

CANADA / JUDGMENT

Bowman v. Kimberly-Clark Corporation

2022 BCSC 1864

COURT

Supreme Court of British Columbia

DECIDED

25 October 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1864 Bowman v. Kimberly-Clark Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bowman v. Kimberly-Clark Corporation,

2022 BCSC 1864

Date: 20221025

Docket: S2010566

Registry: Vancouver

Between:

Linda Bowman

Plaintiff

And

Kimberly-Clark Corporation, Kimberly-Clark Inc. and

Kimberly-Clark Canada Inc.

Defendants

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

Corrected Judgment: The cover page of this judgment

was edited on November 2, 2022

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:

S. Turner

J. Giovannetti

Counsel for the Defendants:

J.S. Yates

K. Hanowski

Place and Date of Hearing:

Vancouver, B.C.

September 26, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 25, 2022

Overview

- [1] In this proposed class proceeding, the defendants apply to strike an expert report that the proposed representative plaintiff intends to rely on at the certification hearing on the basis that the report is case-splitting, is not in substance a reply report, is substantively inadmissible because it does not satisfy the preconditions for admissibility, its prejudicial effect outweighs its probative value, and because it was tendered late. The proposed representative plaintiff, Linda Bowman, acknowledges that it was tendered late, but asserts that it is a true reply report and so does not constitute case-splitting. Ms. Bowman asserts that it does not violate any rules for admissibility and that any prejudice due to late delivery can be addressed through adjustments to the schedule leading up to certification.
- [2] The issues are whether the report is not a true reply report and/or violates the rules pertaining to expert reports such that it ought not be admitted into evidence.
- [3] The context in which the issues arise is Ms. Bowman's claim that flushable wipes manufactured and distributed by the defendants, to whom I shall refer to collectively as Kimberly-Clark, between February 7 and July 14, 2020 contained harmful bacteria and were recalled. The proposed class is persons who bought wipes that were recalled. The claims sound in negligence, breach of the Competition Act, R.S.C. 1985, c. C-34, breach of the Food and Drugs Act, R.S.C. 1985, c. F-27, breach of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, unjust enrichment and a claim on behalf of British Columbia pursuant to the Health Care Costs Recovery Act, S.B.C. 2008, c. 27.

- [4] At the conclusion of the hearing, I reserved reasons. I ordered the certification hearing adjourned as I was satisfied that, given my reasons would be under reserve for at least a few weeks, the schedule could not be adjusted to allow Kimberly-Clark the appropriate time to prepare written certification submissions after my reasons were released and prior to the certification hearing then scheduled to commence in November.

Is the Jeziorski Report a True Reply Report?

- [5] Kimberly-Clark asserts that the Jeziorski report contains opinions on matters that Ms. Bowman could have adduced as part of her evidence in chief and ought to have anticipated.
- [6] Ms. Bowman asserts that the topics covered in the Jeziorski report are, in form and substance, reply to Kimberly-Clark's expert evidence authored by Ayse Yesim Orhun. Ms. Bowman submits that the topics on which Dr. Orhun opined are not ones that she ought to have addressed in her case in chief, because she has led other evidence to discharge her burden on certification. She submits she will not be referring to the Jeziorski report in her case in chief. The role of the Jeziorski report is to dispute the evidence that Kimberly-Clark has led to undermine the plaintiff's certification case.

Legal Principles

- [7] At the certification stage of a proposed class proceeding, the plaintiff bears the onus of establishing some basis in fact for the certification requirements set in s. 4(1)(b), (c), (d) and (e) of the Class Proceedings Act, R.S.B. 1996 c. 50: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-100, 102-103. The requirements for which some basis in fact must be established are that there is an identifiable class of two or more persons, there are common issues, there is an appropriate representative plaintiff with a plan to proceed, and a class proceeding is the preferable procedure to resolve the common issues.
- [8] The trial rule against case-splitting requires the party who has a burden on an issue to exhaust his evidence in the first instance and prohibits that party from leading only prima facie evidence and then confirmatory evidence in reply: *Canadian National Railway Co. v. Canada*, 2002 BCSC 1669.
- [9] In *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 2029 at para. 11, Justice Walker adopted an approach to determining the admissibility of affidavit evidence on certification hearings, where the evidence is said to be case-splitting, described in several Ontario authorities, including by Justice Strathy (as he then was) in *Canadian Triton International, Ltd. (Assignees of) v. National Iranian Oil Co.*, [2005] O.J. No. 949, and applied by Justice Masuhara in *Seidel v. Telus Communications Inc.*, (24 June 2014), Vancouver L050143 (B.C.S.C.). That approach is more flexible than the approach used at a trial where a party surprised by reply evidence that is not true reply does not have the opportunity to respond. In a certification hearing, there is more ability to mitigate prejudice by providing time to respond. However, the jurisprudence does not regard the potential to address prejudice with the opportunity to respond as a cure-all if expense and delay is itself prejudicial, and

therefore in some cases late tendered expert evidence that is not proper reply may be ruled inadmissible in advance of certification: *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 186 at paras. 44-46 and 54, citing *Cantlie, Pollack v. Advanced Medical Optics Inc.*, 2011 ONSC 580, and *Johnson v. North America Palladium Ltd.*, 2018 ONSC 4496.

- [10] It is important to note that in *Tietz*, the application in which the issue arose was not a certification application but rather leave to bring an action under the Securities Act. Justice Wilkinson held such applications to be more akin to a trial to which the stricter application of the rule against case-splitting applies. Justice Wilkinson's statement of the legal principles was approved on appeal: *Tietz v. Affinor Growers Inc.*, 2022 BCCA 307.

Discussion

- [11] Kimberly-Clark delivered the report of Dr. Orhun, who has a doctorate in marketing and is a professor of marketing at the University of Michigan Ross School of Business. Dr. Orhun offers opinions on the likely differences between consumers of wipes, the variability of prices they would pay, the variability of purchasing patterns, whether the price paid by each class member can be discerned from available data, whether there is a methodology by which the price paid by each class member can be determined on a class-wide or sub-class-wide basis, and whether there is a methodology to determine whether each class member suffered harm in relation to the purchase of recalled units.
- [12] Prezmyslaw Jeziorski holds a doctorate in economic analysis and policy. He is a professor of marketing at the University of California, Berkley. His research focuses on advertising markets.
- [13] Dr. Jeziorski's report is organized to provide opinions on the same questions that Dr. Orhun was asked and to comment on Dr. Orhun's answers to those questions. Dr. Jeziorski does so. In form, the report is a reply report.
- [14] At this stage, I do not have a nuanced understanding of the opinions in the context of the certification case as a whole, so I am not able to determine whether it inappropriately strays from reply in substance, but there is nothing in it that jumps out at me as doing so. I note that on this application, Kimberly-Clark did not put in Dr. Orhun's report, counsel for Ms. Bowman did. I take from Kimberly-Clark's failure to do so that the face value impression one has from reading Dr. Jeziorski's report remains true when his opinions are compared to those of Dr. Orhun with the benefit of a nuanced understanding of the opinions in the context of the certification issues.
- [15] Kimberly-Clark submits that the matters that Drs. Orhun and Jeziorski address go to matters that Ms. Bowman ought to have known would be germane to certification and so ought to have led evidence on in her case in chief. However, the rule against case-splitting addresses the requirement to lead evidence on issues on which one has the burden; it does not require a party to lead every piece of evidence that might be germane. It is possible that one party can lead evidence that satisfies its burden, and the opposing party leads evidence on a topic

not specifically addressed by the plaintiff that undermines the cogency of the body of evidence led by the plaintiff. The plaintiff can reply to that evidence without case-splitting.

- [16] Kimberly-Clark asserts that Dr. Jeziorski does not simply dispute Dr. Orhun's opinions (but where he does, Kimberly-Clark says his opinions are inadmissible for the reasons addressed below), but goes further and offers freestanding opinions. For example, on the topic of whether the price paid by any particular class member is knowable, Dr. Orhun opines that neither a certain database, nor any other source, contains the data which allow the price paid by each class member to be determined and states why. Dr. Jeziorski opines that estimates of the price paid by each class member can be obtained using a different data set than that to which Dr. Orhun referred. Dr. Jeziorski referred to Dr. Orhun's evidence that she is uncertain whether such data is available in Canada. Dr. Jeziorski opines that it is, identifies it, and states that it has been used in peer-reviewed studies.
- [17] I am assuming, without having heard detailed submissions on its relevance to the certification tests, that this evidence goes to whether there is some basis in fact for the existence of common questions including aggregate damages. With regard to whether this is evidence that Ms. Bowman ought to have led in her case in chief, Ms. Bowman asserts she intends to discharge her burden of proof without addressing the type of evidence referred to in the expert reports. Ms. Bowman explains that because Kimberly-Clark has raised these issues and intends to argue that they undermine her case for certification, she has addressed the evidence in reply.
- [18] I have not been apprised of the evidence Ms. Bowman seeks to lead on certification. I am not in a position to assess whether it would be possible for Ms. Bowman to meet her burden on certification without evidence on the topics addressed by the experts. It is not obvious that a putative representative plaintiff needs to lead opinion price marketing evidence to establish common issues on a proposed class action involving a product that has been recalled. At this point, it would be inappropriate for me to conclude that Ms. Bowman cannot discharge her burden without leading expert evidence on the topics that Drs. Orhun and Jeziorski address. At the certification hearing, it will be apparent if Ms. Bowman seeks to incorporate the marketing opinion evidence into her case in chief. If she does so, Kimberly-Clark can address this matter further.
- [19] I conclude that the Jeziorski report is not improper reply evidence.

Is the Jeziorski Report Otherwise Substantively Inadmissible?

- [20] Kimberly-Clark submits that the Jeziorski report should not pass the threshold screening inquiry for opinion evidence because it is not relevant, not necessary, makes findings of fact, is argumentative, offers opinions on matters of law, and makes conclusory statements without authority: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 23. Kimberly-Clark also submits that the balance undertaken at the discretionary stage of judicial gatekeeping is not in favour of its admissibility: *White Burgess* at para. 24.

- [21] Although Dr. Jeziorski opines on the same matters that Dr. Orhun does, Kimberly-Clark asserts that Dr. Jeziorski's report does not meet the first stage threshold inquiry of relevance because his evidence goes to matters of law, includes conclusory statements and includes findings of facts guised as opinion.

Opining on the Law

- [22] With regard to expressing opinions on matters of law, Kimberly-Clark complains that Dr. Jeziorski proposes a framework for assessing economic harm that is different from the established legal framework by opining on compensating for the risk of harm. I do not see Dr. Jeziorski's report as inappropriately attempting to tell the court what the law is or ought to be. He simply provides evidence about marketing theories and methodologies for assessing economic harm. He offers no opinion on whether those methodologies are acceptable in law or ought to be acceptable in law.
- [23] In my view, this objection is misplaced at this stage. In many certification cases, the court considers evidence going to whether there is a methodology to determine class-wide harm and damages. Dr. Jeziorski's opinions will either be helpful on this front or not. That is a matter to decide at certification on the "some basis in fact" test and also considered at trial when damages are actually assessed.
- [24] I accept Kimberly-Clark's reminder that the court is a gatekeeper on opinion evidence and must not shrug off that responsibility by letting in inadmissible opinion evidence and only addressing shortcomings when deciding how much weight to apply to the opinion evidence, if any. However, in my view Kimberly-Clark has not raised an admissibility argument on this criticism of Dr. Jeziorski's report. At its core, this is an argument about whether I ought to accept the opinion evidence because it does not relate to Kimberly-Clark's view of how liability can be established and damages can be assessed.

Conclusory Statements

- [25] Kimberly-Clark asserts that Dr. Jeziorski makes statements without citing literature or any other source for his opinion. This is common place in written opinion evidence, as is the practice of citing literature or studies in some cases. For example, an orthopaedic surgeon rarely references an anatomy text book when opining that an injured plaintiff's pain is coming from a certain anatomical feature or disputing that it is coming from a certain anatomical feature. However, the same physician may cite literature when opining on the prognosis for a certain injury that has been extensively studied. Failing to footnote literature or a source does not make opinion evidence inadmissible per se.

- [26] Dr. Jeziorski's report contains footnotes with references to literature, websites and data sources. Whether he has failed to identify all the citations that he ought to have is not a matter I can determine at this stage by simply reading the report. That is perhaps an indicator that this report meets the threshold necessity requirement as evidence on a technical topic with which the court needs assistance: *R. v. Mohan*, [1994] 2 SCR 9 at para. 25.
- [27] Both Dr. Orhun and Dr. Jeziorski address the existence and adequacy of data in relation to whether there are methodologies to determine prices paid by class members on a class-wide basis and whether harm to class members can be determined on a class-wide basis. Kimberly-Clark's objections on this issue relate to these opinions, and include that Dr. Jeziorski does not identify "authority" for his opinion that the data is available and that the data is appropriately utilized in the methodology about which he opines.
- [28] In *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, the Court of Appeal reviewed the development of the law on the "some basis in fact" test in relation to expert evidence on methodology to establish class-wide harm. The Court of Appeal held that it is not necessary, to meet the certification evidentiary standard, for an expert opining on this topic to confirm the availability of the type of data that the expert opines is likely available to be used in a methodology about which the expert opines. Justice Hunter for the Court stated:
- [111] In my opinion, the certification judge erred in principle when he rejected the plaintiff's methodology on the ground that the plaintiff's expert had not ascertained whether the data he would need was in fact available. The plaintiff provided some basis in fact that there was a methodology that could demonstrate that overcharges had been passed through to the indirect purchasers. I do not consider the term "some evidence of the availability of the data to which the methodology is to be applied" to be a separate requirement from "some basis in fact" for the viability of the methodology, but if it is, the plaintiff has provided "some evidence" that the data his expert will need is available.
- [29] Kimberly-Clark argues that the case is not of assistance to determine whether the expert evidence is admissible because the issue was considered in conjunction with the evidentiary test at certification, not as a matter of the gatekeeper role of the court on threshold admissibility. With respect, I disagree. The gatekeeper role must be informed by the use to which the opinion evidence will be put. I consider *Ewert* to be binding authority that the "some basis in fact" inquiry does not require a plaintiff to prove, at certification, that the expert has confirmed the availability of data proposed to be used in a methodology to prove class-wide harm in order for the court to accept that there is some basis in fact that there is a methodology and the data to be used in it. If the opinion evidence is acceptable to meet the certification standard of proof without specifics confirming it is available, then it is not inadmissible for failing to provide a reference to such specifics.

Findings of Fact Guised as Opinion

[30] Kimberly-Clark asserts that Dr. Jeziorski makes findings of fact and makes factual assertions guised as an opinion. For example, Dr. Jeziorski states that retailers keep transaction ledgers that specify a uniform product code, transaction price, transaction quantity, and transaction date. In my view, this is not inappropriate factual evidence. While it is hearsay evidence, opinion evidence is an exception to the hearsay rule. Dr. Jeziorski's expertise is in marketing and advertising policy. If Kimberly-Clark wishes to assert that his experience and expertise does not provide support for his opinion as to what data is kept by retailers, or it is a necessary element of his report that he footnote that opinion with a factual source or literature, Kimberly-Clark can make those arguments. At bottom, this objection appears to derive from Dr. Jeziorski's failure to employ the words "in my opinion" in front of what appear to be factual statements or to footnote them, a point I have already addressed. I do not agree that the report is inadmissible on this basis.

Balancing Probative Value Against Prejudice

[31] I have not found any substantive problems with the admissibility of the Jeziorski report that need to be considered on the balancing exercise in the second stage of determining threshold admissibility. Kimberly-Clark asserts that the balancing exercise must consider how late the report was delivered, especially in the context of an agreed upon schedule in a case managed proposed class proceeding.

[32] I agree that lateness can itself cause enough prejudice to rule a report inadmissible.

[33] In relation to this, Kimberly-Clark asserts that the late report is part of a wholesale revision of the plaintiff's case including amended pleadings and common issues.

[34] While the issues addressed in the Orhun report and the Jeziorski report may relate to the amendments to the notice of civil claim, I cannot conclude that the report itself raises matters that cause Kimberly-Clark prejudice. Kimberly-Clark raised the issues that are the subject of the Jeziorski report in the Orhun report. The substance of those issues is a matter that Kimberly-Clark has been considering for the many months it had to prepare its certification evidence.

[35] With regard to lateness, I understand that Ms. Bowman's counsel did not have time, in the three weeks for reply evidence that the schedule allowed, to retain and instruct an expert and for that expert to prepare a report. Nevertheless, Ms. Bowman's counsel should have advised defence counsel, and the court, that it was considering filing reply evidence that might affect the schedule, even if it did not wish to disclose the nature or the subject before it had it in hand. That is a necessary party of the case management process.

[36] With regard to the amendments to the notice of civil claim and the proposed common issues, I have not been directed to anything that directly relates them to the Jeziorski report. Ms. Bowman contends they are unrelated. Kimberly-Clark contends they are part of a

wholesale revision of Ms. Bowman's certification case which includes the Jeziorski report. Ms. Bowman was entitled to amend her notice of civil claim without leave and she did so, albeit at the risk that it would interfere with the timing of certification. If Kimberly-Clark needed more time to address those amendments and changes to the proposed common issues, it was at liberty to seek it. Instead, it sought to have the Jeziorski report ruled inadmissible.

- [37] Kimberly-Clark asserts that the delay the Jeziorski report has caused and the expense to Kimberly-Clark of having to address it are prejudicial in and of themselves. However, Kimberly-Clark does not provide any facts in support of this prejudice. The only evidence of the prejudice by the lateness is whether Kimberly-Clark had time to address the report given the schedule of deadlines the court had imposed and the pending certification date.
- [38] As result of this application, I adjourned the certification hearing because at the time of the application the deadline for Kimberly-Clark to deliver its certification submissions was running and it did not know whether the Jeziorski report was in or out. I considered that Kimberly-Clark needed to know what the evidence would be at certification to prepare its submissions and the time at which I had this decision under reserve would erode that to the extent that certification could not proceed. The end result is that the exercise of bringing this unsuccessful application eliminated any prejudice to Kimberly-Clark by the lateness of the report and the lack of time to consider the amendments to the notice of civil claim and common issues.

Disposition

- [39] Kimberly-Clark's application to exclude the Jeziorski report is dismissed.
- [40] I direct the parties to address a new certification hearing date and a schedule to meet it. If they wish to address these matters at a case planning conference, they may seek one. If they are of the view that a case planning conference is not necessary they shall address the new certification hearing date with Supreme Court Scheduling and communicate the date and agreed upon schedule to me through Supreme Court Scheduling. If I consider a case planning conference to be appropriate at that time, I will communicate that to the parties through Supreme Court Scheduling.

"Matthews J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/18/2022BCSC1864cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bowman-v-kimberly-clark-corporation-2022>

Prepared on 28 October 2026 · Esheria