IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bui v. Cargill, Incorporated,* 2024 BCSC 1364

Date: 20240731
Docket: S221365
Registry: Vancouver

Between:

Giang Bui

Plaintiff

And

Cargill, Incorporated, Cargill Meat Solutions Corporation, Cargill Limited, JBS USA Food Company, Swift Beef Company, JBS Packerland Inc., JBS Canada ULC, Tyson Foods, Inc., Tyson Fresh Meats, Inc., and National Beef Packing Company, LLC

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Thomas

Reasons for Judgment

Counsel for the Plaintiff:	D.G.A. Jones M.L. Segal
Counsel for Cargill, Incorporated, Cargill Meat Solutions Corporation, Cargill Limited:	J.S. Yates K. Hanowski
Counsel for JBS USE Food Company, Swift Beef Company, JBS Packerland Inc., JBS Canada ULC:	M.A. Eizenga K. Booth
Counsel for Tyson Foods, Inc.; Tyson Fresh Meats, Inc.:	R.L. Reinertson J.A. Hutchinson
Counsel for National Beef Packing Company, LLC:	C.A. Sethi S.A. Forbes

Place and Date of Hearing:	Vancouver, B.C. July 15–17, 2024
Place and Date of Judgment:	Vancouver, B.C. July 31, 2024

[1] This is an action involving an alleged conspiracy to set the price of beef by the defendants to the detriment of the plaintiff and a proposed class of plaintiffs.

[2] The parties have served all of their certification materials and have a certification hearing scheduled in January 2025.

[3] The plaintiff seeks to strike isolated statements from the defendants' affidavit materials that relate solely to denying the existence of the conspiracy. The plaintiff takes no issue with the admissibility of evidence relating to a denial of the conspiracy ancillary to evidence pertaining to the common issues proposed by the plaintiff.

[4] If the application to strike is denied, the plaintiff seeks comprehensive document disclosure and cross-examination of the defendants' affiants to explore in detail the merits of the defendants' denials of the alleged conspiracy.

[5] The plaintiff says that the law in British Columbia precludes the admission of evidence relating solely to the merits of the action at certification because the certification judge may not adjudicate on the merits. The court's assessment of evidence at this stage must remain limited to whether there is "some basis in fact" to establish the final four certification criteria, including whether the claims raise common issues that can be determined on a class-wide basis, pursuant to s. 4(1)(c) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[6] The defendants say that the law in British Columbia requires a threshold determination of the merits of the action at certification pursuant to s. 4(1)(c). The statements the plaintiff seeks to strike are relevant, they say, to determining whether there is some basis in fact that the common issues actually exist.

[7] In my view:

a) resolution of the application will require a determination of the proper legal test to apply to s. 4(1)(c); and

b) such a determination will require a complete factual matrix which, in this case, will only be presented and argued during the certification hearing.

[8] Hearing this application prior to the certification hearing will require me to consider and resolve conflicting interpretations of legal issues which lie at the heart of the certification process with only a partial evidentiary framework. This would result in “litigating” certification “in slices”.

[9] Counsel for the defendants should have a full opportunity to argue at the certification hearing the relevance of the affidavit evidence. To prohibit them from doing so on a preliminary basis does not, in my view, meet the needs of justice. I agree with Justice Groves in *Siwocha v. Recochem Inc.*, 2024 BCSC 67 at para. 10 that the court should exercise significant caution before excluding evidence prior to the certification hearing.

[10] It may be that the defendants will wish to argue that the statements the plaintiff seeks to strike, when viewed in the context of the entire factual matrix at certification, are relevant to the commonality of the claims—or, for that matter, to any of the other certification requirements. It would therefore be premature to exclude the statements at this stage of the proceeding.

[11] The plaintiff says that I should proceed with the application at this time in order to enable him to determine the legal test that he has to satisfy at certification and avoid surprise. He was unable to clearly articulate the specific nature of the prejudice he would suffer at certification should the isolated statements in the affidavits not be struck, nor was he certain as to the purposes for which the evidence would be used by the defendants. He simply asserts that document discovery and cross-examination of the defendants’ affiants would be necessary to ensure trial fairness.

[12] In my view, the uncertainty the plaintiff faces does not constitute “trial by ambush”. Uncertainty over the application of the legal test on this issue represents the type of uncertainty inherent to the legal process. It would not be appropriate for the court to provide an interpretation of the *CPA* or apply it to the facts in this case prior to certification. See *Andersen v. St. Jude Medical Inc.*, [2002] O.J. No. 4478, 2002 CanLII 32019 (S.C.) at paras. 10–11.

[13] Having decided I cannot prejudge the relevance—or, as a result, the admissibility—of the portions of the affidavits the plaintiff seeks to strike, I cannot determine whether the production of documents or cross-examination is necessary. The tests for pre-certification document discovery or cross-examination both involve an assessment of necessity and proportionality, neither of which, in these circumstances, I can properly determine at this stage of the proceeding: *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at para. 38; *McEwan v. Canadian Hockey League*, 2023 BCSC 2272 at para. 18.

[14] For the above reasons, I am exercising my discretion to adjourn this application to the certification hearing.

[15] In my view, it would be appropriate to defer a consideration of the costs of this application until after the certification hearing. The parties are directed to discuss the issue of costs, and if either party wishes to seeks costs prior to the certification hearing, submissions on costs should be made in accordance with the directions provided on July 17, 2024.

"Thomas J."