Osgoode Class Action Conference 2008

Cross Canada Check-up: BC cases from April 2007 to April 2008

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1. Introduction

With only two final certification decisions since this time last year, the 2007 class action season in British Columbia is more notable for developments in pre-certification proceedings.

The Menu Foods carriage disputes kicked off in British Columbia and along with its sister decisions in Ontario and Quebec have fleshed out the analysis to be undertaken when evaluating carriage disputes.

Competing dispute resolution procedures in arbitration cases have received attention in British Columbia as elsewhere in the country.

British Columbia courts have been increasingly flexible in allowing amendments to pleadings prior to certification both in the context of adding plaintiffs and adding additional claims.

Finally, we have seen some important commentary in British Columbia on the role of the solicitor-client relationship in the context of class proceedings as well as the role of the representative plaintiff.

2. Certification decisions

In ***Bartolome v. Payday Easy Loans*** 2008 BCSC 132[1], Madam Justice Brenda Brown certified three actions in the latest of a growing list of payday loan class action cases in British Columbia. The representative plaintiff, Jose Bartolome, argued that the interest and other fees charged by three different cash advance lenders on short-term personal loans amounted to criminal rates of interest under the Criminal Code.

In assessing the requirements for certification of class action, the court addressed the proper test for the establishment of a cause of action. At issue was whether the court ought to follow the test in *Brogaard v. AG Canada* 2002 BCSC 1149 which established that a Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed, or the test in *Hoffmann v. Monsanto Canada Inc*. 2007 SKCA 47 in which the Saskatchewan Court of Appeal found that the representative plaintiff has to satisfy the judge that the

[1] The author was counsel for the payday loan companies in this case.

pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies. Justice Brown was not convinced that the two cases formulate different tests but found that, in any event, she was bound by the *Brogaard* decision.

On the common issues analysis, the Defendants argued that the unjust enrichment common issue should be broken down into three sub-issues in conformity with those certified in the British Columbia Court of Appeal decision in *Parsons v. Coast Capital Savings Credit Union* 2007 BCCA 247. Justice Brown declined to reframe the common issues in that manner stating, amongst other things, that the refined Parsons issues were already implicit in the proposed issues.

In relation to the management of extra provincial class members, Justice Brown stated that to be workable and maintain the right to opt in contemplated in the *Class Proceedings Act*, the order should provide that anyone wishing to opt in may contact class counsel.

The Court approved a limited notice campaign by requiring only that notice be published in one copy of the Vancouver Sun and the Province weekend newspapers, by posting notice in the defendants' stores and on their websites and by notice on class counsel's website. With the exception of notice on class counsel's website, the defendants were required to bear the costs of notice as the plaintiff had adduced evidence of this limited resources and the Court found the defendants would benefit from opt outs. The Court approved a two month opt out period with a 7 day delay before the opt out period becomes operative.

The Court permitted the defendants to refuse to do business with members of the class. The Court found that communications with class members when a loan has been denied must be carefully circumscribed to ensure that a denial of the loan does not become a mechanism to coerce a class member to opt-out of the proceedings. The Court found that if the defendants deny a loan to any individual because they are class members, any communications about the class proceedings and the reasons for the denial of the loan should be confined to written communications in a form agreed by the parties and approved by the Court.

There are now approximately 24 criminal interest rate class actions in British Columbia, 12 of which have been certified, 2 have been settled, 2 have had common issues trials, and 12 have not been certified.[2]

[2] Kilroy v. Money Sense Check Services Inc. (Certified and Settled)
MacKinnon v. Vancouver City Saving Credit Union City (Certified and Settled)
Kilroy v. A.O.K. Payday Loans (Certified and Common Issues Trial successful)
Tracy v. Instaloans Financial Solution Centres et al. (Certified and Common Issues Trial complete)
Parsons v. Coast Capital Credit Union (Certified)
Bodnar et al. v. The Cash Store et al. (Certified)
MacKinnon v. National Money Mart Co. (Certified)
Bodnar v. Payroll Loans Ltd. et al. (Certified)
Bartolome v. Cashnow Solutions dba Cash Converters Guildford (Certified)
Bartolome v. Nationwide Payday Advance Ltd. (Certified);

In ***McMillan v. Canada Mortgage and Housing Corporation*** 2007 BCSC 1475, Justice Smith dismissed an application for certification. The plaintiffs had sued the Canada Mortgage and Housing Corporation for losses arising from their leaky condominium. The plaintiffs' argument was succinctly laid out at paragraph 5:

> The Plaintiffs' claim is that in the course of its investigating housing problems in Canada, CMHC learned of a fundamental flaw in the design and construction of residential dwellings on the West Coast of Canada which CMHC knew, if uncorrected, would lead to wide spread structural failure in these homes. The Plaintiffs say that with this knowledge CMHC owed to them a private law duty of care to warn the proposed class of these known defects, or to have taken the appropriate steps to arrest further construction of these homes on the west coast of British Columbia. Not having done so, CMHC was in breach of the duty they owed to the class and have thereby been a major contributor to the leaky condominium debacle on the west coast of British Columbia, which has lead to wide spread structural failure of thousands of homes, hundreds of millions of dollars of damages, and the disenfranchisement of thousands of homeowners. The situation created cries out for an affordable remedy against CMHC.

In considering whether the pleadings disclosed a cause of action as part of the first step to consider in the test for certification, the Court found that there was in fact no duty of care owed by the Canada Housing and Mortgage Corporation. The Court found that there was nothing in the *Canada Housing and Mortgage Corporation Act* or the *Housing Act* suggesting a duty to protect against poor design choices, or to prevent construction of residences. The Court also noted at paragraph 92 that there were other more responsible parties:

> Further, at least three layers of possible responsibility elsewhere separate the home buyers from CMHC: the architects and builders of residential properties, who have professional responsibility for adequate design and construction; the municipalities, which have responsibility for approval of plans and inspection of compliance with building by-laws; and the province, which has adopted a Building Code.

Finally, the court reiterated the distinction between malfeasance and non-feasance and issued the reminder that a duty of care for non-feasance only arises in exceptional circumstances. Based on all of the above, the Court concluded that there was no duty of care.

In ***Kotai v. The Queen of the North*** 2007 BCSC 1056, the Plaintiffs, two of the passengers on the Queen of the North ferry, applied for certification of a class action

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Bartolome v. Mr. Payday Easy Loans Inc. (Certified);
Tracy v. Instaloans Financial Solution Centres et al. (Certified)
MacKinnon v. Payroll Loans Ltd. et al.; Bodnar v. North Shore Credit Union et al.; Smith v. VanCity Credit Union; MacKinnon v.; Canadian Cheque Cashing Corp.; MacKinnon v. Stop 'N' Cash 1000 Inc.; Marshall et al. v. Yellow Cash Centre Inc. et al.; Oliver v. Cash Factory Loans Inc.; Oliver v. Sorensen's Loans 'Til Payday Inc. et al.; Thibeault v. Cash Advantage Services Inc.; Halter v. PFS Group Inc. et al.; Parsons v. Moneypot Financial Services Inc.; Casavant v. Cash Money Cheque Cashing Inc. et al. (pending)

against British Columbia Ferry Services Inc. ("B.C. Ferries") and three crew members for losses sustained during the running aground and seeking of the ferry. The defendant had already admitted liability and paid for the majority of the property damage claims.

On the preferability analysis, the court rejected the argument that a class of 53 members is too small.

The Court found that the representative plaintiff was not appropriate in this case. First, the issues of a conflict of interest between passengers of the "Queen of the North" and their dependants was raised as a result of the limit on liability under the Athens Convention, which appears to apply to each passenger and their dependants on a combined basis and the fact that there were no pleadings on behalf of dependants. Second, the Kotais were the only passengers whose non-vehicle property claim exceeded the limit on liability and in order to recover would have to establish liability against the individual defendants and reckless conduct, something that the other passengers would not need to raise, thereby creating a common issue problem. The Court found that Mrs Kotai may not fairly represent the interests of all class members in deciding whether the limits of liability should be challenged and has a potential conflict with some members who may not wish to advance aggravated and punitive damage claims. The Court thought it better that the Kotais act as representative plaintiffs for a subclass. The Court did not dismiss the application out of hand but rather chose to adjourn it so that these deficiencies could be addressed.

3. Relationship between class counsel and representative plaintiff

Burnett Estate v. St. Jude Medical Inc 2008 BCSC 148 is a proposed class action in which negligence is alleged against St. Jude Medical, Inc. and St. Jude Medical Canada, Inc. in connection with the research, development, design, testing, manufacture and release of allegedly defective Silzone-coated heart valves.

In response to the representative plaintiff amending her statement of claim and removing any possible subrogated claim by the Province for health care costs, the Province brought an application to the delete those amendments from the Statement of Claim.

Against that backdrop, the Court made the following interesting remarks at paragraph 48 about the solicitor client relationship prior to the certification proceeding:

> It appears that generally, the solicitor-client relationship prior to the certification proceeding is between the solicitor and the representative plaintiff, not the solicitor and the putative class members.

With respect to counsel's relationship to the Province, the court found:

> 57 I do not think it is necessary in the circumstances of this case to determine whether any duty is owed by the law firm to the Province and the nature and extent of that duty in the period prior to certification.

> 58 The most significant concern, I find, is whether the amendment has prejudiced the Province. I turn to that issue now.

The court agreed that the limitation issue for the Province was a possible source of prejudice but the time limitation issue was suspended by consent, therefore removing this as a real issue. The court therefore dismissed the Province's application.

Richard v British Columbia 2007 BCSC 1107 [3] involved two competing motions in an already certified class action that arose from conflicting instructions from two representative plaintiffs. Essentially, one representative plaintiff applied to have class counsel removed, while class counsel applied to have that representative plaintiff removed due to the alleged conflict. In removing class counsel, the court outlined the following principles with respect to the role of the representative plaintiff and the solicitor-client relationship with class members at paragraph 42:

> (1) The representative plaintiff has the mandate to act in the best interests of the class as a whole.
> (2) The representative plaintiff has a significant role to play in the proceedings after certification. He or she acts in the class' best interest by directing litigation, instructing class counsel and authorizing settlement.
> (3) Class counsel has a solicitor-client relationship with class members and owes the duties and obligations that arise as a result of that relationship to the class members. Class counsel also has a duty to act in the best interests of the class as a whole.
> (4) Class counsel also has a solicitor-client relationship with the representative plaintiff and owes the duties and obligations that arise as a result of that relationship to the representative plaintiff. This includes a duty of loyalty to the representative plaintiff, which includes the duty to avoid conflicting interests, the duty of commitment to the client's cause and the duty of candour.
> (5) While class counsel has a significant role to play in the conduct of proceedings, class counsel may not ignore the wishes of the class representatives in making fundamental litigation decisions and may not prosecute an action with unfettered discretion.
> (6) Given the relationship between the class, class counsel and the representative plaintiff, there is a risk that conflicts may arise. Class counsel must be conscious of the conflicts that may arise between the representative plaintiff and other class members, or between his or her own interests and the interests of the class members.
> (7) When conflicts arise and cannot be resolved between the class members, class counsel and the representative plaintiff, an application for directions under s. 12, or for approval of the settlement pursuant to s. 35, should be made to resolve the conflict.
> (8) The ultimate responsibility to ensure that the interests of the class members are not subordinated to the interests of either the representative plaintiff or class counsel rests with the court.

It should be noted that while the court did find class counsel had breached their duty of loyalty, the court recognized that in so doing, their actions were only motivated with the view of the best interests of the class as a whole. Rather, the court removed counsel because the steps taken by counsel were done without consultation and contrary to the

[3] The author is co-counsel for the Crown in this case.

interests of the representative plaintiff. In so doing, class counsel attempted to remove the fundamental litigation decisions from the representative plaintiff and was attempting to exercise its discretion to become in fact, the representative of the class.

Leave to appeal was granted on the basis that the role of class counsel in class proceedings should be considered by the Court of Appeal. The Court of Appeal dismissed the appeal in Richard v. British Columbia, 2008 BCCA 53 on February 1, 2008.

4. Carriage disputes

In ***Joel v. Menu Foods Genpar Ltd.*** 2007 BCSC 1248 a national consortium of law firms (of which the author is a member), sought carriage of a proposed class action against the Menu Foods group of defendants for the recovery of damages by owners of pets affected by the consumption of what they allege was contaminated pet food manufactured and distributed by the defendants.

The national consortium first established that the court has jurisdiction to hear the carriage motion prior to certification in *Joel v. Menu Foods Genpar Ltd.* 2007 BCSC 1248.

The carriage motion played out between the Joel action brought by British Columbia counsel in the national consortium and the Ewasew action brought by the Merchant Law Group, a firm with offices in a number of Canadian cities. The Ewasew action named trust and fund entities that are part of the Menu group, as well as retail distributors and individual directors of the Menu Foods company, and brought claims for misrepresentation, unjust enrichment, and breach of contract. The Joel action preferred to focus on a common negligence claim for negligence in manufacture and sale of pet food against the most exposed defendants.

In evaluating the theories advanced by counsel in the two actions, Justice Hinkson favored the streamlined approach adopted by the national consortium on the basis that "less was more". He found that the Consortium's plan to pursue the most exposed defendants first was the proper approach in terms of speed and maximizing the prospects for certification.

5. Arbitration clauses

Ruddell v. BC Rail Ltd, [2007] 282 D.L.R. (4th) 664 involved appeal two competing dispute resolution procedures, arbitration and class proceedings, to govern the claim that BC Rail Ltd. inequitably allocated an actuarial surplus in the BC Rail Pension Fund. The Plan is governed by the Pension Benefits Standards Act which requires each plan to contain an arbitration provision. The central issue was thus whether the preferable procedure for dispute resolution was a class proceeding or arbitration.

The Court of Appeal found that the failure to recognize the legislature's preference for arbitration and the direction for a binding arbitration award under the Pension Benefits Standards Act was in error. The Court of Appeal set aside the order and stayed the class proceedings. In arriving at its conclusion, the court had reviewed the authorities and found at paragraph 38 that amongst those cases

> none concerned a situation in which another statute specifically required the dispute in issue to be referred to an arbitration process. The cases outside this jurisdiction are cases which do not engage the competition between class proceedings legislation and an arbitration scheme required in governing pension legislation.

The Court of Appeal also found that the lower court had failed to give effect to the statutory provision directing that arbitration orders were final and binding not only on the parties but also on affected persons. A successful arbitration would therefore bind all similarly situated individuals. Accordingly, the Court set aside the certification order.

6. Pre-Certification procedural issues

In ***Wiggins v. British Columbia*** 2007 BCSC 1644, the plaintiff applied to amend its statement of claim in this proposed class action for allegedly having paid school fees in contravention of the School Act and the School Board Fees Order. The plaintiff sought to add a plea for negligence against the Crown on the basis that it owed a duty to oversee and control the activities of its agents, the schools and the school boards. The court allowed the application to amend the statement of claim.

In ***Birrell v. Providence Health Care Society*** 2007 BCSC 668, involves pre-certification motions to add two plaintiffs to the proposed class proceedings. The action claims negligence arising from the operation of the Ear Bank by the defendants. In late 2002, Health Canada conducted a review of the Ear Bank's operations and found that the Ear Bank was maintaining incomplete and insufficient records relating to whether donors of tissue had been screened for various infectious diseases. Health Canada issued a warning for donor recipients to undergo testing for HIV, Hepatitis and Hepatitis C on a precautionary level. No one has yet come forward with any infection from this Ear Bank. The plaintiff is claiming for loss of life expectancy, loss of income, cost of care, medical expenses and nervous shock.

After the proceeding was instituted, it was discovered that the plaintiff had not actually received a transplant from the Ear Bank but rather, had received a transplant of her own tissue. The plaintiff therefore brought a motion to add two additional plaintiffs while the defendant moved to have the claim dismissed under Rule 18A of the Rules of Court.

The Court allowed the plaintiff's application to add the two additional plaintiffs and removed the original plaintiff.

Leave to appeal this decision, in particular the result in relation to the ultimate limitation period, was granted on January 15, 2008 at 2008 BCCA 14.