Court File No: A-84-24

FEDERAL COURT OF APPEAL

BETWEEN:

SEISMOTECH IP HOLDINGS INC.
SEISMOTECH SAFETY SYSTEMS INC.

APPELLANTS

AND:

RONA INC. and HOME DEPOT OF CANADA INC., as proposed representative defendants for the class of defendants in the underlying actions

RESPONDENTS

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellants' solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the orders appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: February 27, 2024

Issued by:_____
(Registry Officer)

Address of local office: Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, Ontario
K1A 0H9

WITH NOTICE TO: **RONA INC.**

Norton Rose Fulbright Canada LLP
1 Place Ville Marie, Suite 2500
Montréal, QC H3B 1R1

ATTN: Mr. François-David Paré, Mr. Brian Daley, Mr. Renaud Garon Gendron, Ms. Sandrine Raquepas, and Ms. Denise Pope

WITH NOTICE TO: **HOME DEPOT OF CANADA INC.**

DLA Piper (Canada) LLP
1 First Canadian Place
100 King Street West, Suite 6000
P.O. Box 367, Toronto ON M5X 1E2

ATTN: Mr. Bentley Gaikis, Ms. Rebecca von Rüti, Ms. Erin Chamberlain, Mr. David Lafontaine, and Mr. Nicholas G. Papastavros

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Order of the Honourable Justice Martine St-Louis on February 22, 2024, an order applicable to files T-1146-23 and T-1149-23 made after a single case management conference for both files (the "**Order**"). The Order was not made pursuant to a motion brought by either party.

The Order was a "sequencing order" indefinitely postponing the hearing of the appellants' (plaintiffs') motion for class action certification, although Rule 334.15(2) provides that such motions "*shall be made returnable no later than 90 days after the later of*" the day the last Statement of Defense was filed or required to be filed.[1]

The Order also "sequenced" a motion for security for costs to be heard *before* the class action certification motion, despite this Court recently re-affirming that the "No-Costs Rule" in Rule 334.39 "*is strong and essential for the proper operation of the class proceedings regime*."[2] The Order did not include *any* reasoning on how a security for costs motion could be compatible with the "No-Costs Rule" in class actions when Rule 334.11 excludes usual rules that are incompatible with Part 5.1 - Class Proceedings.

The Federal Court's novel approach to "sequence" a security for costs motion would serve as a procedural means to defeat class proceedings in the federal courts and directly undermine the goal of class proceedings to facilitate access to justice for litigants.

The topic of "sequencing" has also become significant in class actions practice in various courts across Canada.[3] This Court has yet to provide any guidance on "sequencing" and these three (3) specific topics cry out for appellate guidance: (a) the default rule to hear the parties' contemplated motions, including a motion for class action certification, concurrently in a single instead of multiple hearings; (b) in exceptional circumstances, the factors to consider when evaluating whether to depart from the default rule; and (c) the process for showing exceptional circumstances and requesting departure from the rule.

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[1] *Berenguer v. WOW Air ehf*, 2019 FC 407 (per Lafrenière, J.).

[2] *Wenham v. Canada (Attorney General)*, 2021 FCA 208 at paras. 10-20, particularly para. 16.

[3] E.g., *British Columbia v. Apotex Inc.*, 2020 BCCA 186 at para. 34.

Recent experience in another Canadian jurisdiction demonstrate that a "case-by-case" analysis of "sequencing" will result in a proliferation of sequencing debates (and likely appeals) in nearly *every* class action.[4] Whereas, the Federal Court adopted a clear default rule to hear all motions concurrently unless there are "exceptional circumstances,"[5] but the case management judge did not follow this common sense approach.

Class action certification is a straightforward motion focusing narrowly on whether the action can be litigated collectively or not, and nothing more[6], and is often determinative of whether the litigation could even proceed. The practical reality is that a delay to a class action certification motion, whether the decision is positive or not, impacts access to justice and the timely and efficient administration of justice *on their merits*. A defendant's pre-certification motion(s) opens the door to multiple rounds of appeals putting additional pressure on the limited resources of appeal courts. It is a license for inefficiency.

THE APPELLANTS ASK that:

1. The appeal be allowed and the Order be set aside, and a direction that should the respondents wish to have any other motion(s) heard before the class action certification motion, they shall forthwith bring a sequencing motion at the Federal Court with supporting evidence of any "exceptional circumstances";

2. In the alterative, the appeal be allowed and the Order be varied to state that the respondents' contemplated motions (i.e., security for costs and motion to strike) and the appellants' class action certification motion be heard at the same hearing, subject to the discretion of the judge on the relative order of the parties' submissions at the hearing and whether to render a decision on some or all of those motions;

3. Each party bear their own costs, in accordance with Rule 334.39; and

4. This Honourable Court grant such further orders and relief as it deems just.

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[4] *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 at para. 35-37 adopting a case-by-case approach, and numerous Supreme Court of British Columbia sequencing applications thereafter.

[5] *Berenguer v. WOW Air ehf*, 2019 FC 407 at para. 20 (per Lafrenière, J.); *Moore v. Canada (Attorney General)*, 2022 FC 824 at paras. 14-17 (per Southcott J.).

[6] *Brake v. Canada (Attorney General)*, 2019 FCA 274 at paras. 16-19.

THE GROUNDS OF APPEAL are as follows:

The appellants rely on the following five (5) grounds of appeal, as detailed further below:

1. **Procedural Fairness:**
   a. The Order was decided through a process that lacked procedural fairness.[7]
   b. The Order specified a process for next steps in the underlying actions that would not permit the appellants to fully advance or defend their case.
2. **Horizontal *Stare Decisis* – The Test for Sequencing Requiring "Exceptional Circumstances" Was Not Cited or Followed**[8]
3. **Rule 334.11 provides that Part 5.1 (Class Proceedings) of the *FCR* Overrides Part 11 (Costs), and such security for costs motions should not be scheduled in a class proceeding**
4. **Failure to Consider the Relevant Factors for "Sequencing" and Palpable and Overriding Error in Weighing the Relevant Factors**
5. **Order Did Not Provide Sufficient Reasons for the Extraordinary Decision**

Ground 1(a): Procedural Fairness in Rendering the Sequencing Order

1. Although a case management judge has broad powers under Rule 385 to issue orders, "*these powers are to be exercised in accordance with procedural fairness*."[9]

2. "*The policy considerations underpinning the class proceedings legislation quite properly focus on providing timely and affordable access to justice. Courts must be ever mindful of these goals concerning sequencing of applications, and the hearing and determination of applications in the course of the litigation*."[10]

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[7] *Mazhero v. Fox*, 2014 FCA 219 at para. 5 (Stratas, J.A., sitting as a motions judge); see also *Sport Maska Inc. v. Bauer Hockey Ltd.*, 2019 FCA 204 at para. 36; *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at para. 42.

[8] *Berenguer v. WOW Air ehf*, 2019 FC 407 at para. 20 (per Lafrenière, J.); *Moore v. Canada (Attorney General)*, 2022 FC 824 at paras. 14-17 (per Southcott J.).

[9] [emphasis added] *Mazhero v. Fox*, 2014 FCA 219 at para. 5 (Stratas, J.A., sitting as a motions judge); see also *Sport Maska Inc. v. Bauer Hockey Ltd.*, 2019 FCA 204 at para. 36; *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at para. 42.

[10] [emphasis added] *Creery v Match Group LLC*, 2024 BCSC 149 at para. 17.

3. The case management judge erred in characterizing the parties' dispute as a mere scheduling matter, as the effect of the "scheduling" here would delay the certification motion for many **years**, and would also involve hearing a preliminary security for costs motion despite the "No-Costs Rule" and Rule 334.11. In such circumstance, the procedure for reaching such a decision on sequencing must be procedurally fair.

4. The Order did not respect procedural fairness in at least two (2) respects.

5. Firstly, in this case, the appellants submitted to the case management judge that the respondents should bring a formal motion to resolve the sequencing dispute with a proper evidentiary record. A formal motion would have permitted the appellants to present evidence on three pertinent issues for the sequencing dispute:

    a. The inventor for the underlying patents is in his late 70s with deteriorating health, and delays would affect the fairness of the trial for all parties. Relatedly, the inventor desires to see the conclusion of the litigation as soon as practicable.

    b. There is a serious risk of the class of defendants shrinking as time progresses,[11] which would complicate the trial and ultimately prejudice the appellants.

    c. The appellants are start-up companies whose principal is the inventor, and should not have to endure multiple rounds of procedural motions at great costs.

6. The above concerns were all raised at the case management conference ("**CMC**"). The case management judge rendered the Order without giving the appellants an opportunity to present evidence and argue their case for these three issues.

7. Secondly, the Order was based, at least in part, on the one-sided evidence and submissions in the respondent's security for costs motion that was provided to the appellants and the court less than 48 hours before the case management conference, far shorter than the timeframe for formal motions. The appellants also had no reasonable opportunity to present any evidence in response, when some of the respondent's evidence and submissions were on their face entirely inaccurate.

[11] See for example, *Voltage Pictures, LLC v. Salna*, 2023 FC 893 at paras. 34-36.

Ground 1(b): Order Provides for a Sequence of Motions that is Unfair

8. At the CMC, and in a letter beforehand, the appellants advised that the appellants be permitted to bring a document disclosure motion, which is necessary to ensure a fair adjudication and for the appellants to fully answer the motion for security for costs. The Order implicitly refused without reason this key procedural step that is necessary to ensure fairness.

9. The pertinent documents relate to the indemnification of, and/or funding the litigation for, the respondents by members of the putative class. It is trite law that cost awards are not intended to be a windfall or profit, and are otherwise not available if the party is already indemnified by another person or otherwise financed by the class. Consequently, it could serve as a complete answer as to a security for costs motion.

10. Moreover, the issue of indemnification and financing for the class representative is subject to strict judicial oversight to protect the integrity of the justice system, even before class action certification.[12] The appellants' motion for disclosure of such documents before any motion for security for costs is merely giving effect to the letter and spirit of the "prompt disclosure" requirement of any such arrangements.[13]

11. The Order did not allow for the appellants to bring a motion for document disclosure, which deprived the appellants a fair opportunity to defend the respondents' security for costs motion. It also deprived the Federal Court of necessary information to properly appreciate the dynamics underlying the litigation.

Ground 2: Horizontal *Stare Decisis* – "Exceptional Circumstances" Are Required for Pre-Certification Motions to Be Heard in Advance

12. The Federal Court has long recognized the default rule that certification is the first order of business and a defendant's contemplated motions are to be heard concurrently alongside certification, but that the court retains the discretion to hear

[12] *Ingarra v. Dye & Durham Limited*, 2024 FC 152; *Breckon v. Cermaq Canada Ltd.*, 2024 FC 225 at paras. 92-125.

[13] *Breckon v. Cermaq Canada Ltd.*, 2024 FC 225 at paras. 102-104.

motions in advance of certification only in "exceptional circumstances":[14]

> [19] The general rule is that a certification motion should be the first procedural matter heard in a proposed class proceeding. This rule is premised in part on the brief 90 day period for bringing a certification motion set out in Rule 334.15 of the FCR, which is indicative of a legislative intent that certification be heard promptly and given precedence over other preliminary motions. The Court must avoid to the extent possible increased costs in class action proceedings. In addition, it should curb litigation by instalments, which could result in appeals and significant delay in disposing of the class proceeding on its merits.
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> [20] The Court retains the discretion to hear a motion prior to certification. However, it should only do so in exceptional circumstances. In *Cannon v Funds for Canada Foundation*, 2010 ONSC 146 [Cannon], Justice George Strathy (as he then was) set out a number of considerations to be taken into account in deciding whether to allow bringing a motion prior to certification, at paragraph 15:…

13. Based on the principle of horizontal *stare decisis*,[15] the case management judge should have followed the default rule in *Berenguer v. WOW Air ehf*, 2019 FC 407 at para. 20 (per Lafrenière, J.) and *Moore v. Canada (Attorney General)*, 2022 FC 824 at paras. 14-17 (per Southcott J.), that the motion for class action certification is the first procedural motion and the respondents must first demonstrate "exceptional circumstances" to warrant hearing their motions first, as opposed to concurrently.

14. A default rule that all motions be heard concurrently makes common sense. The judge hearing a "sequencing" dispute would always be in a tough position to predict the efficiency of hearing, and the likely outcome of, the contemplated motions, in a situation where there is an incomplete record and only based on the parties' say-so.

15. Although cited in the appellants' letter for the case management conference, the case management judge did not cite *Berenguer v. WOW Air ehf*, 2019 FC 407 and *Moore v. Canada (Attorney General)*, 2022 FC 824.

16. The case management judge also did not explicitly find there to be any "exceptional circumstance" in this case that would warrant departure from the default rule. There was also nothing in the court record that could support a finding of an "exceptional circumstance."

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[14] [emphasis added] *Berenguer v. WOW Air ehf*, 2019 FC 407 at paras. 19-20 (per Lafrenière, J.).

[15] *R. v. Sullivan*, 2022 SCC 19 at paras. 73-83.

17. A defendant's class action itself cannot be an "exceptional circumstance" when this procedure is expressly contemplated in the *Federal Courts Rules*, with centuries of pedigree and proven usage and effectiveness as detailed further below. This Court recently noted the high threshold necessary to establish an "exceptional circumstance" in the context of class proceedings.[16]

18. The appellants acknowledge that a situation where a putative representative defendant does not have the resources to represent the class, or where the putative representative defendant is stuck defending the interest of a class of defendants he has no relationship with and for which he has no involvement regarding the wrongdoing of those other defendants may amount to an "exceptional circumstance".[17]

19. However, a defendant's class action is intended for situations involving "*corporate defendants who are commonly placed in that there is the same conduct that is at issue and there's a financial incentive for all the defendants to defend the case*,"[18] which is precisely the case here. The respondents are the major retailers of devices that allegedly infringe the appellants' patents. The appellants provided the respondents an opportunity to cease as the putative representative defendant in the underlying cases if they do not have indemnifications or funding from the class.

20. Moreover, based on the default rule, "*the Court must consider the prima facie strength of the motion and determine whether allowing it to be heard before the certification hearing militates in favour of judicial economy and efficiency*."[19]

21. For the respondents' contemplated motion(s) to strike, the respondents did not even provide a draft notice of motion, and their request was to hear all their motions sequentially: (a) motion for security for costs; (b) multiple motion(s) to strike; (c)

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[16] *Wenham v. Canada (Attorney General)*, 2021 FCA 208 at paras. 33-37

[17] *Voltage Pictures, LLC v. Salna*, 2017 FCA 221 at para. 12.

[18] *Reverse class action judgment needs to be reversed*, LegalMatters on Oct. 6, 2021 on well-resources corporate defendants as representatives.

[19] *Berenguer v. WOW Air ehf*, 2019 FC 407 at para. 17 (per Lafrenière, J.)

motion to defer filing a Statement of Defense; and (d) if needed, motion for class action certification. In the circumstances, the Federal Court could not even make any informed assessment of any *prima facie* strength of the respondents' contemplated motion(s) to strike in the absence of any draft materials, and it was an error to permit the respondents to sequence their motions in priority merely based on their say-so.

22. For the respondents' motion for security for costs, it is *prima facie* weak as the "No-Costs Rule" in Rule 334.39 specifically provides that no costs shall be awarded for class actions, which also applies to defendant's class actions.[20] Rule 334.11 also specify that other provisions in the *Federal Courts Rules* shall not apply to the extent that they are incompatible with specific rules for class actions, such as the "No-Costs Rule." The case management judge did not provide any reason how a security for costs motion could be compatible with the "No-Costs Rule" that "*is strong and essential for the proper operation of the class proceedings regime*."[21]

Ground 3: Rule 334.11 - Part 5.1 Overrides Part 11, and Security for Costs Should not be Scheduled

23. Part 5.1 (Class Proceedings) provides that the rules for actions and applications apply to class proceedings, except to the extent they are incompatible with the rules under Part 5.1:

> **Applicability of rules for actions and applications**
>
> 334.11 Except to the extent that they are incompatible with the rules in this Part, the rules applicable to actions and applications, as the case may be, apply to class proceedings.

24. Rule 334.39 provides a comprehensive and complete "No-Costs Rule" applicable to class proceedings:[22]

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[20] *Wenham v. Canada (Attorney General)*, 2021 FCA 208 at paras. 18-19.

[21] [emphasis added] *Wenham v. Canada (Attorney General)*, 2021 FCA 208 at paras. 10-20, particularly para. 16.

[22] *Ibid.*

Costs

No costs

334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;

(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or

(c) exceptional circumstances make it unjust to deprive the successful party of costs.

Individual claims

(2) The Court has full discretion to award costs with respect to the determination of the individual claims of a class member.

25. Part 11 of the *Federal Courts Rules* is entitled "Costs", and includes Rule 415 for security of *contemplated* costs, which is inherently incompatible with Rule 334.39 and could not apply per Rule 334.11. There is simply no *contemplated* costs in a class proceeding to possibly seek security for, and motions for such security should not be scheduled as a matter of course.

26. The case management judge has now set a precedent in scheduling a motion for security for costs in advance of a class proceeding, which is unheard of in the decades of class proceedings in the federal courts. Sequencing a security for costs motion before class action certification could be used strategically as a procedural means to defeat class proceedings, contrary to the intent of the framers of the class action rules.

27. The appellants recognize that the Federal Court of Appeal has awarded security for costs in a defendant's class proceeding in *Voltage Pictures, LLC v. Salna*, 2017 FCA 221, which predated the Federal Court's extensive guidance on sequencing issues (above) and in a context where sequencing was not even addressed in the case that gave rise to the appeal (*Voltage Pictures, LLC v. Salna*, 2017 FC 130).

28. Most importantly, *Voltage Pictures, LLC v. Salna*, 2017 FCA 221 appears to be

manifestly wrong in overlooking a relevant statutory provision (i.e., Rule 334.11),[23] which was not raised at all in either level of court by any party.

29. There is no utility in scheduling a hearing for a motion that is on its face incompatible with the "No-Cost Rule" for class proceedings, and on this appeal this Court would necessarily need to consider if *Voltage Pictures, LLC v. Salna*, 2017 FCA 221 was manifestly wrong in having overlooked Rule 334.11.

The Same Policy Objectives Underly both Plaintiff and Defendant Class Actions

30. The three goals underlying class actions are: (a) judicial economy by aggregating similar individual actions to avoid unnecessary duplication in fact-finding and legal analysis; (b) access to justice in spreading the costs over a large number of litigants and making economical the litigation of claims that may be too costly for individual litigation; and (c) behavioural modification by delivering efficient and timely justice so actual and potential wrongdoers do not ignore their legal obligations.[24]

31. The three goals of class actions apply equally to a plaintiff's class action (i.e., an action by a single plaintiff seeking to represent a group of potential claimants) and a defendants' class action (i.e., an action with representative defendant(s) appointed to represent the interest of a group of similarly situated defendants),[25] as courts have recognized for decades:[26]

> A defendant class action is a civil action brought against one or more persons defending on behalf of a group of persons similarly situated. It provides an efficient procedural mechanism for the determination of common issues in a complex proceeding involving multiple parties. It offers a means of binding all interested parties and, therefore, prevents re-litigation of the same issues in a multitude of lawsuits. The advantages of a defendant class action include the conservation of judicial resources and private litigation costs, both absolutely, by preventing relitigation of the same issues, and relatively, by spreading expenses and resolving common issues over a large number of defendants. In this sense, greater access to the courts, by plaintiffs and defendants alike, is achieved. See Ontario Law Reform Commission, Report on Class Actions (1982) ("O.L.R.C. Report") at pp. 2, 41

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[23] *Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 10.

[24] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 27-29.

[25] *Salna v. Voltage Pictures, LLC*, 2021 FCA 176 at paras. 26 and 67.

[26] [emphasis added] *Chippewas of Sarnia Band v. Canada (Attorney General)*, 1996 CarswellOnt 2396 at paras. 16-17, case was cited with approval in *Salna v. Voltage Pictures, LLC*, 2021 FCA 176.

> and Notes, 91 Harvard L.R. 630 (1977-78), at pp. 630-31, 658.
>
> Defendant class actions have a long history in Anglo-American jurisprudence. Their origins are in the English Courts of Equity of the 18th and 19th century. They evolved as a means of providing plaintiffs with an enforceable remedy where it was otherwise impractical to secure the attendance of all potential defendants, while at the same time ensuring that those affected by the outcome of a lawsuit, although absent, were sufficiently protected. Adequate representation of absentee defendants was viewed as a sufficient substitute for the natural justice requirements of individual notice and the opportunity to be heard. See Barry M. Wolfson, "Defendant Class Actions" (1977), 38 Ohio State L.J. 459 at pp. 462-65; Newberg on Class Actions, 3rd ed. (1992), at pp. 4-181 to 4-183; and Hansberry v. Lee, 61 S.Ct. 115 (1940) at pp. 118-19.

Ground 4: Failure to Consider the Relevant Factors for "Sequencing" and Palpable and Overriding Errors in Weighing the Relevant Factors

32. Even assuming there is no default rule that all motions be heard concurrently with class action certification, the case management judge did not consider the relevant *non-exhaustive* factors for assessing if a defendant's contemplated motion should be heard in advance:[27]

    a. whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;

    b. the likelihood of delays and costs associated with the motion;

    c. whether the outcome of the motion will promote settlement;

    d. whether the motion could give rise to interlocutory appeals and delays that would affect certification;

    e. the interests of economy and judicial efficiency; and

    f. generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding

33. The factors above were brought to the case management judge's attention, and the Court was also informed that the respondents' contemplated motions did not appear to meet these factors.

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[27] *Berenguer v. WOW Air ehf*, 2019 FC 407 at para. 20; *Moore v. Canada (Attorney General)*, 2022 FC 824 at para. 17.

34. Most importantly, the case management judge did not consider four important and specific factors in the circumstances of this case, which are not on the list above:

    a. The inventor for the underlying patents is in his late 70s with deteriorating health, and delays would affect the fairness of the trial for all parties. Relatedly, the inventor desires to see the conclusion of the litigation as soon as practicable.

    b. There is a serious risk of the class of defendants shrinking as time progresses,[28] which would complicate the trial and ultimately prejudice the appellants.

    c. The appellants are start-up companies whose principal is the inventor, and should not have to endure multiple rounds of procedural motions at great costs.

    d. Even ignoring the fact that there is a possibility that the respondents are fully indemnified or have litigation financing by the class, there is *prima facie* a serious imbalance of resources between the parties (i.e., start-up company versus two large publicly-traded leading home improvement retailers in North America). On a macro level, the case management judge's decision would put the start-up company in the position of having to expend resources for multiple rounds of motion(s)/appeal(s), and facilitate the publicly-traded companies to achieve minimal savings on legal costs. The potential harm to the start-up company becomes more apparent in the face of the "No-Costs Rule" when the start-up company may not be able to recover their costs for having to endure the expense of the multiple rounds of motions/appeals.

35. Furthermore, the case management judge did not give sufficient weight to the factors noted in *Berenguer* in exercising the discretion to hear pre-certification motions only *after* a finding of "extraordinary circumstances." The factors that the court did not weigh or sufficiently weigh include, but not limited to, the factors below.

36. The case management judge recognized that the respondents' contemplated motion(s) to strike would rely on Rule 221(a), (c), and/or (f), but overlooked the

[28] See for example, *Voltage Pictures, LLC v. Salna*, 2023 FC 893 at paras. 34-36.

substantial overlap with the reasonable cause of action criteria for certification in Rule 334.16(1)(a). It would be a considerably inefficient use of this Court's resources if each of the five class action certification criteria are reviewed on an appeal on piecemeal *a la carte* basis.[29]

37. In the absence of a draft notice of motion presented by the respondents, the respondents' say-so that they intend to rely on Rule 221(c) and/or (f) could very well be merely duplicative of Rule 221(a). As illustrated in a recent case, a defendant raising similar multiple grounds for a motion to strike was summarily rejected by the court as duplicative of the argument for a reasonable cause of action and the party advancing an abuse of process argument must provide clear and convincing evidence and face a significant burden.[30]

38. The case management judge's assumption that the respondents' contemplated motions would result in savings of judicial resources is predicated on an assumption that the respondents' motion will succeed at first instance and also on appeal. The problem is that if the appellants succeed, it will result by and large in more expenditure of judicial resources, in both levels of court, as compared to hearing all motions and appeals concurrently.

Ground 5: Order Provided Insufficient Reasons for the Extraordinary Decision

39. The Order was an extraordinary decision in at least two-ways:

    a. Permitting a motion for security for costs to proceed in priority to class action certification, despite the "No-Costs Rule" and Rule 334.11 involving the apparent incompatibility of the usual rules for costs under Part 11 (which includes Rule 415 security for costs)

    b. Permitting the respondents' contemplated motion to strike in the absence of any details of that motion, and not even a draft Notice of Motion.

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[29] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2007 BCCA 138 (per Finch, CJ, as a motions judge).

[30] *Creery v Match Group LLC*, 2024 BCSC 149 at paras. 60-68.

40. The extraordinary outcome cries for a clearly reasoned decision supported by precedent or authorities.

41. The underlying decision also risks creating confusion for class actions in the federal courts as the decision appears to allow a security for costs motion to be made as the first step, despite the "No-Costs Rule."

Other and Further Grounds of Appeal

42. Such further grounds as counsel may advise and this Honourable Court may permit.

February 27, 2024

Simon Lin
EVOLINK LAW GROUP
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6
Tel: 604-620-2666
Email: simonlin@evolinklaw.com

Me. Sébastien A. Paquette
SERVICES JURIDIQUES SP INC.
1434 Sainte-Catherine Street W, Suite 200
Montreal, Québec, H3G 1R4
Tel: 514-944-7344
Email: spaquettelaw@gmail.com