

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Siwocha v. Rechochem Inc.*,
2024 BCSC 67

Date: 20240115
Docket: S2012015
Registry: Vancouver

Between:

Maciej Siwocha

Plaintiff

And

Recochem Inc.

Defendant

Before: The Honourable Justice Groves

Reasons for Judgment

Counsel for the Plaintiff:

M.C. Canofari

Counsel for the Defendant:

E. Lefebvre
K. Smiley

Place and Date of Hearing:

Vancouver, B.C.
November 28, 2023

Place and Date of Judgment:

Vancouver, B.C.
January 15, 2024

[1] This is a class action proceeding. Although it is at a relatively early stage in terms of litigation, and the allegations have yet to be proven, the plaintiff is alleging that the defendant, who produces solvent products, has, for a number of years, produced three levels of solvent, marketed as good, better and best, with a price difference between each gradient as you move up to a higher level of quality. The suggestion in the pleadings is that initially the defendant produced three different solvents, but at some point, decided to continue marketing solvents as good, better, best, when in fact all the solvents were exactly the same.

[2] The certification motion in this class action is set for June 2024.

[3] By way of notice of application filed November 21, 2023, heard on November 28, 2023, the plaintiff seeks an order that the defendant's expert reports commissioned by Dr. Soberman and Dr. Mulvey are not admissible as evidence in the certification motion.

[4] The test for certification is set out in s. 4 of the *Class Proceeding Act*, R.S.B.C. 1996, c. 50. That section reads as follows:

Class certification

4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

(3) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada and involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced elsewhere.

(4) When making a determination under subsection (3), the court must

- (a) be guided by the following objectives:
 - (i) to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;
 - (ii) to ensure that the ends of justice are served;
 - (iii) to avoid irreconcilable judgments, if possible;
 - (iv) to promote judicial economy, and
- (b) consider relevant factors, including the following:
 - (i) the alleged basis of liability, including the applicable laws;
 - (ii) the stage that each of the proceedings has reached;
 - (iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for

advancing the proceeding on behalf of the proposed class;

(iv)the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative plaintiffs to participate in the proceedings and to represent the interests of class members;

(v) the location of evidence and witnesses.

[5] As I understand the law in regards to admissibility of expert evidence, to be admitted the opinion must be relevant to a material issue, come from a qualified expert, and must be necessary to assist the trier of fact in arriving at a correct decision. Additionally, to be admissible the report cannot violate any exclusionary rules of evidence.

[6] It is argued by the plaintiff that the two reports should be excluded because they offer conclusions of law, as well as conclusions on the merit of the action which is irrelevant on a certification motion. The plaintiff argues this based on the decision of the British Columbia Court of Appeal in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG.*, 2009 BCCA 503 [*Pro-Sys*], which held *inter alia* that the purpose of a certification hearing is not to assess the merits of the claim, but rather to focus on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. Further, *Pro-Sys* notes that on a certification motion the court is not equipped to engage in weighing or assessment of evidence, or to resolve conflicts in the evidence.

[7] The defendant in this proceeding relies on the decision of the Quebec's Superior Court in *Option Consommateurs v. Samsung Electronics Canada Inc.*, 2023 QCCS 2388 [*Option Consommateurs*] in which the Court considered as a preliminary motion, what is requested here, to dismiss an expert report from consideration at a certification hearing. The Court held *inter alia* at para. 180:

... Indeed, it may be dangerous to exclude expert evidence at a preliminary stage, without having had the benefit of full evidence enabling the judge to weigh the necessity or relevance of the expert report. Caution is called for. ...

[8] Additionally of note, as pointed out by the defendant in their application response, courts in this province have started to adopt a two-step test for a plaintiff to establish that the claims of class members raise a common issue. That twofold tests established that a plaintiff must show some basis in fact that the proposed common issues actually exist, and that the plaintiff show some basis in fact that the proposed common issues can be answered in common across the class. As noted above, s. 4 of the *Class Proceeding Act* requires a finding that the claim of the class raises common issues.

[9] I have had the opportunity since reserving on this matter to review the reports provided. I am cautious about their potential admissibility, specifically as it relates one possible view of the reports that the authors are purporting to usurp the role of the court in determining the validity of the class proceeding, based on their perceived expertise. Additionally, as pointed out by counsel for the plaintiff, it is not particularly helpful to this court to be advised by a proposed expert that candy is often packaged with different flavours, or that through marketing of a similar or identical product, different product names exists. Those conclusions are not something which necessarily required expert opinion.

[10] That being said, I have concluded that it is not appropriate to rule the reports at this stage inadmissible. Counsel for the defendant should have a full opportunity to argue at the certification hearing the relevance and admissibility of their opinions and to prohibit them from doing so on a preliminary basis does not, in my view, meet the needs of justice and, as noted in *Option Consommateurs*, it is proper to exercise significant caution in this type of application.

[11] It may well be the case that the defendant wishes to argue that the reports assist the court in determining that a cause of action does not exist, or that the proposed common issues do not actually exist.

[12] I am in no way prejudging that issue, but I can see that it is arguable that some of the information and opinion that was contained in the two impugned expert reports may form the basis of an argument on either of those two points noted

above. The defendant should have the opportunity to state its case in full at a certification hearing.

[13] As such, the application in the motion of November 21, 2023 is dismissed.

[14] It may now be the case, based on this ruling, that the plaintiff wishes to provide contrary expert evidence. The plaintiff should be entitled to do so and that may necessitate a further application to amend the current schedule for the certification hearing and general litigation conduct of this matter. If the plaintiff so chooses and an application is necessary to amend the current schedule, that should be scheduled before me at the earliest date possible.

“J.R. Groves J.”

GROVES J.