22-5(8), I am of the view that the conversion of an individual action to a class proceeding may, in appropriate circumstances, serve as a means to include additional persons who suffered related damages into an existing action. These appear to be capable of falling within the ambit of s. 22(1)(d) of the *Limitation Act*, which permits "new parties" to be "added or substituted as plaintiffs or

defendants", where their claims relate to or are connected with the existing claim. This does not necessarily mean that in this case, the limitation period will be suspended by operation of s. 22(1)(d) of the *Limitation Act*.

[51] In fact, there is jurisprudence to the effect that class members are not "parties": *Lewis v. WestJet Airlines Ltd.*, 2023 BCSC 1921 at paras. 42–45; *United Food and Commercial Workers Canada, Local 175, Region 6 v. Quality Meat Packers Holdings Limited*, 2018 ONCA 671 at para. 67. In my view, the resolution of such issues is better suited for a certification hearing or a common issues trial with substantive submissions on the point, rather than at a conversion application.

[52] The appellants make much of the judge stating that it does not advance the administration of justice to "punish" putative class members for counsel's actions in missing a limitation period. I accept that "punish" was an unnecessary overstatement of what the judge was attempting to express ("disadvantage" being a more neutral term). However, this was of no moment. Reading the reasons as a whole, the judge took care in analyzing this factor. He found that the passing of the limitation period was "significant" and weighed against conversion. And yet, he did not consider the factor in isolation but as part of a broader contextual analysis, which resulted in the exercise of his discretion in favour of the conversion of the action into a class proceeding.

[53] This is what the judicial exercise of discretion entails (*Kish* at para. 33) and why there is a highly deferential standard of review.

[54] I would consider the appellants' challenges on this first ground of appeal to be no more than an attempt to have this Court interfere with the judge's exercise of discretion because we might have exercised it differently. That is not our role. In my view, the appellants have failed to establish a reviewable error or that the decision on this point is so clearly wrong so as to amount to an injustice.

2. Did the judge err in granting leave to file the FANOCC since the proposed pleading lacks the requisite collective claims to advance a class proceeding under the CPA?

Introduction

[55] Section 4(1) of the *CPA* provides, in part, that the court must certify a proceeding as a class proceeding when certain requirements are met, including: (i) the pleadings disclose a reasonable cause of action; and (ii) there is an identifiable class of two or more persons.

[56] Three of the appellants (being Quantum, Elite, and Stantec) submit that Ms. Rayner has failed to articulate a reasonable cause of action and identifiable class. They say her claim remains entirely individual in nature but for the addition of the citation to the *CPA* in the style of cause.

The parties' positions

[57] The appellants argue that the judge made errors of law or errors in principle in finding that the FANOCC adequately articulated the nature of the claim.

[58] The appellant Stantec submits that Ms. Rayner has failed to satisfy the first step of a two-step analysis. It argues that, to grant conversion, the court must be satisfied both that the originating pleading contains the requisite elements of a class proceeding and that the relevant contextual factors weigh in favour of conversion. It says that the application should have been dismissed because Ms. Rayner has not pled common issues or an identifiable class.

[59] The appellants submit that the FANOCC was fundamentally flawed. Specifically, it was not sufficient to only add the words "Brought under the *Class Proceedings Act*" to the ANOCC to convert the action to a class proceeding.

[60] Elite, for example, submits, "[a] change to the style of cause is plainly insufficient" to ground a class proceeding. They also say that the issues pled address potential causes of action that belong to Ms. Rayner, but, as articulated, cannot be extended to other members of the class.

[61] Furthermore, the appellants argue that, as a result of the lack of articulation of common claims in the FANOCC, the judge defined a class that is too broad. As currently defined, Ms. Rayner, being a tenant, but not an owner, is tasked with representing both tenants and owners. And Ms. Ramrup and Mr. Dhaliwal are part of a class in which they are suing themselves.

[62] For these reasons, the appellants submit the appeal should be allowed, the application dismissed, and Ms. Rayner required to renew the application for conversion with a pleading that identifies a definition of the proposed class, and that discloses reasonable common issues.

[63] Ms. Rayner argues that the only statutory requirement at this stage was to add the words “Brought under the *Class Proceedings Act*”, as needed under R. 22-3(6) of the *Supreme Court Civil Rules*. She says the conversion application was not the certification application, and the judge was correct not to require a certification-ready articulation of the causes of action and identification of the class.

Legal framework

[64] Plaintiffs must take proper care in drafting class proceedings to articulate common issues that advance their claims: *Stanway* at paras. 8–16. However, at certification, the articulations of those issues are only required to meet the low threshold of not being “plain and obvious” that they are bound to fail: *Good Guys Recycling Inc. v. 676083 B.C. Ltd.*, 2023 BCCA 128 at para. 71. Although this is not a high standard, the failure to properly define a defendant’s impugned conduct may result in the dismissal of the certification application: see generally *Gibbs v. HSBC Global Asset Management (Canada) Limited*, 2024 BCSC 324.

[65] Typically, if a plaintiff has not sufficiently articulated common issues in their notice of civil claim, the failure to do so may still be remedied by amendment. It is not unusual for pleadings brought under the *CPA* to undergo numerous amendments prior to a certification hearing. In fact, it is only in the “clearest of cases” that a judge should deny a plaintiff leave to amend a pleading to address the absence of material facts supporting a class-wide cause of action: *McMillan v. Canada*, 2024 FCA 199 at para. 107; *Barkley v. Tier 1 Capital Management Inc.*,

2018 ONSC 1956 at para. 68, aff'd 2019 ONCA 54. And a judge ought to grant leave to amend pleadings prior to certification, for deficiencies that are capable of being remedied by amendment: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 94.

[66] Furthermore, putative class proceedings can be amended to address deficiencies after being refused certification: see generally *Gibbs*. Even post-certification, the threshold is low to amend pleadings: *Tucci v. Peoples Trust Company*, 2025 BCSC 816 at para. 12; *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2016 BCSC 2021 at para. 24. If post-certification amendments are fundamental to the action, those new issues can be the subject of further scrutiny under the test for certification: *Endean v. Canadian Red Cross Society*, 1998 CanLII 6063 at para. 8, [1998] B.C.J. No. 1542 (S.C.).

Analysis

[67] I would agree with Stantec that the applicable framework on an application for conversion involves a two-step process. The court must be satisfied: (1) that the pleading contains the requisite elements of a class proceeding; and (2) that the relevant context weighs in favour of conversion: *Canadian Gaming* at paras. 39, 50; *Lou v. London Life Insurance Company*, 2017 ONSC 4188 at para. 26.

[68] The fundamental issue raised by the appellants is that the FANOCC does not satisfy the first requirement: it does not plead elements of a class proceeding.

[69] On this issue, the chambers judge decided that there was a likelihood a class could eventually be defined. He agreed there were two proposed sub-classes, being renters and owners. However, he held that, while the subclasses may have different damages, they still shared a common issue—the negligence of the defendants resulting in damages from the fire. This, in his view, satisfied the need for the subclasses to share a common link.

[70] In my view, the judge's reasoning on this issue is legally sufficient. Although the FANOCC did not specifically identify a "single overriding class", it was obvious what it consisted of: being, tenants and owners of units in the Tamarind who sustained damages as a result of the fire. While the judge could, and probably

should, have ordered Ms. Rayner to provide a definition of the overarching class, he apparently did not find it necessary to do so because the definition was self evident.

[71] The appellants rely on *C.H.S. v. Alberta (Director of Child Welfare)*, 2006 ABQB 528 [*C.H.S. ABQB*], aff'd 2006 ABCA 355 [*C.H.S. ABCA*], where the Alberta Court of Appeal dismissed an appeal from an order dismissing a pre-certification application to amend a statement of claim to add new issues. The application was dismissed because the plaintiff's proposed amendments "seem[ed] to be highly personal to the named Plaintiffs, and…further confuse[d] the issue of whether [the action was] still intended to be a class proceeding": *C.H.S. ABQB* at para. 31.

[72] *C.H.S. ABQB* involved circumstances that were different from this case. The context was a putative class proceeding brought by infants that were apprehended under the *Child Welfare Act*, R.S.A. 2000, c. C-12, but for which the Temporary Guardianship Orders under which they were apprehended were subsequently held to be void. The amendments sought to add new claims that alleged failures on the part of the Director of Child Welfare, which in the judge's view, did not relate to the invalidity of the Temporary Guardianship Orders (the claim that formed the foundation of the original pleading): *C.H.S. ABQB* at para. 30. The judge, in dismissing the application, held that the pleadings must set out a properly defined class for those new issues, and that to hold otherwise would permit "an almost unlimited ability to amend after the limitation has expired": *C.H.S. ABQB* at para. 32.

[73] I would not accede to the appellants' argument that *C.H.S. ABQB* and *C.H.S. ABCA* require Ms. Rayner to plead her claim with greater specificity at this juncture. First, I note that the proposed amendments to the causes of action in *C.H.S. ABQB* did not relate to the class as initially proposed. Therefore, the amendments created an uncertainty about the scope of the class members because the new issues were not limited to a single time-specific event: *C.H.S. ABQB* at paras. 32–33. In Ms. Rayner's case, and as the chambers judge held, the overarching class is, albeit implicitly, well defined, and arises from a discrete event—the fire. This makes the proposed class much clearer than that proposed in *C.H.S. ABQB*.

[74] Further, the unspecific nature of the class was not the only basis for the dismissal of the application in *C.H.S. ABQB*. Justice Costigan, in *C.H.S. ABCA* at para. 4, observed, "[t]here was no evidence to support the proposed amendments; the proposed pleading was unacceptable for a class proceeding because it did not define the proposed class or the relief requested for the class; the proposed pleading did not provide sufficient particulars of the alleged breaches; and the *Charter* claims did not raise genuine issues or include particulars."

[75] By comparison, the FANOCC in this case is replete with references to the alleged acts or omissions of the various appellants and particulars of the claims against them, on behalf of, not only Ms. Rayner, but other tenants and owners. For example, as against Mr. Dhaliwal, the claim includes, "failing to take any, or any reasonable care to ensure that the occupants of the Building, including the Plaintiff and other residents and/or owners, would be reasonably safe contrary to the provisions of the OLA [*Occupiers Liability Act*, R.S.B.C. 1996, c. 337] and amendments and regulations thereto". Similar language is used in the pleadings concerning Ms. Ramrup. As against all the defendants, the FANOCC pleads that they "knew, or ought to have known, that the acts or omissions alleged herein could lead to loss, damage and injury to the occupants of the Building, including the Plaintiff and other residents and/or owners of the Building."

[76] In my view, the FANOCC's failure to identify a class, when viewed from the appellants' perspective, at best represents a technical as opposed to a substantive breach of the requirements to identify the elements of a class proceeding. They can clearly identify the case being brought against them.

[77] At the first stage of the analysis I referred to at para. 67 above, the judge had to be satisfied that the pleadings identified the elements of a viable class proceeding. To make the point another way, the conversion application would only fail at this stage if the judge was satisfied that it was plain and obvious that the elements of a class proceeding could not be established. On the pleadings before him, the judge was clearly of the view that, with necessary "modifications", they disclosed a basis for a class proceeding.

[78] It will be for Ms. Rayner, at the certification hearing, to identify the common issues: *CPA* s. 4(1)(c). I remain perplexed, however, as to why, during the conversion application, Ms. Rayner did not address certain matters, such as:

a) including in the FANOCC some of the language she used in her notice of application, which describes in detail the putative common issues. For example, she could have added into the FANOCC her repeated references in her notice of application that "as a result of the Fire, the Plaintiff, and all other residents of the Building" suffered losses;

b) making further modifications to the FANOCC before it was filed in order to articulate the common issues in the form required under the *CPA*; and

c) including a clear definition of the overriding class in order to satisfy the requirement under s. 2(1) of the *CPA* that a class proceeding must be commenced "on behalf of the members of that class".

[79] Be that as it may, I would not view the deficiencies in the FANOCC to be incurable by amendment: *McMillan* at para. 108; *Situmorang* at para. 94. In fact, I would find the opposite. It would not be in the interests of justice to allow the appeal and dismiss the application, as the appellants argue. This would unnecessarily oblige Ms. Rayner to start the conversion process afresh. The proper course would be to permit further amendments to the FANOCC to cure these deficiencies.

[80] Accordingly, I would grant Ms. Rayner leave to file a second further amended notice of civil claim in accordance with these reasons.

[81] In conclusion, the appellants have not, in my view, identified a reviewable error—that is, one of law or in principle—that would result in this Court acceding to this ground of appeal, and requiring Ms. Rayner to begin her conversion afresh. While it is not clear to me why Ms. Rayner's counsel chose to file the FANOCC in the form of Schedule 'A' to the notice of application, the fact he did so is not fatal to the conversion application. The FANOCC is certainly capable of further amendments to address its ongoing deficiencies. And to the extent the appellants wish to

challenge any further amendments, they will presumably do so on their own application or at the certification application.

3. Did the judge err in determining that the "commencement of the proceedings" for the purposes of s. 38.1 of the CPA was the date of the filing of the NOCC, being October 3, 2022?

The Supplementary RFJ

[82] Following the release of the RFJ, various defendants filed a requisition with the British Columbia Supreme Court, seeking "clarification" from the judge regarding the date to which the limitation period was suspended for the purpose of s. 38.1 of the *CPA*.

[83] In the Supplementary RFJ, the judge framed the issue and the positions of the parties:

> [16] As I thought was clear from the Reasons, one of the primary purposes of allowing the conversion was to allow individuals who may not have filed conventional claims to participate in the class proceeding. In other words, I did not intend to limit the class to only those participants who had filed notices of civil claim before the limitation period expired. Nor did I intend to provide a substantive right for an individual to now, two years after the Fire, be able to file a conventional civil claim, without the defendants being able to raise a limitation defence should a new conventional action commence in respect of the Fire.
>
> [17] Given the application before me dealt only with the issue of conversion, I also did not intend to preclude the defendants from raising a limitation period defence going forward, either at the certification hearing or in respect of other matters within the class proceeding. In my view, the matter before me was narrow in scope and concerned only whether the conventional claim could be converted to a class proceeding and whether other putative class members could participate in the class proceeding (if certification is ultimately granted).
>
> [18] Put differently, whether issues of limitation periods arise in other contexts in the class proceeding will be an issue for the Court making those determinations. As such, I ordered the conversion but intended to do so without prejudice to the defendants from raising arguments respecting limitation periods at subsequent proceedings.
>
> [19] As referenced above, the parties seek clarification as to what date the limitation period is suspended under s. 38.1 of the *CPA*. More specifically, the parties ask what date I concluded should be deemed the "commencement of the proceedings." The importance of this determination is because s. 38.1 of the *CPA* provides that for a person with a cause of action, the applicable limitation period is suspended for the period beginning "on the commencement of the proceeding" and ending on either:

> (a) the date on which the court refuses to certify the action, or
>
> (b) the date on which the court orders that the person is not a member of the class.
>
> [20] The defendants interpret the commencement of the class proceedings as the date that I pronounced the order converting the action to a class proceeding (January 13, 2025). The defendants also propose three alternate dates that might be considered as the "commencement of the proceeding" which are the date on which the plaintiff filed her Notice of Application (August 2, 2024), the date on which the application was originally scheduled (September 9, 2024), or the date of the hearing (November 7, 2024).
>
> [21] The defendants' concern is that if the commencement of the proceedings were deemed to be the date the plaintiff filed her notice of civil claim, it would provide a substantive right to other individuals to file conventional claims after the limitation period expired from the date of the Fire (or notice of the event) because it would effectively toll the limitation period from that date. This may unintentionally revive claims from individuals who may otherwise be statute-barred by the *Limitation Act*, S.B.C. 2012, c. 13. The defendants may also wish to argue a limitation defence at the class proceedings should the proceeding continue as a class action for some or all of the class members.
>
> [22] The plaintiff contends that the commencement of the proceeding for the purpose of the limitation period should be the date that Ms. Rayner filed her notice of civil claim, being October 3, 2022.

[84] The judge decided that the commencement of the proceedings for the purposes of s. 38.1 of the *CPA* was October 3, 2022, when Ms. Rayner first filed her NOCC.

[85] He noted that his initial intention in converting the action to a class proceeding was to allow other tenants and owners of the Tamarind to potentially participate in the litigation. Therefore the "only logical date" to give the effect of the remedy of conversion was October 3, 2022. The appellants' interpretation and application of s. 38.1 would frustrate the purpose of the conversion, by barring other tenants and owners in the Tamarind from participating in the class proceeding by making their claims limitation barred.

[86] Citing *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at para. 49, the judge noted that class proceedings are "merely procedural vehicles," and that he did not intend to create substantive rights. Therefore, with the "commencement" being October 3, 2022, other individuals could join the class, but

the appellants may advance a limitation defence in the event any new conventional individual actions were commenced.

Legal framework

[87] Sections 38.1 and 39 of the *CPA* provide, in part:

> ***Limitation period for a cause of action not included in a class proceeding***
>
> **38.1** (1) If a person has a cause of action, a limitation period applicable to that cause of action is suspended for the period referred to in subsection (2) in the event that [certain circumstances are met.]
>
> …
>
> (2) In the circumstances set out in subsection (1), the limitation period applicable to a cause of action referred to in that subsection is suspended for the period beginning on the commencement of the proceeding and ending on the date on which
>
> (a) the time for appeal of an order referred to in subsection (1)(c) expires without an appeal being commenced, or
>
> (b) any appeal of an order referred to in subsection (1)(c) is finally disposed of.
>
> ***Limitation periods***
>
> **39** (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when [certain circumstances occur, as listed in the *CPA*.]
>
> [Emphasis added.]

[88] The *Limitation Act* also bears on the analysis. It provides, in part:

> ***Basic limitation period***
>
> **6** (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
>
> …
>
> ***Counterclaim or other claim or proceeding***
>
> **22** (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:
>
> (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;

(b) third party proceedings may be brought;

(c) claims by way of set off may be advanced;

(d) new parties may be added or substituted as plaintiffs or defendants.

[Emphasis added.]

The parties' positions

[89] The appellants' argument can be summarized this way. The judge acknowledged that the appellants had a "strong limitation defence" because the action was not converted to a class proceeding until after the expiry of the basic limitation period. He also did not want to limit the appellants' right to a substantive defence through a procedural order. Nevertheless, he ordered a date of "commencement" for the purposes of suspending the limitation period under s. 38.1 of the *CPA* as October 3, 2022. As a result, the limitation period for all tenants and owners in the Tamarind was suspended before it would have expired under s. 6(1) of the *Limitation Act*.

[90] The appellants say they now suffer prejudice through the loss of a substantive right to raise a limitation defence. Their position is that, while the judge stated he did not wish to prevent the appellants from relying upon a limitation defence, his order had that effect which amounted to an error in law or principle.

[91] Ms. Rayner submits the judge provided a reasoned analysis for why he selected October 3, 2022 as the date of commencement, and that he was well aware of the limitation issues. Accordingly, he made no reviewable error.

Analysis

[92] In my view, it was unnecessary for the judge to decide the commencement date of the proceeding for the purposes of s. 38.1 of the *CPA* and, respectfully, I find that he erred in principle by doing so.

[93] That said, I have sympathy for the judge, considering how the issue arose.

[94] Neither the notice of application seeking conversion, nor any of the responses filed specifically raised this issue. Nor was it addressed directly at the hearing of the

application. It is clear, however, that the appellants opposed the conversion application, in part, on the basis that if it were granted, they would be exposed to an increased number of claims. And certain appellants raised this issue more broadly, by arguing that Ms. Rayner was attempting to "manoeuvre around the limitation period to allow additional individuals to participate in the lawsuit".

[95] It seems to me that one or more of the appellants, after the judge delivered the RFJ, decided with the benefit of hindsight to seek "clarification" as to the date of the commencement of the action, in order to determine when the limitation period tolled for the additional claims. The appellants took this position at this juncture of the proceeding, without waiting until the certification application itself, or some later time to seek adjudication of the issue. This resulted in a brief video conference with the judge, and a subsequent memorandum to counsel in which the judge granted the parties leave to file "brief written submissions if they so wished".

[96] The judge then provided supplementary reasons on an issue that he was not asked to decide at the hearing of the application. The Supplementary RFJ then became problematic for a number of reasons.

[97] First, they are silent as to the impact, if any, of s. 22 of the *Limitation Act* and the framework which governs the addition of parties after an applicable limitation period has expired. Subject to my comments below, the selection of a commencement date, in my view, is a potentially relevant issue, which is best addressed at or after the certification hearing.

[98] Issues in this case about the commencement date are inherently related to the limitation period. These, in turn, are linked to the factual context in which they are being considered: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 65. For this reason, even the certification hearing may be a premature point at which to consider limitation period issues, absent "exceptional circumstances": *Godfrey* at para. 67. It follows, in my view, that it is premature to consider limitation periods and commencement dates in any substantive manner at a conversion application, absent circumstances where the answers to those issues are self-evident.

[99] The appellants argue in this Court that the judge erred in principle because the effect of the Supplementary RFJ is that statute barred claims have been definitively revived. I agree that the Supplementary RFJ could be read this way. In my view, the judge ought not to have decided any issue that bore on a potential limitation defence without a proper record and substantive submissions as to whether s. 22 of the *Limitation Act* applied. The conversion application was not the proper vehicle to seek determination of any limitation issues.

[100] In the Supplementary RFJ at paras. 32–33, citing *Godfrey*, the judge correctly observed that limitation issues are often not addressed until after the certification stage. He also correctly relied upon *Canadian Gaming* at para. 45 for the proposition that conversion applications are procedural, and should therefore not affect substantive rights, such as limitation defences.

[101] And yet, notwithstanding this framework, and without the issue of the commencement date for the purposes of suspending the limitation period being raised in the notice of application or the responses, the judge decided, on the basis of brief submissions from counsel, that the date would be October 3, 2022.

[102] Certain appellants (Stantec, Quantum, Elite, and Quay) submit that the judge erred further in his specific selection of October 3, 2022, because he lacked the authority to hold that proceedings had "commenced" on the date the NOCC was first filed. They submit the judge's error arose from his interpretation of Skolrood J.'s discussion of commencement dates in *Canadian Gaming*:

> [40] … While s. 2 refers to the *commencement* of a class proceeding, that refers to the point in time at which the *CPA* is invoked and the proceeding is brought on behalf of members of the class, which may be when the notice of civil claim is first filed, or may be when it is subsequently amended to include reference to the *CPA*.
>
> …
>
> [44] I also do not agree that ss. 38.1 and 39 are inconsistent with the ability to amend a notice of civil claim to plead the *CPA*. While these provisions, like s. 2, refer to the *commencement* of the proceeding, I read this to mean that point in time at which the action is purportedly brought on behalf of class members, either upon initial filing or at the time of a subsequent amendment.
>
> [Italics emphasis in original; underline emphasis added.]

[103] The appellants submit that para. 40 of *Canadian Gaming* stands for the proposition that there are only two dates upon which a class proceeding can be "commenced": (1) when a notice of civil claim that meets the requirements of the *CPA* and *Supreme Court Civil Rules* is filed; or (2) when a notice of civil claim is amended to meet the requirements of the *CPA* and *Supreme Court Civil Rules* to invoke the *CPA*. As a result, they argue, there can only be one commencement date in this case—the date the FANOCC was filed, which was the first date that the words "Brought under the *Class Proceedings Act*" were added to the NOCC.

[104] In my opinion, the appellants' submissions on this point are problematic for several reasons.

[105] First, it bears emphasizing that Skolrood J. was faced with two distinct issues in *Canadian Gaming*. The first related to what he called the "jurisdiction" for the BCSC to convert an individual action into one under the *CPA*; the second being the analytical framework to apply if the BCSC indeed had that jurisdiction.

[106] Paragraphs 40 and 44 of *Canadian Gaming*, and the references therein to ss. 38.1 and 39 of the *CPA*, merely formed a step in Skolrood J.'s analysis of the jurisdiction issue. On my reading, Skolrood J. was simply rejecting an argument that ss. 38.1 and 39 militated against finding jurisdiction to convert an individual action into a class proceeding.

[107] In no way, in my view, can it be taken from *Canadian Gaming* that a judge presiding over a conversion application ought to make a definitive ruling on the applicability of s. 38.1 of the *CPA* or otherwise determine the commencement date of the proceedings for the purposes of a limitations argument. In fact, *Canadian Gaming* arguably stands for the opposite proposition. And the appellants who requested "clarification" from the judge unnecessarily raised an issue which did not need to be decided at that time, if at all.

[108] Section 38.1 of the *CPA,* furthermore, suspends a limitation period "for a cause of action not included in a class proceeding". The FANOCC sets out the various causes of action "in the class proceeding". These causes of action will presumably be identified in better detail when Ms. Rayner files her second FANOCC

in accordance with these reasons. With respect to the appellants' concern that other residents or occupants of the Tamarind may bring individual claims outside the class proceeding, it is clear, in my view, that the appellants retain the right to raise a limitation defence or seek a stay pending the outcome of Ms. Rayner's proceeding.

[109] Furthermore, even if s. 38.1 of the *CPA* were a relevant factor to be considered at the conversion application, the exercise of discretion to convert an ordinary action to a class proceeding must be "consistent with the overarching objectives and the inherent flexibility of class proceedings": *Canadian Gaming* at para. 38. It would, in my view, be contrary to Skolrood J.'s recognition of a framework based on flexibility to then limit the commencement date to only two options.

[110] This is demonstrated by Skolrood J.'s observations that "an amendment to plead the *CPA* is procedural in nature and in no way impacts a defendant's ability to subsequently raise limitation issues at the certification or common issues stage", and his recognition that the *CPA* is sufficiently flexible to address limitation issues: *Canadian Gaming* at paras. 44–45.

[111] Accordingly, if a conversion to a class proceeding is meant, "in no way" to impact limitation period issues, then the commencement of the proceeding for the purposes of s. 38.1 of the *CPA* should only be decided on a satisfactory record and with thorough submissions on the limitation dates. This is a contextual analysis that is not limited to the date the *CPA* was first pled.

[112] Given the intrinsic nexus between commencement dates and limitation periods, such an inquiry should not have been decided at the time of this conversion application, but rather, in conjunction with other limitation issues, at or after the certification stage of the proceeding.

[113] I would add that the Supplementary RFJ do not address s. 39 of the *CPA*, which may also be relevant. It refers to the "commencement of the proceeding" after certification has been ordered. I can only assume that the judge was not provided with submissions as to the potential relevance of this section. If the appellants are

correct in their submissions regarding s. 38.1 of the *CPA*, different commencement dates may arguably apply under s. 38.1 and s. 39.

[114] My analysis should not be seen as limiting the scope of a judge's discretion in considering the *Canadian Gaming* factors. If limitation issues are identified at the conversion application, they should obviously be considered by the chambers judge in their exercise of discretion, as the judge did in this case.

[115] I would add that the manner in which the issue of the commencement of the proceedings arose in this case and the brief submissions made, may also explain certain contradictory findings by the judge on the limitation issue.

[116] For example, in the RFJ at para. 73, the judge stated that the "prejudice to potential class members of not being able to participate outweighs the prejudice to the defendants of the passing of the limitation period" (emphasis added).

[117] And yet, in the Supplementary RFJ, the judge made it clear that he was not precluding the appellants from raising limitation period arguments:

> [30] …I wish to be clear that, despite this clarification of when I have found the class proceeding to have commenced, I am not precluding the defendants from raising limitation period arguments at future applications or at trial in these class proceedings. It may be that as the class proceeding advances issues relating to limitation periods and prejudice will be better understood, ventilated, and considered than they were at the plaintiff's conversion application.
>
> [Emphasis added.]

[118] The entered order further confuses whether limitation periods were affected:

> 4. For the purposes of the suspension of limitation periods pursuant to section 38.1 of the *CPA*, the commencement of the proceedings is October 3, 2022, the date the Plaintiff filed her Notice of Civil Claim.
>
> [Emphasis added.]

[119] In conclusion, I am of the view that the judge erred in principle in deciding the "commencement of the proceedings" for the purposes of s. 38.1 at the conversion application. That finding was premature and unnecessary. This question should be addressed with any other limitation period issues, either at or after the certification hearing.

[120] I would therefore accede to this ground of appeal and vacate para. 4 of the order.

Disposition

[121] I would allow the appeal on the limited basis that I would:

a) grant leave to Ms. Rayner to file a second further amended notice of civil claim in accordance with these reasons; and

b) vacate para. 4 of the order which sets the date for the commencement of the proceedings for the purposes of s. 38.1 of the *CPA* as October 3, 2022.

[122] In that there has been divided success, I would order that the parties bear their own costs of this appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Riley"

I AGREE:

"The Honourable Justice Gomery"