

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *TELUS International (Cda) Inc. v
Middleton,*
2026 BCCA 377

Date: 20260915
Docket: CA50998

Between:

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

Appellants
(Defendants)

And

Kayne Michael Middleton

Respondent
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Horsman
The Honourable Mr. Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated
August 21, 2025 (*Middleton v TELUS International (Cda) Inc.*, 2025 BCSC 1611,
Vancouver Docket S248620).

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Place and Date of Hearing:

Vancouver, British Columbia
May 25, 2026

Place and Date of Judgment:

Vancouver, British Columbia
September 15, 2026

Written Reasons by:

The Honourable Mr. Justice Riley

Concurred in by:

The Honourable Justice Dickson

The Honourable Madam Justice Horsman

Summary:

*This is an appeal from a case management judge's sequencing order in a proposed class action against the appellant, TELUS International (Cda) Inc., and individual officers and directors (collectively, "TELUS"). The underlying action includes a proposed claim for secondary market liability, which cannot proceed without leave of a judge by way of originating petition. Applying the analytical framework for sequencing applications in class actions set out in *British Columbia v The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 [Jean Coutu], the case management judge concluded the leave petition and the certification application would be dealt with "sequentially at the same hearing". TELUS appeals, arguing that the case management judge (i) erred in law by applying the Jean Coutu framework, or alternatively (ii) committed a reviewable error in his weighing of the relevant factors under that framework.*

HELD: Appeal dismissed. The case management judge did not err in applying the analytical framework set out in Jean Coutu to determine the sequence of the leave petition and the certification application. Nor did he err in his weighing of the relevant factors. While TELUS disagrees with the outcome, it has not shown that the judge's weighing of the relevant considerations was unreasonable or tainted by reviewable error.

Reasons for Judgment of the Honourable Mr. Justice Riley:**Introduction**

[1] TELUS International (Cda) Inc. ("TELUS Digital") and its named officers and directors (collectively, "TELUS"), appeal from the decision of a case management judge regarding the sequencing of applications in a proposed class action. The underlying claim is brought by Mr. Middleton, who acquired shares in TELUS Digital during the proposed class period, and who alleges that the company and certain of its officers and directors made public statements misrepresenting the profit margin implications of the company's move toward artificial intelligence ("AI") based services. The action includes a putative claim for secondary market misrepresentation under s 140.3 of the *Securities Act*, RSBC 1996, c 418, a claim which cannot be commenced without leave of the court under s 140.8.

[2] Mr. Middleton applied for a case management order directing that his petition for leave to pursue the secondary market liability claim and his application for class

action certification should be heard sequentially at the same hearing. TELUS resisted, arguing that the leave petition had to be heard and determined first.

[3] Before the case management judge, TELUS argued that the analytical framework for determining sequencing issues endorsed in *British Columbia v The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 [*Jean Coutu*], did not apply to this issue. TELUS argued that because leave is a prerequisite for a secondary market liability claim, courts should generally require plaintiffs to obtain leave before hearing any certification applications.

[4] The case management judge did not accept TELUS's position. He considered the non-exhaustive list of factors outlined in *Jean Coutu* and concluded that the interests of judicial efficiency and timely resolution were best served by scheduling the petition for leave and the certification application to be dealt with "sequentially in the same hearing".

[5] On appeal, TELUS says the judge erred in applying the *Jean Coutu* framework to determine sequencing in this case. TELUS also argues, in the alternative, that even if the *Jean Coutu* framework applies, the case management judge committed a reviewable error by placing undue weight on a single factor. More specifically, TELUS says the judge erred by basing his sequencing decision more or less entirely on the concern that requiring the leave petition to be determined in advance of the certification hearing was likely to result in significant delay arising from separate appeals.

Facts

Mr. Middleton's Claim

[6] The following summary of the facts underlying Mr. Middleton's claim consists of yet unproven assertions taken from the pleadings.

[7] TELUS Digital is a technology services company. At the time of the events that are the subject of Mr. Middleton's claim, it was a publicly traded company with shares listed on the Toronto and New York stock exchanges. The other 15

defendants named in Mr. Middleton's action are, or were at the material time, senior officers or directors of TELUS Digital.

[8] Mr. Middleton is a TELUS Digital shareholder.

[9] Mr. Middleton's pleadings allege that during the proposed class period, running from 16 February 2023 to 1 August 2024, TELUS Digital and the personal defendants made a series of public statements misrepresenting the company's business strategy and anticipated financial performance. More specifically, Mr. Middleton alleges that:

- (a) TELUS Digital and the personal defendants made public representations to investors that the company's move toward delivery of AI-driven services would enhance or sustain its historical profit margins.
- (b) In fact, many of TELUS Digital's AI-driven services generated lower profit margins than its traditional services.
- (c) TELUS Digital and the personal defendants failed to disclose in a timely way that the company's shift toward AI-driven services fundamentally lowered the company's profit margins.
- (d) The truth about TELUS Digital's reduced profitability did not emerge until the company made its earnings announcements for the first and second quarters of 2024, disclosing a downward revision of its financial outlook.

[10] The public statements on which Mr. Middleton's allegations are based span an 18-month period. The sources include quarterly financial statements, management discussion and analysis reports, press releases, and earnings calls.

The Pleadings

[11] On 12 December 2024, Mr. Middleton filed a notice of civil claim and an accompanying petition.

[12] Mr. Middleton's notice of civil claim advanced three causes of action against TELUS Digital and the personal defendants: (i) a statutory claim of secondary market misrepresentation under s 140.3 of the *Securities Act*, (ii) a shareholder oppression claim under s 227 of the *Business Corporations Act*, SBC 2002, c 57, and (iii) a common law claim of negligent misrepresentation. The secondary market liability claim was pleaded conditionally, pending a judicial determination of leave under s 140.8 of the *Securities Act*. The notice of civil claim indicated an intent to seek certification as a class action under the *Class Proceedings Act*, RSBC 1996, c 50, on behalf of all those who purchased TELUS Digital shares during the class period and continued to hold them until the alleged corrective disclosures at or near the end of that time frame.

[13] Mr. Middleton's accompanying petition sought leave to bring the secondary market misrepresentation claim. It stated that if leave was granted, the secondary market liability claim would be pursued by: (i) filing an amended notice of civil claim in which this cause of action was pleaded non-conditionally, or alternatively (ii) filing a separate action to advance the claim.

[14] On 27 June 2025, Mr. Middleton filed a notice of application seeking an order that his petition for leave to bring the secondary market misrepresentation claim be heard "concurrently with" his certification application under s 4(1) of the *Class Proceedings Act*.

[15] On 30 July 2025, TELUS filed an application response, opposing Mr. Middleton's application. TELUS took the position that leave to bring a secondary market liability claim had to be obtained "before any other steps, including certification, are to be taken in respect of a proposed class action".

[16] On 29 August 2025, Mr. Middleton filed an amended notice of civil claim and amended petition for leave to commence the secondary market liability claim. The amendments have no material bearing on the issues raised in this appeal.

The Case Management Judge's Decision

[17] Mr. Middleton's application was heard on 6 August 2025. In reasons given on 21 August 2025 and indexed at 2025 BCSC 1611 ("Reasons"), the case management judge granted the application. He ordered that the petition for leave to pursue a secondary market misrepresentation claim and the certification application were to be heard "sequentially in the same hearing".

[18] Near the beginning of his reasons, the judge identified the sole issue to be determined as "whether the leave petition and the certification motion can and should be presented to the Court in a single hearing or whether two separate hearings are required": Reasons at para 4.

[19] On the way to deciding that issue, the judge had to resolve the parties' disagreement about the applicability of the *Jean Coutu* framework. This framework outlines factors that guide a judge's exercise of discretion in sequencing preliminary applications in proposed class actions: Reasons at para 6. Mr. Middleton argued that the judge ought to consider the *Jean Coutu* factors in deciding the sequencing issue in this case. TELUS disagreed, arguing that the *Jean Coutu* framework: (i) only applies to the sequencing of defence motions, such as applications to determine jurisdictional questions, strike pleadings, or dismiss claims; and (ii) could not be applied to sequence a petition for leave to commence a secondary market liability claim, since this claim is not properly before the court until leave is granted.

[20] TELUS argued, relying on *Theratechnologies Inc. v 121851 Canada Inc.*, 2015 SCC 18, that the statutory requirement for leave to commence a secondary market liability claim calls for a merits assessment that is more onerous than the sufficiency of pleadings test applied on a certification application. In TELUS's submission, the qualitative difference between these two legal thresholds undermined the suggestion that there is any significant duplication or overlap in the analysis between the leave petition and the certification application.

[21] The judge rejected TELUS's position. He accepted that "no valid action" for secondary market liability exists until leave is granted, but found that this did not

preclude a determination of the leave petition and the certification application “sequentially at the same hearing”: Reasons at para 12. Nor was the judge convinced by TELUS’s submission that the general practice in British Columbia was for a petition for leave to be decided in advance of a certification hearing. He noted there has been only one case in this jurisdiction in which leave to commence a secondary market liability claim was decided, namely *Tietz v Cryptobloc Technologies Corp.*, 2021 BCSC 2275, rev’d in part in *Tietz v Affinor Growers Inc.*, 2022 BCCA 307. As the judge put it, “one case does not constitute a practice”: Reasons at para 15. He concluded that it was “appropriate ... to have regard to the considerations set out in *Jean Coutu*”: Reasons at para 16.

[22] The judge went on to cite the “non-exhaustive” list of factors endorsed at para 33 of *Jean Coutu* (as originally stated in *Shaver v Mallinckrodt Canada ULC*, 2021 BCSC 455):

- a) any delay by the plaintiff in proceeding to certification;
- b) the extent to which a preliminary application may dispose of the whole proceeding or narrow the issues to be determined, taking into account the strength of the applicant’s arguments on the proposed applications and the breadth of the applications;
- c) the cost to the parties of participating in pre-certification procedures and the potential to avoid exposing the defendants to costs of a full certification hearing if the matter will be resolved on the basis of the s. 4(1)(a) requirement alone;
- d) the potential for delay arising from interlocutory appeals;
- e) the complexity and interplay of the issues that may arise in and between the pre-certification and certification applications;
- f) whether the outcome of the motion will promote settlement;
- g) the interests of economy and judicial efficiency (including whether the parties agree the motion will be determinative of the s. 4(1)(a) aspect of the certification motion); and
- h) the fair and efficient determination of the proceeding.

[23] The judge instructed himself that these factors were not to be treated as a “checklist”, and that not all will apply in every case: Reasons at para 18, citing *Jean Coutu* at para 34. In the judge’s view, this case involved two “paramount considerations”, which pulled in opposite directions.

[24] The consideration weighing most heavily in favour of hearing the leave petition and the certification application together was *Jean Coutu* factor (d), “the potential for delay arising from separate appeals”: Reasons at para 20. In assessing the significance of this factor, the judge cited several Ontario cases in which trial courts declined to order separate hearings, primarily due to concerns about delay arising from separate appeals: Reasons at paras 21-24, citing *Labourers’ Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2012 ONSC 1924 at paras. 77, 80-81 and *Browne v Horizons ETF Corp.*, 2022 ONSC 3441 at paras 5-7. The judge also took into account the procedural history in *Tietz*, in which leave to commence the secondary market liability claim and certification were determined separately, with separate appeals, over many years: Reasons at paras 30-34.

[25] The consideration most favouring hearing the leave petition and the certification application separately was the impact of the leave petition on the nature and scope of the certification hearing. In the judge’s view, this consideration fit best under *Jean Coutu* factor (b), but also implicated factors (c), (e), and (g): Reasons at paras 35-36. The judge noted the potential complexity of the secondary market liability claim, which involved 13 “core documents”, 12 “non-core documents”, and eight “public oral statements”: Reasons at para 37. In TELUS’s submission, because the leave requirement is a “robust deterrent screening mechanism” which calls for a “serious evidentiary inquiry”, it would be a “massive exercise in inefficiency” to argue it together with a certification application: Reasons at para 38.

[26] In the judge’s view, these competing concerns were “mostly irreconcilable”, such that “neither a combined hearing nor separate hearings is a perfect choice”: Reasons at para 40. On the one hand, hearing the leave petition and the certification application together would result in “inefficiencies”, including the need to prepare materials and advance arguments anticipating multiple different outcomes of the leave petition: Reasons at para 41. Much of this work would turn out to be unnecessarily undertaken if leave was ultimately refused: Reasons at para 41. On the other hand, hearing the leave petition and the certification application separately

gives rise to “concerns regarding separate appeals and long delays”: Reasons at para 42.

[27] The judge’s objective was to exercise his discretion “in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute”: Reasons at para 43, citing *Jean Coutu* at para 37. He concluded at para 44 that:

... at least in the circumstances of this case, the inefficiencies and wasted cost and work that may result from hearing the leave petition and the certification motion together are outweighed by the need to achieve a timely resolution of the dispute and the efficiencies to be achieved by a combined hearing. ...

On Appeal

[28] TELUS applied for leave to appeal the case management judge’s sequencing decision. Leave to appeal was granted on 11 December 2025.

[29] TELUS acknowledges that the case management judge’s sequencing decision is a discretionary matter entitled to a high degree of appellate deference. The appeal court will only intervene where “the judge erred in principle, failed to consider or weigh all relevant circumstances, clearly and demonstrably misconceived the evidence, or made an order resulting in a clear injustice”: *Jean Coutu* at para 31, citing *Strohmaier v K.S.*, 2019 BCCA 388 at para 21; see also *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27. The standard of review is “even more deferential” where, as here, the order under appeal is made by a case management judge: *Jean Coutu* at para 31, citing *Strohmaier* at para 22; see also *Stephens v Altria Group, Inc.*, 2021 BCCA 396 at para 4.

[30] The appeal raises two issues. The first is whether the case management judge erred in failing to apply the “correct legal framework” in his sequencing decision. The parties agree that this issue raises an error in principle, or an extricable legal error, subject to review on a correctness standard.

[31] The second issue, raised in the alternative, is whether the judge erred in his weighing of the factors bearing on the sequencing decision. The parties are in

agreement that this issue involves a challenge to the case management judge's exercise of discretion, subject to the highly deferential standard of review described in the above-noted authorities.

Discussion

[32] Before addressing the arguments of the parties, it is helpful to review two decisions bearing most directly on their positions. In chronological order, the first is *Theratechnologies*, in which the Supreme Court of Canada discussed the purpose and significance of the leave requirement for a secondary market misrepresentation claim. The second is *Jean Coutu*, in which this Court discussed the proper analytical approach to the determination of sequencing orders in class action proceedings.

Theratechnologies

[33] The plaintiff in *Theratechnologies* sought to advance a statutory secondary market misrepresentation claim against a pharmaceutical company, based on an allegation that the company's failure to provide public updates on the status of a proposed new drug amounted to non-disclosure of a material change in its financial position. The provincial securities statute that created the cause of action included a statutory requirement for judicial authorization to bring a secondary market liability claim, similar to the leave requirement in British Columbia's *Securities Act*. The decision of the motions judge granting authorization for the claim to proceed was ultimately set aside in the Supreme Court of Canada.

[34] Justice Abella, writing for the Court, explained that the statutory authorization requirement was "part of a new regime of statutory civil liability to address breaches of disclosure obligations" in the "secondary market" where "shares are traded publicly" after their release by the issuing company: *Theratechnologies* at para 21. Following the recommendations of a national association of securities regulators, many provinces moved to establish a statutory cause of action for secondary market liability, coupled with a screening mechanism requiring judicial authorization to bring the claim. These legislative initiatives struck a balance by creating an effective remedy for investors harmed by misrepresentations or material non-disclosures,

coupled with a screening mechanism to prevent unmeritorious claims against issuers, companies, and corporate officers: *Theratechnologies* at paras 30-37.

[35] Under this approach, “[c]ourts are given an important gatekeeping role, which requires them to conduct a preliminary examination of the impugned action or inaction to assess whether it could be said to have a reasonable possibility of success”: *Theratechnologies* at para 36. To give effect to the “legislative objective of a robust deterrent screening mechanism”, the threshold must be “more than a ‘speed bump’”; the court must undertake a “reasoned consideration of the evidence to ensure that the action has some merit”: *Theratechnologies* at para 38.

[36] Justice Abella described the threshold contemplated by the Quebec statute as follows:

[39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success — and the time and expense they impose — are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant’s favour.

[37] It is apparent from Abella J.’s analysis that she did not consider the Quebec statute in isolation. She viewed it as part of a “Canada-wide” effort to “develop a more meaningful and accessible form of recourse for investors”: *Theratechnologies* at para 27. At the time of the *Theratechnologies* decision, the recommendations of the Canadian Securities Administrators, including the statutory screening mechanism, had been adopted and implemented in securities legislation in Ontario, Quebec, and British Columbia. In considering the nature of the threshold, Abella J. referenced case law in all three jurisdictions: *Theratechnologies* at paras 35-37. The

statutory requirements for leave under s 140.8 of the *Securities Act* correspond with the elements of the screening mechanism in the Quebec and Ontario statutes: *Theratechnologies* at paras 21, 31. I conclude that Abella J.'s summary of the test aptly describes the substance of the leave requirement in s 140.8 of the *Securities Act*.

[38] TELUS submits that the screening mechanism for secondary market liability claims is qualitatively different from the sufficiency of the pleadings test on an application for certification of a class action. This is one of the reasons why, in TELUS's submission, the analytical framework normally applied to sequencing issues in a proposed class action should not govern petitions for leave to bring *Securities Act* claims. TELUS also argues, in the alternative, that the case management judge erred in principle by failing to properly account for the robust nature of the leave requirement in his analysis of the factors relevant to his sequencing decision.

Jean Coutu

[39] *Jean Coutu* involved a proposed class action brought by British Columbia, on behalf of all provincial and territorial governments, seeking to recover opioid-related healthcare costs from 48 companies involved in the manufacture and distribution of opioid products in Canada. Two of the defendants, The Jean Coutu Group (PJC) Inc. and Pro Doc Limitée, brought applications to determine the court's jurisdiction over them. They argued that the jurisdictional applications went to a threshold issue that had to be determined prior to the certification hearing. The chambers judge disagreed and directed that the jurisdictional applications should proceed at the same time as the certification hearing and all other preliminary applications.

[40] On appeal in this Court, the "core issue" was "whether the judge erred in the exercise of his discretion by making a sequencing order that effectively requires the Quebec defendants to remain participants in lengthy, complex and expensive proceedings" that could continue for years before the jurisdictional issue was resolved: *Jean Coutu* at para 6.

[41] In his analysis of this issue, Justice Butler explained that “[s]equencing applications have become increasingly common in proposed class proceedings”, and that each proposed pre-certification motion had to be considered “in the specific context of the case”: *Jean Coutu* at para 33. He went on to endorse a “non-exhaustive list of factors to consider in a sequencing application”: *Jean Coutu* at para 33, citing *Shaver* at para 10. He explained that these factors are “not a checklist to be reviewed by rote”, and the judge is not required to “weigh all the factors on each application”: *Jean Coutu* at para 34.

[42] Justice Butler also considered and rejected the idea that there should be a “presumption” in favour of hearing and determining certification before any other decision is made in a proposed class action: *Jean Coutu* at paras 35-37. Rather, each pre-certification application must be considered in the overall context of the case and the court’s discretion on sequencing “ought to be exercised in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute”: *Jean Coutu* at para 37.

[43] The appellants in *Jean Coutu* argued that, as a matter of “constitutional imperative”, questions of territorial competence had to be resolved before any “substantive” step in a class proceeding, including certification and applications for summary determination: *Jean Coutu* at para 41. The Court rejected this submission because it disregarded the “purpose and import of a sequencing order” in a proposed class action: *Jean Coutu* at para 43. While the “subject matter” of a proposed pre-certification application is “a factor, and perhaps an important factor” for the case management judge to consider, it does not alter the discretionary nature of the sequencing order, nor does it “eliminate consideration of other relevant factors”: *Jean Coutu* at para 43. The assertion that, as a matter of law, a jurisdictional challenge must be determined first was therefore “inconsistent with the discretion granted to a case management judge generally and the established factors guiding a judge’s sequencing determination”: *Jean Coutu* at para 44.

[44] Justice Butler went on to find that the case management judge in *Jean Coutu* committed a reviewable error in the exercise of his discretion. The high threshold for appellate intervention was met because the judge failed to give “adequate weight” to the importance of resolving the jurisdictional issue, given the “circumstances and context” of the proposed class action: *Jean Coutu* at para 59. In Butler J.A.’s view, the “magnitude and complexity” of the case made it “markedly different” from most class actions: *Jean Coutu* at para 60. Among other things, the judge failed to consider the potential prejudice to the appellants in requiring their continued involvement in such a complex, time-consuming, and costly proposed class action, without permitting them to challenge the court’s jurisdiction over them at an early stage of the proceedings. While prejudice was not explicitly included in the non-exhaustive list of relevant sequencing factors, it was clearly relevant to a proper assessment of a number of the *Jean Coutu* factors: *Jean Coutu* at para 60.

[45] Mr. Middleton says *Jean Coutu* supports his position that case management judges have a broad discretion in deciding sequencing issues, under a flexible analytical framework, where there is no rule requiring that any particular kind of preliminary application must, as a matter of law, precede the certification hearing. TELUS says *Jean Coutu* does not speak to the reasons why a petition for leave to commence a secondary market misrepresentation claim must be determined prior to the certification hearing. TELUS also relies on *Jean Coutu* in support of its alternative position that the case management judge committed a reviewable error in his analysis of the sequencing factors in this case.

Issue 1: Applicability of the *Jean Coutu* Framework

[46] TELUS advances two fundamental arguments in support of its position that the case management judge erred in law in applying the *Jean Coutu* framework to resolve the sequencing dispute. First, TELUS says that because a secondary market misrepresentation claim filed without leave is a legal nullity, nothing else can happen until the petition for leave is determined. Second, TELUS says both the legislative intent behind the leave requirement and practical experience tell us that leave to commence a secondary market misrepresentation claim must be determined before

certification can be considered. TELUS says both these arguments mandate the conclusion that the *Jean Coutu* framework does not apply to sequencing of a petition for leave to bring a secondary market liability claim.

The Need to Obtain Leave for a Secondary Market Liability Claim

[47] To obtain leave to commence a secondary market liability claim under s 140.8 of the *Securities Act*, the plaintiff must show that: (a) the action is being brought in good faith, and (b) there is a reasonable possibility that the action will be resolved at trial in their favour. It is common ground between the parties that the proper procedure for obtaining leave in British Columbia is by way of an originating petition. That view is supported by the case law discussed below.

[48] In my view, however, TELUS has overstated the significance and legal effect of the proposition that a secondary market misrepresentation claim commenced without leave is a legal nullity. TELUS relies on the discussion of this point in two British Columbia cases, *Larouche v Pure Gold Mining Inc.*, 2024 BCSC 1889 [*Pure Gold*] and *0116064 B.C. Ltd. v Alio Gold Inc.*, 2019 BCSC 1829 [*Alio Gold*]. For reasons explained below, both are distinguishable.

[49] In *Alio Gold*, the plaintiff filed a proposed class action alleging secondary market liability without bringing a petition for leave. Following a case planning conference, Justice Elwood, then a master of the Supreme Court, ruled that the defendants' motion to strike the secondary market liability claim should be heard before certification. Without deciding the point, he expressed some affinity for the argument that a secondary market liability claim brought without a petition for leave is a nullity. Given the importance of the leave requirement in s 140.8 of the *Securities Act*, he viewed the motion to strike as "more than the ordinary argument that a pleading fails to disclose a cause of action": *Alio Gold* at para 16. He also explained that, in his view, a leave decision could "fundamentally alter the complexion of the proposed class action": *Alio Gold* at para 18.

[50] In *Pure Gold*, the plaintiff filed a proposed class action alleging, among other things, secondary market liability. Instead of filing a petition for leave to commence

the secondary market liability claim, the plaintiff applied for leave within the proposed class action. The defendants applied to strike the claim on multiple grounds, including the plaintiff's failure to seek leave by way of a petition. The case management judge agreed with the defendants, reasoning that the secondary market liability claim was a nullity until leave was granted, and that leave can only be pursued by way of an originating petition proceeding: *Pure Gold* at paras 113, 115. He therefore struck that portion of the claim, with the right to include it in an amended notice of civil claim if and when leave to commence the secondary market liability claim was granted by way of a petition: *Pure Gold* at paras 122-123. The judge also discussed how the petition might be joined with the surviving components of the action, and how, if leave were granted, the notice of civil claim might subsequently be amended to include the secondary market liability claim, so that all of the claims would be before the court for continuing case management: *Pure Gold* at paras 116-118.

[51] Mr. Middleton says these cases are distinguishable. Unlike the plaintiffs in *Alio Gold* and *Pure Gold*, Mr. Middleton filed a notice of civil claim advancing a secondary market liability claim that is framed conditionally. He filed this claim concurrently with a petition for leave to bring the secondary market liability claim. He relies on *Tietz* at paras 366-368, wherein the court granted leave to bring a secondary market liability claim *nunc pro tunc* to the date on which the notice of civil claim was filed. If the improperly commenced claim in *Tietz* could be retroactively validated in this way, then, in Mr. Middleton's submission, there is no good reason to question his more cautious manner of proceeding in this case.

[52] I agree with Mr. Middleton that *Alio Gold* and *Pure Gold* are distinguishable. In both matters, the plaintiff filed a notice of civil claim including a claim for secondary market liability, without bringing a petition for leave to do so. By contrast, in this case Mr. Middleton filed a notice of civil claim that included a conditional plea of secondary market liability, coupled with a petition for leave under s 140.8 of the *Securities Act*. Regardless of the validity of the conditional secondary market liability claim included in the notice of civil claim, the proposed claim was properly before the

court by way of the petition. In this context, the case management judge was correct in reasoning that while “no valid action” for secondary market liability exists until leave is granted, this would not preclude the court from determining the leave petition and the certification application “sequentially at the same hearing”.

Principle and Practical Experience

[53] TELUS submits that there are both principled and practical reasons why leave for a secondary market liability claim must be determined in advance of certification, making the discretionary framework for determining sequencing issues outlined in *Jean Coutu* inapt in this context.

[54] At the level of principle, TELUS stresses the importance of the leave requirement. The comparable provision in the Quebec statute has been said to establish a “robust deterrent screening mechanism”: *Theratechnologies* at para 38. The leave requirement establishes a judicial gatekeeping function designed to limit the prejudice to putative defendants of having to answer unmeritorious secondary market misrepresentation claims. To discharge its gatekeeping role, the court is expected to undertake a “critical evaluation of all the evidence”, to determine whether the record can adequately support the claim: *Mask v Silvercorp Metals Inc.*, 2016 ONCA 641 at para 45.

[55] TELUS submits that this robust screening mechanism is “undermined when defendants are required to respond to and prepare for both the leave petition and the certification application at the same time, even if they are heard sequentially”.

[56] For his part, Mr. Middleton stresses that TELUS has not provided any legal authority supporting its position that the *Jean Coutu* framework does not apply to pre-certification motions to determine a statutory precondition. He says TELUS’s approach is inconsistent with *Jean Coutu*, in which the Court rejected a “similar attempt to characterize a proposed preliminary motion as a threshold [matter]”.

[57] I agree with Mr. Middleton’s submission. In *Jean Coutu*, the Court rejected the Quebec defendants’ argument that the jurisdictional issue turned on a “constitutional

imperative” such that it had to be resolved in advance of the certification hearing. Even though jurisdiction *simpliciter* was fundamental to the court’s authority to entertain the claim against the Quebec defendants, this did not mean the jurisdictional application had to be assessed outside of the discretionary sequencing framework. As Butler J.A. explained, sequencing orders in class proceedings do not “resolve, or curtail resolution of” the substantive rights of the parties: *Jean Coutu* at para 43. While the nature or subject matter of a particular application is a potentially important factor, this does not alter the fundamentally discretionary nature of the sequencing analysis, or “eliminate consideration of other relevant factors”: *Jean Coutu* at para 43.

[58] TELUS contends that this reasoning overlooks the intent of the *Securities Act*’s leave requirement to create a substantive right for a putative defendant not to be called upon to answer a secondary market liability claim unless and until a judge has been satisfied that the claim is brought in good faith and stands a reasonable chance of success at trial. I do not agree. The putative defendant’s “right” is to have a determination of the leave requirement before the claim is accepted for filing. While, as a matter of logic, that determination must be made before the claim can form the basis of a class action certification, this is no bar to adjudication of these two matters “sequentially at the same hearing”. A sequencing order does not pronounce on whether the claim passes the merits threshold under s 140.8 of the *Securities Act*. It merely addresses a procedural aspect of that determination.

[59] TELUS cites a collection of post-*Theratechnologies* cases in Ontario in which courts have adjudicated the question of leave to bring a secondary market liability claim in advance of the certification hearing: *Swisscanto v BlackBerry*, 2015 ONSC 6434; *Miller v FSD Pharma, Inc.*, 2020 ONSC 6716 at paras 2, 4; *Kauf v Colt Resources, Inc.*, 2021 ONSC 2814 at paras 3, 6; *Wong v Pretium Resources*, 2021 ONSC 54, aff’d 2022 ONCA 549; *Gowanlock v Auxly Cannabis Group Inc.*, 2023 ONSC 477 at paras 1-2, 10. However, as Mr. Middleton points out, there are many other post-*Theratechnologies* cases, in Ontario and elsewhere, that have proceeded by way of concurrent leave and certification hearings: *Coffin v Atlantic Power Corp.*,

2015 ONSC 3686; *Mask v Silvercorp Metals Inc.*, 2015 ONSC 5348; *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v SNC-Lavalin Group Inc.*, 2015 ONSC 256; *Catucci c Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870; *Cappelli v Nobilis Health Corp.*, 2019 ONSC 2266; *Stevens v Ithaca Energy Inc.*, 2019 ABQB 474; *Badesha v Cronos Group*, 2021 ONSC 4346; *Peters v SNC-Lavalin Group Inc.*, 2021 ONSC 5021; *Dyck v Tahoe Resources Inc.*, 2021 ONSC 5712; *MM Fund v Americas Gold and Silver Corp.*, 2022 ONSC 6515; *Markowich v Lundin Mining Corporation*, 2022 ONSC 81 [rev'd 2023 ONCA 359, aff'd 2025 SCC 39]; *Poirier v Silver Wheaton Corp.*, 2022 ONSC 80; *Pineo v Sona Nanotech Inc.*, 2024 NSSC 230; *Kamrani-Ghadjar v Anaergia Inc.*, 2025 ONSC 2167; *Newsome v Endeavour Mining PLC.*, 2025 ONSC 5616 at para 12; *Dziedziejko v Canopy Growth*, 2025 ONSC 6766.

[60] TELUS says the practical reasons for determining leave in advance of the certification hearing are revealed by an examination of the history of the proceedings in *Tietz*. In that case, leave to commence secondary market liability claims against various defendants was adjudicated first, and the question of which defendants would be required to answer these claims was not conclusively resolved until an appeal was decided: *Tietz v Cryptobloc Technologies Corp.*, 2021 BCSC 2275, rev'd in part *Tietz v Affinor Growers Inc.*, 2022 BCCA 307. TELUS says the case management judge in *Tietz* was only able to properly grapple with the issues raised in the certification application after the theory of secondary market liability had been fully explored and vetted in the ruling on leave and subsequent appeal: *Tietz v Bridgemark Financial Corp.*, 2024 BCSC 1166 at para 175, rev'd in part (but not on this issue) *Tietz v BLOK Technologies Inc.*, 2026 BCCA 45.

[61] Two things come to mind in response to this submission. First, the complexity of the claims in *Tietz* makes it difficult to compare to other cases. The plaintiffs brought secondary market liability claims against four distinct issuers and related co-defendants. The case against each issuer depended on different disclosure documents and alleged misrepresentations. The secondary market liability claims

described in *Tietz* are considerably more complex than the claim in this case, which involves a single corporation and its officers and directors.

[62] Second, while *Tietz* shows how refinement of secondary market liability claims in the course of the leave process can provide downstream benefits for the subsequent certification application, those benefits can come at a significant cost in terms of the timely and efficient resolution of the claims. In *Tietz*, some five years passed between the case management judge's determination of the leave application and this Court's determination of the certification appeal. The case management judge placed considerable weight on this aspect of the *Tietz* litigation.

[63] Both of these points demonstrate the case-specific nature of the considerations that ought to inform a sequencing order. I see no reason to conclude that *Jean Coutu*'s context- and case-specific, multi-factorial, discretionary framework is not up to the task. As Butler J.A. explained, while the "subject matter" of the particular pre-certification matter is potentially an important factor, this "does not alter the nature of the discretionary *sequencing* order", nor does it "eliminate consideration of other relevant factors": *Jean Coutu* at para 43.

[64] TELUS identifies several dimensions of Mr. Middleton's secondary market liability claim with potentially significant downstream implications for certification. One has to do with whether, and to what extent, certain statements allegedly made by TELUS were corrective or alternatively misrepresentative of the true facts, which could have implications for the proposed class definition and class period. Another has to do with identifying the "actionable statements", which could simplify the certification analysis, by allowing for a more focused assessment of the common issues, and the preferability of the proposed class action.

[65] In my view, all of these are case-specific points properly considered in assessing whether the case management judge committed a reviewable error in the exercise of his discretion. They do not advance TELUS's submission that the case management judge erred in law in applying the *Jean Coutu* framework to determine the sequencing issues in this case.

Issue 2: Case Management Judge's Exercise of Discretion

[66] TELUS says the case management judge based his sequencing decision more or less entirely on the concern that requiring the leave petition to be heard in advance of the certification hearing created the likelihood of significant delay arising from separate appeals. In TELUS's submission, the judge committed a reviewable error by placing undue weight on the question of delay, to the exclusion of other relevant factors.

[67] TELUS likens this to the error in *Jean Coutu*, in which this Court held that the judge failed to give "adequate weight" to the importance of resolving the jurisdictional issue: *Jean Coutu* at paras 30, 59-61, applying the standard of review articulated in *Penner* at para 27.

[68] TELUS emphasizes that in his consideration of the *Jean Coutu* factors, the judge identified the likelihood of delay arising from potential appeals as the only consideration weighing in favour of scheduling the leave petition and the certification application together at a single hearing. TELUS says that by collapsing the analysis into a single question of delay, the judge negated the utility of *Jean Coutu*'s multi-factorial analytical framework.

[69] I do not agree with TELUS that the manner in which the case management judge weighed the relevant factors can be likened to the error identified in *Jean Coutu*. This Court's decision to overturn the sequencing order in *Jean Coutu* was driven by the exceptional nature of the proposed class action in that case, namely an opioid cost recovery action against some four dozen pharmaceutical producers and distributors. In refusing to schedule the jurisdictional motion in advance of the certification hearing, the judge in *Jean Coutu* failed to properly account for the magnitude and complexity of the action, and the corresponding prejudice to the Quebec defendants in being required to participate in a lengthy certification process before having the opportunity to challenge the court's jurisdiction over them. The judge in *Jean Coutu* also made other discrete errors in his analysis, including

reliance on an incorrect presumption in favour of determining certification as the first step in a proposed class action.

[70] Unlike *Jean Coutu*, the claims advanced by Mr. Middleton do not make this case “markedly different from most class actions”: *Jean Coutu* at para 60. It is a proposed class action against a single corporate defendant and certain officers and directors. The claims are all focused on alleged misrepresentations of the company’s profitability over a relatively discrete time frame. Although the unresolved issues pertaining to the parameters of the proposed secondary market liability claim may create some intricacies, one cannot say the case is remotely comparable to *Jean Coutu* in its scale and complexity. Nor can it be said that the case management judge overlooked the question of prejudice to the defendants. He acknowledged that the leave requirement is intended to be a “robust deterrent screening mechanism” and expressly took into account the potential prejudice to TELUS in having to “prepare arguments and materials” that “might ultimately be unnecessary”: Reasons at paras 38-39.

[71] I do not accept TELUS’s submission that the case management judge effectively collapsed the analysis into the single factor of delay. The judge identified the two competing sets of concerns and carefully balanced them. He found that concern about separate appeals and corresponding delay pulled in one direction, and a number of other concerns pulled in the other direction. He concluded that, on balance, the former concern outweighed the latter ones. (The judge also took into account that hearing the two matters together would achieve some efficiencies, given the overlap in arguments and evidence as between the leave petition and the certification analysis.) In any event, the judge did not suggest that the importance of avoiding delay necessarily dictated the result or would always carry the day. Rather, he found that in the particular circumstances of this case, the potentially lengthy delay arising from interlocutory appeals was a more compelling consideration than countervailing concerns about inefficiency, potentially unnecessary cost, and added complexity.

[72] TELUS takes issue with the case management judge's use of the phrase "at least in the circumstances of this case". In TELUS's submission, this phrase does not offer sufficient guidance to parties on how the courts should exercise the discretion to determine sequencing issues. With respect, the judge's obligation was to provide a decision that was intelligible to the parties in this case, not to provide guidance to others interested in class action litigation. I agree with Mr. Middleton that the "absence of broader guidance" in the case management judge's reasons, "does not disclose any reversible error".

[73] TELUS does not argue that the reasons are inadequate to explain the result to the parties or to allow for effective appellate review. In any event, I have no difficulty concluding that those basic requirements are met. Read generously and together with the record as a whole, the reasons explain how the judge reached his conclusion. He conducted a case-specific balancing of the relevant factors and concluded — despite the countervailing concerns about added complexity, potentially inefficiency, and added cost and effort that might prove unnecessary — that the likelihood of significant delay from separate appeals was a more pressing concern.

[74] I do not propose to review each of the *Jean Coutu* factors to describe how they are accounted for in the case management judge's reasons. As the judge correctly observed, the factors are not a checklist, and not all of them will apply in any particular case. The judge identified the two broad sets of concerns pulling in opposite directions. In one way or another, his analysis of these concerns involved an assessment of all of the *Jean Coutu* factors that were relevant in this case.

[75] TELUS argues that the judge erred in principle by failing to consider or properly weigh how a decision on leave to bring the secondary market liability claim could simplify the certification analysis. If leave were refused, the certification analysis would be concerned only with the remaining oppression and misrepresentation claims, which TELUS says are weak. Even if leave were granted, the leave process could refine the secondary market misrepresentation claim, by

identifying which of the statements attributed to the defendants are actionable, which could in turn narrow the claim's temporal parameters.

[76] I do not agree that the judge overlooked or failed to meaningfully weigh these considerations. He took into account TELUS's submissions that determining leave in advance of the certification hearing: could have "substantial impact" on the "identification and articulation" of common issues, and the preferability of a class action (para 36) and would allow all the parties to understand what claims are left before the certification hearing (para 37). He considered that the secondary market liability claim rests on 13 core documents, 12 non-core documents, and eight public oral statements (para 37). He considered that scheduling the leave petition and the certification hearing together would: require the defendants to prepare for both matters at the same time (para 38); be inefficient given the differences between the two applications (para 38); and require the parties to prepare arguments and materials that might ultimately be unnecessary if leave is refused or granted on a narrower basis than as alleged in the pleadings (para 39).

[77] The case management judge balanced all of these considerations against the countervailing concern about lengthy delay associated with deciding the leave petition in advance of the certification hearing. He reasoned that separate hearings would likely result in multiple appeal processes, potentially years apart (paras 42, 44). The judge ultimately concluded that this was the most weighty concern bearing on the sequencing analysis (para 44).

[78] The judge also reasoned that there were certain "efficiencies" to be achieved through a combined hearing, given the overlap in submissions and evidence as between the leave petition and the certification application (para 44). He reached this conclusion after acknowledging the differing scrutiny applied in determining leave to commence a secondary market liability claim (para 29). Despite this, the judge found that there "must be some overlap and some efficiency gained" by hearing both matters together, because "[a]t least some of the underlying facts and evidence will be common to both" (para 29).

[79] In light of the deferential standard that applies to the review of a discretionary decision made by a case management judge, the question is not whether this Court would have reached a different conclusion in weighing these competing considerations. Rather, it is whether the case management judge's weighing involved any reviewable error or resulted in a clear injustice. I am not satisfied that it did. TELUS may disagree with the judge's weighing of the relevant factors, but it has failed to show that it was unreasonable.

TELUS's Plea for Further Guidance

[80] TELUS also urges this Court to provide further guidance on the application of the *Jean Coutu* framework to proposed class actions involving claims of statutory secondary market misrepresentation. In TELUS's submission, this guidance would be of "significant benefit to litigants and courts", given the increasing "prevalence and complexity" of secondary market liability claims.

[81] Specifically, TELUS urges the court to offer further guidance on the relationship between the leave petition and the issues to be determined on a certification application, the purpose and importance of the leave requirement, the practical consequences of uncertainty in this particular context, and the need to consider delay in the context of all the other factors, rather than treating it as determinative.

[82] I agree with Mr. Middleton that it is unnecessary to provide "bespoke" guidance or refinement of the *Jean Coutu* framework in the context of secondary market misrepresentation claims. The existing framework acknowledges that the nature of the application may be a significant factor in the exercise of a case management judge's discretion in sequencing applications. However, as Butler J.A. was quick to add, this does not alter the discretionary nature of decisions on sequencing, "nor eliminate consideration of other relevant factors": *Jean Coutu* at para 43.

[83] The framework endorsed in *Jean Coutu* is intended to be context-specific, flexible, and discretionary. The best guidance is found in *Jean Coutu* at para 45

where, after urging judges to consult the non-exhaustive list of factors summarized earlier in the decision, Butler J.A. stated:

... 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.

Conclusion

[84] I would dismiss the appeal.

“The Honourable Mr. Justice Riley”

I AGREE:

“The Honourable Justice Dickson”

I AGREE:

“The Honourable Madam Justice Horsman”