

Not Enough to File and Smile: BC Supreme Court Refuses to Certify Class Proceeding, Confirms That Low Bar Does Not Mean No Bar

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The British Columbia Supreme Court has held that a class action certification application is not merely a “file, smile and certify” exercise, and that certification is intended to be a meaningful screening device.

KEY TAKEAWAYS

- **The British Columbia Supreme Court will not permit an uncritical “file, smile and certify” process in class proceedings. Plaintiffs must prove that they meet the low threshold for certification.** The Court may also scrutinize evidence where necessary at the certification stage to ensure that all requirements are met.
- **Expert methodology should be grounded in a realistic prospect of demonstrating harm on a class-wide basis at trial.** This may require the plaintiffs to lead evidence regarding the availability of data required by their methodology, especially where sources are publically available. Experts must clearly demonstrate how identified data sources will be sufficient to yield expected results using the proposed methodology.

SUMMARY AND BACKGROUND

On December 21, 2017, the BC Supreme Court refused certification in *Ewart v. Nippon Yusen Kabushiki Kaisha*,¹ a putative class proceeding. The plaintiff alleged, among other things, that the corporate defendants had engaged in civil conspiracy and breached sections 45 and 46(1) of the *Competition Act*.²

The defendants operated roll-on/roll-off vessels used to transport vehicles and heavy equipment to Canada. The proposed class comprised “indirect purchasers” of these vehicles, to whom increased costs resulting from the wrongful conduct had allegedly been passed down. The putative class additionally included “umbrella purchasers” who bought vehicles that were not shipped by the defendants, but who were alleged to have nonetheless been affected by increased market prices.

The defendants and some of their executives had already pleaded guilty or reached settlements in the United States and Japan with respect to similar allegations.

CERTIFICATION DECISION

The BC Court must certify a class proceeding where a plaintiff meets the requirements set out in section 4(1) of the *Class Proceedings Act*.³ A key requirement is that a plaintiff must provide evidence that the claims of the class members raise common issues that predominate over issues affecting individual members of the putative class. Given the nature of the allegations in this competition class action, alleged harm and damages to the class must be proved by economic expert evidence.

The Court explained that expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. The proposed methodology must be grounded in facts of the particular case in question and there must be some evidence of the availability of data to which the methodology will be applied.⁴

IDENTIFYING AVAILABLE DATA

In this case, the Court held that a methodology must offer a “reasonable prospect” of establishing that a portion of the alleged overcharges were passed through to the indirect purchasers. Although the Court ultimately found that the plaintiff’s expert methodology had a realistic prospect of demonstrating harm on a class-wide basis at trial, the Court also found that the plaintiff’s expert had failed to adequately explain how the data he proposed to use was necessary or how it would support the plaintiff’s case. Specifically, the plaintiff’s expert suggested using both public information and private information (that the defendants would make available during discovery), but failed to establish whether the required data was actually available.

The Court distinguished between (i) data that is expected to come from defendants and (ii) data that is expected to come from other sources, particularly public sources, and held that the latter should be identified. The plaintiff’s expert only went as far as to assert that such data might exist. The Court concluded that this was insufficient.

The Court was careful to explain that a proposed methodology does not have to be fully developed for the purposes of certification, because the court does not weigh competing expert reports at that stage. However, it is necessary for the expert to make an effort to determine whether the necessary data actually exist. The Court explained that it needs some confidence that there is a “realistic prospect” to develop a credible model, which cannot be done where part of the required data may not exist.

Ultimately, the Court refused to certify the proceeding, holding that the plaintiff had failed to meet the low threshold set out in the case law.

THE UPSHOT

As competition class actions continue to work their way through the various provincial courts to the

certification stage, it is hoped that the helpful principles established in this well-reasoned case are adopted in other Canadian jurisdictions.

Going forward, plaintiffs should be mindful that certification of class-wide harm as a common issue where an econometric model is proposed may present particular challenges. Plaintiffs should ensure that their expert can explain the availability and utility of the data required for their methodology to be successful. Defendants, conversely, can both challenge the sufficiency of the plaintiffs' proposed model on this basis and may take some comfort from the fact that they are not likely to be forced into an onerous discovery process in competition class actions where the plaintiffs' theory of common harm is based on nothing more than a "wing and prayer".

The decision in *Ewart v. Nippon Yusen Kabushiki Kaisha* is available [here](#).

If you have any questions concerning this case or class actions generally, please contact Derek Ronde, John M. Picone and Danielle DiPardo or any other member of the Cassels Class Actions Team.

¹ 2017 BCSC 2357 [*"Ewart"*].

² R.S.C., 1985, c. C-34.

³ R.S.B.C. 1996, c. 50 [*"Class Proceedings Act"*].

⁴ Notably, the Court cautioned that it is currently in an "experimental stage" of assessing the practicality or validity of econometric models that are at the basis of certification.