COURT FILE NUMBER	QBG-SA-00766-2022
COURT OF KING'S BENCH FOR SASKATCHEWAN	
JUDICIAL CENTRE	SASKATOON
PLAINTIFFS / RESPONDENTS	CAITLIN ERICKSON, JENNIFER SOUCY (BEAUDRY) and STEFANIE HUTCHINSON ~~and COY NOLIN~~
DEFENDANT / APPLICANT	MILE TWO CHURCH INC.
DEFENDANTS / RESPONDENTS	KEITH JOHNSON, JOHN OLUBOBOKUN, KEN SHULTZ, NATHAN RYSAVY, DUFF FRIESEN, LYNETTE WEILER, JOEL HALL, ~~FRAN THEVENOT~~, LOU BRUNELLE, JAMES RANDALL, ~~TRACEY JOHNSON~~, ~~SIMBO OLUBOBOKUN~~, ~~ELAINE SCHULTZ~~, ~~CATHERINE RANDALL~~, KEVIN MACMILLAN, ~~ANNE MACMILLAN~~, DAWN BEAUDRY, NATHAN SCHULTZ, AARON BENNEWEIS, ~~DEIDRE BENNEWEIS~~, ~~STEPHANIE CASE~~, DARCY SCHUSTER, RANDY DONAUER, JOHN THURINGER, THE GOVERNMENT OF SASKATCHEWAN, JOHN DOES and JANE DOES

Brought under *The Class Actions Act*

BRIEF OF LAW OF THE APPLICANT (DEFENDANT), MILE TWO CHURCH INC.

Re Sequencing

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PART I INTRODUCTION

1. Thirteen Defendants, including Mile Two, have applied to stay the within Action as an abuse of process (the "**Stay Applications**"). The same Defendants have pending individual applications seeking further and better particulars (the "**Particulars Applications**") with respect to allegations made against them in the Second Amended Statement of Claim dated June 29, 2023 (the "**Claim**").

2. Aside from the within application, the Stay Applications and the Particulars Applications are the only extant applications before this Honourable Court. Despite the Claim having been issued more than two years ago, no application for certification has been made.

3. Mile Two submits that the Stay Applications should be heard and decided prior to any other step in the Action being taken. Consideration of delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency, and fairness dictate this result. If the Stay Applications are granted, there will be no need for the Court to consider the Particulars Applications (or any further applications). The reverse is not true – the Stay Applications will need to be heard and determined regardless of their sequencing in relation to any other application.

PART II FACTS

A. The Claim

4. The Action was commenced by Statement of Claim issued August 8, 2022. Twice amended, the operative version of the Claim is dated June 29, 2023. The Action is a proposed class action.

5. Despite the Action having been commenced over two years ago, the Plaintiffs have not applied for certification.

B. The Particulars Applications

6. The Particulars Applications are comprised of thirteen individual applications brought by the following Defendants: Mile Two, The Government of Saskatchewan, James Randall,

Duff Friesen, Ken Schultz, Joel Hall, Randy Donauer, John Olubobokun, John Thuringer, Lou Brunelle, Nathan Rysavy, Aaron Benneweis, and Kevin MacMillan.

7. Through the Particulars Applications, the Defendants seek further and better particulars with respect to allegations made against them in the Claim.

C. The Stay Applications

8. The same thirteen Defendants that brought the Particulars Applications have sought to stay the within Action as an abuse of process as a consequence of the Plaintiffs' failure to immediately disclose settlement agreements that they entered into with select former Defendants.[1]

9. The Stay Applications are entirely unrelated to the Particulars Applications or certification. The Stay Applications are based on circumstances that were unknown to the Defendants when the Particulars Applications were made.

PART III ISSUE

10. The sole question before this Court is whether the Stay Applications should be heard and decided before any other steps in the Action are taken, including the hearing of the Particulars Applications. Mile Two submits that the answer is yes.

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[1] The Stay Applications include the following three applications:

a. An application by Mile Two, dated November 1, 2024;

b. An application by The Government of Saskatchewan, dated November 29, 2024; and

c. An application by James Randall, Duff Friesen, Ken Schultz, Joel Hall, Randy Donauer, John Olubobokun, John Thuringer, Lou Brunelle, Nathan Rysavy, Aaron Benneweis, and Kevin MacMillan, dated November 29, 2024.

PART IV ARGUMENT

A. The Stay Applications should precede the Particulars Applications and certification

1) Sequencing in class actions

11. This Honourable Court has the power to manage the course of a proceeding, including a proposed class action, under its inherent jurisdiction to control its own process.

12. Rule 3-89 of *The King's Bench Rules* [*Rules*] provides that the general procedure and practice of the Court applies to actions and applications brought under *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*]. Rule 1-3(1) provides that the purpose of the *Rules* is to provide a means by which claims can be justly resolved by the Court in a timely and cost effective way.

13. The Court retains discretion on the sequencing of applications in a proposed class action. In *Hoedel v WestJet Airlines Ltd.*, 2023 SKCA 135 at para 29 [*Hoedel*], the Court of Appeal noted "that the Court of King's Bench has the discretion to determine the sequence in which applications and motions in prospective class action proceedings are heard relative to the certification application".

14. The Court in *Hoedel* provided substantive guidance on the factors relevant to consideration of the sequencing of applications in a class action. Emphasizing the case-by-case approach required to determine sequencing, the Court stated the following at paragraph 37:

> [37] ... The central point to be made here is that, regardless of the precise wording used in articulating the test, each sequencing application must be assessed on a case-by-case basis, with an understanding that the factors are not exhaustive and that no one factor is determinative....

15. In paragraph 35 of *Hoedel*, Schwann J.A. drew from the decision of the British Columbia Court of Appeal in *British Columbia v The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219, [2021] 10 WWR 606 [*Jean Coutu*] in setting out the framework for determining sequencing in the pre-certification context:

> [35] In my view, the more pertinent decision on the matter of sequencing is *Jean Coutu*, where the British Columbia Court of Appeal distilled the relevant case law into the following, non-exhaustive, list of factors for consideration in such applications:

[33] Sequencing applications have become increasingly common in proposed class proceedings. Each proposal for a pre-certification motion must be looked at in the specific context of the case. The case law has identified a non-exhaustive list of factors to consider in a sequencing application: *Lieberman et al. v. Business Development Bank of Canada*, 2005 BCSC 389 at para. 16; *Cannon* at para. 15; *Li* at para. 18; *Kett v. Mitsubishi Materials Corporation*, 2019 BCSC 2373 at paras. 11–12. Justice Matthews, in *Shaver v. Mallinckrodt Canada ULC*, 2021 BCSC 455, combined and summarized the factors:

> [10] ... **Combined, 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...
>
> 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 proceedings.**

...

[45] **In my view,** a judge's discretion as to sequencing ought to be guided by the approach set out in *Pro-Sys* through the application of the *Shaver* factors. Each sequencing application must be determined in the context of the particular case before the court and **the court's discretion ought to be**

exercised in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute.

[Emphasis added]

16. Drawing from *0790482 B.C. Ltd. v KBK No. 11 Ventures Ltd.*, 2021 BCSC 258 and *Cannon v Funds for Canada Foundation*, 2010 ONSC 146 [*Cannon*], the Court in *Hoedel* emphasized at paragraph 36 that the list of considerations relevant to determining sequencing invoke several "broad themes and concerns: delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency, and fairness".

17. Mile Two respectfully submits that each of the factors expressed in *Hoedel* heavily favour sequencing the Stay Applications before the Particulars Applications and certification.

a) The issue of delay weighs in favour of sequencing the Stay Applications prior to the Particulars Applications and certification

18. Concerns around delay typically reflect the historical position that, "generally, certification applications should be the first matter heard in any class action proceeding or that interlocutory motions should at least be heard at the same time as certification" (*Hoedel* at para 23).

19. Despite the Action having been commenced over two years ago, the Plaintiffs have not applied for certification. The hearing of certification cannot be delayed where no application for certification has yet been brought. The only extant applications that would be delayed by the primacy of the Stay Applications are the Particulars Applications, which were brought by the same Defendants that now seek an order staying the Action as an abuse of process. The determination of the Particulars Applications will impact on (i) the Defendants' response to the certification application and (ii) the Defendants' Statements of Defence if the Action is certified. Therefore, there can also be no delay caused by deferring the Particulars Applications where no application for certification has been made.

20. The Court in *Jean Coutu* at para 33 recognized that the potential for delay arising from interlocutory appeals is also a relevant consideration. This concern is not operative in the circumstances. Any appeal resulting from sequencing or the determination of the Stay Applications can have no delay on the advancement of this Action given that no application for certification has been made.

21. The issue of delay weighs in favour of sequencing the Stay Applications prior to any other step in the Action, including the Particulars Applications.

b) A consideration of cost weighs in favour of sequencing the Stay Applications prior to the Particulars Applications, certification, and any other pre-certification applications

22. Related to concerns about delay is the issue of cost. The Stay Applications could dispose of the whole proceeding. Hearing the Stay Applications first has the potential to entirely avoid the cost of hearing and determining the Particulars Applications, bringing, hearing and determining the certification application, and any other pre-certification applications that could arise. If the thirteen Particulars Applications are sequenced in advance of the Stay Applications, however, the Stay Applications will still need to be adjudicated. The same can be said of scheduling the Stay Applications to be heard at the same time as certification.

23. In *Tanchak v British Columbia*, 2023 BCSC 1482 [*Tanchak*], the Court considered whether to sequence applications to strike or stay a proposed class action as an abuse of process in advance of or at the same time as a certification application. Like this Action, no certification application had been filed when the Court considered the sequencing issue: see *Tanchak* at para 9. In considering the cost associated with sequencing the abuse of process applications in advance of certification, the Court observed that the applications would "be brought on a relatively limited record, with less time and cost than a certification hearing" (*Tanchak* at para 28). The Court determined that a consideration of cost weighed in favour of sequencing the abuse of process applications prior to certification: *Tanchak* at para 28. The same reasoning applies here.

c) Judicial efficiency and the prospect of multiple rounds of proceedings weigh in favour of sequencing the Stay Applications prior to the Particulars Applications and certification

24. The principles of judicial economy and efficiency also weigh in favour of the Stay Applications being heard prior to the Particulars Applications and certification. So too does the prospect of multiple rounds of proceedings. If the Court grants the Stay Applications, the Particulars Applications and certification will be rendered moot. Conversely, however, the Court's disposition of the Particulars Applications prior to the Stay Applications, or at the

same time as certification, will not render the Stay Applications unnecessary. This strongly suggests that the Stay Applications should be determined first.

25. In *Cannon* at para 15, the Court noted that a relevant sequencing consideration is whether an application "will dispose of the entire proceeding or will substantially narrow the issues to be determined". If successful, the Stay Applications will dispose of the entire proceeding.

26. In *Tanchak*, the Court confronted the argument that the abuse of process applications it was tasked with sequencing relative to certification raised "discrete, dispositive issues, which are narrower and have limited interplay with the wider issues addressed at a certification hearing" (*Tanchak* at para 33). Despite determining that there was some interplay between the issues on the abuse of process applications and certification, the Court found that the limited interplay supported the abuse of process applications being heard first: *Tanchak* at para 34.

27. Here, there is no factual or legal interplay between the Stay Applications and the Particulars Applications or a certification application. The factual and legal issues raised in the Stay Applications have no bearing on the certification criteria set out in s. 6(1) of the *CAA*.

28. A further consideration relating to judicial efficiency is the lack of practical impact associated with considering the Particulars Applications prior to the Stay Applications. The Particulars Applications are irrelevant to the Stay Applications.

29. The Particulars Applications relate to the procedure and substance of the Action. As stated, the determination of the Particulars Applications will impact on (i) the Defendants' response to the certification application and (ii) the Defendants' Statements of Defence if the Action is certified. The Stay Applications, however, are unconnected to procedure or to the substantive merits of the claims at issue. The Stay Applications raise issues discrete from any other potential application that could be brought in the Action. Whether the Action must be stayed as an abuse of process is a stand-alone issue.

30. The Court in *Jean Coutu* at para 45 noted that when considering sequencing, "the court's discretion ought to be exercised in a manner that facilitates judicial efficiency and the

timely resolution of the dispute". This goal is reflected in Rule 1-3(1), which underlines that the purpose of the *Rules* is to provide a means to have claims justly resolved by the Court in a timely and cost effective way. The principles of judicial efficiency and economy weigh heavily in favour of considering the Stay Applications prior to the Particulars Applications.

d) Fairness dictates the sequencing of the Stay Applications prior to the Particulars Applications and certification

31. Fairness also dictates that the Stay Applications be heard and determined prior to the Particulars Applications and certification.

32. Deferring the Stay Applications would be unfair and prejudicial to the Defendants. The premise underlying the Stay Applications is that the Plaintiffs have perpetrated an abuse of process and that the Action should be stayed as a consequence. The Stay Applications assert that the Plaintiffs' own actions have shifted the litigation landscape without immediate notice to the Defendants. It would be unfair to require the Defendants to argue the Particulars Applications and defend certification of what may be an abusive action, particularly when the Stay Applications could be entirely dispositive of the Action.

PART V CONCLUSION

33. For all of these reasons, it is respectfully submitted that considerations of delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency and economy as well as fairness weigh decisively in favour of this Court considering the Stay Applications before any other step in the Action is taken.

34. Mile Two seeks the costs of this application as against the Plaintiffs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2024.

McDOUGALL GAULEY LLP

Per: _____

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PART VI LIST OF AUTHORITIES

Case Law

Tab	Case Name	Legal Principle(s)	Para(s)	Case Citation
	British Columbia v The Jean Coutu Group (PJC) Inc.	The Court set out a non-exhaustive list of factors to consider in a sequencing application, including: - Any delay by the plaintiff in proceeding to certification; - The extent to which a preliminary application may dispose of the whole proceeding or narrow the issues to be determined; - The cost to the parties of participating in pre-certification procedures; the potential for delay arising from interlocutory appeals; - The complexity and interplay of the issues that may arise in and between the pre-certification and certification applications; - Whether the outcome of the motion will promote settlement; - The interests of economy and judicial efficiency; and - The fair and efficient determination of the proceedings. When considering sequencing, the Court's discretion ought to be exercised in a manner that facilitates judicial efficiency and the timely resolution of the dispute.	33, 45	2021 BCCA 219, [2021] 10 WWR 606

	Cannon v Funds for Canada Foundation	Relevant sequencing considerations include the following broad themes and concerns: delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency, and fairness. A relevant sequencing consideration is whether an application will dispose of the entire proceeding or will substantially narrow the issues to be determined.	15	2010 ONSC 146
	Hoedel v WestJet Airlines Ltd.	The Court of King's Bench has the discretion to determine the sequence in which applications and motions in prospective class action proceedings are heard relative to the certification application. Concerns around delay in a proposed class action proceeding typically reflect the historical position that, generally, certification applications should be the first matter heard in a class action proceeding or that interlocutory motions should at least be heard at the same time as certification. The list of considerations relevant to determining sequencing invoke several broad themes and concerns: delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency, and fairness. Each sequencing application must be assessed on a case-by-case basis, with an understanding that the factors are not exhaustive and that no one factor is determinative.	23, 29, 35–37	2023 SKCA 135
	Tanchak v British Columbia	The Court considered whether to sequence applications to strike or stay a proposed class action as an abuse of process in	9, 28, 33–34	2023 BCSC 1482

		advance of or at the same time as a certification application. No certification application had been made when the Court considered the sequencing issue. In considering the cost associated with sequencing abuse of process applications in advance of certification, the Court observed that the applications would be brought on a relatively limited record, with less time and cost than a certification hearing. The Court determined that a consideration of cost weighed in favour of sequencing abuse of process applications prior to certification. The Court confronted the argument that the abuse of process applications it was tasked with sequencing relative to certification raised discrete, dispositive issues, which are narrower and have limited interplay with the wider issues addressed at a certification hearing. While noting there was some interplay between the issues on the abuse of process applications and certification, the Court found that the limited interplay supported the abuse of process applications being heard first.		
	0790482 B.C. Ltd. v KBK No. 11 Ventures Ltd.	Relevant sequencing considerations include the following broad themes and concerns: delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency, and fairness.		2021 BCSC 258

Legislation

Tab	Statutes / Rules	Section(s) / Rule(s)	Citation
	The Class Actions Act	6(1)	SS 2001, c C-12.01
	The King's Bench Rules	1-3, 3-89	Sask Gaz December 27, 2013, 2684