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There are some product liability class actions that are too big to certify. "Certifying this case would almost certainly become a monster of complexity and cost. Indeed, the monster here can be identified: It would be a hydra, the many-headed, serpentine creature of Greek myth. As in the myth, attempting to slay this beast would be a Herculean task, with more and more heads emerging as the court fought to finish off the last."

Too Big to Certify? Class Actions in Canada

ABOUT THE AUTHOR

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As every fisherman knows, the bigger the net, the bigger the haul. There are times, however, when the potential catch may overwhelm and scuttle the ship, or the net becomes unmanageable. Such applies to class actions as well.

An example of this can be found in the recent British Columbia Supreme Court case of *Kett v. Mitshubishi Material Corporation*, 2020 BCSC 1879, a decision released December 1, 2020. The allegations included claims that automotive parts suppliers charged higher prices than they should have arising from failures to carry out proper testing which led to inflated car prices. The supply chain was global and complex. There were over 1,744 automobile models that came within the proposed class definition involving at least 8.3 million vehicles.

Audits revealed that certain productions deviated from specifications. Public disclosure led to charges against corporate officers regarding offences under the Japanese *Unfair Competition Prevention Act* and fines were imposed by the Tokyo Summary Court. The Defendants publicly apologized for their misconduct. You may say that heads rolled.

In the application for certification before Justice Branch, the judge put the issues as follows:

> [1] Can a class action be "too big to certify"? That is the question at the core of this application for certification under s. 5 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA].
>
> [2] The application also raises additional challenging legal issues, including whether a parts supplier can be held liable to end users for wrongdoing towards a manufacturer of a consumer product under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA].

Cutting to the end of the 208 paragraph reasons, Justice Branch held:

> [208] Given the failure to meet all the requirements of s. 4(1) of the CPA, the application for certification must be denied. As it turns out, some class actions are indeed "too big to certify", at least when they are both too large and too fragmented.

For the purposes of this paper, I will summarize the decision, paraphrasing, and quoting extensively with little editorial comment. The reasons contain a useful compendium of issues and potential strategies for those engaged in complex product liability class actions and may be of value internationally. Although representative actions have deep roots in the common law, class action legislation in Canada only arose in the 1970's and much was adopted from the US legislation.

The test for certification was addressed and summarized as follows:

1. The court has an important gate-keeping role requiring it to carefully screen proposed claims to ensure they are suitable for class action treatment: para. 64.

2. The test for certification is set out in s. 4 of the CPA:

> 4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

3. The plaintiff bears the onus of satisfying the above. The requirement for a cause of action is based on the pleadings alone. For the balance, the plaintiff need show "some basis in fact" to meet the requirements: para. 56.

> 4. Certification does not require an assessment of the merits. The focus is on the form of the action to determine suitability as a class proceeding: para. 57.

I will not cover all the issues addressed by Justice Branch, but I will try to highlight and cite the most significant ones. In determining whether the pleadings disclose a cause of action, the court will only refuse certification if it is clear and obvious that the plaintiff's claim is bound to fail. The court must be mindful of the "cultural shift" mandated by the Supreme Court of Canada in *Hryniak v. Maudlin*, 2014 SCC 7, emphasizing "resolving questions of law by striking claims that have no reasonable chance of success". Judges must have the power to be bold to strike hopeless claims: paras. 58 – 59.

The judge first considered the claims under the *Business Practices and Consumer Protection Act*, (BPCPA). The defendants argued that they only supplied components later incorporated into the "good" which was the subject of the consumer transaction, the vehicle itself. Thus, they were not the suppliers of "good". The judge agreed and the claim under the BPCPA claim was struck, with one exception. Had the claim been certifiable otherwise, which it was not, this portion could have been rectified with better particulars. The claim might have been certifiable under the BPCPA with respect to unconscionability. There is a very low threshold for such claim under the Act.

It was not plain and obvious that the claims for unjust enrichment would fail. Nor was it plain and obvious that the unlawful means tort would fail. He held that targeted malice was not required in the pleadings.

The judge next turned to whether there was a proper class. While the class definition was over-inclusive, it was not more than necessary on the present evidence.

We then turn to whether there were common issues of fact and law. The essence of a common issue was that it must be a substantial ingredient of each class member's claim. The plaintiff's proposed the following common issues:

> a. Did the defendants fraudulently alter quality control certifications for their automotive products?
>
> b. Did the defendants breach the BPCPA?
>
> c. Has the safety or durability of the defendants' automotive products been compromised?
>
> d. Did the defendants commit the tort of unlawful means?
>
> e. If the defendants are found liable to the class, should the court make an aggregate award and, if so, in what amount?
>
> f. Were the defendants unjustly enriched by their conduct and, if so, should the court order restitution or disgorgement, and in what amount?

> g. Is the defendants' conduct deserving of an award of punitive damages and, if so, in what amount?
>
> h. What is the appropriate distribution of damages or disgorgement to the class, and should the defendants pay the costs of distribution?
>
> i. Are the defendants liable to pay interest on the award?

Regarding the issue of fraudulently altered quality control certifications, the judge agreed with the defence that this was framed at the highest level of abstraction. The plaintiff conceded that there could not be a single answer for all components manufactured by all defendants. The breadth of the claim degraded its commonality. This question did not qualify as a common issue as whether a wrong occurred could only be answered on a shipment-by-shipment basis, of which there were possibly 500,000: paras. 124-140

The issue of breaches of the BPCPA raised the same issues as above. The individuality of the claims made the case less preferable as a class action.

The issue of whether the safety or durability of the products was compromised was abandoned.

Regarding the issue of tort of unlawful means, the same issues arose as above. The claims would have to be determined on a shipment-by-shipment basis which rather detracted from common issues.

In regard to the issues of quantification of damages, the plaintiffs must propose a workable methodology to order to certify an aggregate damages common issue. After reviewing the expert evidence presented, the judge concluded that here he "was dealing with numerous products, produced by multiple manufacturers, which are subject to disparate testing issues: para.158. The judge concluded that the plaintiff had put together no credible methodology that would allow the determination of the proposed aggregate damages common issue: para. 166.

Indeed, based on the above analysis, the claims for punitive damages and interest on the awards did not support any common issues worthy of certification. Assessment of damages and interest would also have to be based on a shipment-by-shipment basis.

In short, there were no proper common issues proposed.

Was a class proceeding a preferable procedure? Both liability and damages would have to be determined shipment-by-shipment. The unavoidable structure of this action did not allow for a common analysis for the entire class: para.172. Any required analysis would come close to a vehicle-by-vehicle analysis involving millions of vehicles.

The judge, in his concluding remarks, noted:

> [181] Considering all of these difficulties, the subset of class members with a reasonably tight bond of commonality would only be those that received the same set of a

> defendant's parts from the same shipment put into the same make and model. One can imagine how small these subsets would be.
>
> [182] Based on my review of the evidence, I expect the required analysis would come very close to a vehicle-by-vehicle evaluation, in a case involving millions of vehicles—a daunting prospect to be sure.
>
> [183] In my view, this case really seeks to tie together many potential class actions. The CPA is not designed to stich together a case with so many dangling threads. It is designed for cases with a strong factual and legal bond. . .

Certifying this case would compel the court to manage a proceeding that would almost certainly become "a monster of complexity and cost": *Tiemstra v. Insurance Corp. of British Columbia* (1997), 38 B.C.L.R. (3d) 377, 149 D.L.R. (4th) 419 (C.A.) at paras.13-14. Indeed, the monster here can be identified: It would be a hydra, the many-headed, serpentine creature of Greek myth. As in the myth, attempting to slay this beast would be a Herculean task, with more and more heads emerging as the court fought to finish off the last.": para.193

Given all the above, there was no other answer but that some class actions are too big to certify. This case was far too large and too fragmented. The net, if you will, was simply unmanageable and unworkable. I think it most unlikely that the Court of Appeal would disagree.

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