

CANADA / JUDGMENT

Kett v. Mitsubishi Materials Corporation

2020 BCSC 1879

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2020 BCSC 1879 Kett v. Mitsubishi Materials Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kett v. Mitsubishi Materials Corporation,

2020 BCSC 1879

Date: 20201201

Docket: S1813758

Registry: Vancouver

Between:

Ryan Kett

Plaintiff

And

Mitsubishi Materials Corporation, Mitsubishi Cable Industries Ltd., Mitsubishi Shindoh Co. Ltd.,
Mitsubishi Aluminum Co. Ltd., Tachibana Metal Mfg. Co. Ltd., and Diamet Corporation

Defendants

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

Before: The Honourable Mr. Justice Branch

Reasons for Judgment on Certification

In Chambers

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Place and Date of Hearing:

Vancouver, B.C.

September 14-18, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2020

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I. INTRODUCTION

- [1] Can a class action be "too big to certify"? That is the question at the core of this application for certification under s. 5 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA].
- [2] The application also raises additional challenging legal issues, including whether a parts supplier can be held liable to end users for wrongdoing towards a manufacturer of a consumer product under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA].

II. THE FACTS

A. The Plaintiff

- [3] The plaintiff is a resident of British Columbia who purchased a 2009 Honda Civic EX-L Coupe for his personal use.
- [4] He alleges that the defendant parts suppliers charged auto manufacturers more than they should have as a result of their failure to carry out proper parts testing. He says that the price of his vehicle was correspondingly higher than it should have been.

B. The Defendants

- [5] The defendants are automobile parts suppliers incorporated under the laws of Japan: Mitsubishi Materials Corporation ("MMC"), Mitsubishi Shindoh Co., Ltd. ("MSC"), Mitsubishi Aluminum Co., Ltd. ("MAC"), Mitsubishi Cable Industries, Ltd. ("MCI"), Tachibana Metal Mfg. Co., Ltd. ("TMM"), and Diamet Corporation ("DMC").
- [6] MMC is extra provincially registered in BC. The other defendants are subsidiaries or related companies to MMC. MSC recently merged into MMC.
- [7] The breadth of products which the plaintiff seeks to cover in this litigation is staggering. This scope can be illustrated with a brief review of each company's operations.
- [8] Before its April 2020 merger with MMC, MSC produced copper and copper-alloy rolled products, which were processed into shapes such as plates, strips, tubes, bars and wires. These products were used by customers in a plethora of applications, such as connectors, lead frames, fuses, switches, terminals, bus bars, and other components. MSC's products were not capable of direct installation into a vehicle and hence were all subject to further alteration, processing or assembly. Indeed, the products were potentially subject to multiple alterations by downstream companies before ultimately being sold to an automobile manufacturer and installed into a vehicle.
- [9] MAC produces aluminum and aluminum milled and fabricated products. Known automotive applications include components for use in heat exchangers, truck air tanks, truck fuel tanks, aluminum wheels, number plates, thermal shielding plates, protective fuel pumps, truck roof panels, and inverter cooling boards. For its extruded products, the known automotive applications include bumpers, drop sides for trucks or buses, truck mounting components, components for heat exchangers, engine components, extruded materials for buses, wheels, expansion valves, ABS control boxes, anti-vibration rubber, roof rails, tubes for power steering, and swing arms for motorcycles. Although it may be known whether a customer operates in the automotive supply chain, MAC does not always have that information. Some of MAC's customers also sell spare parts. While some parts sold by MAC are capable of direct installation into a vehicle, the majority of its products are subject to further alteration, processing (including cutting, stamping, heating or shaping), or assembly by the customer, and then resale as part of another automotive component.
- [10] MCI's primary products are seals, packing products, fibre optic products, and wireless-related products. MCI also produces fine rectangular wires coated with an ultra-thin insulating film, which are used primarily in induction coils for electronic equipment (a product now known as MEXCEL). In automotive applications, MEXCEL is used in inductors in electronic control unit power circuits. MCI produces seal products made of both rubber and metal, electronic parts, and wire harness products.

- [11] TMM produces aluminum (light alloy) products which have been extruded, drawn, and processed into shapes, as well as tubes and other fabricated products, some of which are used in the automotive industry. TMM's products are also not capable of direct installation into a vehicle and may be subject to variation along the supply chain. Known automotive-sector applications include anti-vibration materials, motorcycle mufflers, automobile air conditioners, motorcycle bearings, motorcycle handles and automobile seatbelts. TMM's aluminum extruded products are known to be used for bumpers, air conditioners, conductive material, cylinders, floor mats, roof rails, sunroofs, truck frames, truck luggage carriers, bus window frames, and special vehicle mounting parts.
- [12] DMC produces sintered mechanical parts from metal powders. These parts are used in automotive applications by certain customers, after modification by those customers or assembly with other components. DMC's primary product types include oil-less bearings and other powder metallurgy parts. Parts may be used for variable valves and transmissions and oil pump rotors, sintered oil-impregnated bearings, such as bearings for fuel pumps, electronically-controlled throttle and exhaust gas recirculation systems, and sintering special alloy, such as that used in soft magnetic cores, wear resistance materials and stainless steel parts.

C. The Automotive Supply Chain

- [13] The automotive supply chain is global and complex.
- [14] Vehicle manufacturers are known as Original Equipment Manufacturers ("OEMs"). The supply chain leading up into OEMs is commonly divided into three tiers.
- [15] Tier 1 suppliers provide parts directly to the OEMs. Tier 1 suppliers may supply several different OEMs.
- [16] Tier 2 suppliers supply parts to Tier 1 suppliers. Generally, Tier 2 suppliers do not sell directly to OEMs, and their products are combined with other components by Tier 1 suppliers for sale to OEMs.
- [17] Tier 3 suppliers supply Tier 2 suppliers. Generally, Tier 3 suppliers do not sell directly to OEMs or Tier 1 suppliers. Their products are usually processed and combined with other components by Tier 2 suppliers for sale to Tier 1 suppliers.
- [18] Companies may operate in different tiers at the same time.
- [19] Geography is another complicating factor. OEMs produce their vehicles in many different locations. In some instances, vehicles for the Canadian market may be sourced from facilities in one country, while in other instances, vehicles of the same make, model and model year may have been sourced from multiple locations around the world. From 2002 to 2018, at least 124 of the models proposed to be included in this litigation were sourced from two or more countries. At least 20 models were sourced from three or more countries.

- [20] During the proposed class period from 2002 to 2018 (the "Class Period"), MCI, DMC, MAC and TMM did not deliver any of their products directly into Canada. This is also true for MSC from at least 2012 onward, but it is not known whether its products were possibly exported directly into Canada before 2012.
- [21] For the most part, the defendants' products entered the supply chain in Japan. It is presently unknown to what extent their materials or components were incorporated into motor vehicles that entered the market in Canada. The defendants have competitors in Japan and elsewhere that produce products that may be used for the same applications.
- [22] Trying to determine whether the defendants' parts were used in particular vehicles would generally require the use of the individual Vehicle Identification Numbers ("VINs"). The VIN provides a plant code, a production code, and the vehicle's serial number. However, the VIN does not directly provide information on the identity of each component in the vehicle. Hence, it would usually be necessary to engage in multi-level tracking of parts, raw material inventories and usage, assuming such information is available. There is some evidence that OEMs track certain parts, depending on the safety-critical nature of the component.
- [23] OEMs sell finished vehicles to distributors (e.g. Honda Canada) who then sell to affiliated dealers (e.g. Honda Vancouver). The vehicles are then sold to the ultimate consumer.
- [24] The parties provided the following graphical representations of the supply chain, the first showing the supply of parts up to the OEMs, and the second showing the distribution down through to the consumer:

C. Parts Pricing

- [25] The parts sold by the defendants are not sold based upon strict set prices or a price list. Rather, sales are negotiated with each customer. The price can be based on a large number of factors, including the historical relationship with the customer, purchase volume and contract duration, technical specifications, and current component prices. As a result, it is possible that different customers were charged different prices for the same product.

D. Class Size

- [26] There were at least 1,774 automobile models sold in Canada during the Class Period by the OEMs identified in the proposed class definition.
- [27] These models in turn have differences in trim level, fuel type, engine type, body style and wheels driven, depending on the model year and the customer's individual choices. Accounting for these additional variations, there are in the range of 6,346 different types of vehicles sold in Canada by the included OEMs over the Class Period.

[28] The number of new automobiles sold in Canada by the OEMs during the Class Period is at least 8.3 million vehicles. It is not known what portion of the 8.3 million vehicles contain parts or materials sold by the defendants.

F. The Wrongdoing

[29] As a result of audits and reports from whistleblowers, MMC discovered that MAC, TMM, DMC, MSC and MCI delivered certain products to their customers that deviated from customer specifications ("Non-Conforming Products").

[30] When these problems were discovered, MMC established a special investigation committee. The committee published two interim reports, and then a final report entitled "Relating to Non-Conforming Products at MMC Subsidiaries", published in 2018 (the "Final Report"). The wrongdoing uncovered was summarised as follows:

Generally, the misconduct identified may be summarized as consisting of one or more of the following:

- a) Rewriting of inspection record or testing data, to meet either customer or other requirements;
- b) Non-performance of inspections or tests, while recording results that met inspection, testing, or customer requirements;
- c) Delivery of product to customers that did not (or may not) meet customer specifications because the testing and inspections had not been completed in compliance with Japanese Industrial Standards, internal or customer requirements; and
- d) Inspections that were conducted by inspectors who had not received internal certifications.

[31] Misconduct was only identified for specific audit review periods, which periods differ for each of MAC, TMM, DMC, MSC and MCI.

[32] The results of the audit process for each defendant are summarised below.

MSC

[33] The review period for MSC was generally October 18, 2016 to October 18, 2017. Some customers requested longer review periods.

[34] Certain products shipped from MSC's Wakamatsu Plant were affected by misconduct, including (a) rewriting quality records data for various dimension inspections or tests of material properties, including hardness, tensile strength, yield strength or other measurements, and (b) rewriting the composition of ingredients. The proportion of products affected was a small proportion of the total production of the Wakamatsu Plant (950 out of 57,374 tons). Aside from one isolated incident, investigations did not identify similar conduct at MSC's Sambo plant.

- [35] Brass strips accounted for more than 90% of MSC's Non-Conforming Products.
- [36] For the majority of its customers, it is not known if the customer uses MSC's products for applications in the automotive sector. There are eight customers where it is known that the applications are for the automotive sector. The amount of Non-Conforming Product as a proportion of total deliveries to these customers varied from a low of 0.2% to a high of 27.6%.

MAC

- [37] An initial three-year review period was investigated for MAC, from December 1, 2014 to November 30, 2017. For a portion of its Non-Conforming Products, it was not possible to know whether its products met or did not meet specifications.
- [38] The misconduct at MAC's Fuji Plant related to appearance and dimension inspection or to mechanical testing. Specifically:
1. certain products were delivered to customers after rewriting the measured values of inspection or test results to meet the specifications, despite the fact that those measured values were outside of the customer's specifications;
 2. in other cases, measurement methods or sample numbers used for testing were not in compliance with methods required by customers' standards or prescribed by Japanese Industrial Standards; and
 3. in some cases, products were delivered to customers without performing part of the required inspections.
- [39] MAC conducted further investigations. For the period January 2017 to January 2018, MAC identified 12 customers of its Sheet and Foil Division and 48 customers of its Extrusion Division involved in the automotive sector and who received Non-Conforming Products.
- [40] A few of MAC's direct customers, or customers of its distributors, were OEMs. However, the majority were Tier 1 and Tier 2 suppliers.
- [41] The extent to which customers received Non-Conforming Products varied. For one customer, Non-Conforming Products were approximately 46% of the total value of products delivered, while for another, approximately 87% of the value of products delivered were Non-Conforming Products.

MCI

- [42] The audit process revealed that the inspection section at MCI's Minoshima Works plant would deem products to be "passing" if the results of dimension inspections were within the range of values permitted by MCI, which was wider than its customers' specifications. When disclosing inspection results to customers, the data was re-written and the values were reported as falling within customer specifications. For the review period December 1, 2016

to November 30, 2017, five MEXCEL customers received Non-Conforming Products, only one of whom was involved in the automotive sector. Only 1.4% of the product delivered to that single customer was affected.

TMM

- [43] TMM's review period was January 1, 2017 to January 15, 2018. Non-Conforming Products were delivered to 44 Tier 1 or Tier 2 suppliers in the automotive sector who were either direct customers of TMM or direct customers of its distributors. For most of these customers, the misconduct involved either non-performance of inspections or tests, or tests that were not conducted in compliance with proper methods. For a few of these customers, the misconduct was rewriting actual test or inspection results to come within required specifications.
- [44] The proportion of deliveries affected by misconduct varied between customers--for example, approximately 85% of deliveries were affected for one customer, but only 55% for another.

DMC

- [45] The review period for DMC was February 2017 to January 2018. In general, the misconduct at DMC's Niigata Plant was that test and inspection data were rewritten to fall within customer specifications, or testing and inspections were not performed at all. The misconduct impacted about one third of the total products produced at the Niigata Plant during the review period.
- [46] Where testing was not completed, there is no information as to whether those products met or did not meet customer specifications.
- [47] The audit identified 45 DMC customers from the automotive sector who purchased 391 products affected by delivery of Non-Conforming Products. Some customers identified during the review period, directly or through distributors, were OEMs, but the majority were Tier 1 parts suppliers, and a few were in Tier 2.
- [48] The standards not tested for, or not met, included inspection frequency as well as a range of issues such as size, shape (angle, flatness, roundness, cylindricity, etc.), oil adhesion, density, hardness, and surface roughness.
- [49] For some of the products it is not possible to determine the extent of deviation from customer specifications, if any. Some deliveries were treated as Non-Conforming Products because there were inconsistencies in the number sampled. In some instances, fewer samples were taken than required, while in others, more samples were taken than required.

G. The Punishment, Apology, and Compensation

- [50] As a result of the public disclosure of the defendants' misconduct, DMC, MAC, MCI, and the former presidents of MCI and DMC were charged with offences under the Japanese Unfair Competition Prevention Act, and fines were imposed by the Tokyo Summary Court.
- [51] The defendants also publicly apologized for their misconduct, and took various steps seeking to ensure that similar misconduct does not occur in the future.
- [52] The defendants worked with their customers in a safety verification process to confirm whether the Non-Conforming Products delivered during the review periods gave rise to any safety concerns. No safety concerns were raised by customers.
- [53] Some customers of MCI, MSC and DMC were reimbursed for some safety verification costs related to Non-Conforming Products, and one indirect purchaser asked for and received compensation. Aside from this, there is no evidence of direct customers seeking or receiving compensation as a result of the wrongdoing.

IV. THE CERTIFICATION TEST

A. Generally

- [54] The court has an important gate-keeping role requiring it to carefully screen proposed claims to ensure they are suitable for class action treatment:
- [117] The goal of the CPA is to be fair to both plaintiffs and defendants "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency."

Thorburn v. British Columbia, 2012 BCSC 1585, appeal dismissed, 2013 BCCA 480

- [55] The test for class certification is set out in s. 4 of the CPA:

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.

[56] The plaintiff bears the onus of satisfying each of the five certification requirements. The requirement for a cause of action is decided on the basis of the pleadings alone. For the balance, the plaintiff needs to show "some basis in fact" that the certification requirement is met.

[57] The certification stage does not require an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action. "[R]ather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [Pro-Sys] at para. 102, citing *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 65.

B. Do the Pleadings Disclose a Cause of Action?

Generally

[58] The pleadings test is akin to that used on an application to strike a proceeding under Rule 9-5(1) of the Supreme Court Civil Rules. A court will only refuse to certify the action on this ground if it is plain and obvious that the plaintiff's claim is bound to fail, assuming the facts alleged in the pleadings are true: *Pro-Sys* at para. 63; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [Babstock] at para. 19.

[59] In applying the pleadings requirement, the court must keep in mind the "cultural shift" mandated by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, which emphasizes "resolving questions of law by striking claims that have no reasonable chance of success": *Babstock* at para. 18. The *Hryniak* decision has been interpreted as giving judges "the power to be bold...to strike hopeless claims": *Bruno v. Samson Cree Nation*, 2020 ABQB 504 at para. 26. As Justice Brown states in *Babstock*:

[19] [A] claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the pleadings. This is because such claims present "no legal justification for a protracted and expensive trial". If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy.

[Citations omitted. Emphasis in original.]

[60] With this guidance and direction in mind, we turn to the causes of action plead in this case.

Breach of the BPCPA

Generally

[61] The BPCPA creates a civil cause of action for breaches of its prohibited acts: see ss. 4, 5, 8, 9, and 171.

[62] Given the restricted scope of the BPCPA, this cause of action is only pleaded on behalf of class members who purchased vehicles for purposes that are primarily personal, family or household.

[63] The defendants raise three challenges to this cause of action:

1. the defendants do not qualify as "suppliers" of "goods";
2. the allegation of unconscionability is inadequately pleaded; and
3. proposed class members outside of BC are not entitled to rely upon the BPCPA.

Are the Defendants Suppliers in a Consumer Transaction?

[64] The defendants accept that the BPCPA must be interpreted liberally in favour of consumers: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 37. The defendants also acknowledge that the BPCPA does not require privity of contract with the proposed defendant in order to be actionable: BPCPA, s. 1. Nonetheless, they argue that they are not "suppliers" of "goods" on the facts pleaded in this case.

[65] The BPCPA defines the relevant terms as follows in s. 1:

"consumer transaction" means

- (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
- (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

"goods" means personal property, fixtures, credit and prepaid purchase cards, but does not include a security as defined in the Securities Act or contracts of insurance under the Insurance Act

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

- (a) supplying goods or services or real property to a consumer, or
- (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 [Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit], includes a person who solicits a consumer for a contribution of money or other property by the consumer.

[66] Looking first at the definition of "supplier", there is no allegation that the defendants were engaged in "soliciting, offering, advertising or promoting" as provided for in subparagraph (b) of the definition. Hence, the plaintiff must rely on subparagraph (a), i.e. that the defendants are persons who participated in a "consumer transaction" by "supplying goods or services or real property to a consumer."

[67] The defendants do not provide "services" or "real property". This only leaves the supply of "goods".

[68] The definition of "supplier" embeds in it the requirement that there be a "consumer transaction". A "consumer transaction" means "a supply of goods for purposes that are primarily personal, family or household".

[69] The defendants argue that the "good" being supplied for personal purposes must be the vehicle. Car buyers are not, for example, purchasing extruded aluminum for personal use. Rather, they are buying a car. Put another way, the consumer is not buying a mere collection of parts, but rather a finished product. The finished vehicle is that "good".

[70] I find that the defendants' argument is logical and is supported by the language of s. 4(3)(a) (i) of the BPCPA, which provides as follows:

Deceptive acts or practices

4 (1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

- (a) an oral, written, visual, descriptive or other representation by a supplier, or
- (b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

- (2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.
- (3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
 - (a) a representation by a supplier that goods or services
 - (i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have

[Emphasis added.]

[71] This provision acknowledges a difference in character between a "good" and its "components". As such, with one exception discussed below, I find that the defendants only supply "components" later incorporated into the "good" that is the subject of the consumer transaction, being the vehicle itself.

[72] Even the plaintiff conceded that there must be a limit preventing an end user from pursuing BPCPA claims further and further up a supply chain ad infinitum. The real question is where to draw that line. An example of that limit is found in *Tracy v. Instalogs Financial Solution Centres (B.C.) Ltd.*, 2008 BCSC 669, where the court held in a payday loan class action that only the actual storefront companies could be liable under the BPCPA, and not the companies that simply provided staff and management services. The court held:

[72] I accept the defendants' submissions with respect to the Head Office Companies and individual defendants. The operative sections of the BPCPA and TPA are concerned with unconscionable practices of "suppliers" The Head Office Companies and individual defendants do not come within the definition of supplier in either the BPCPA or the TPA.

- [73] This interpretation does not undermine the consumer protection purposes of the BPCPA. The consumer still retains the right to pursue anyone who provided a vehicle that did not have the promised "performance characteristics", "components" or "benefits". The consumer also retains the right to pursue claims against any dealer with whom there was privity of contract under the Sale of Goods Act, R.S.B.C. 1996, c. 410 [SGA].
- [74] Nor does the interpretation necessarily immunize the defendants from the consequences of their wrongdoing. For example, if the OEM that sold the vehicle "good" was sued under the BPCPA, the OEM would retain the ability to claim over against the defendants. Similarly, in an SGA claim, the contractual chain could eventually reach the defendants. Finally, if a component was dangerous, the plaintiff may, under limited conditions, be able to bring an action directly against the defendants for negligence: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 at paras. 1-2 and 12, 121 D.L.R. (4th) 193; 1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2020 SCC 35.
- [75] The plaintiff admits there is no case directly on point contradicting the analysis above, but submits there are decisions which suggest the court should exercise caution in striking the claim at this stage.
- [76] In *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544, aff'd 2015 BCCA 353, a BPCPA claim was allowed to proceed beyond the pleadings stage against a drug manufacturer, even though there was a physician who prescribed the medication. The court stated:
- [74] The defendants argue that they are not "supplier[s]" to which the statute applies. While they acknowledge that privity of contract is not necessary under the BPCPA they submit that there is no "consumer transaction" between the defendants and a patient prescribed Propecia or Proscar because a learned intermediary is required (a doctor to prescribe the medication). Therefore there is a "lack of immediacy" in the relationship between supplier and consumer. They also claim because of this lack of immediacy the defendants are not suppliers under the BPCPA as they are not "soliciting" in respect of a "consumer transaction" because a consumer's choice to use the medicine is a decision between him and his doctor, not through advertisement. They submit that the product labelling is not primarily used to solicit, promote or advertise the medicine but rather is intended to provide information regarding risks and benefits of medicines to prescribing physicians. Accordingly, the defendants allege there is no statutory cause of action
- [86] As the transactions at bar ostensibly fit within the definitions set out in the case law, the question then becomes whether the lack of immediacy between the plaintiff and the defendants somehow takes them outside the scope of the BPCPA.
- [87] The BPCPA states that a supplier is someone who "participates in a consumer transaction by supplying goods to a consumer" or by soliciting "with respect to" a consumer transaction. On a plain reading "with respect to" does not require direct solicitations to a consumer, it merely requires that the solicitations be about or related to the consumer transaction

- [94] As such in my opinion the word "participates" is to be given a wide interpretation under the BPCPA. I find support for this view in *Robson v. DaimlerChrysler Corp.*, 2002 BCCA 354, where on appeal of the chambers judge's decision that the former Trade Practice Act did not include an American manufacturer the British Columbia Court of Appeal said that in introducing cars into the Canadian stream of commerce the US defendants ought to have known that they would be sold to consumers in Canada and that as a result there was an arguable case that they were suppliers under the Trade Practice Act. To a similar effect is *Reid v. Ford Motor Company*, 2003 BCSC 1632.
- [95] If the defendants are correct in their submission that immediacy is required, the purpose and effectiveness of the BPCPA would be thwarted. I conclude that a liberal construction must be applied to the "consumer transaction" at issue and that such a transaction includes one where a learned intermediary is involved. In addition, I am satisfied that the defendants are "suppliers" under the BPCPA. I note that recently in *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260, the British Columbia Court of Appeal certified a class action involving a prescription drug. The court was clearly alive to the learned intermediary issue in doing so, although its effect on the BPCPA was not addressed.
- [77] I find that this decision is of limited benefit to the plaintiff, as:
1. the defendants are not relying on an "immediacy" test; and
 2. the upstream drug manufacturer in *Miller* was supplying the precise "good" that eventually made its way into the plaintiff's medicine cabinet. The defendant was not simply a manufacturer of a component incorporated into the implicated drug.
- [78] The plaintiff also relies on *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286. In that case, a BPCPA claim was certified against the manufacturer of fireplace inserts. The class included persons who purchased homes with the insert already installed. The court stated:
- [231] On plain reading of the legislation, the definition of "consumer transaction," "consumer," and "supplier" are broadly framed. For example, the definition of "consumer" includes within its scope persons who are supplied goods by a supplier that are primarily for personal or family use. Although there is reference to the consumer having participated in a consumer transaction, as there is no requirement for privity of contract, the apparent intention is to focus on the goods supplied rather than on the transaction in which the good were acquired. Subsection (b) of the definition of "consumer transaction" also suggests a broad interpretation as it extends the reach of consumer transaction to solicitations, offers, and advertisements. Other sections of the legislation similarly suggest an expanded application of a "consumer transaction". For example, s. 4, in defining deceptive acts or practices under the statutes, states that a deceptive act or practice by a supplier may occur before, during or after the consumer transaction

- [237] Finally, as the plaintiffs note, the remedies under the BPCPA do not appear to require a party to have participated in an impugned consumer transaction. Section 171 states that any "person" who is injured due to a contravention of the BPCPA may bring a claim if they suffered harm from that contravention. While the defendants argue that s.171 uses the word "person" so that individuals with claims under other parts of the Act have a remedy (for example for breach of Part 7 of the Act), I find this submission unpersuasive. This interpretation would require person to have one meaning for part of the legislation and another for other parts.
- [238] I am not satisfied that the pleadings are deficient in including members of the subclass who did not purchase a fireplace directly from a defendant and in not pleading further material facts concerning the nature of the consumer transactions. I find that the plaintiffs' interpretation is not bound to fail and a determination of whether the BPCPA applies can be a common issue.
- [79] In my view, the ratio of Cantlie is that a subsequent homeowner may be able to rely upon a deceptive consumer transaction with a prior owner in order to ground the subsequent homeowner's own cause of action under the BPCPA. In Cantlie, the original homeowner would have bought the "good", being the fireplace insert, in its complete and final form. The court held the plaintiff did not need to have participated in the original impugned consumer transaction in order to recover. Here, subject to one exception discussed below, no one separately purchased components manufactured by the defendants.
- [80] The plaintiff also relies on Robson v. DaimlerChrysler Corp., 2002 BCCA 354. But in that certified paint delamination class action, it was not the manufacturer of the paint component that was sued, but the manufacturer of the vehicle good.
- [81] Hence, I conclude that, with one exception, the BPCPA claim should be struck.
- [82] The exception arises from the plaintiff's argument that their pleading should be read sufficiently generously to include claims by individuals who bought specific replacement parts separate and apart from the purchase of any vehicle. They allege that some of those parts may have come to the end consumer in the final form distributed by the defendants. Although the pleading in this respect leaves something to be desired, I allow that it could reasonably be amended to clarify this plea. From the perspective of this narrow claim alone, there is arguably the provision of a good, thereby triggering a claim included within the scope of the BPCPA. Had the claim been otherwise certifiable, I would have granted leave to amend to better particularize this aspect of the claim.

Unconscionability

- [83] Under the s. 9 of the BPCPA, a supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction. In determining whether an act or practice is unconscionable, s. 8 of the BPCPA provides that a court must consider all the surrounding circumstances of which the supplier knew, or ought to have known, including:
1. that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
 2. that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer's or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
 3. that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
 4. that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
 5. that the terms or conditions on, or subject to, the transaction the consumer entered into, were so harsh or adverse to the consumer, they were inequitable.
- [84] The defendants argue that there are no pleaded facts which support a claim in respect of unconscionable acts or practices. They rely on decisions striking such claims in *Consumers' Association of Canada v. Coca-Cola Bottling Company*, 2006 BCSC 863 at para. 88, aff'd 2007 BCCA 356, leave to appeal ref'd [2007] S.C.C.A. No. 464; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 91-93; and *Cantlie* at para. 250.
- [85] The plaintiff responds that unconscionable practices are not limited to the factors or examples listed in s. 8(3) of the BPCPA. On a narrow or a generous reading of the claim, they argue that there is a sufficient basis for the claim.
- [86] Disregarding the broader conclusion about the applicability of the BPCPA reached above, I find that the pleadings are sufficient to clear the low threshold required to advance the unconscionability claim, particularly in light of the language of ss. 8(3)(b) and (c). On the plaintiff's theory, the plaintiff would not have been apprised of the pricing of the components contained within the vehicle, and class members were arguably forced to pay more for their vehicle than would have been paid by others for similar goods. Furthermore, similar class claims have been certified "irrespective of whether the factors set out in subsection (3)(a), 3(b) and 3(d) are present in any individual case": *Pearce v. 4 Pillars*, 2019 BCSC 1851 at para. 196; *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213 at para. 72, aff'd 2007 BCCA 231.

Ability of Persons Outside BC to Rely on BPCPA

- [87] As noted, the defendants argued that class members outside of BC cannot rely on the BPCPA, given that it is a provincial statute.
- [88] Rather than require the court to address this argument, the plaintiff agreed they would not seek certification of BPCPA claims on behalf of anyone resident outside of BC at this time.

Unjust Enrichment

- [89] A cause of action for unjust enrichment is well established in Canadian law: *Garland v. Consumers' Gas Co.*, 2004 SCC 25.
- [90] The plaintiff has pleaded the necessary enrichment and corresponding deprivation. The plaintiff has also pleaded common law fraud or breach of the Criminal Code, R.S.C. 1985, c. C-46, both said to negate any juristic reason for the enrichment.
- [91] Section 380 of the Criminal Code provides as follows:

Fraud

380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
- (b) is guilty
 - (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
 - (ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

- (2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

- [92] Courts have certified claims for unjust enrichment where the unlawful act undercutting the juristic reason for any enrichment is a breach of a statute such as the Criminal Code: *Bodnar v. The Cash Store*, 2005 BCSC 1228 at paras. 38-40, *aff'd* 2006 BCCA 260 at para. 17; *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018 at paras. 49-50; *Bodnar v. Payroll Loans Ltd.*, 2006 BCSC 1132 at paras. 43-44; *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 58; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 [Godfrey].

- [93] The defendants argue that the lack of juristic reason plea is flawed, as all of the products were purchased pursuant to contracts with direct purchasers. They argue that these contracts are the juristic reason for any benefit, relying on *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002 at paras. 100-116, *aff'd* 2015 BCCA 260 at para. 66; and *Low v. Pfizer Canada Inc.*, 2014 BCSC 1469 at paras. 87-90, *aff'd* on this point, 2015 BCCA 506 at para. 101, leave to appeal dismissed, [2016] S.C.C.A. No. 55.
- [94] However, in neither of these decisions was it directly alleged that the defendant had committed fraud or acted contrary to the Criminal Code. In *Illeman*, it was alleged that there was a breach of the BPCPA, but the court found that this particular statute was a complete code, and hence, it could not be used to underpin an unjust enrichment claim (para. 113). In *Low*, there was a bare pleading that the contracts were "void because they are against public policy, illegal and based on mutual mistake" (para. 74).
- [95] The defendants also argue that although fraud is pleaded, fraud, whether criminal or not, only makes the underlying contract voidable. Given that there is no pleading that the defendants' direct customers ever sought to void the contract, the fraud committed against the customers cannot be used to undermine the existence of a juristic reason.
- [96] However, the above argument is directly undercut by the decision of Justice Strathy, as he then was, in *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, where in upholding certification of an unjust enrichment issue, he stated as follows:
- [328] [T]he defendants say that there is a juristic reason for the enrichment, namely a valid contract between the donors and ParkLane and Donations Canada Financial Trust
- [331] The question of whether the contracts are sufficient juristic reasons for the enrichment of ParkLane and Donations Canada Trust will depend upon whether they are found to be valid and enforceable, an issue that is likely to be capable of determination on a common basis. If the contracts are rescinded or voidable, the contracts cannot serve as "juristic reason" for the enrichment of the contracting party: *MacKinnon v. Ontario Municipal Employees Retirement Board et al.* (2007), 2007 ONCA 874 (CanLII), 88 O.R. (3d) 269, [2007] O.J. No. 4860 at para. 82; *Windisman v. Toronto College Park* (1996), 1996 CanLII 8108 (ON SC), 28 O.R. (3d) 29, [1996] O.J. No. 552 (Gen. Div.) at para. 69; *Larson v. Charron*, 2007 BCSC 675, [2007] B.C.J. No. 1012; *Metzler Investment GMBH v. Gildan Activewear Ltd.*, [2009] O.J. No. 5695 (S.C.J.) at para. 30, referring to *Windisman v. Toronto College Park*: "a contract rendered unenforceable by law or equity does not qualify as a juristic reason for the purposes of the test for unjust enrichment."
- [97] Given this reasoned authority, I cannot say that it is plain and obvious that the unjust enrichment claim will fail.

Unlawful Means Tort

- [98] The existence of the unlawful means tort has been confirmed by the Supreme Court of Canada. In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 [Bram], the court stated:
- [23] The unlawful means tort creates a type of 'parasitic' liability in a three party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party) There is no dispute here that this is an intentional tort; the focus of the dispute in this case is on the unlawful means element
- [28] At its core, however, the tort has two key ingredients: intention and unlawfulness. The gist of the tort is the intentional infliction of economic harm by unlawful means.
- [99] In their Notice of Civil Claim ("NCC"), the plaintiff pleads that the defendants acted fraudulently and unlawfully against OEMs and other direct purchasers. Those direct purchasers would potentially have causes of action against the defendants as a result. This satisfies the first aspect of the test. As the Supreme Court of Canada stated in *Bram*:
- [76] I conclude that in order for conduct to constitute "unlawful means" for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct.
- [100] The key debate between the parties was over the required element of intent. In *Bram*, the Supreme Court of Canada describes this element as follows:
- [95] The Court of Appeal of England in *Douglas v. Hello! Ltd.*, [2005] EWCA Civ 595, [2005] 4 All. E.R. 128, one of the appeals heard with *OBG*, identified five types of intention which might be relevant in this context: (a) an intention to cause economic harm to the claimant as an end in itself; (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive; (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm; (d) knowledge that the course of conduct will probably cause the claimant economic harm; (e) knowledge that the course of conduct undertaken may cause the claimant economic harm coupled with reckless indifference as to whether it does or not: para. 159. In my opinion, the first two of these species of intention represent the core intention required for the unlawful means tort. They describe cases in which the tortfeasor is "aiming at" or "targeting" the plaintiff It is the intentional targeting of the plaintiff by the defendant that justifies stretching the defendant's liability so as to afford the plaintiff a cause of action. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that

harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition.

[96] Goudge J.A. put this point aptly in *Alleslev-Krofchak*, where he summarized the House of Lords' discussion in *OBG*:

... intentional interference with economic relations requires that the defendant intend to cause loss to the plaintiff, either as an end in itself or as a means of, for example, enriching himself. If the loss suffered by the plaintiff is merely a foreseeable consequence of the defendant's actions, that is not enough. [para. 50]

[97] In my view, this narrow approach to intention is consistent both with the policy concerns relevant to this area of law as well as the underlying "liability stretching" rationale for the tort. It is an important safeguard against attaching liability to vigorous but lawful competitive behaviour. Economic harm to a competitor is often a foreseeable consequence of such behaviour. Mere foreseeability of such harm does not meet the requirement for intention in the unlawful means tort.

[101] The plaintiff pleads that "[the defendants] intended to cause economic harm to the Plaintiff and Class Members as a necessary means of enriching [themselves]": *NCC*, at para. 32. The claim also pleads that the defendants represented "[their] Non-Conforming Products met the Standards" and charged prices on that basis "knowing that the cost would be passed on to consumers": *ibid.*

[102] The defendants argue that the plaintiff has not properly pleaded the intent element. The defendants say that the British Columbia Court of Appeal has recently held that a pleading of "targeted malice" is required.

[103] In *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201, the Court of Appeal stated:

[166] As the judge stated, the Supreme Court of Canada clarified the narrow bounds of the unlawful means tort in *A.I. Enterprises Ltd.* In summary, the tort is available in three-party situations in which the defendant commits an actionable unlawful act against a third party and that act intentionally causes economic harm to the plaintiff (at para. 5). The relevant intention is "targeted malice". As Justice Cromwell explained, incidental economic harm is part of market competition and, therefore, the fact that the plaintiff suffers harm as an incidental consequence of the defendant's conduct, even where the defendant realizes such harm will likely result, is not sufficient to establish liability (at para. 95).

[167] In my view, the judge erred in applying the test for liability for the unlawful means tort. There was nothing unlawful in any Crown defendants' conduct that provided Sunbelt or Snowcap with a civil claim and, as the appellants point out, even if there was, it caused no one any loss. More importantly, there was no evidence, direct or circumstantial, of any targeted malice directed at Rain Coast. It follows that I would set aside the liability finding for the unlawful means tort.

[Emphasis added.]

[104] It is correct that the plaintiff has not expressly pleaded that there was "targeted malice." That said, I am troubled by the cited excerpt from the Court of Appeal's decision in *Rain Coast Water*. The Supreme Court of Canada in *Bram* framed the intent requirement for this tort clearly and unambiguously. The Court of Appeal arguably added an element of "malice" not present in the Supreme Court of Canada's formulation. It is possible that this term may have crept into the Court of Appeal's discussion because the court had just completed its review of the test for the tort of misfeasance in public office, which clearly does have a "targeted malice" requirement. This was the key tort being relied upon by the plaintiff in *Rain Coast Water*. In discussing the misfeasance tort, the Court of Appeal stated as follows:

[152] The tort of misfeasance in public office has two distinct branches, commonly referred to as Category A and Category B misfeasance. As Justice Smith explained in *J.P.*, the two branches share common elements: i) deliberate unlawful conduct by a public officer in the exercise of his or her powers; and ii) knowledge that the unlawful conduct is likely to injure the plaintiff. As to the latter, she said this about the requisite mental elements:

[326] Category A misfeasance is established when a public officer exercises his or her power for the specific purpose of harming the plaintiff. *Three Rivers* described it as "targeted malice" that includes conduct done for the ulterior or improper purpose of harming the plaintiff. Proof of the specific intent to harm the plaintiff will be sufficient to establish that the public officer had knowledge his or her conduct was likely to harm the plaintiff: *Odhavji* at para. 23 .

[Emphasis added.]

[105] I have located no other case decided since *Bram* that has framed the intention test for the unlawful means tort as requiring "targeted malice".

[106] If the Court of Appeal simply intended that the term "targeted malice" mean the equivalent of the Supreme Court of Canada's formulation in *Bram*, then I am content that the plaintiff's pleading of intent is sufficient to satisfy the Supreme Court of Canada's formulation. In this respect, I note the plaintiff's limited ability to plead particulars of the intention at this early stage of the proceeding. As the court noted in *Great Oak v. S & T Accounting*, 2018 ONSC 5934:

[12] It is true that the statement of claim does not specifically plead that the defendants intended to injure the plaintiff. However, a subjective intention is commonly proven by circumstantial evidence as seldom there is direct evidence of such an intention. In this case, what is pleaded is that the defendants did specifically target the plaintiff. It is not being pleaded that the defendants' economic activity for its own benefit was based upon a broader marketplace strategy such as simply copying the plaintiff's reports. It is pleaded that in December 2017, the defendants specifically approached firms that referred claimants to the plaintiff for the preparation of reports. They did so with marketing materials that [were] false or misleading

by affiliating S & T's service as those of the plaintiff's. They used a report that reproduced the look, feel, organization, and layout of the plaintiff's reports as a part of S & T's campaign to drive the plaintiff's clients to S & T. Based on these facts, it is not a great leap to infer an intention on the part of the defendants to injure the plaintiff. At this stage of the action, a more detailed pleading about the intent of the defendants is not required: Paton Estate at para. 47. I note parenthetically that if this was the only deficiency in the pleading, leave to amend would have been assured and the pleading could have been amended readily and forthwith.

[Emphasis added.]

See also *Imola v. Dundee Securities Ltd.*, 2019 ONSC 1715, paras. 29-30.

[107] I am also comforted in my approach by Justice Smith's decision in *Low* [rev'd on other grounds]. In that case, consumers of Viagra alleged that Pfizer wrongfully obtained a patent for Viagra, preventing competitors from selling generic versions. The court found that the unlawful means tort was adequately pleaded, stating:

[53] Pfizer argues that it was not intending to harm purchasers, but intending to protect its legitimate interest in the manner allowed by the applicable legislation. Pfizer's intention at the relevant time is a question of fact that cannot be resolved on this application. At this stage, it is sufficient that the plaintiff explicitly pleads that Pfizer intended to cause him and other Class Members economic harm.

[54] In view of the low threshold that the plaintiff must meet on this application, I cannot say that he has failed to state a cause of action in interference with economic relations, or that his claim is "certain to fail."

See also *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, and *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270, paras. 26-28, where an unlawful means tort claim was also certified.

[108] If, on the other hand, the Court of Appeal in *Rain Coast Water* did intend to heighten the pleading requirement through its use of the term "targeted malice", I find that I am bound to follow the Supreme Court of Canada's decision, particularly given:

1. that the Court of Appeal's discussion of the unlawful means tort was technically obiter given the court's determination of a preliminary limitations issue (para. 144);
2. the Supreme Court of Canada's concern in *Bram* about having the test for this tort turn on "malice" alone, given its vague nature and the corresponding potential for such a test to depend on the "idiosyncrasies of individual judges" (para. 33); and
3. Section 52 of the Supreme Court Act, R.S.C. 1985, c. S-26, making the Supreme Court of Canada's decisions "final and conclusive".

[109] If I am wrong in this approach, and it is found that I should have required a heightened "targeted malice" pleading standard, I would have granted the plaintiff's request for leave to amend to bring the pleading into compliance with the test in *Rain Coast Water*, particularly given that the NCC was prepared prior to the Court of Appeal's decision in *Rain Coast Water*.

Waiver of Tort

[110] The plaintiff accepts that this plea can no longer be advanced in light of the Supreme Court of Canada's decision in *Babstock* (see paras. 30-35).

Conclusion on the Causes of Action

[111] The claim under the BPCPA is struck, save for the exception for direct parts purchases above. The aspects of the NCC raising waiver of tort shall also be struck. However, I conclude that it is not plain and obvious that the remaining causes of action for unjust enrichment and the unlawful means tort will fail.

C. Is there a Proper Class?

[112] Section 4(1)(b) of the CPA requires that there be an identifiable class of two or more persons. The Supreme Court of Canada, in *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 [Dutton], describes the requirement for an identifiable class as follows:

[38] First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria. [Citations omitted]

[113] The plaintiff initially proposed the following class:

All persons in Canada who purchased or leased a new or used vehicle manufactured by Toyota (including Lexus), Honda (including Acura), Subaru, Suzuki, Mazda, or Mitsubishi, between 2002 and 2018.

[114] In their written argument on certification, the plaintiff proposed the following definition:

All persons in Canada who purchased a new vehicle or motorcycle manufactured by Toyota (including Lexus), Honda (including Acura), Subaru, Suzuki, Mazda, Mitsubishi, Isuzu, Hino or Yamaha between 2002 and 2018.

- [115] During oral argument, the plaintiff sought to amend the proposed class definition once again, by adding a further manufacturer, Nissan.
- [116] There is no dispute that the defendants' automotive products have been used by the identified OEMs. I accept that the definition is objective. The defendants' affidavits also provide the required "some basis in fact" to support the class definition given it is clear that at least some shipments to the OEMs likely included Non-Conforming Products.
- [117] It is clear that the class definition is over-inclusive, as not all vehicles covered by the class will have contained the defendants' parts. Further, it is clear that not all of the defendants' products in each vehicle were non-conforming. However, given the nature of the case and the evidentiary challenges faced by the plaintiff at this early stage of the proceeding, I accept that the definition is no more over-inclusive than necessary on the presently available evidence.
- [118] In terms of identifiability, the defendants do not argue that class members would necessarily be unable to track whether their vehicle contained any products manufactured by the defendants. They simply note that it would be a complex exercise and may not be possible in every case.
- [119] The defendants do argue that the class definition is still flawed given that it includes former owners of vehicles. However, I accept that the approach to "pass-through" adopted by the Supreme Court of Canada in *Pro-Sys* provides a legal basis supporting the inclusion of former owners, given that some of any alleged overcharge may have "stuck to" former owners, even as they sold the vehicle on to a new owner.
- [120] In sum, I accept that the proposed class definition is not, in and of itself, a basis for refusing certification. That said, I preview here that the scope and breadth of the class has a negative impact on the ability to satisfy the remaining elements of the certification test.

D. Are there Common Issues?

- [121] To satisfy s. 4(1)(c) of the CPA, the action must raise common issues of fact or law. Such issues do not have to be determinative of liability. However, the issues do need to advance the litigation in a material way for the benefit of class members. The essence of a common issue is that it be a substantial ingredient of each class member's claim: *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 at para. 41; *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at para. 24; *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, 98 B.C.A.C. 22 (C.A.) at para. 53, leave to appeal ref'd [1998] S.C.C.A. No. 13.
- [122] The commonality requirement is described by the Supreme Court of Canada in *Dutton* as follows:
- [39] ...[T]here must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as

a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim

[Emphasis added.]

[123] The plaintiff proposes the following common issues:

- a. Did the defendants fraudulently alter quality control certifications for their automotive products?
- b. Did the defendants breach the BPCPA?
- c. Has the safety or durability of the defendants' automotive products been compromised?
- d. Did the defendants commit the tort of unlawful means?
- e. If the defendants are found liable to the class, should the court make an aggregate award and, if so, in what amount?
- f. Were the defendants unjustly enriched by their conduct and, if so, should the court order restitution or disgorgement, and in what amount?
- g. Is the defendants' conduct deserving of an award of punitive damages and, if so, in what amount?
- h. What is the appropriate distribution of damages or disgorgement to the class, and should the defendants pay the costs of distribution?
- i. Are the defendants liable to pay interest on the award?

I analyze the commonality of each of the proposed issues below.

- (a) Did the defendants fraudulently alter quality control certifications for their automotive products?

[124] The defendants complain that this issue is framed at the highest level of abstraction. I agree. As the court stated in *Mackinnon v. National Money Mart Company*, 2005 BCSC 271:

[27] The common issues have an appearance of commonality because of the generality with which they are stated. If the common issue is restated in the manner in which it must be addressed, it becomes apparent that it is not a common issue. For example, common issue 1 would be (for only one fee of one lender in one type of loan): does the documentation fee charged by Instalogs in its inheritance loan standard form agreement constitute interest?

- [125] Notably, the plaintiff concedes that there could not be a single answer for all components manufactured by all defendants. The analysis would, at best, have to be performed on a product-by-product basis. Hence, at a minimum, this first question would have to be reformulated as follows:
- (a) Did the defendants fraudulently alter quality control certifications for some of their automotive products? If so, which ones and for what period?
- [126] However, the problems with this question run deeper than reflected by this potential amendment.
- [127] While it is true that nuanced answers can be given to a common question, the difficulty in this case is that there is little unifying the pursuit of the answer from product to product, or shipment to shipment.
- [128] The plaintiff does not plead that there was overarching systemic wrongdoing in relation to all products across all defendants. Although the plaintiff pleads that the defendants operated as a joint enterprise, he does not allege that a boardroom-level decision was taken by the parent company to start falsifying test results across all subsidiaries. There is no single conspiracy alleged across the defendants. Rather, on the evidence, it appears that any fraud was made levels down from the parent company's boardroom.
- [129] This lack of an allegation of overarching systemic wrongdoing sets this case apart from the systemic negligence sexual abuse cases certified in *Rumley v. B.C.*, 2001 SCC 69, and others.
- [130] It also sets the case apart from the price-fixing cases where plaintiffs allege a single overarching conspiracy across all defendants.
- [131] The plaintiff nonetheless seeks to rely on the following statement by the Supreme Court of Canada in the Godfrey price-fixing class action:
- [120] It should be borne in mind that the trial judge, following the common issues trial, might reach any one of numerous possible conclusions on the question of whether the class members suffered loss. For example, the trial judge might accept Dr. Reutter's evidence that all class members suffered a loss, in which case it would be open to the trial judge to use the aggregate damages provisions to award damages to all class members. Alternatively, the trial judge might conclude that no purchasers suffered a loss -- for example, if the trial judge does not accept that Dr. Reutter's methodology demonstrates that loss reached the direct and indirect purchaser levels. Were that the case, the action would fail. Or, it might be that the trial judge finds that an identifiable subset of class members did not suffer a loss, in which case the trial judge could exclude those members from participating in the award of damages, and then use the aggregate damages provision in respect of the remaining class members' claims. Finally, the trial judge could accept Toshiba's argument that some class members suffered a loss and some did not, but that it is impossible to determine on the expert's methodology which class members suffered a loss. In such a case, individual issues trials would be required to determine the purchasers to whom

Toshiba is liable and who are therefore entitled to share in the award of damages. At the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach. I outline these possibilities and the availability of aggregate damages merely to provide guidance.

- [132] However, in *Godfrey*, there was at least some hope on the part of the plaintiffs at the outset that there would in fact be a single finding in favour of the entire class. Here, such a finding is admittedly not possible. In this case, it is not an issue of simply providing a nuanced answer to a single common question. Rather, the court would need to provide separate answers to separate questions.
- [133] Even within a single product, whether there were testing problems is not universal over the Class Period. Instead, the evidence shows that testing problems applied only to certain shipments of a single product. As such, at best, the proposed issue would have to be analyzed on a shipment-by-shipment basis. Given that there were hundreds of products, it is not far-fetched to presume that the number of shipments could be in the tens or hundreds of thousands. For example, 500 products with 1,000 shipments each would mean there would be 500,000 shipments to evaluate.
- [134] A common issue should be one in which all class members at least have an interest. The problem here is that, for example, Class Member #24,567, with a vehicle containing Part #357 from Shipment #106,454, has no real legal interest in whether Class Member #264,568, with Part #957 from Shipment #23,456, succeeds in establishing fraud in relation to the testing protocol used for the latter shipment. As such, it cannot reasonably be said that answering the question for the first class member "is necessary to the resolution of each class member's claim."
- [135] This distinguishes the present situation from cases such as *Reid v. Ford Motor Company*, 2003 BCSC 1632, where a single and universal alleged design defect applied across multiple vehicle models, and "all proposed class members [had] an interest in determining whether [the TFI module] placement was defective or negligent": paras. 2, 43-44 and 51.
- [136] I find that this case is more akin to the situation faced by the court in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3692 (Div. Ct.), where the chambers judge rejected certification of a case alleging problems with 20 different models of cameras manufactured and distributed by the defendants:
- [171] This brief review demonstrates the need for the plaintiff to demonstrate on certification some factual basis for the proposition that the product owned by the plaintiff shares a common defect with the products owned by all members of the class. The plaintiff need not establish that the defendant is liable for the defect, but it must be shown that the defendant's liability to the class can be extrapolated from a finding in relation to the representative plaintiff.

- [172] Thus, in *Chase v. Crane Canada*, there was evidence of an unusually high failure rate amongst toilet tanks manufactured at a particular plant and expert evidence linking the failure to the process employed at that plant. In *Bondy v. Toshiba* and *Griffin v. Dell*, there was evidence that the plaintiffs' computers were shutting down or otherwise failing to perform in normal operating conditions and there was expert evidence linking those failures to deficiencies in design that were shared with other computers in the class. In both cases, there was a factual foundation for the proposition that findings concerning the plaintiffs' computers could be extrapolated to all the computers at issue. In *Koubi v. Mazda Canada*, the actions taken by the manufacturer, which applied to the entire class, helped to establish that there was a defect and that it was common to all the vehicles at issue.
- [173] On the other hand, in the cases that were not certified, the evidentiary record did not establish a basis in fact for the common issues. In *Chartrand v. General Motors*, the defect in the plaintiff's vehicle had not been established and there had been no recall of automatic transmission vehicles, which met all relevant standards. There was no evidence that the alleged defect could be determined on a class-wide basis. Similar conclusions were reached in *Poulin v. Ford Motor Co. of Canada* and *Ernewein v. General Motors of Canada Ltd*.
- [262] The obstacle to certification of the proceeding is the absence of admissible evidence to show that the plaintiffs' claims give rise [to] common issues of fact. As I have noted, there is no evidence to show that the E18 Error message displayed by the plaintiffs' cameras is caused by a defect. Nor is there evidence to show that the answer to this question can be extrapolated from the plaintiffs' cameras to the Cameras of the class in such a way as to advance the resolution of every class member's claim.
- [264] Moreover, there is no evidence that liability for the defect, if there is one, in the twenty Canon PowerShot models referred to in the statement of claim, can be determined on a common basis. The evidence of Mr. Hieber is that while there is a similarity in the basic design of the PowerShot cameras and the cameras have some common features, there are differences in their design and construction. There is no evidence to show that the similarities are such that the causes of the E18 Error can be determined on a common basis.
- [281] There is no evidence at all that the plaintiffs' cameras have a "defect." Nor is there any evidence to establish a factual basis for the proposition that all Cameras in the proposed class share the same defect or that the defendants' liability for that defect can be established on a common basis.
- [Emphasis added.]
- [137] A similar concern prevented certification in *Benning v. Volkswagen Canada Inc.*, 2006 BCSC 1292, where the plaintiff asserted a defect in the locking system of the defendants' vehicles. The court rejected certification because it was impossible to extrapolate the results of the analysis of the fitness of the lock on the plaintiff's vehicle to other vehicles in the class, because the nature of any attempted theft would vary from vehicle to vehicle (paras. 84-85).

The same type of difficulty prevented certification in *Poulin v. Ford Motor Co. of Canada* (2006), 153 A.C.W.S. (3d) 30, 35 C.P.C. (6th) 264 (Ont. S.C.J.) at para. 67, and *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 34.

- [138] The breadth and number of necessary evaluations is highlighted by the fact that the plaintiff does not even tie himself down to the evaluation of products or categories of products identified in the Final Report. The plaintiff confirmed that he wished to leave open the possibility that he will pursue a finding of wrongdoing in relation to other products as well. Further, he seeks to pursue wrongdoing for time periods beyond the audits that underlie the Final Report. The plaintiff suggested that the evaluation of any additional products might be limited to performing a "paper review", but their pleading is not so limited. The NCC states baldly and broadly:
27. The Plaintiff and Class Members' vehicles contain or contained parts or replacement parts manufactured using Non-Conforming Products from MMC on which Unauthorised Alterations had been done.
- [139] The breadth of this claim degrades its commonality. Would a class member with Part #545 from Shipment #9,456, already admitted to having been "offside" in the Final Report, want their counsel or their expert wasting time and money chasing down whether Part #123 from Shipment #3,225, not identified in the Final Report, also failed to meet testing standards?
- [140] I find that this first question does not qualify as a common issue given that its formulation fails to recognize that the question of whether a wrong occurred can only be answered on a shipment-by-shipment basis. As the Court of Appeal in *Ernewein* stated:
- [32] The ability to generalize, or extrapolate, from one plaintiff's vehicle to another, is crucial to the existence of a common issue.
- (b) Did the defendants breach the BPCPA?
- [141] This proposed common issue raises all the same concerns in relation to issue (a) above, and hence also fails to qualify as a common issue.
- [142] The defendants raise an additional concern with this issue.
- [143] The BPCPA does not apply unless a vehicle was purchased for personal, family or household purposes, which is admittedly going to require an individual evaluation. That said, given that there are at least some class members who will certainly meet this test, I accept that our courts have generally tolerated the existence of this particular complication when certifying BPCPA breach issues, leaving it to class members to fit themselves within the BPCPA's scope at the individual issues stage of the proceeding: see for example *Jiang v. Peoples Trust Co.*, 2017 BCCA 119 at paras. 89-94 and *Reid* at para. 68

- [144] While not fatal in terms of preventing certification as a common issue in and of itself, this additional complication does increase the individuality of the claim in a way that makes the case less preferable as a class action, as discussed further below.
- (c) Has the safety or durability of the defendants' automotive products been compromised?
- [145] During the course of the hearing, the plaintiff abandoned this issue.
- (d) Did the defendants commit the tort of unlawful means?
- [146] This issue faces the same challenges as common issue (a). Any wrongdoing will not be determinable on a common basis, but rather will have to be determined on a shipment-by-shipment basis.
- (e) If the defendants are found liable to the class, should the court make an aggregate award and, if so, in what amount?
- (f) Were the defendants unjustly enriched by their conduct and, if so, should the court order restitution or disgorgement, and in what amount?
- [147] These two issues seek determination of whether the class suffered a loss that can be determined through a common issues trial.
- [148] Courts have indicated that class members must propose a workable methodology in order to certify an aggregate damages common issue, and that the methodology must be sensitive to the type of claim advanced: Ewert, at paras. 133-135 and 140.
- [149] Here, the plaintiff has proposed a methodology akin to that used in price-fixing cases. The plaintiff intends to argue that the initial direct purchaser paid too high a price for the Non-Conforming Product. The plaintiff then argues that proper testing has economic value to the direct purchaser, and correspondingly represents a cost if not performed. Hence the direct purchaser paid more for the component than it is actually worth. The cost represented by the absence of proper testing will be passed down the chain of distribution the ultimate consumer.
- [150] The plaintiff's expert, economist Dr. Douglas Allen, suggests that he should be able to calculate an "overcharge" paid by direct purchasers, and that he can then demonstrate that this "overcharge" was passed through to class members. However, Dr. Allen's approach suffers from tensions that shred the metaphorical rope purporting to tie all class members together.
- [151] First, for any given vehicle, a class member would have to prove that a product manufactured by the defendants was actually used in manufacturing that vehicle. Some of the challenges in this respect were reviewed in our evaluation of the first proposed common issue.

[152] Second, it would then be necessary to prove that the particular shipment of that particular product was, in fact, "non-conforming". As noted, the defendant provided examples where the percentage of product found to be non-conforming was as low as 1.4%. As such, there could be a "needle in a haystack" element to this part of the assessment.

[153] Next, the court would need to consider the nature of the non-conformity. As discussed above, an array of potential failures were identified in the Final Report, some of which could conceivably affect the price, value or durability of the vehicle, and others which may not. Examples include:

1. Testing by uncertified persons: If a defendant were able to show that the employee who performed the testing was still competent, even though uncertified, then presumably there is little prospect of the class member establishing a compensable loss.
2. Shipping product that fell below the testing protocol: If the direct purchaser was prepared to testify that their written standard was higher than required to ensure safety and durability, this would again reduce the prospect that any class member will have suffered a compensable loss.
3. The standard not met was a government standard that was stricter than that required by the purchaser: Again, it is difficult to see how a loss could have been suffered in such a case.
4. A testing failure due to the fact that too many samples were taken: This will be another situation where it will be very difficult to establish that any harm was done to the ultimate purchaser.
5. No record kept of the extent of deviation from the specification: It may be possible, in some cases, to test the part today to determine if there are residual safety or durability concerns. If not, the class members' case may become more difficult.
6. Failure to perform any test at all: If the defendants can show that the purchaser's manufacturing process was such that the purchased part was eventually rendered safe and durable, then there is presumably little prospect for the class member to have sustained a loss.

[154] The opinion evidence of the defendants' automotive expert, Dr. Michael Stevenson, demonstrates the individuality of the inquiry involved for a class member to prove that any testing deviation has had an effect on the vehicle's price, safety or durability. For example, Dr. Stevenson opines that:

If a raw automotive metal product [meaning a material that will be further processed or incorporated into a component or assembly] is nonconforming, it does not preclude that automotive metal product from being processed to achieve the desired final properties and, therefore, performance characteristics that meet expectations.

[155] Dr. Stevenson provided evidence on the limits to which conclusions can be drawn regarding performance, safety, or durability as follows:

Failure to meet specifications at the raw material level, versus at the component, assembly, or vehicle level, must be evaluated individually and in the context of the particular products involved. When raw materials fail to meet specification, that is only of consequence when it impairs the ability of the products to be manufactured from those materials and to ultimately meet the final product specifications. At the product level, there is an individualized engineering analysis required that is balanced by the design considerations for the finished products. Specifications for a product may include robust design margins that are intended to accommodate variations in production such that even a failure to meet product level specifications may not impede the actual performance of the component in an actual automobile.

In most circumstances, individualized engineering analysis of each automotive metal product is required in order to determine whether or not a property variation is impactful to the safety, performance and/or durability of the automotive component, assembly, or vehicle. Such an analysis would require consideration of many factors including: the reason for the material property specification, the nature of changes to the property during processing, the purchaser's position in the supply chain, the type and magnitude of the nonconformity, the final application of the product, and the downstream testing/modeling of the component, assembly and/or vehicle into which the initially nonconforming material is incorporated.

[156] The plaintiff's automotive expert, Dr. Dimitry Sediako, does not disagree with this basic proposition, i.e. that deviations from specifications in raw materials do not preclude an automotive product from being processed to achieve the desired final properties. Indeed, Dr. Sediako acknowledges that the assertion that a range of starting points can all result in a final product that meets the expected material performance parameters, is "partially true".

[157] Dr. Sediako also accepts that, in order to determine whether the Non-Conforming Product works just as well as promised, a detailed analysis may be required. Dr. Sediako states the following (replying to Dr. Stevenson):

Dr. Stevenson: In most cases, to completely evaluate the effect of a raw material property deviation on the finished material performance on the component, assembly, and vehicle levels would be a complex, costly, and time-consuming endeavor, and in some cases may be impossible based upon the available data and hardware.

[Dr. Sediako]: This statement is correct, but that is yet another reason we have the standardized specifications in place and the supply-chain producers must meet the specs. That is why you have to have full confidence in the properties of the raw material.

[158] The experts generally agree that quality affects price. However, the assessment of the quality of each shipment will vary from shipment to shipment. Once again, this distinguishes this case from the price-fixing class actions, where the quality of a uniform

product is generally assumed to be fixed. In a typical price-fixing case, a single product is the subject of a single conspiracy amongst several nominal competitors. Here, we are dealing with numerous products, produced by multiple manufacturers, which are subject to disparate testing issues.

- [159] A credible and plausible methodology must be capable of proving "common impact" that is "common to all the members of the class": Pro-Sys at para. 115. The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question: Pro-Sys, para. 118. Here, the facts are such that any analysis would have to be, at best, conducted on a shipment-by-shipment basis. Dr. Allen never truly wrestles with the implication of this reality, i.e. that the analysis for one shipment cannot be extrapolated to members of the class whose vehicles contain parts from other shipments.
- [160] Dr. Allen also fails to recognize the scope of the action proposed by the plaintiff. He appears to assume that it is limited to products already found to have been non-conforming when he states: "My understanding is that Mitsubishi Materials Corp et al. know which transactions involved misconduct and to what extent " As noted above, the plaintiff is not restricting his claim to products already accepted to be non-conforming.
- [161] The defendants' economist, Dr. Mark Israel, notes further problems with Dr. Allen's proposed methodology. He opines that Dr. Allen's approach is built on the "flawed premise that he can treat actions regarding product quality, and information about that product quality, as equivalent to a price overcharge." Dr. Israel states that:

This is simply wrong as matter of economics: A buyer receiving a faulty product or faulty claims that a product meets a particular specification is obviously not the same thing as that buyer paying an overcharge. It is not the case that there are two sets of products--those in and out of specification--each with their own prices and that direct purchasers received out of specification products at (higher) in-specification prices. Rather, direct purchasers negotiated a particular price and specification for a product and, although they paid the negotiated price, they may have received a product that did not (or had not been shown to) meet the specifications. The economic harm--if any--to a given direct (or indirect) buyer in such a case is the inherently individualized amount by which the failure to meet specification or to provide information on whether the product met specification affected that particular buyer's experience with the product and how much (if any) that particular buyer valued any such effect [footnote omitted]. This is not a case in which one could theoretically say "every buyer paid \$10 too much;" rather in this case, one would first have to determine whether the particular product purchased by a given buyer was even affected by a defect or misinformation. And even if the buyer's product was affected, the buyer may or may not have been made worse off as a result, depending on how that buyer valued the quality difference or misinformation about the quality. Dr. Allen provides absolutely no methodology to determine instances when a quality defect or misinformation about quality occurred, and no methodology for assessing these quality effects on customers. In fact, given that quality effects are inherently individualized--as the economic literature recognizes--I see no way he could do so on a basis common to the class

These issues affecting whether or not any harm occurred are specific examples of a general point in economics: The economics of quality competition are quite different from those of price competition because of the heterogeneity across consumers in their valuation of quality [footnote omitted]. Given that such valuations are inherently individualized--as economic literature recognizes--I see no way that Dr. Allen could provide a methodology to assess economic harm due to these factors on a basis common to the proposed class.

[Emphasis added.]

[162] In his supplementary report, Dr. Allen accepts that, in his initial report, the analysis presumed that there was only one product involved. Dr. Allen accepts in his supplementary report that: "[i]n implementing this strategy it will be necessary to determine which products were affected".

[163] Beyond the need to actually run the analysis on a product-by-product basis (or more accurately, a shipment-by-shipment basis), Dr. Allen's approach also buries much of its complexity inside the variables that make up his formulae. He suggests that "[e]stimating the pass-through is relatively simple", but then proposes the following formula for analyzing the supply chain stage from an OEM to their dealer:

,

Where is the OEM's cost of the automobile, are the other variables that influence the price of a car (such as per capita GDP), and is the error term. [Footnote omitted.]

[164] Plaintiff's counsel confirmed that the variable ID embeds certain aspects of individual complexity, such as the potential that prices for a particular automobile's price could be "sticky" i.e. that a small discount on a single component may not cause the OEM to change the price of the car at all. The same "catch-all" ID variable is used in the later stages of the analysis required to calculate the loss incurred by the customer, and contains further complexity. For example, the plaintiff concedes that the extent to which a class member is able to negotiate a better price for their vehicle may need to be incorporated into the analysis, presumably through this magical ID variable.

[165] Although a similar methodology may have been approved in price-fixing cases, the complexity is multiplied in a case such as this, which seeks to cover so many products, and so many shipments, in a single action.

[166] Hence, I conclude that the plaintiff has not put forward a credible methodology that would allow the determination of the proposed aggregate damages common issues.

(9) Is the defendants' conduct deserving of an award of punitive damages and, if so, in what amount?

- [167] Given that there is no overarching wrongful conduct alleged, the entitlement to punitive damages would also have to be analyzed on a shipment-by-shipment basis. It is not an issue that can be assessed once for the entire class.
- (h) What is the appropriate distribution of damages or disgorgement to the class, and should the defendants pay the costs of distribution?
- (i) Are the defendants liable to pay interest on the award?
- [168] Given that there is no basis to certify any proposed common issues regarding damages, there is also no basis to certify these subsidiary damages issues.

Conclusion on Common Issues

- [169] For the reasons expressed above, I find that the plaintiff has proposed no proper common issues.

E. Is a Class Proceeding the Preferable Procedure

Generally

- [170] The plaintiff bears the burden of establishing that certifying this action as a class proceeding is the preferable method of resolving the claims. As the Supreme Court of Canada put it in *AIC Limited v. Fischer*, 2013 SCC 69:
- [48] The party seeking certification of a class bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31
- [171] I begin my analysis of preferability by reviewing the mandatory factors set out in s. 4(2) of the CPA.
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members
- [172] As discussed above, the evidence shows that the evaluation of both liability and damages will require a "shipment-by-shipment" analysis at best. Based on the available evidence, it seems clear that there will not have been an overcharge for all products or all shipments. While perhaps not degraded all the way down to the need for an individual analysis, the unavoidable structure of this action certainly does not allow for a common analysis for the entire class.
- [173] For example, for situations where testing was not performed and cannot be reconstructed, it will generally be necessary to assess what the purchaser would have done with that (lack of) information. It is possible that the purchaser still would have accepted the shipment (if,

for instance, their own manufacturing process would negate any safety or durability concerns). It is also possible that they would have sought to negotiate a discount (which is presumably the best outcome for the plaintiff in terms of the ability to establish an overcharge). Or it is possible that the purchaser simply would have rejected the shipment and asked the defendants to send a new conforming shipment. The existence of these various alternatives increases the individuality of the analysis and degrades commonality.

- [174] Although the plaintiff has abandoned his effort to certify a proposed common issue regarding safety and durability, these issues may still be relevant in trying to evaluate the appropriate "but for" world. If a properly disclosed failed test result would have shown a real safety concern, then the purchaser would clearly have been less likely to accept the product. On the other hand, if it is shown that the manufacturing process by the purchaser would address any safety concerns, then the purchasers would be more likely to have accepted the product regardless. These are difficult issues that may have to be separately evaluated for each shipment in order to establish the fact and nature of any alleged overcharge.
- [175] The complexity in evaluating likely purchaser behaviour with full information is magnified here by defendants' evidence of the Japanese concept of "tokusai", the practice whereby a manufacturer may ask their customer to willingly accept material that fails to meet specifications. The fact that no direct purchaser demanded a refund highlights the fact that each purchaser's likely response to the disclosure of full information will have to be carefully evaluated. In contrast, if all the direct purchasers had immediately demanded full compensation for the cost of necessary safety recalls, then the court would have greater confidence that purchaser responses would be generally consistent. However, on the facts, it appears that they will be highly idiosyncratic.
- [176] In some cases, there will be a market for a delivered product of lesser quality that may facilitate the evaluation of what would have happened had the defendants made full disclosure of their testing failings. But in other cases, there will be no such direct basis for comparison.
- [177] Obviously, in cases where the testing was simply not performed, there will be no lesser product to consider, because it is not actually known if the delivered product was of lesser quality than it should have been.
- [178] The plaintiff's experts suggest that, in some cases, it may be possible to assess the cost that would have been incurred to bring the component up to the proper standard. However, will obviously require a complex analysis to determine the extent to which the cost otherwise incurred by the defendants to properly test as component is in fact reflective of an "overcharge" incurred by the direct purchaser.
- [179] Additional complexity is created by the fact that purchasers may have purchased the same or similar parts from other suppliers. If purchasers did not track whose parts were used in each vehicle, it may be necessary to create subgroups of class members within the same

distribution chain to establish whether, on a balance of probabilities, it is more likely than not that the defendants' product was placed into their vehicle. For raw materials, this analysis may be need to be performed at multiple levels along the supply chain. These tracing challenges raise some of the same concerns which resulted in the Supreme Court of Canada rejecting certification in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at paras. 65-67, 72.

- [180] Even more individuality exists at the class member level. One class member might have only one product from one defendant in their vehicle, while another could have multiple products made by multiple defendants. As such, even two class members who both obtained a vehicle containing Product #347 will not necessarily require the same analysis. For example, their overcharge analysis could differ if the second class member's vehicle also contained defendants' Product #5481.
- [181] Considering all of these difficulties, the subset of class members with a reasonably tight bond of commonality would only be those that received the same set of a defendant's parts from the same shipment put into the same make and model. One can imagine how small these subsets would be.
- [182] Based on my review of the evidence, I expect the required analysis would come very close to a vehicle-by-vehicle evaluation, in a case involving millions of vehicles--a daunting prospect to be sure.
- [183] In my view, this case really seeks to tie together many potential class actions. The CPA is not designed to stich together a case with so many dangling threads. It is designed for cases with a strong factual and legal bond. Justice Winkler, as he then was, raised a similar concern in a proposed tobacco injury class action, *Caputo v. Imperial Tobacco Ltd.* (2004), 42 B.L.R. (3d) 276, 236 D.L.R. (4th) 348, (Ont. S.C.J.):
- [72] Here, notwithstanding the inability of the plaintiffs to define an acceptable class in relation to the causes of action alleged, it appears that any class would be comprised of at least several million people. The eight remaining legal bases for asserting claims allegedly arise from multiple fact situations spanning at least 50 years, during which prevailing circumstances changed dramatically. The legal principles underlying the claims asserted require inquiry into the circumstances of each individual class member in order even to ascertain liability, let alone damages. This would be necessary on a procedural basis to ensure that the defendants are treated fairly but would also be necessary from the perspective of the members of the class so that each would receive fair compensation. Further, even if the defendants were to only contest a portion of the individual claims, and each dispute could be concluded in one day, simple mathematics indicate that such a process would require the equivalent of 1,000 years of litigation, if it were to be conducted sequentially.

- [73] In my view, a class proceeding based on the present action would not be "fair, efficient and manageable" and, therefore, it does not meet the fourth element of the test for certification
- [80] In my view, the action as advanced is not appropriate for certification as a class proceeding. The best estimates of the number of class members is a range between 2.4 and 15 million persons. The plaintiffs proceed on the basis that tobacco is inherently dangerous and therefore the class should include everyone who smokes or has ever smoked in Ontario, whether alive or deceased, and regardless of individual differences pertaining to smoking habits or the effects of smoking on any particular individual class member. It is apparent on any careful analysis of the proposed class in the context of the conduct complained of and the allegations set out in the Amended Statement of Claim, that the plaintiffs have combined at least five, and possibly more, classes, not to mention innumerable subclasses, into one globally defined class for the purpose of seeking certification. In adopting this strategy, the plaintiffs have presented an action lacking a core of commonality that would permit the court to approve, or frame, common issues that would significantly advance the proceeding.

[Emphasis Added.]

- [184] Rather than the price-fixing claims relied upon by the plaintiff, I find that this case is more akin to Mackinnon, in which certification was rejected in a payday loan class action against multiple lenders. Although the court accepted that there was a common legal analysis that would need to be applied, that commonality was insufficient to sustain certification. As the court stated in reviewing the issue of preferability:
- [39] Here, in my view, the individual issues overwhelm the common issues. As Payroll Loans and Pay Credit (B.C.) say in their argument, any issues that can be phrased commonly play a minimal role in the context of the entire claim which manifestly requires a review of the individual circumstances with respect to each individual loan agreement. The proposed common issues do not predominate over the individual issues when the common issues are viewed in the context of the claim as a whole. Assuming that a particular standard form loan agreement is found to constitute an agreement to receive interest at a criminal rate, the court must still look to individual circumstances
- [185] In sum, this first mandatory factor weighs heavily against certification, given the limited work that can be done together on behalf of all class members, as compared to the expansive amount of work that will need to be done for very small subsets within the class, if not individually.
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions
- [186] There is no evidence that any putative class members wish to pursue these claims on an individual basis. This factor supports certification.

- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceeding

[187] There is no evidence of any other individual or class proceedings in Canada involving these issues. As such, there is no evidence that certification is necessary to avoid a multiplicity of 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

[188] In terms of the procedural benefits of a class action, the plaintiff argues that, at a minimum, class members will be able to share the cost of the experts and counsel. Furthermore, joint discoveries should be possible. However:

1. it is clear that both experts and counsel would need to do at least some independent work on each shipment;
2. counsel would need to ask separate questions about each product and shipment at any discoveries; and
3. the discovery of one plant employee for one defendant would yield limited useful overlap with the discovery of another employee of another defendant.

[189] Furthermore, the potential of achieving certain general litigation economies of scale is insufficient to justify certification if the degree of commonality is limited and the manageability concerns are expansive.

[190] Is the case manageable? It will be a massive exercise to follow each shipment of each component from the relevant defendant through any intermediaries, to the OEM, then down from the OEM, through additional intermediaries, and eventually to individual class members.

[191] The plaintiff relies on the certification in Pro-Sys for an example of another wide-ranging case that was able to achieve certification. However, there was a common core to that claim, being a single defendant's alleged unlawful conduct in relation to a limited number of products: MS-DOS, Windows, Word, Excel, Office, Works Suite, and Home Essentials.

[192] The plaintiff here projected a four-month common issues trial. In my view, it would require a multiple of that estimate. The plaintiff argues that a trial is not unmanageable simply because it is long. That may be so where there is a solid common core--for example, a long trial to determine the single question of whether a single Indigenous group has title to a single area. That is not this case.

[193] I find that certifying this action would compel the court to manage a proceeding that would almost certainly become "a monster of complexity and cost": *Tiemstra v. Insurance Corp. of British Columbia* (1997), 38 B.C.L.R. (3d) 377, 149 D.L.R. (4th) 419 (C.A.) at paras.13-14.

Indeed, the monster here can be identified: It would be a hydra, the many-headed, serpentine creature of Greek myth. As in the myth, attempting to slay this beast would be a Herculean task, with more and more heads emerging as the court fought to finish off the last.

The Purposes of Class Proceedings

[194] In evaluating preferability, the court may also consider the extent to which the proceeding is likely to enhance the three purposes of class actions, being (1) access to justice, (2) judicial economy, and (3) behaviour modification: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, citing *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at paras. 13 and 27.

[195] In terms of access to justice, the fact that the value of recovery for any particular component of a much larger vehicle may be very small diminishes the "access to justice" pull of the proceeding somewhat. I note that the proposed settlement of a similar proceeding brought by the same plaintiff only has funds going cy-pres rather than into the hands of class members given the low value of the claims: *Kett v. Kobe Steel, Ltd., VA S1710805*. That said, the fact that a claim may have low value, or that direct class member distribution is unlikely, is not necessarily fatal to certification. Indeed, certification has been rejected in certain cases where each individual claim was found to be of too high a value: *Norman v. Thunder Bay Regional Health Sciences Centre*, 2015 ONSC 3252 at paras. 113-117; *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2015 ONSC 1634 (Div. Ct) at para. 22.

[196] In terms of judicial economy, I find that the risk of the proceeding collapsing under its own weight is simply too great. This risk will not only be visited upon the court, but also upon the defendants and individual class members, who expect and deserve prompt access to justice once the proceeding has been certified. The court should avoid certifying an action where the proceeding will inevitably over-promise and under-deliver.

[197] In terms of behaviour modification, this purpose has already largely been fulfilled by the criminal proceedings in Japan, as well as the defendants' transparency with their direct customers regarding their failures: *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352, 46 C.P.C. (6th) 234 (S.C.J.) at paras. 163, 173; *Stewart v. Demme*, 2020 ONSC 83 at para. 104; *Hollick* at paras. 34-35.

[198] Considering all of these factors, the Court is unable to conclude that a class proceeding would be the preferable procedure.

F. Is there an Adequate Representative Plaintiff with a Proper Litigation Plan?

Adequacy of the Plaintiff

- [199] A representative plaintiff need not be "typical" of the class, nor the "best" possible representative: Dutton at para. 41. The test for the adequacy of a proposed representative plaintiff is whether he or she will vigorously prosecute the action: Campbell at paras. 75-76.
- [200] The defendants' primary objection to the proposed representative arises from the failure of the plaintiff to disclose that his sister-in-law was an associate at proposed class counsel Mr. Klein's firm at the time the plaintiff swore his affidavit in support of certification. Mr. Klein confirmed on the record that he was aware of the family relationship at that time. The parties agreed that the associate left Mr. Klein's firm in May 2020.
- [201] In *Kerr v. Danier Leather*, 19 B.L.R. (3d) 254, [2001] O.T.C. 743 (S.C.J.), the proposed representative plaintiffs included Ms. Kerr, who was a partner at the proposed class counsel's firm, and Mr. Kerr, her husband. The court rejected them as representative plaintiffs, stating:
- [71] The potential danger inherent in situations such as the case at bar was elucidated by Circuit Judge Arnold in *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140 (U.S. C.A. 8th Cir., 1999). He noted at 1155 that:

In situations where there is a close familial bond between a class counsel and a class representative, it seems to us that there is a clear danger that the representative may have some interests in conflict with the best interests of the class as a whole when making recommendations or decisions that could have an impact upon attorney fees.

- [72] As a general principle, it is best that there is no appearance of impropriety. In this situation, there is the perception of a potential for abuse by class counsel through acting in their own self-interest rather than in the interests of the class. See generally *Epstein v. First Marathon Inc. / Société First Marathon Inc.*(2000), 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (Ont. S.C.J.). In my view, the better practice is that class counsel be unrelated to a representative plaintiff so that there is not even the possible appearance of impropriety.

- [202] The language used in *Kerr* is not absolute. It is cited as "better practice". That said, a review of the case law allows the court to pull out the following considerations as relevant to this assessment:

1. Is there an actual or perceived conflict of interest?
 - Where the proposed plaintiff actively works as counsel on the case, the court is likely to find a conflict: *Dikranian c. Quebec (Procureur general)*, 2008 QCCS 6 at paras. 38-45; *George c. Quebec (Procureur general)*, J.E. 2004-1425, 2004 CarswellQue 1785 (C.S.) at paras. 40-42, *aff'd* 2006 QCCA 1204; *Kerr*, at para.72. But see *Roach v. Canada (AG)*, 175 A.C.W.S. (3d) 331, 2009 CanLII 7178 (Ont. S.C.J.) at para. 80 (court found proposed lawyer and representative plaintiff "eminently qualified" to advance Charter-based class action where the claim for damages was struck);

· Where the plaintiff is closely related to counsel actively working on the case, the court is likely to find a conflict: see *Dupont-Rachiele c. Société de transport de Montréal*, 2019 QCCS 1941 at para. 88 (sister of class counsel was rejected); *Bourgoin c. Bell Canada Inc.*, 2007 QCCS 6087 at paras. 50-53 (brother of class counsel was rejected); *Fairhurst* at paras. 86-87 (part-time employee of class counsel was replaced by an alternative representative); *Harvey c. Videotron*, 2019 QCCS 2994 at para. 113 (brother-in-law of class counsel was rejected). But see *Fortier c. Leon Furniture Ltd.*, 2014 QCCA 195 at paras. 151-152 (class counsel employee was allowed to be the representative plaintiff but the court said counsel could be removed later if a conflict arose) and *Cassano v. Toronto Dominion Bank* (2009), 178 A.C.W.S. (d) 1015, 98 O.R. (3d) 543 (S.C.J.) at para. 58 (court found that the fact that the representative plaintiff was the spouse of a non-equity partner in co-counsel's firm had no bearing on the issue of counsel's fees as it was disclosed at the outset of the litigation).

2. Is the conflict ongoing, or is it in the past?

· The relationship may no longer be relevant if there is no active conflict at the time of the hearing: *Boulerice c. Bell Canada*, 2008 QCCS 249 at paras. 71-74; *Heyde v. Theberge Developments Ltd*, 2018 ONSC 4257 at paras. 67-78; *Harvey* at para. 110.

3. Are there reasons to doubt suitability aside from the relationship to counsel?

· Evidence that the plaintiff is a token plaintiff or that their class membership was somehow contrived by class counsel will weigh against approval: *Dupont-Rachiele* at para. 73; *Bourgoin* at para. 52.

4. Did the plaintiff and counsel disclose the relationship?

· The transparency of the person who applies for the status of representative is one of the essential elements for achieving the social objective pursued by the legislator: *Bouchard v. Agropur Cooperative*, 2006 QCCA 1342, at para. 90;

· A failure to disclose the relationship may weigh against approval: *Dupont-Rachiele* at paras. 67, 75;

· Looked at from the other direction, disclosure is viewed as a factor favouring the representative: *Cassano* at para. 58.

[203] Applying the relevant factors here:

1. Mr. Kett is not a lawyer working on the case, nor is he a lawyer at Mr. Klein's firm.
2. Mr. Kett is only the brother-in-law of a former associate in Mr. Klein's firm. At the time of swearing his affidavit in support of certification, he had no blood relationship with class counsel, and the family relationship he did have was not with a partner having control over the conduct of the litigation.
3. Any conflict is now in the past, as the associate left the firm in May 2020.

4. The plaintiff is otherwise appropriate to fulfill the role and there is no evidence that the plaintiff is a mere puppet of class counsel.
 5. It is true that the plaintiff and counsel did not disclose the relationship. This is the most problematic aspect of the evaluation. Although the case law suggests some debate about where the line of disclosure should be drawn, I conclude that this is something that should have been disclosed. Section 5(5) of the CPA creates a mandatory obligation on the part of a deponent to swear all facts material to certification. This positive obligation is frequently, and unfortunately, observed in the breach by both sides on most certification applications. However, I conclude that the nature of the relationship should have been disclosed here, either by Mr. Kett, or by class counsel, who can be assumed to be familiar with the mixed authorities on the point. The failure does not reflect well on class counsel, and the suitability of counsel is a factor in assessing the suitability of the representative: Dutton, at para. 41.
- [204] Applying all the relevant factors, however, I find that the associate's resignation and consequential negation of the conflict overwhelms the concern raised by the lack of disclosure. If the case were otherwise certifiable, I would have accepted the plaintiff as a suitable representative.

Litigation Plan

- [205] Justice Winkler stated as follows in Caputo:
- [75] The Act mandates that the representative plaintiffs produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class ". McLachlin C.J. held in Hollick that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.
- [206] It is true that the plaintiff produced a litigation plan in a form similar to plans that have previously been approved by this court: see for example Miller at paras. 218-222, 236, Appendix A; Pearce at paras. 260-273; MacKinnon v. National Money Mart Company, 2007 BCSC 348 at paras. 75-76, Schedule B.
- [207] However, the challenges raised by the evidence here demand more than a "standard form" plan. The plaintiff's plan needs to address directly the many threads of liability and damages. While such a plan would be suitable for a case with a clear common core, it is too simplistic for a case lacking in same. As Justice Winkler stated in Caputo:
- [78] In my view, in a proceeding of this size and complexity, a proper litigation plan should reflect a clear acknowledgement of the massive undertaking involved. Thus, the plan should contain, at a minimum, information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel involved, an

analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined. In respect to the latter point, I do not wish to be taken as holding that only large firms can prosecute class actions nor that the proposed representative plaintiffs must be themselves sufficiently wealthy to finance litigation. Rather, the plan should satisfy the court as to how the resources available to the plaintiffs can be brought to bear to ensure that the litigation can be conducted in such a way so as to protect the interests of the class members. The detail required with respect to each of these elements is relative to the nature of the action

[79] In consideration of the foregoing, and given the paucity of information proffered in the certification motion record, the plaintiffs have not met the requirement of providing a "workable" litigation plan to the court. Were it the case that this was the only defect, I would normally be inclined to grant a conditional certification, subject to the plaintiffs producing an acceptable litigation plan. However, in this case, the other deficiencies are such that, without changing the entire theory of the case, it is not possible for the plaintiffs to satisfy the requirement.

V. CONCLUSION

[208] Given the failure to meet all the requirements of s. 4(1) of the CPA, the application for certification must be denied. As it turns out, some class actions are indeed "too big to certify", at least when they are both too large and too fragmented.

"Branch J."

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