KIM SPENCER McPHEE CLASS ACTION MONITOR

April 28, 2020 | **Issue 09**

IN THIS ISSUE

NEW CASES:

Class action launched over COVID-19 airline vouchers

Overview:

A BC woman has launched a consumer protection class action in Federal Court, seeking to enforce airplane passenger's rights to refunds for monies paid for air tickets cancelled due to the COVID-19 pandemic. The proposed representative plaintiff, Janet Donaldson, names Swoop Inc. ("Swoop"), WestJet Airlines Ltd. ("WestJet"), Air Canada, Air Transat A.T. Inc. ("Air Transat"), and Sunwing Airlines Inc. ("Sunwing") as defendants.

The proposed class includes all persons, residing anywhere in the world, who "entered into a Contract of Carriage", meaning they bought a flight ticket from one of the defendants, prior to March 11, 2020 for any flight between March 13, 2020 and "the date the Government of Canada withdraws travel advisories for COVID-19", and who did not get a refund for the original payment. The proposed class definition also includes sub-classes with specific dates until which trips were cancelled or suspended: May 31, 2020 (for Westjet and Swoop); April 30, 2020 (for Sunwing, Air Transat, and Air Canada); or, any other date to be determined by the Court.

Ms. Donaldson booked a roundtrip flight with WestJet on January 14, 2020, travelling from Vancouver to New York via Toronto on April 17, 2020 and April 23, 2020. She paid $361.39 CAD to WestJet on her credit card. The action alleges this booking created a "Contract of Carriage" between the plaintiff and defendant. On or about March 11, 2020, the World Health Organization deemed COVID-19 a global pandemic. On March 13, 2020, the Government of Canada issued a blanket travel advisory advising against non-essential travel outside of Canada, and restricting entry of foreign nationals into Canada. The claim alleges that prior to March 13, 2020, there was no indication these measures would be taken, and the COVID-19 pandemic is outside of class members' control.

Shortly after the declaration, the defendants of their own initiative cancelled and/or suspended numerous flights up to May 31, 2020, for WestJet and Swoop, and April 30, 2020 for Sunwing, Air Transat and Air Canada, with more cancellations pending. The defendants then implemented new policies, not included in the Contract of Carriage, or any of the International or Domestic Tariffs, that enabled the defendants to keep the class members' money and in exchange issue or offer to issue "travel credits", subject to numerous restrictions.

The action alleges that it is an express and/or implied term that passengers have a right to be refunded money they paid if the air carrier is unable to transport them for a reason that is beyond the passenger's control. The action also alleges that the air carriers cannot keep the fare paid by passengers on the basis that its inability to provide transportation was due to certain events. The claim alleges that in effect, the defendants are forcing the class members to forego their fundamental right to a refund and to spend their monies with the same defendant in the future to purchase travel that the class members may not wish to undertake any longer, and likely at a substantially different price.

The claim alleges frustration of the contracts of carriage on a class wide basis as well as breach of contract. The claim has been filed in Federal Court because the "aeronautics and/or works and undertakings extend beyond the limits of any province", and are governed by federal statutes including the *Canada Transportation Act*, S.C. 1996, c. 10 and the *Aeronautics Act*, R.S.C. 1985, c. A-2. The claim seeks an order requiring the defendants to refund to the original form of payment the monies received in relation to the airline tickets as well as special, general, nominal and punitive damages.

Details:

Plaintiff: Janet Donaldson

Defendants: Swoop Inc.; WestJet Airlines Ltd.; Air Canada; Air Transat A.T. Inc.; Sunwing Airlines Inc.

Lawyers for the Plaintiff: Jeremie John Martin; Sebastien A. Paquette, Simon Lin

Court File No.: T-428-20

Comments:

The action comes as airlines remain under increased scrutiny for their reactions to the global pandemic, and the extent to which their losses have been passed on to the consumer. The statement of claim references the steps taken by multiple airlines to reduce costs, such as laying off vast portions of staff and cancelling flights in order to avoid bankruptcy. Keeping up front ticket funds and offering coupons for future flights was certainly another of these tactics. Interestingly, despite describing itself as a consumer protection action, the statement of claim makes no reference to claims under any *Consumer Protection Act*.

TOP

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Action seeks unpaid employment benefits for Approval Team salespeople

Overview:

A former salesperson with Approval Team has filed a proposed class action in Ontario seeking unpaid employment benefits. Approval Team is a used car dealership that offers loan services to Ontario residents. The goal is to secure auto financing loans for customers within their monthly budget, regardless of their credit scores. Approval Team would provide salespeople with one to eight leads a day to contact, review applications, and secure financing. Once financing was secured, the salesperson would then provide the leads with vehicle options based on the approved amount.

The plaintiff Tom Rallis worked as a salesperson for the defendant Approval Team from April 2018 to May 2019. The non-corporate defendants Sergey Barandich, Patrick Jardine and Alexsander Savic all worked as directors and "operating minds" of Approval Team.

Mr. Rallis alleges he signed a written employment contract when he started working for Approval Team, which stated that he would be paid bi-weekly based solely on commissions representing a percentage of the value of his sales. If no sales were made, Approval Team would provide Mr. Rallis with a draw of about $1,000 that would be deducted from future sales. The cheque amount varied based on sales, but Mr. Rallis claims he was never able to confirm his commissions because the Approval Team never provided him with pay stubs with each cheque.

In May 2019, Mr. Rallis received his first pay stub from Approval Team, which listed CPP and EI deductions. He previously understood that no other employees had CPP or EI deductions added. Mr. Rallis further claims he never received vacation or statutory holiday pay while working for the defendants, and that salespeople were systemically encouraged to work long hours without extra compensation for the extra hours.

Mr. Rallis claims that he and other class members were employees of Approval Team, but were never given benefits owed to them under the *Employment Standards Act*, 2000, S.O. 2000, c. 41 nor were government statutory remittances properly deducted. He claims that the Approval Team breached the provisions of the *ESA* by, *inter alia*, failing to ensure hours of work were monitored and recorded, not paying overtime, failing to compensate for vacation pay or holiday pay, and failing to pay minimum wage. Mr. Rallis claims that the *ESA* applied to class members' employment, and as a result, salespeople's contracts of employment implicitly provided for overtime pay, vacation pay, holiday pay and minimum wage pay.

Mr. Rallis seeks $5 million in general damages for being incorrectly paid by the defendants and a declaration that Approval Team violated the terms of the*Employment Standards Act*. He pleads that the damage award ought to be made in the aggregate, as records kept by the Approval Team as to the time worked by salespeople should allow for damages to be calculated without needing to resort to individual assessments or mini-trials.

Details:

Plaintiff: Tom Rallis

Defendants: Approval Team Inc., Sergey Barandich, Patrick Jardine, Aleksandar Savic

Lawyers for the Plaintiff: Andrew Monkhouse

Date Issued: January 17, 2020

Court File No.: CV-20-00634668-00CP

Comments:

The core legal issue will be whether Mr. Rallis and the other class members as salespeople qualify as employees or as independent contractors. This question has been the focus of numerous recent class actions involving ride sharing and delivery app workers such as Uber, Foodora and Skip the Dishes, which have made headlines in Canada and the United States.

TOP

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Securities action seeks damages from Luckin Coffee after company accuses CEO of manufacturing sales data

Overview:

A proposed securities class action has been filed in Québec against Luckin Coffee Inc. on behalf of class that includes "all persons and entities that acquired Luckin Coffee Inc.'s securities during the Class Period" or "any other Class to be determined by the Court".

Luckin Coffee is a corporation with its head office in China and is publicly traded on the NASDAQ. On or around April 3, 2020, news broke that Luckin Coffee was accusing its chief operating officer of fabricating its 2019 reported sales and inflating its costs and expenses. The corporation stated that investors should not rely on previous financial statements for the nine months that ended on September 30.

As detailed in the pleading, Luckin Coffee had been publicly traded since May 2019. The corporation sold an additional 4.8 million shares in a secondary offering in January 2020 and raised over $380 million. The plaintiff states that when the news broke about the issues with the sales figures, the price of Luckin Coffee stock dropped by more than 75%.

The plaintiff seeks damages for Luckin Coffee's misrepresentation.

Details:

Plaintiff: Martin Banoon

Defendants: Luckin Coffee Inc.

Lawyers for the Plaintiff: Mtre Joey Zukran, LPC Avocat Inc.

Court File No.: 500-06-001058-201

Comments:

Several similar class actions have been filed against Luckin Coffee in the United States seeking recovery of damages for investors under federal securities laws.

TOP

CASE UPDATES:

Chandler c. Volkswagen Aktiengesellschaft

2020 CarswellQue 2932, EYB 2020-351148, 2020 QCCS 1202 (C.S. Que.)

Decision:	Application for declinatory exception—granted in part Date of Decision: February 28, 2020
Judge:	Justice Chatelain
Court:	Superior Court of Québec
Lawyers:	
Counsel for the Plaintiff:	Shawn K. Faguy
Counsel for the Defendant:	Stéphanie Pitre

Background:

The plaintiff, Mr. Lawrence Chandler, brought a motion for authorization to institute a class action against Volkswagen Aktiengesellschaft (VW). The action was brought on behalf of all Québec residents who purchased VW securities during the class period (March 12, 2009 - September 18, 2015) and seeks monetary damages for the misrepresentations made by VW regarding their diesel cars' compliance with emission standards regulations. The action alleges that class members' investments dropped as a direct result of the disclosure of VW's intentional misrepresentations.

On May 28, 2018, the Superior Court of Québec authorized the class action and on May 29, 2019, Mr. Chandler served his Originating Application Instituting a Class Action. On July 3, 2019, VW served its Notice of Disclosure of a Declinatory Exception and served its Application for Declinatory Exception for lack of territorial jurisdiction or, in the alternative, *forum non conveniens*, on August 16, 2019.

Other Proceedings

Various proceedings have been instituted in other jurisdictions in relation to the same or similar proposed misrepresentations/omissions on behalf of VW securityholders. Proceedings were commenced in Austria and the Netherlands but were dismissed based on jurisdictional grounds. A proceeding in Ontario was dismissed on August 15, 2018, on the basis that the court did not have jurisdiction *simpliciter* or alternatively, that judicial discretion should be exercised to decline jurisdiction and stay the action in favour of the U.S. and Germany proceedings (see below). For more information on the Ontario proceeding see *Leon v. Volkswagen AG* (2018), 27 C.P.C. (8th) 270, 52 C.C.L.T. (4th) 151, 2018 ONSC 4265, 2018 CarswellOnt 13517, 84 B.L.R. (5th) 110 (Ont. S.C.J.).

A. *U.S. Proceedings*

Five putative securities class action complaints were filed in the US in the fall of 2015 and subsequently consolidated. The allegations in those proceedings were made on behalf of a worldwide class (including Québec residents) and substantially related to the same conduct at issue in the Québec proceeding, but with a shorter class period. A preliminary approval order for settlement was made on November 28, 2018 and 251 settlement notice packages were sent to Québec addresses. The evidence of Mr. Chandler was that he never received a package and was only notified of the settlement by class counsel days before the expiry of the objection or exclusion period. In total, four Canadian class members opted out of the U.S. settlement and Mr. Chandler was the only Québec resident to do so. On May 10, 2019, the U.S. settlement was granted final approval. A total of 607 claims were received from Québec addresses, with 68 of the claims deemed eligible by the U.S. claims administrator. On February 5, 2020, an extension was provided for Québec residents to submit claims (until February 26, 2020), but no evidence was provided confirming that additional claims were made or accepted.

B. *Germany Proceedings*

Litigation is ongoing in Germany on behalf of VW shareholders and noteholders, but the claims must be made on behalf of individual institutional investors as class actions do not exist in the German legal system. According to the evidence of VW, over 84% of the 1,628 institutional plaintiffs who are suing VW in Germany are non-German investors with Québec addresses. Twenty institutional class members opted out of the present proceedings and all of them are shareholders or noteholders who are pursuing their claims in Germany.

Article 167 of the *Code of civil procedure*, c. C-25.01 allows a party to bring an application for declinatory exception to have a claim referred to a court of competent jurisdiction or failing that, have the claim dismissed. VW brought an application for declinatory exception for lack of territorial jurisdiction or alternatively, *forum non conveniens*.

Update:

The Superior Court of Québec granted the application for lack of territorial jurisdiction, holding that there were insufficient connecting factors between the claim and Québec. The Court also considered the application for *forum non conveniens* but held there was no evidence that the U.S. and Germany forums were clearly more appropriate. The Court concluded that it was not an exceptional case where the Court must exercise its discretion to decline jurisdiction.

A. *Québec Courts' Territorial Jurisdiction*

In order for a Québec court to have jurisdiction over personal matters of a patrimonial nature, at least one of the connecting factors established in Article 3148 of the *Civil Code of Québec*, CQLR c. CCQ-1991 (*C.C.Q.*) must apply. When a defendant adduces evidence that is serious enough to challenge the plaintiff's facts concerning jurisdiction, the burden falls on the plaintiff to prove the facts alleged on a balance of probabilities. The Court held that VW had provided sufficient evidence to engage a jurisdictional debate and the burden of proof rested on Mr. Chandler to demonstrate there was a sufficient connection between the claim and Québec.

1. *Assessing each instrument separately*

VW submitted that there should be separate jurisdiction analyses for each of the three types of security instruments included in the claim: Shares, American Depository Receipts (ADRs), and Notes. VW asserted that the nexus for the purpose of jurisdiction would depend on the instrument, thereby requiring separate assessments. The Court dismissed these arguments on the basis that jurisdiction should be considered globally as there was only one class and one cause of action at issue.

2. *Res judicata from the Authorization judgment*

The Court dismissed Mr. Chandler's argument that the conclusions on jurisdiction in the Authorization judgment were binding and the principle of *res judicata* applied. The Authorization judgment acknowledged that it was only considering jurisdiction at the authorization stage and it was not binding on the Court. The Authorization judgment required an assumption that all facts were true and the record before the Court at this stage greatly differed from the record at the authorization stage.

3. *Submitting to Québec's jurisdiction*

At the authorization stage, the Court held that VW had waived its right to raise a declinatory exception and Mr. Chandler argued that the same reasons applied at this stage in the proceeding. The Court disagreed and held that an Originating application is a new action, subject to a new set of procedural steps, including any applicable preliminary exceptions. The Court held that it would be incongruous and contrary to the nature of the authorization process to compel defendants to raise their jurisdictional arguments at the authorization stage and foreclose them from doing so at the merits stage.

4. *Establishment and Dispute in Québec*

Article 3148(2) *C.C.Q.* has two criteria for establishing a connecting factor: the defendant must have an establishment in Québec and the dispute must relate to its activities in Québec. VW did not have an establishment in Québec, but its wholly owned subsidiary and issuer of notes, VW Credit Canada Inc. (VCCI), had an office in Québec. The Court held that this was not a sufficient connection. Further, Mr. Chandler's argument that VW carried on business in Québec through agents who were dealers distributing securities on its behalf was untenable. The Court concluded that VCCI and VW could not be conflated as a single entity and there was no evidence to demonstrate that VW conducted activities in Québec related to the dispute.

5. *Fault or Injury in Québec*

Article 3148(3) *C.C.Q.* states that Québec courts have jurisdiction if a fault or injurious act/omission was

committed in Québec, an injury was suffered in Québec, or an obligation arising from a contract was to be performed in Québec. As the claim was extra-contractual in nature, the last situation was clearly not applicable.

a) *Fault in Québec*

The Court held that the alleged acts/omissions of VW that could constitute a fault were not committed in Québec. VW's alleged fault was the omission to disclose adverse material facts and misstatements relating to its compliance with U.S. emission standards. According to the evidence filed, the vast majority of VW's impugned activities, management board meetings, and decisions occurred in Germany. Other than bald unsubstantial allegations, there was simply no evidence of a specific fault/omission committed in Québec.

b) *Injury Suffered in Québec*

In the Authorization judgment, the Court found there was a*prima facie* basis for holding that Mr. Chandler suffered injury in Québec as he resided in Québec, made his purchase and sell orders in Québec, received confirmation of purchase in Québec, held the securities in Québec, and suffered monetary loss in Québec. As stated above, this analysis was not binding as it took all facts as true and had a less substantial evidentiary record.

The Court agreed with VW's argument that injury was suffered where the instruments were purchased and sold: Germany for Shares, the U.S. for ADRs, and Québec for Notes. In *Option consommateurs c. Infineon Technologies AG* (2013), 45 C.P.C. (7th) 99, 2013 CarswellQue 10520, 2013 CarswellQue 10521, 2013 SCC 59, 364 D.L.R. (4th) 668, 450 N.R. 355, [2013] 3 S.C.R. 600, 20 B.L.R. (5th) 1 (S.C.C.) the Supreme Court held that "where financial damage is merely recorded in Québec, that fact is not sufficient to ground jurisdiction". The Court concluded that it was relevant that the injury was suffered in Québec for noteholders, but not determinative of whether Québec had jurisdiction. As the claim was framed in a manner that was indiscriminatory against the type of security instrument held, a connecting factor only related to the acquisition of Notes was not a sufficient connecting factor to ground jurisdiction in Québec.

6. *Jurisdiction under the Securities Act*

Section 236.1 of the *Securities Act*, CQLR c. V-1.1 states that an action may be brought in the court of the plaintiff's residence if the action is related to the distribution of a security or a take-over bid or issuer bid. The Court held this provision did not apply as the claim was related to misrepresentations rather than securities law, and it could therefore not ground Québec courts' jurisdiction.

B. *Forum non conveniens*

While it was not necessary for the Court to deal with VW's alternate arguments related to *forum non conveniens*, the Court nevertheless addressed the parties' submissions. Article 3135 *C.C.Q.*invokes the *forum non conveniens* doctrine as an exceptional and discretionary remedy in which the advantages or disadvantages of proceeding in one jurisdiction over another are assessed. The Court stressed that the existence of another equivalent or equally competent forum was not sufficient for the Québec courts to decline jurisdiction. The burden of proof lies on the defendant to provide a clear impression that it would be fairer and more efficient to defer to another authority.

The Court found that although some factors militated in favour of declining jurisdiction, other factors more overwhelmingly favoured assuming jurisdiction. The fact that the securities were traded in Germany or the U.S. and therefore governed by the applicable German and U.S. laws were factors in favour of declining jurisdiction. The parties' residence, location of VW's assets, and location of material evidence were factors that did not weigh in favour of declining jurisdiction. The fact that class proceedings do not exist in German law was not a determinative factor in the *forum non conveniens* analysis, nor was the fact that the Québec class period was longer than the U.S. settlement's class

period. Further, any class member who had not submitted a claim was barred from doing so in the U.S. settlement at the time of this proceeding and VW had failed to provide a response that satisfied the Court as to the adequacy of the U.S. claims process for Quèbec residents.

In conclusion, the other forums proposed by VW would not appear "clearly more appropriate" and VW had not convinced the Court that this is a case where the Court must exercise its discretion to exceptionally decline jurisdiction.

Related Cases:

Chandler v. Volkswagen Aktiengestllchaft, 2018 CarswellQue 4354 (C.S. Que.) (Motion for Authorization to Institute Class Action)

Related Articles:

Issue 2018-12—Case Updates—"*Chandler v. Volkswagen Aktiengsellschaft* 2018 CarswellQue 4354"

TOP

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Mancinelli v. Royal Bank of Canada

2020 ONSC 1646, 2020 CarswellOnt 4989 (Ont. S.C.J.)

Decision:	Motion for certification—motion granted Date of Decision: April 14, 2020
Judge:	Justice Perell
Court:	Ontario Superior Court of Justice

Lawyers:

Lawyers for the plaintiffs: Reider Mogerman, Louis Sokolov, Charles Wright, Rebecca Coad, Daniel Bach
Lawyers for the BMO defendants: Wendy Berman, Lara Jackson, Christopher Horkins
Lawyers for the Credit Suisse defendants: Donald Houston, Shane D'Souza, Caroline Humphrey
Lawyers for the defendant Deutsche Bank AG: Subrata Bhattacharjee, Caitlin Sainsbury, Pierre Gemson
Lawyers for the RBC defendants: Allan D. Coleman, Robert Carson
Lawyers for the TD defendants: Paul Le Vay, Brendan Van Niejenhuis, Ben Kates

Background:

The plaintiffs sued eighteen groups of financial institutions alleging that all defendants conspired to fix, raise, maintain, stabilize, control, or unreasonably enhance the prices of currency purchased in the foreign exchange foreign currency market ("FX market").

As of this motion's date, fourteen of the defendant groups had settled with the plaintiffs. The plaintiffs brought a motion to certify the action as against the remaining four groups of defendants—Credit Suisse, Deutsche Bank, RBC and TD.

The plaintiffs asserted five causes of action: (a) a statutory cause of action under sections 36 and 45 of the *Competition Act*, R.S.C. 1985, c. C-34; (b) unlawful means conspiracy; (c) predominant purpose conspiracy; (d) unjust enrichment; and (e) waiver of tort.

The proposed class definition was: "All persons in Canada who, between January 1, 2003 and December 31, 2013, entered into an FX Instrument transaction with a named defendant's salesperson either directly or through an intermediary." This class definition includes both "direct" and "indirect" purchasers of FX instruments.

Proposed "direct" purchaser class members included those parties who directly entered into a transaction to buy or sell FX instruments in which the counterparties were both named defendants and non-defendant banks or brokers. The plaintiffs allege that proposed direct purchaser class members were affected by the defendants' manipulation insofar as they entered into FX transactions in which spreads (difference between dealers' bid and ask prices) were illegally widened. These proposed class members were also allegedly affected by manipulation of Fixes (daily benchmark exchange rates for various currency pairs) insofar as they entered into FX transactions that were tied to Fix rates that had been improperly raised or lowered. The plaintiffs sought to recover damages for these class members resulting from manipulation of both spreads and Fix rates.

The plaintiffs did not seek to trace the pass-through spread manipulation damages to "indirect" purchaser class members, referred to herein as "investor" class members.

Proposed investor class members included those parties who owned units in entities, including mutual funds, hedge funds, or defined benefit pension funds, that entered into FX transactions at rates tied to the Fix. This included those Canadian funds that bought and sold foreign currency for hedging purposes or bought and sold securities or other financial instruments priced in foreign currency, and were required to mark to market their holdings in the fund's denomination (*i.e.*, a Canadian dollar denominated fund was required to mark to market its holdings in Canadian dollars). The plaintiffs alleged that, to the extent that mark to market was tied to manipulated Fix rates, the value in the funds and the value of fund units was affected. The plaintiffs sought to recover for investor class members consequential damages that resulted from Fix rate manipulation.

The defendants led evidence that investor class members would include every Canadian who was invested in a pension fund, mutual fund, or any other investment fund during the class period—encompassing the 70% of Canadian households that own private pension assets. The proposed class would include millions of Canadians.

Update:

Justice Perell certified the action against the non-settling defendants.

Cause of Action

Justice Perell held that the claim disclosed reasonable causes of action and noted that each defendant had served a detailed statement of defence, indicating that the defendants encountered no difficulty in understanding the case to meet. The plaintiffs concisely pleaded an episodic conspiracy of price fixing in the FX market over an eleven-year period.

Justice Perell acknowledged the defendants' submission that, where fraud—like the allegations of conspiracy in this case—is alleged, the pleading must contain full particulars, but noted that the full particulars in this case are essentially that the defendants' traders met in chat rooms and traded information to manipulate FX transactions for their own benefit. The evidence proving those conversations, such as chat transcripts, if available, would emerge during the discovery stage. Justice Perell held that the defendants cannot set a virtually impossible standard for the plaintiffs to meet in a price-fixing conspiracy case that is secret in nature, with conspiracy details largely in the conspirators' hands.

Justice Perell also considered several arguments from the defendants about the viability of investor class members' claims but, as discussed below, ultimately determined that these proposed class members should not be part of this class action for other reasons.

Identifiable Class

Justice Perell agreed with the defendants that the direct purchaser from non-defendant class members and investor class members should be excluded from the class definition, which should include only parties who entered into an FX instrument transaction with a named defendant's salesperson either directly or through an intermediary.

Justice Perell held that the direct purchasers from non-defendant banks do not share a common experience with the direct purchaser from defendant bank class members—a serious commonality problem. The direct purchasers from non-defendants in this case negotiated individual FX instrument transactions that may not have been affected by what the defendant banks were doing, if they were doing anything at all at the particular time.

This case is not, according to Justice Perell, like price-fixing cases involving so-called umbrella purchasers who purchase from non-defendants the goods whose sale prices were being fixed by the defendants who controlled the market for those goods. In those cases, the defendants who dominated the market by their misconduct effectively fixed the prices for the whole market in goods. In this case, the direct purchasers who purchased FX instruments from non-defendant banks entered into individually negotiated lawful transactions in which there is no commonality with the purchaser class members who entered into FX transactions with defendant banks.

Further, Justice Perell held that, to the extent that the direct purchasers from non-defendants were affected by the defendant banks' misconduct, which is theoretically possible, they cannot identify themselves as victims. Given the episodic nature of the defendant banks' alleged price fixing, it would be impossible for the direct purchasers from non-defendant banks to identify whether at the time they made their purchase of liquidity from a non-defendant bank, their transaction was affected by the unrelated illegal transactions.

Discussion of why investor class members were removed from the class definition is below at "Common Issues."

Common Issues

Justice Perell held that the direct purchaser from defendant bank proposed class members' claims, alone, satisfied the common issues criterion.

There was no meaningful dispute in this case that there was some basis in fact for issues about a conspiracy by the defendant banks to fix prices in the FX market. The defendants' essential argument was that there was no basis in fact for concluding that the proposed common issues could be answered in common across the class.

Justice Perell agreed with the defendants insofar as the direct purchaser from non-defendants and investor proposed class members were concerned, holding that these persons have fundamentally different cases from direct purchasers from defendants and their claims are highly individualistic and lack commonality. Moreover, answering the proposed common issues for the proposed direct purchaser from non-defendants and investor class members would require discreet and separate answers to all of the proposed common issues from the answers for the direct purchaser from defendant bank class members.

Justice Perell disagreed with the defendants' argument against commonality as regarding the direct purchaser from defendant bank class members, holding that even an episodic conspiracy that might involve changing permutations of twined currencies can and does raise common issues including the common issues of whether the defendants conspired to periodically price fix the spread and the Fix.

Justice Perell noted that a workable methodology of determining causation or the quantification of damages on a class-wide basis is not a "*sine qua non*" for the certification of every class action. A productive common issues trial that determines whether the defendants conspired to episodically price fix would substantially advance the proceeding and could be a launch pad for individual issues trials to determine individual causation and quantification of damages. Assuming success at the common issues trial, and given that the defendants' liability for conspiracy is a joint and several liability, the direct purchaser from defendant class members would have established potential liability for all those defendants proven to have been co-conspirators and proven general causation of harm.

Preferable Procedure

For the reasons discussed above, Justice Perell concluded that the preferable procedure requirement was satisfied for the direct purchaser from defendant class members only. A manageable class proceeding emerged that can proceed to a common issues trial that would meaningfully advance the litigation and provide access to justice for both the class members and the defendants, and that is preferable to individual actions.

Justice Perell rejected the defendants' "odd and ironic" argument that, since many of the putative class members are large financial institutions, it would be preferable, and the class members would be better off, to pursue individual or joinder actions. Justice Perell held that this argument was "odd and ironic" because, if accepted, the defendants who deny their liability would simply have to prove their innocence at some considerable expense over and over and over again in individual issues trials brought by sophisticated deep pocketed plaintiffs. Also, having regard to the defendants' confidence that collusion in the FX market is both impossible and also impossible to prove, Justice Perell noted that it is the defendants who

should prefer a class proceeding to obtain a discharge from liability for millions of transactions involving quadrillions of dollars.

Representative Plaintiff

Justice Perell held that the Labourers' Fund is an appropriate representative plaintiff but not Mr. Staines, who was disqualified because the proposed investor class members for whom he was to be representative would not be class members.

Justice Perell rejected the defendants' argument that the Labourers' Fund should be disqualified because of conflicts between class members. The defendants submitted that, since the impact on class members from the defendants' behaviour could have been either positive or negative, depending on the particular class members' trading in the currency pair at the relevant time, there was an inherent conflict because success for one class member would mean failure for another.

Justice Perell held that there is no conflict because the class member who benefited from the trade would never have had a claim so there is nothing to fail. The class member who was injured would simply have a claim for having overpaid for liquidity. There is no conflict of interest because the plaintiffs are seeking compensation only for the damages caused by the defendants and this does not affect the class members who unknowingly and inadvertently benefited from the defendants' wrongdoing.

Finally, Justice Perell rejected the defendants' argument that the Labourers' Fund did not qualify to be a representative because it was not directly involved in FX instrument trading. While this is factually true because the Labourers' Fund's trading was undertaken by portfolio managers or FX brokers on its behalf, Justice Perell held this just means that its direct purchases were made by its agents.

Related Cases:

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Royal Bank of Canada, 2017 CarswellOnt 47 (Ont. S.C.J.)

Mancinelli v. Royal Bank of Canada, 2017 CarswellOnt 19562 (Ont. S.C.J.)

Mancinelli v. RBC, 2018 CarswellOnt 11443 (Ont. S.C.J.)

Mancinelli v. Royal Bank of Canada, 2018 CarswellOnt 9315 (Ont. C.A.)

Related Articles:

Issue 2017-04—Case Updates—"*Mancinelli v. Royal Bank of Canada*"

Issue 2017-20—In the News—"Additional settlements approved in FX Market class action bringing total recovery to $107M"

Issue 2017-26—Case Updates—"*Mancinelli v. Royal Bank of Canada*"

Issue 2018-10—Case Updates—"*Mancinelli v. RBC*"

Issue 2018-13—Case Updates—"*Mancinelli v. Royal Bank of Canada*"

Issue 2018-22—In the News—"Mancinelli certified against Morgan Stanley for settlement purposes"

TOP

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Spring v. Goodyear Canada Inc.

2020 ABQB 252, 2020 CarswellAlta 738 (Alta. Q.B.)

Decision:	Application for certification—application granted Date of Decision: April 14, 2020
Judge:	Justice G.A. Campbell
Court:	Alberta Court of Queen's Bench
Lawyers:	
Lawyers for the plaintiff:	Chad Babiuk, Ben Frenken
Lawyers for the defendants:	Sara E. Hart, Philip Tinkler

Background:

The defendant Goodyear designs, manufactures and distributes tires. One of Goodyear's tire models was an all-season on/off road all terrain truck tire that came in two versions called Wrangler SilentArmor and Wrangler SilentArmor Pro-Grade Tires ("WSA Tires").

The plaintiff commenced this proposed class action against Goodyear on behalf of all Canadians who purchased or acquired WSA Tires, alleging that all WSA Tires contain an inherent defect that makes them prone to tread separation during normal use, which can lead to serious motor vehicle crashes and harm to people and property, including death.

The plaintiff alleges that Goodyear unreasonably limited a 2012 tire recall to only 6 of 51 different sizes and types of WSA Tires manufactured in a limited 13-week period in 2009 at only one of its manufacturing plants. He alleges that the recall was arbitrarily limited, leaving other WSA Tire consumers exposed to risk, and that Goodyear limited the recall with knowledge that WSA Tires not included in the recall were likewise prone to tire failure to avoid the expense of a more thorough recall.

The plaintiff brought an application to certify the action, which Goodyear contested.

Update:

Justice Campbell certified the action.

Cause of Action

Justice Campbell held that the pleadings disclosed causes of action in negligent design and manufacturing, failure to warn, and unjust enrichment or waiver of tort, both being claims seeking the restitutionary remedy of disgorgement from wrongful enrichment.

Negligent design and manufacturing

Goodyear argued that there was no valid cause of action in negligent design and manufacturing because the pleadings did not distinguish between defendants, separate the types of negligence, or identify a specific design or manufacturing defect because tread separation is a consequence, not a defect.

First, Justice Campbell held that the pleadings were consistent about the role of each party, despite the global reference to "the Defendants" in them. The plaintiff and Goodyear both agreed as to the roles of Goodyear US, as the designer, manufacturer, and distributor of WSA Tires and Goodyear Canada, as the Canadian distributor. Each defendant's role was clear and consistent throughout the pleadings, such that each knows what is being claimed against it.

Second, Justice Campbell held that it was not plain and obvious at the certification stage that pleading negligent design and manufacturing together means this cause of action will fail. Justice Campbell held that pleading negligent design and manufacture together in a non-pharmaceutical product liability class action is not necessarily inappropriate, noting that product liability class actions, including those for motor vehicle defects, frequently allow causes of action for negligence in design and manufacturing.

Third, Justice Campbell noted that other product liability cases involving non-pharmaceutical products have not strictly required proof of a specific defect. In such cases, courts have applied a general and flexible test based on what is reasonable to expect of a product in all the circumstances, whether or not the cause of that defect could be determined. Thus, Justice Campbell held, it may be possible to establish negligence in design or manufacturing by providing evidence of a defect without evidence as to the defect's cause.

Further, Justice Campbell held that the informational imbalance at the certification stage prevents the plaintiff from more specifically identifying the exact cause of the alleged tire separation or issue that may exist in the design or manufacturing process. Discovery at the certification stage is not a matter of right and it would be unfair to require a plaintiff to provide evidence that relates to matters exclusively within the manufacturer's specialized knowledge.

Failure to warn

The plaintiff agreed with Goodyear in oral submissions that negligent marketing falls within the duty to warn and Justice Campbell was satisfied that the claim provided particulars for a claim in negligence based on Goodyear's duty to warn.

Unjust enrichment and waiver of tort

Goodyear disputed the existence of a cause of action in unjust enrichment or waiver of tort.

Goodyear argued that a claim for unjust enrichment would fail because: (a) Goodyear was not directly enriched by WSA Tire consumers since they only provide WSA Tires to retailers who then sell them to consumers, and (b) because the contracts for sale between retailers and consumers, and between Goodyear and retailers, are a valid reason for any benefit received.

Justice Campbell held that it was not plain and obvious at the certification stage that the unjust enrichment claim would fail, noting that it is well-settled law that indirect purchasers have a right of action for unjust enrichment notwithstanding the absence of a direct contract of sale.

Further, the presence of contracts for sale between consumers and retailers and the manufacturer and the retailer does not prevent certification of unjust enrichment as a cause of action. Any questions as to the specifics of the contracts and whether they provide a juristic reason for the enrichment or not should be left to the trial judge.

As for waiver of tort, Justice Campbell noted that there is considerable debate as to whether waiver of tort exists as an independent cause of action in restitution or is merely a remedial alternative and that, in light of this debate, courts have generally declined to strike these claims at the pleadings stage, leaving the decision to the trial judge, and waiver of tort continues to be certified in class proceedings irrespective of whether it is an independent cause of action or a remedy.

Given the unsettled law around waiver of tort, Justice Campbell held that it was not plain and obvious that there is no independent cause of action that might permit the plaintiff and the proposed class to recover benefits gained by Goodyear from their alleged wrongful conduct.

Identifiable Class

Goodyear conceded that there was a rational connection between the proposed class and the claim but argued that the plaintiff is the only person with a complaint and evidence of two or more people with a current complaint is required in order to certify an identifiable class. Further, Goodyear argued that there was no basis in fact for the allegation of a defect in either the WSA Tire design or manufacturing process, and that the proposed class was overbroad.

Does the plaintiff need to show other complainants?

The plaintiff contended that Goodyear alone is in possession of information and records to ascertain the identity of prospective class members, but the evidence provides some basis in fact that there were thousands of WSA Tires sold and distributed in Canada even though consumers' precise identity remains unknown.

Justice Campbell held that there was no requirement at the certification stage to identify specific prospective class members or claims beyond the objectively identifiable class of consumers who purchased the WSA Tires. Justice Campbell agreed that

there was some basis in fact to support that there are other consumers of the WSA Tires with similar claims as those at issue, which was sufficient to show an objectively identifiable class of two or more people.

Is there some basis in fact for a common defect?

The recall notice provided some basis in fact that there is a dangerous common defect in WSA Tires that were the subject of the recall. As for the WSA Tires that were not recalled, Justice Campbell found that the plaintiff provided sufficient evidence to establish some basis in fact that there is a dangerous common defect in those tires as well and that the recall was inadequate. This evidence included crown separation data, statements by Goodyear about design and manufacturing similarities among all WSA Tires, and other accidents and complaints for WSA Tires outside the recall.

Ultimately, Justice Campbell held that there was some basis in fact for the plaintiff's allegation that Goodyear knew or ought to have known that there was a dangerous defect, be it one of design or manufacturing, that affected more WSA Tires than those identified in the recall notice and that the plaintiff provided some factual basis for his proposition that his WSA Tires share a common defect with the proposed class.

Is the proposed class definition overbroad?

Justice Campbell held that there was no rational basis on which to narrow the proposed class at this stage. There was some basis in fact that the alleged defect may be present in all WSA Tires and, accordingly, the class definition should encompass all individuals who bought WSA Tires. Further, there was a rational connection between the proposed class and the proposed common issues.

Common Issues

Justice Campbell certified common issues on negligent design and manufacture, failure to warn, unjust enrichment, and entitlement to damages.

The plaintiff proffered evidence such as early warning data, crown separation data, and consumer complaints to suggest there is a defect that extends across the proposed class and is common to all WSA Tires. Further, as discussed above at the identifiable class analysis, Justice Campbell found some basis in fact for common design and manufacturing processes of WSA Tires such that the core proposed common issues of whether there is a defect in the design or manufacturing process is a common issue for all WSA Tires.

Regarding the necessity and possibility of identifying the specific defect, Justice Campbell held that it was sufficient at the certification stage that the plaintiff identified that a condition leading to possible tread separation that poses a safety risk to users may exist in all WSA Tires and not just those in the recall population.

Preferable Procedure

Justice Campbell concluded that a class action is the preferable procedure in this case.

Goodyear argued that it would be more appropriate for the plaintiff to pursue an individual action, initiate a complaint to Transport Canada or the NHTSA, or rely on Goodyear's warranty process, and further suggested that there are existing behaviour modification tools available through legislation and statutory bodies, including regulations and sanctions under the *Motor Vehicle Safety Act* and through investigations and enforcement by Transport Canada.

Justice Campbell held that a consumer complaint to a regulatory body would not necessarily result in an investigation or provide relief to individuals exposed to risk from the alleged defect, and the warranty claim process only provides for returns in limited circumstances and is not within the control of a consumer seeking redress for negligence or failure to warn. Ultimately, Justice Campbell held it was not clear that either of these processes would match the role of class actions in behaviour modification.

Further, the common issues regarding the alleged defect are common to the entire proposed class and predominate over any individual issues. The key issue in this proceeding is whether the WSA tires contain a defect that makes them dangerous or unfit for their intended purpose. If this action was not certified and the plaintiff and the proposed class were left to pursue

Goodyear individually, this same issue would be litigated and decided multiple times, resulting in a significant and costly duplication of effort, impeding access to justice and undermining the objective of judicial economy.

Justice Campbell held that resolving the common issues is an efficient way to advance the action because it will determine Goodyear's liability and dispose of the greater part of the class' claims, including disgorgement of profits, leaving only issues of individual causation.

Representative Plaintiff

Justice Campbell held, and Goodyear did not dispute, that the plaintiff is a suitable representative, noting that he has retained competent legal counsel, has the ability to bear costs that might arise from the action, and is motivated to move the action forward. The parties agreed that the litigation plan would be addressed following certification.

TOP

IN THE NEWS

SCC dismisses application for leave to appeal from Québec court's dismissal of failure to warn claim over Biaxin

On April 9, 2020, the Supreme Court of Canada dismissed the plaintiffs' application for leave to appeal in *Angèle Brousseau, et al. v. Abbott Laboratories Co. (formerly known as Abbott Laboratories Limited)*, 2020 CarswellQue 2573, 2020 CarswellQue 2574 (S.C.C.).

The plaintiffs filed a class action alleging that the manufacturer and distributor of the antibiotic Biaxin (clarithromycin) failed to provide sufficient information about the risks associated with the drug. Specifically, the plaintiffs alleged that the drug causes serious neuropsychiatric side effects. The plaintiffs alleged that the defendant was liable for a lack of instructions necessary for the protection of the user against a risk under s. 53 of the *Consumer Protection Act*, c. P-40.1 and for safety defects under articles 1468, 1469 and 1473 of the *Civil Code of Québec*, c. CCQ-1991.

At a trial on the common issues, the Superior Court dismissed the action (*Brousseau c. Laboratoires Abbott ltée*, 2016 QCCS 5083, 2016 CarswellQue 9586, EYB 2016-271704 (C.S. Que.)). The Québec Court of Appeal upheld that decision (*Brousseau c. Laboratoires Abbott limitée*, 2019 QCCA 801, EYB 2019-311099, 2019 CarswellQue 6618, 2019 CarswellQue 3778, 58 C.C.L.T. (4th) 167 (C.A. Que.)), finding that the sale of consumer drugs is not governed by the*Consumer Protection Act* because there is no consumer contract. Further, the Court of Appeal noted that the defendant was entitled to rely on the learned intermediary rule and that a manufacturer's compliance with regulator standards, while not conclusive, may indicate that a defendant has satisfied its duty to warn.

The application for leave to appeal was dismissed with costs.

TOP