Court of King's Bench of Alberta

Citation: Williams v GFL Environmental Inc., 2022 ABKB 757

Date: 20221115
Docket: 2003 06875
Registry: Edmonton

Between:

Lee Williams As Representative Plaintiff

Plaintiff

- and -

GFL Environmental Inc.

Defendant

Reasons for Decision, Application for Certification of Class Action
of the
Honourable Justice James T. Neilson

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[1] This action has been brought by the proposed representative Plaintiff, Lee Williams, ("Williams") pursuant to the *Class Proceedings Act*, R.S.A. 2003, c.C-16.5. The Plaintiff alleges that he has been improperly charged by the Defendant for certain fuel and environmental surcharges on services provided to the Plaintiff under a written contract for the removal and disposal of solid waste from his property.

[2] Williams, who resides in Clyde, Alberta, operates a business as a painter. He has entered into successive written contracts with the Defendant to provide a bin located at his property for the disposal of solid waste, and to remove the bin when ordered by the Plaintiff for disposal of its contents and return the bin to the Plaintiff's property.

[3] The Defendant, GFL Environmental Inc. ("GFL") has several divisions for its operations within Canada. It conducts a liquid waste business, an infrastructure business for the excavation and transport of clean and contaminated soils, and a solid waste business. The claim by the Plaintiff only relates to his contract which is within GFL's solid waste business.

[4] The evidentiary record before the Court includes an affidavit affirmed by Williams, an affidavit affirmed by Keith Reuter, an expert retained by the Plaintiff, affidavits of Matthew McAra and David Richmond affirmed on behalf of GFL, transcripts of the cross-examinations of Williams, McAra and Richmond, and answers to undertakings given by the affiants.

[5] Williams entered into three successive Consumer Service Agreements ("CSA's") with GFL dated August 9, 2016, November 17, 2017, and December 17, 2018.

[6] The CSA's were a combination of printed terms and conditions and handwritten terms negotiated between Williams and GFL. The 2016 Agreement provided for a 60 month term, which was revised in handwriting to 12 months. The Agreement provided that Williams would be invoiced a monthly service charge of $85.02, a fuel surcharge at 10% and applicable GST.

[7] The 2017 Agreement provided that Williams would be invoiced a monthly bin rental fee of $50.00 and an "on call" service fee of $65.00 per lift, referred to by Williams as "the dumping fee". Again, the term was changed from 60 months to one year.

[8] GFL performed its services under the 2018 Agreement between December 2018 and May 2019. Each of the CSA's provided a term that pricing "does not include fuel/environmental surcharge or GST". As detailed in the affidavit evidence and cross-examination of McAra, GFL applies fuel and environmental surcharges to help recover its costs related to environmental compliance and fuel which are driven by government regulations, while at the same time allowing it to retain a reasonable operating margin.

[9] Williams does not take issue with the surcharges that were applied to the lift fee or "dumping fee". Rather, he challenges the surcharges that were applied to the rental fee. GFL estimates that, over the time period pleaded in the claim, Williams was charged a total of $113.00 for what he now asserts were improper surcharges.

[10] Upon reviewing invoices that included surcharges for the rental fee, Williams registered a complaint with GFL. In response to an email from Williams dated April 15, 2019, an accounts receivable analyst, Marie King, stated:

> Regarding the reoccurring incorrect charges, I have confirmed that our system is unable to recognize whether or not a service was provided so it automatically calculates.

[11] Ms. King is no long employed by GFL. However, McAra deposed that the information Ms. King provided to Williams was not correct. Rather, GFL's accounting software can recognize all of the services GFL provides and can select which ones attract surcharges. McAra confirmed this erroneous statement by Ms. King during his cross-examination.

[12] GFL ultimately agreed to provide Williams with a credit for one month worth of surcharges that had been applied to a rental fee. This was done as a concession for customer relations. GFL maintained its position, however, that the surcharges were properly levied. After Williams continued to object to pay surcharges on the rental fee going forward, GFL terminated

the 2018 Agreement. Williams subsequently entered into a solid waste removal agreement with another provider.

[13] The Statement of Claim asserts several causes of action, namely a breach of the duty of care, unjust enrichment, breach of contract, breach of consumer protection legislation, and a failure to notify.

[14] The proposed class is defined as: "Any and all individuals in Canada who have been charged environmental and fuel surcharges that are unassociated with a dumping fee. The class herein as so defined is hereinafter referred to as the "Class", and any individual member of the Class is hereinafter referred to as a "Class Member", and collectively referred to as "Class Members".

[15] The Defendant denies that it has breached its contract with the Plaintiff, and disputes the claims under the other causes of action pleaded in the Statement of Claim.

Application for Certification of the Class Action

[16] Section 5(1) of the *Class Proceedings Act* sets out the five preconditions to certification of a class action:

> In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[17] The Alberta Court of Appeal has recently affirmed the test for certification in ***Spring v Goodyear Canada Inc.***, 2021 ABCA 182 at paragraphs 17 and 18 as follows:

> [17] The representative plaintiff must establish all five of the preconditions to certification found in s. 5 of the *Class Proceedings Act*. If those five preconditions are met, the action must be certified; if they are not met, the application for certification must be dismissed.

> [18] The certification process plays a screening role, but it is limited in scope. At the certification stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for certification has been granted: ***L'Oratoire Saint-Joseph du Mont-Royal v J.J.***, 2019 SCC 35 at para. 7...

[18] The Alberta Court of Appeal has given further guidance as to sufficient facts to support the application for certification as a class proceeding in ***Fisher v Richardson GMP Limited***, 2022 ABCA 123 at paras 34-36:

> The court must certify the action as a class proceeding where all the requirements of subsections 5(1)(a) to (e) are satisfied. If the requirements are not met, the certification application must be dismissed: CPA, ss. 5(3) and 5(4); *Spring* at para 17.
>
> The applicant must show there is some "basis in fact" for each of the statutory requirements, except for the requirement that the pleadings disclose a cause of action. This criterion is governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is plain and obvious that no claim exists: *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 63 and 99, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 25; *Warner* at paras 12-14.
>
> The "basis in fact" standard has been described as "sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of...the CPA not having been met": *Pro-Sys* at para 104. The evidentiary burden is not onerous and requires only a minimum evidentiary basis: *Warner* at para 13, citing *Hollick* at paras 24-25 and *Stewart v General Motors of Canada Ltd*, [2007] OJ No 2319 (SCJ). This is consistent with the principle that the certification hearing is not a determination of the merits of the claim: CPA, s. 6(2). It is, instead, a procedural application concerned with the form of the action: Warner at para 10, citing *Pardy v Bayer Inc*, 2004 NLSCTD 72 at para 91. The question is not whether the claim is likely to succeed, but whether it is appropriately prosecuted as a class action: *Hollick* at para 16.

a) The Pleadings Disclose a Cause of Action

[19] In his brief for the certification of this class action in paras 40 to 41, the Plaintiff states, correctly, that, with respect to s. 5(1)(a), no evidence is admissible and the cause of action is determined on the pleadings alone. Citing ***Hollick v Metropolitan Toronto (Municipality)***, 2001 SCC 68 at para 16, the Plaintiff states that there is a low threshold for establishing the "cause of action" requirement. Claims may proceed that are "not hopeless but rather analytically defensible, albeit novel, even dubious". The Plaintiff's brief states:

> It is submitted that the Statement of Claim clearly discloses causes of action. All causes of action are relatively straight forward and pled correctly.

[20] However, the causes of action pleaded in the Statement of Claim require closer scrutiny at this stage. As the Supreme Court of Canada stated in ***Knight v Imperial Tobacco Canada***

Ltd., 2011 SCC 42 at paras 22 to 24, the Plaintiffs have an obligation at the pleading stage to set out the facts supporting their claim, and that the determination of whether a claim discloses a cause of action can only proceed on the facts as pleaded:

> ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

i) Breach of Contract

[21] GFL acknowledges that paragraph 54 of the Statement of Claim pleads a cause of action for a breach of contract:

> The charges levied against the Plaintiff and Class Members were levied in breach of the contracted obligations of the Defendant, or in the alternative, the charges were not provided for in the contract.

ii) The Plea of Negligence

[22] In paragraphs 38 to 43 of Williams' brief under "duty of care" it is alleged that GFL "owed a duty of care" to ensure that they complied with the terms of their Agreements and that the Agreement sufficiently explained when fuel and environmental surcharges would be charged". The allegation is that GFL breached that duty by failing to ensure that Williams and the Class Members "were not unnecessarily or incorrectly charged surcharges".

[23] Paragraph 64 to 68 of Williams' brief, under "Failure to Notify", it is alleged that GFL failed to notify Mr. Williams and the Class Members of the terms of the surcharges and that its accounting systems were charging Williams and the Class Members incorrectly.

[24] In the case of ***BG Checo International Ltd. v British Columbia Hydro and Power Authority***, [1993] 1 S.C.R. 12 at para 15, the Supreme Court confirmed that:

> where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negate the right to sue in tort...

[25] In these circumstances, a general duty arising in tort "must yield to the parties' superior right to arrange their rights and duties in a different way".

[26] The Alberta Court of Appeal in ***Driving Force Inc. v I Spy-Eagle Eyes Safety Inc.***, 2022 ABCA 25 at para 25 stated, in that case, there was not a stand alone claim in tort available against the director of the defendant with respect to lease payments and the failure to return leased trucks. The "theoretical ability... to sue in tort is tempered by the fact that this was primarily a contractual relationship." In particular:

> ... the "private ordering" of the parties should be respected. This was in substance a debt transaction, and the remedies should *prima facie* be in contract and debt. If the rental payments were not made, or the trucks were not returned, the intention of the parties was that the remedy would be for breach of contract.

[27] In the case of ***Heller v Uber Technologies Inc.***, 2021 ONSC 5518 Justice Perell concluded that the Plaintiffs in that proposed class action, satisfied the cause of action criteria for their claims for breach of the *Employment Standards Act*, and breach of contract but did not satisfy it for claims in negligence and unjust enrichment. Justice Perell struck the claim in that case based on negligence as follows, at paras 166 and 167:

> In my opinion, the case at bar, is one of the cases where tort liability does yield to the principle of private ordering in contract. The claim in negligence would be based on a duty of care to properly classify the Class Member as an employee of Uber pursuant to the Service Agreement. But whether the Class Member is an employee of Uber pursuant to the Service Agreement is precisely the subject matter dealt with by the parties by their private ordering in contract. This is not an occasion for concurrent liability in contract and tort.
>
> Put somewhat differently, just as there is no duty of care in negotiating a contract, there is no duty of care in how to perform it. Rather, there is strict liability in contract (without considering the standard of a care of a reasonable contracting party), if the contract is breached. Moreover, any claim in negligence would be redundant and cumbersome and would not satisfy the preferable procedure criterion.

[28] In the claim by Williams, there is no possibility that GFL could be found to have applied the surcharges in accordance with the Agreement yet somehow still be liable in tort. Either GFL breached the Agreement and is liable for breach of contract, or it complied with the contract which would oust any potential liability in tort.

[29] The issue in dispute is precisely "the subject matter dealt with by the parties by their private ordering in contract". It is "plain and obvious" that Williams' claims in negligence for both causes of action must fail. This is also germane to the Court's subsequent consideration of the proposed class composition, and the proposed common issues.

iii) Unjust Enrichment

[30] In paragraphs 44 to 48 of the Statement of Claim, Williams alleges that GFL was "enriched by charging fees that they should not be charging" that Williams and the Class Members "suffered a corresponding financial deprivation by paying surcharges that should not have appeared or incorrectly appeared on their invoices". However, the pleading does not allege the third requirement to establish a claim for unjust enrichment, namely, an absence of a juristic reason for the enrichment and corresponding deprivation: ***Atlantic Lottery Corp Inc. v Babstock***, 2020 SCC 19, paras 69 and 70. In this case, the existence of the contract between the parties was a juristic reason for the enrichment or corresponding deprivation.

[31] As Justice Perell stated in ***Heller v Uber Technologies Inc.***, *supra,* at para 156:

> ... The plaintiffs' case rises and falls on whether the services agreement violates the ESA. If it does, the proposed class will be entitled to contractual remedies for the defendants' breach of the employment contract. There is no basis for unjust enrichment in this pleading. This is because any "remedial consequences for breach of contract are typically captured by the law of contract." Put simply, "restitutionary relief is not available if the claimant possesses a right to

> contractual relief." When the parties' relationship is governed by contract, so too are their remedies.

[32] In ***676083 BC Ltd. v Revolution Resource Recovery Inc.***, 2021 BCCA 85, a case on point, the Court stated at para 43 that "the existence of a contract is one of the established categories of juristic reason that will bar a claim in unjust enrichment." In the claim by Williams, if the surcharges were justified by the Agreement, there is a juristic reason. If they are not, then GFL is liable in breach of contract. As the Court of Appeal stated in ***Revolution***, at para 55:

> There is no prospect of the circumstances of this case, as pleaded, that [the] claim in contract had failed while its claim in unjust enrichment could succeed.

[33] It is plain and obvious that the Plaintiff's claim in unjust enrichment must fail in the circumstances of this case.

iv) Claim under the Consumer Protection Act

[34] Section 13(1) of the *Consumer Protection Act***,** RSA 2000, c-26.1 provides as follows:

> 13(1) When a consumer
>
> (a) has entered into a consumer transaction, and
>
> (b) in respect of that consumer transaction, has suffered damage or loss due to an unfair practice,
>
> that consumer may commence an action in the Court of Queen's Bench for relief from that damage or loss against any supplier ... who engaged in or acquiesced in the unfair practice that caused that damage or loss.

[35] Section 1(1) of the *Consumer Protection Act* defines a "consumer" as an individual who receives or has the right to receive "goods or services from a supplier". "Goods" are defined as "any personal property that is used or ordinarily used for personal family or household purposes". "Services" are defined as "any service offered or provided primarily for personal, family or household purposes".

[36] As Williams has not pleaded that the agreements for bin rentals and dumping services were carried out "primarily for personal, family or household purposes", these are not "consumer transactions" and, therefore, are not the subject of a claim under the *Consumer Protection Act* as pleaded in the Statement of Claim.

[37] It is plain and obvious that, as pleaded, the Plaintiffs' claim pursuant to the *Consumer Protection Act* must fail.

b) The Proposed Class

[38] Pursuant to s. 5(1)(b) of the *Class Proceedings Act*, the Plaintiff must establish that "there is an identifiable class of two or more persons".

[39] In ***Andriuk v Merrill Lynch Canada Inc.***, 2013 ABQB 422 at para 110, Justice Martin sets out the criteria for an identifiable class:

> An identifiable class is one which identifies the persons who have a potential claim against the defendant, defines the parameters of the lawsuit so as to identify those persons bound by the results of the action, and describes who is entitled to

> notice: *Bywater v Toronto Transit Commission* (1998), 27 CPC (4th) 172 (Gen Div) at para 10. A class is identifiable if it is sufficiently defined such that the parties and the Court can determine who is and is not a member of the class by reference to clearly stated criteria. The Plaintiffs carry the burden of defining the existence and scope of the class with certainty: *Investplan Properties* at para 55.

[40] The Plaintiff at the certification stage has an obligation to establish some basis in fact that at least two class members can be identified: ***Sun-Ripe Products Ltd. v Archer Daniels Midland Co.***, 2013 SCC 58 at para 52.

[41] Williams deposed in paragraph 25(e) of his affidavit that he had taken several steps to fairly and adequately represent the interests of potential Class Members, including "locating additional Class Members and informing potential Class Members of the action". However, on questioning, Williams admitted that he had not located any additional Class Members.

[42] GFL has acknowledged in its evidence that there were over 900 customers that were charged surcharges that were not associated with a "dumping fee". However, this admission does not, in itself, establish that these customers are Class members. GFL submits the following in support of that proposition:

> 1. GFL applied surcharges to contracts that expressly provided that pricing on agreement "does not including fuel/environmental surcharge, or GST". To the extent that Williams relies on a subjective understanding of those words to allege that the surcharges were applied improperly to services that were not associated with "dumping", the subjective intentions of the party about the meaning of contractual language is inadmissible: ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 at paras 57 and 59. Willaims has not provided evidence to establish that there is any other customer who shares his objections to surcharges being applied to services unassociated with a "dumping fee".
>
> 2. Williams has failed to establish that he personally is a "consumer" within the meaning of consumer protection legislation and there is no evidence to establish that any of the approximately 900 customers are "consumers".
>
> 3. Williams was provided inaccurate information by an employee of GFL with respect to surcharges. However, there is no evidence that any other customer was similarly provided with this inaccurate information.
>
> 4. The Plaintiffs' expert, Reutter made assumptions on how the error in GFL's accounting software would enable damages to be determined on a class wide basis. However, these assumptions have been rebutted by GFL's affidavit evidence. The Plaintiff, notwithstanding expert evidence, must satisfy the Court that there is some basis in fact indicating at least two persons can prove they incurred a loss. This basis in fact is not established in the record before the Court.

[43] Furthermore, the Class definition is overly broad in any event. The Defendant objects to the Plaintiff's Class definition for the following reasons:

> 1. It purports to capture "any and all individuals in Canada" when the evidence establishes that customers in eastern Canada were not charged surcharges unassociated with a dumping fee;

2. "Any and all individuals" includes persons who are not consumers within the meaning of consumer protection legislation;

3. It includes persons even if they knowingly agreed to pay surcharges that were associated with a dumping fee; and

4. It does not contain any temporal limitation where individual claims may otherwise be barred by the *Limitations Act*.

[44] The Court, in certifying a class proceeding, may define the class more narrowly, however, in this case, when considered in conjunction with the other issues raised under s. 5 of the *Class Proceedings Act*, I conclude that certification of the action cannot be saved by narrowing the definition of the Class.

c) The Proposed Common Issues

[45] Section 5(1)(c) of the *Class Proceedings Act* requires the Plaintiff to establish that class members' claims raise common issues.

[46] The purpose of identifying common issues is to avoid duplication of fact finding or legal analysis. Each proposed issue must be a substantial part and necessary in the resolution of each class member's claim: ***Western Canadian Shopping Centres Inc. v Dutton***, 2001 SCC 46 at paras 39 and 40.

[47] There must be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings.

[48] Williams' proposed common issues are set out in paras 49(a)-(m) of the Plaintiff's brief.

i) Contract Issues

[49] The Plaintiff cites contract issues relating to the use of a "standard form contract, and with respect to the interpretation of the contract relating to allegations of breach of contract".

[50] The Plaintiff proposes two common issues relating to a "standard form contract: i) whether GFL used a standard form contract with the members of the class; and ii) if so, whether the provisions in the agreement with Williams were substantively the same as the agreements that GFL entered into with the class members.

[51] The Supreme Court of Canada has defined "standard form contracts", to contain the following features, in ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.***, 2016 SCC 37 at para 25:

> … the document put forward will typically constitute a standard printed form that the party proffering the document invariably uses when entering transactions of this kind. The form will often be offered on a "take it or leave it" basis. In the typical case, the other party, then, will have no choice but either to agree to the terms of the standard form or to decline to enter the transaction altogether. Standard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate, in any meaningful sense, the terms of many of the transactions entered into in the course of daily life.

[52] However, in the record before the Court, the Agreement is not "take it or leave it". It does contain printed conditions, as well as provisions that are negotiated between GFL and its

customers. Examples were provided in evidence of another agreement containing this special instruction, “no fuel or environmental surcharge”. Provisions in other example agreements are varied depending on the customer’s requirements, reducing the term of the agreement, or providing specifically for no fuel surcharge.

[53] As each agreement that GFL has with its approximately 900 customers in relation to this type of solid waste disposal service has been negotiated individually, this would not constitute a proper common issue for certification.

[54] Also, Williams proposes common issues relating to how the contracts between the Defendant and the putative members of the class are to be interpreted.

[55] In the record before the Court, GFL’s agreement with Williams expressly states “pricing on agreements does not include fuel/environmental surcharge, or GST”. On its face, there would be no basis to support the distinction relied on by Williams, namely that the pricing referred to in his Agreement was intended only to refer to services that were associated with a “dumping fee” as opposed to services that are not associated with a “dumping fee”. Williams acknowledges that the former surcharges were properly levied, but contests the latter.

[56] As the Supreme Court of Canada stated in ***Creston Molly Corp. v Sattva Capital Corp.***, 2014 SCC 53 at para 47:

> … The overriding concern is to determine “the intent of the parties and the scope of their understanding” (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways*), 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. …

[57] In this case, Williams does not provide a factual basis for interpreting the clause: “pricing in the agreement does not include fuel/environmental surcharges”, to mean “pricing in the agreement in relation to services that only include dumping does not include fuel/environmental surcharges”. He does cite the information he received from the accounts receivable analyst, Ms. King. However, as the Supreme Court has confirmed in ***Sattva***, *supra*, at para 59, this type of subjective evidence is precluded from the task of contractual interpretation. In addition, those facts and surrounding circumstances would be unique to Williams’ dealings with GFL and do not constitute a legitimate common issue for certification.

[58] I conclude that Williams has not made out proper common issues in relation to the claims for breach of contract.

Consumer Protection Claims

[59] As stated previously, Williams has not established that he was a “consumer” for the purposes of the *Consumer Protection Act*, or that any of the other 900 customers of GFL with this type of agreement for solid waste disposal were consumers. Rather, the only GFL contracts where surcharges unassociated with a dumping fee were applied as part of a commercial service, were performed by GFL’s commercial trucks, in relation to commercial dumpsters and with payments made with credit card authorization forms where the customer, including Williams, acknowledges that the “services are for business use only”.

[60] I find that the proposed common issues relating to consumer protection are not applicable in this case.

Damages Cannot be Certified as a Common Issue

[61] Pursuant to s. 30(1) of the *Class Proceedings Act*, aggregate damages can only be certified as a common issue where the Plaintiff establishes the conditions in that section are likely to be satisfied. In this case, the Plaintiff has not argued that these conditions are satisfied, but contends that GFL "is likely in possession of the transaction data necessary to estimate class-wide damages". What is lacking is a rationale for why aggregated damages should be certified as a common issue.

[62] The Plaintiff claims assessment of punitive damages, but does not provide any evidence that compensatory damages are inadequate, and liability and quantum of compensatory damages cannot be determined at the common issues stage: ***Peter v Medtronic Inc.***, 2010 ONSC 3777 at para 37.

[63] Also, there is no support for any claim for waiver of tort and disgorgement of profits.

[64] These remedies are not appropriate since the ordinary remedies for breach of contact would be effective in the Plaintiff's case: ***Spring v Goodyear Canada Inc.***, 2021 ABCA 182 at para 54.

d) A Class Action as the Preferable Procedure

[65] I find that the Plaintiff has not established that there is an identifiable class of two or more persons with respect to the alleged causes of action, and that the alleged claims of the prospective class members do not raise common issues. The claim by Williams that GFL has breached the Agreement is peculiar only to himself, on the record before me.

[66] Accordingly, I find that a class proceeding is not the preferable procedure for the fair and efficient resolution of the issues raised by Williams in his claim.

e) Williams as Representative Plaintiff

[67] Williams does not meet the requirements under s. 5(1)(e) to fairly and adequately represent the interests of his class.

[68] He had deposed in his affidavit that, as of January 6, 2021, he took steps to represent the interests of class members, including by "locating additional class members and informing potential class members of the action". However, when cross-examined on his affidavit eleven months later, he testified that, to his knowledge, he had not located additional class members.

[69] In addition, GFL identified the customers that were charged surcharges unassociated with a dumping fee. Williams was given the opportunity, through his counsel, to review these records provided a suitable confidentiality agreement could be reached. There was no response to this offer.

[70] In view of my foregoing conclusions in this application, I do not need to address the Plaintiff's proposed litigation plan.

Conclusion

[71] As Williams has not satisfied the onus upon him to satisfy all five preconditions to certification of a class action as required by s. 5(1) of the *Class Proceedings Act*, the application for certification is dismissed.

[72] The Defendant is therefore entitled to costs of the application. If the parties cannot reach an agreement on costs, they may make written submissions to me within sixty days of the filing of these reasons, and I will make a ruling in writing on costs.

Heard on the 19th day of May, 2022.
Dated at the City of Edmonton, Alberta this 15th day of November, 2022.

James T. Neilson
J.C.Q.B.A.

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