COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Good Guys Recycling Inc. v. 676083 B.C. Ltd.,* 2023 BCCA 286

Date: 20230630
Docket: CA47904

Between:

Good Guys Recycling Inc.
(formerly known as Revolution Resource Recovery Inc.)

Appellant
(Defendant)

And

676083 B.C. Ltd.

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 22, 2021 (*676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCSC 2072, Vancouver Docket S172912).

Oral Reasons for Judgment

Counsel for the Appellant:	J.D. Winstanley J.E. Fung
Counsel for the Respondent:	J.B. Maryniuk A.D.R. Delmonico
Place and Date of Hearing:	Vancouver, British Columbia June 30, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 30, 2023

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Summary:

The applicant applies for a stay of proceedings pending the resolution of its application for leave to appeal to the Supreme Court of Canada from a judgment of the Court of Appeal. The Court of Appeal judgment dismissed the applicant's appeal from an order of the BC Supreme Court certifying this action as a class proceeding. Held: Application dismissed. The merits of the applicant's leave application are weak, and the relatively minimal financial harm that the applicant may suffer if a stay is refused is outweighed by the harm to 676 if this proceeding is further delayed by the granting of a stay.

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HORSMAN J.A.:

[1] The applicant, Good Guys Recycling Inc., has applied to the Supreme Court of Canada for leave to appeal this Court's order in *Good Guys Recycling Inc. v. 676083 B.C. Ltd*., 2023 BCCA 128 (the "Appeal Decision"). The applicant applies for an order staying this proceeding pending resolution of its application for leave to appeal and, if leave is granted, pending a determination of the appeal.

Background

The certification decision and appeal

[2] There is a lengthy history to this proceeding. I will summarize it only to the extent necessary to give context to the issues on the application for a stay.

[3] In the Appeal Decision, this Court upheld an order certifying this action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The plaintiff is the respondent 676083 B.C. Ltd. ("676"). The claims advanced by 676, and the procedural history are summarized in the Appeal Judgment as follows:

> [3] For present purposes, it is sufficient to note that 676 is a former customer of the appellant, which provides waste disposal and recycling services to commercial customers. In its proposed class action, 676 advanced a number of causes of action covering two discrete claims pertaining to two classes: the "surcharge class", and the "restraint of trade class".
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> [4] First, 676 alleged on behalf of the surcharge class that, since April 2015, Good Guys/Revolution routinely overcharged its customers by billing surcharges said to represent municipal fines, levies, and other charges, without actually incurring those surcharges and without authority under its form of agreement. 676 alleged that instead of passing on the charges as

> incurred, which the contracts permitted, Good Guys/Revolution billed an arbitrary 18% surcharge that was untethered to what actual costs, if any, Good Guys/Revolution incurred. 676 sought damages for breach of contract and unjust enrichment in that regard.
>
> [5] Second, 676 alleged on behalf of the restraint of trade class that Good Guys/Revolution routinely relied on certain clauses in its form of agreement to make it difficult for its customers to avoid an automatic renewal of the term, or otherwise to terminate their agreements and change service-providers. 676 sought to have those clauses declared void and unenforceable as unconscionable and in restraint of trade.
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> [6] In *676 SC#1*, the certification judge refused to certify the action. In essence, he found that the surcharge class's proposed claim in unjust enrichment, as it was pleaded, did not disclose a viable cause of action (at paras 42–43), and concluded that the proposed breach of contract claim did not raise common issues (at para 91).
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> [7] With respect to the restraint of trade class, the judge concluded that all of the elements of the certification test had been met except for the requirement that 676 show that it is a suitable representative plaintiff for that class (at para 185). The problem identified was that 676 was no longer a current customer of the appellant (at para 169).
>
> [8] In these circumstances, the judge granted 676 or its replacement leave to re-apply for certification of the claim in restraint of trade, provided that the application be brought by a different representative plaintiff who was a current customer of Good Guys/Revolution, or 676 demonstrate that its appointment is necessary to avoid a substantial injustice (at para 190).
>
> [9] 676 appealed and Good Guys/Revolution cross-appealed. In *676 CA*, this Court dismissed the cross-appeal and allowed the appeal in part.

[4] In relation to the surcharge claim, the Court of Appeal held in the first certification appeal that 676 should be permitted to re-apply for certification of the breach of contract claim, subject to certain amendments and conditions.

[5] The first certification decision is indexed at 2019 BCSC 2007, and the first appeal decision at 2021 BCCA 85.

[6] Following the first appeal decision, 676 re-applied for certification of the unlawful surcharge and restraint of trade claims. The certification judge found that all requirements for certification had been met and he granted the order certifying both claims: 2021 BCSC 2072. In the Appeal Decision, this Court dismissed the applicant's appeal from the second certification decision.

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[7] There are two issues addressed in the Appeal Decision that are of particular relevance to the stay application.

[8] First, the certification judge appointed 676 as the representative plaintiff of the restraint of trade class, despite the fact that 676 was not a current customer of the applicant and thus not a member of the class. Section 2(4) of the *Class Proceedings Act* provides the court with discretion to make an order appointing a non-class member as the representative plaintiff where necessary to avoid the risk of "substantial injustice to the class". On appeal, this Court held that the order was open to the certification judge to make: Appeal Decision at para. 106.

[9] Second, the certification judge certified the common issues relating to breach of contract that were formulated by this Court in the first certification appeal. He rejected the applicant's argument that the proposed common issues should be restricted to nominal damages in the absence of some basis in fact to show that expectation damages could be assessed across the class. The certified common issues in relation to breach of contract are:

> a) Did Revolution [Good Guys] breach the terms of the customer service agreements by charging the Class Members a Government Surcharge/Material Ban in the amount of 18%?
>
> b) If the answer to common issue (a) is yes, is Revolution [Good Guys] liable to the Class Members for breach of contract, and if so, in what amount?

[10] On appeal, this Court held that the judge did not err in failing to limit the common issues relating to breach of contract in the manner suggested by the applicant: Appeal Decision at paras. 35–50.

The leave application

[11] On May 19, 2023, the applicant filed an application for leave to appeal the Appeal Decision to the Supreme Court of Canada. The leave application asserts two issues of national importance:

> a) What is the appropriate test for a party seeking to appoint a non-class member as representative plaintiff in common law provinces except Ontario? Must proposed non-member plaintiffs demonstrate exceptional

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or extraordinary circumstances to justify appointment, and if so, what are those circumstances?

b) Must a plaintiff provide some evidence of class-wide loss at certification in order to certify common issues for the recovery of compensatory expectation damages?

[12] On June 16, 2023, 676 served its response to the leave application.

[13] The day before the hearing of the present application, the applicant delivered a late affidavit—the second affidavit of Miranda Tipton. The affidavit exhibits a reply that was filed by the applicant in the Supreme Court of Canada on June 26, 2023. 676 objects to the affidavit being considered on this application. I will admit the affidavit as evidence on this application. The affidavit does no more than update the status of the process in the Supreme Court of Canada. The material was not available to the applicant at the time it delivered its material. In the circumstances, I see no prejudice to 676 arising from late delivery of the affidavit.

[14] The applicant estimates that the Supreme Court of Canada will decide the leave application within one to three months. They rely on a portion of the Supreme Court of Canada's website for this estimate. I do not consider it safe to anticipate the expected timing of a decision on the leave application with any precision. The decision could be released on the time line suggested by the applicant, or it could be a longer period of time.

Current status of the proceeding

[15] On May 29, 2023, the parties appeared before the certification judge at a judicial management conference. The judge made a number of orders, including:

a) By June 9, 2023, 676 was to serve its notices of application seeking:

i. court approval of its proposed notice plan;

ii. production of a sale agreement relating to the applicant's business;

b) By July 10, 2023, the applicant will deliver its responses to those applications; and

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c) By October 6, 2023, the parties will produce and exchange lists of documents.

[16] The orders sought by 676 in its recently-served application concerning notice include an order requiring the applicant to "…provide to the plaintiff the names, last known email addresses, and last known physical addresses of all persons resident in British Columbia who had a contract with [the appellant] for the provision of waste and recycling disposal services between April 1, 2015 and October 22, 2021, and who were charged a Government Surcharge/Material ban."

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The Law

[17] Section 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, permits a stay of proceedings to be granted by the Supreme Court of Canada, the court appealed from, or a justice of the court appealed from. Section 33(2) of the *Court of Appeal Act*, S.B.C. 2021, c. 6, also permits this Court to order a post-appeal stay.

[18] The test for a stay is the same as the test for an interlocutory injunction. An applicant must demonstrate:

1. There is some merit to the appeal, in the sense of a "serious question" to be appealed;

2. The applicant will suffer irreparable harm if the stay is refused; and

3. The balance of convenience favours granting the stay.

(*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 337, 340–42; *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 347 at para. 6 (Chambers).

Analysis

The merits

[19] The merits threshold is low, and "[a] prolonged examination of the merits is generally neither necessary nor desirable": *RJR-MacDonald* at 338. A judge must be

satisfied the issues raised on appeal are neither frivolous nor vexatious. The appropriate question is whether there is a serious question to be tried, not whether the applicant can establish a strong *prima facie* case: *RJR-MacDonald* at 335.

[20] Where a stay of proceedings is sought pending the determination of an application for leave to appeal to the Supreme Court of Canada, the merits have to be assessed through the lens of the test for leave to appeal. The applicant must show that ”there is an arguable issue of public importance, an important issue of law or mixed law and fact, or that the matter is otherwise of such a nature and significance as to warrant decision by the Supreme Court of Canada”, as required to obtain leave to appeal to that Court under s. 40 of the *Supreme Court Act*: *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 477 at para. 30 (Chambers), citing *Minister of Community Services v. B.F.*, 2003 NSCA 125 at para. 11.

[21] The applicant argues that it has raised “serious and novel questions of law” related to the proper test to be applied in appointing non-member representative plaintiffs. The applicant says there is presently a “legal lacuna” across multiple jurisdictions, which is said to be the type of scenario “calling out for intervention from Canada’s highest court”. The second proposed leave issue concerns the certification of contract damages claims without some evidence of class-wide compensatory loss.

[22] I am not persuaded that the Supreme Court of Canada is likely to grant leave on either issue identified by the applicant.

[23] As to the first issue, the court’s power to appoint a non-member representative plaintiff involves an exercise of discretion, which is necessarily guided by case-specific circumstances. It is not apparent to me that there is any inconsistency between the Appeal Decision and judgments from courts in other jurisdictions that are cited by the applicant in terms of the broad principles that govern the exercise of this discretion.

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[24] As to the second issue, as 676 points out, the Supreme Court of Canada has already given guidance on the standard to be applied with respect to the certification of loss-related common issues: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 116–119 [“*Microsoft”*]; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at paras. 103–109. The judgments in *Microsoft* and *Pioneer Corp.* are cited and applied in the Appeal Decision: at paras. 41–47. It appears to me that the applicant will face an uphill battle in establishing that an issue of national importance arises from the case-specific application of principles that have been settled by Supreme Court of Canada jurisprudence.

[25] In any event, it is, as noted by *RJR-MacDonald*, unnecessary and unwise to engage in a prolonged consideration of the merits on the stay application. While the leave application does not appear to me to have a strong prospect of success, I find it meets the low merits threshold in the sense that it is not frivolous and raises a serious question.

Irreparable Harm

[26] In *RJR-MacDonald*, the Supreme Court of Canada clarified that “‘[i]rreparable’ refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”: at 341. The question is “whether a refusal to grant relief could so adversely affect the applicants’ own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application”: *RJR-MacDonald* at 341.

[27] The applicant cites two forms of irreparable harm:

(1) First, the applicant says that it will incur uncoverable expense if the certification judge orders the applicant to provide contact information for customers who had a contract with the applicant, and were charged the government surcharge. The applicant’s evidence is that on January 18, 2022, it sold the entire waste and recycling disposal

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business to an "arms-length third party purchaser". Therefore, it does not have enough staff to carry out the file review, and would have to hire and pay a contractor to do the work.

(2) Second, the applicant says that if it was ordered to produce documents relevant to the sale of its business, as sought by 676, it will be required to disclose "confidential and commercially sensitive information". The applicant says there will be no need for the applicant to divulge corporate secrets if it is successful on appeal.

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[28] The applicant says the first form of harm is irreparable because s. 37 of the *Class Proceedings Act* immunizes 676 from any costs award. Therefore, any costs the applicant incurs cannot be recovered if it is ultimately successful in having the certification order set aside on appeal. The applicant acknowledges the observation of Justice Newbury in *Jiang* that she was "…not aware of any authority for the proposition that such a bar constitutes irreparable harm in every case so as to meet the second criterion in *RJR*": at para. 15. However, the applicant says that there is authority to support the proposition that the type of unrecoverable costs it will incur in this case constitutes irreparable harm: *Ferreira v. Richmond (City)*, 2005 BCCA 66 at para. 12. See also: *Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd.*, 2004 BCCA 459 at para. 33.

[29] I note that 676's notice plan has not yet been approved by the certification judge. The irreparable harm cited by the applicant is contingent on a future court order. For the purpose of the analysis on the present application, I will assume that it is likely that the applicant will be required to take steps in implementing the notice plan that will require it to incur costs. The parties' arguments on this application proceed on the same assumption.

[30] I accept that the applicant will suffer irreparable harm if a stay is not granted in the sense that it will be required to take steps to locate contact information for customers that will involve some cost to the applicant, in that it appears this will require a physical file review. The applicant will not be able to recover that cost in

the event that the applicant is successful on its appeal to the Supreme Court of Canada, and the action is decertified.

[31] However, it is also fair to say, as 676 argues, that the applicant's evidence is lacking in detail as to the magnitude of the applicant's anticipated costs. The affidavit of Ron McRae, a director of the applicant, is that it would "at a minimum, take hundreds of hours" to review the files. He does not explain the basis for this estimate. He says that the applicant does not have the "requisite staff" to conduct the review, but does not explain how many employees he expects would be required to complete the task. Mr. McRae gives no cost estimate of hiring a contractor.

[32] On the material before me, the highest case the applicant can make is that it will incur costs in the range of three to four thousand dollars to implement 676's proposed notice plan (assuming payment of minimum wage to individuals to undertake over 100 hours of review of customer files). While I accept that this constitutes irreparable harm for the purpose of this prong of the stay test—which is concerned with the nature of the harm and not its magnitude—the magnitude of the harm is relevant to the balance of convenience stage of the analysis.

[33] I am not persuaded that the applicant has established irreparable harm in respect to its desire to protect confidential business information from disclosure. The applicant says documents related to the sale of the business are only relevant if the action continues as a class proceeding. It is not apparent to me that this is so. In any event, parties are routinely required to produce commercially confidential documents in the pre-trial discovery process. Confidentiality concerns are routinely addressed through such means as undertakings of confidentiality, sealing orders, and/or redactions. Confidentiality concerns can be raised before the certification judge, who can make orders to protect the confidentiality of the documents if he considers it appropriate.

Balance of convenience

[34] The balance of convenience stage requires determining "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory

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injunction, pending a decision on the merits": *RJR-MacDonald* at 342, quoting *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at 129.

[35] I have accepted that the applicant will suffer harm from the refusal of a stay in the sense that it may incur litigation costs in the range of three to four thousand dollars that will not be recoverable if its appeal ultimately succeeds and the case is decertified. I am not persuaded that the material before me demonstrates any harm to the applicant beyond that if a stay is refused. Furthermore, there is no evidence to suggest that expenditures in the range of three to four thousand dollars would cause financial hardship to the applicant.

[36] 676 will suffer harm if a stay is granted. This action was commenced in 2017. It has been before this Court twice on the issue of certification. 676 has been successful in certifying the proceeding as a class action. 676 is entitled to the fruits of the judgment. It is presumptively entitled to proceed with the litigation without further delay. The recent sale of the applicant's business creates the risk of further harm to 676 if the proceeding is stayed. The customer contracts that are in issue in this proceeding are now apparently in the possession of the purchaser, who the applicant refuses to identity. The applicant has also refused to produce the purchase agreement. In applying for a stay, the applicant seeks to delay the hearing of 676's application for document production relevant to the sale of the business. In the meantime, the applicant provides no assurance that the purchaser, who is presumably a stranger to the litigation, will be under any obligation to preserve relevant documents during the period of the further delay that would follow the issuance of a stay.

[37] In my view, the balance of convenience favours 676 in these circumstances. The merits of the applicant's leave application are weak, and the relatively minimal financial harm that the applicant may suffer if a stay is refused is outweighed by the harm to 676 if this proceeding is further delayed by the granting of a stay. In the context of the history of this proceeding, it would not be in the interests of justice to

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delay 676 in proceeding with its certified claims to await the outcome of a leave application that has limited chance of success.

[38] Accordingly, I dismiss the application.

"The Honourable Madam Justice Horsman"

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