

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Siwocha v. Recochem Inc.*,
2025 BCSC 679

Date: 20250410
Docket: S2012015
Registry: Vancouver

Between:

Maciej Siwocha

Plaintiff

And

Recochem Inc.

Defendant

Before: The Honourable Justice Groves

Reasons for Judgment

Counsel for the Plaintiff:

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E.J.F. Grant

Place and Date of Hearing:

Vancouver, B.C.
June 11–12, 2024

Place and Date of Judgment:

Vancouver, B.C.
April 10, 2025

Introduction

[1] It is sometimes said that life imitates art.

[2] In terms of the art, and I am perhaps using this term in the broadest sense possible, there is a somewhat notorious episode of the television show called “The Simpsons”, in which the fatherly character, Homer Simpson is on a tour of a local brewery of the Duff Beer company, the apparent producer of his drink of choice.

[3] At one point during this tour, you see a pipe descending from on high, one pipe, which then distributes the beer flowing through that pipe into three large and different beer storage kegs. One of the kegs is labelled “Duff Lite”, one of the kegs is labelled “Duff”, and the third is labelled “Duff Dry”. The clear implication from this background scene is that the same beer is being used to create the three differently labelled beer products, Duff Lite, Duff and Duff Dry.

[4] That is the essential allegation in this class action litigation. The allegation, which does not appear to be, at this stage at least, significantly disputed by the defendant, is that at some point, and for a period of time, the defendant, Recochem Inc. (“Recochem”), marketed various paint thinners and solvents under various names, citing various qualities of the product, at various different price points, when the contents of the various products were in fact identical.

[5] Solvents are used for primarily two purposes it appears, cleaning of various things mechanical, and as a paint thinner or cleaner of paint products.

[6] There is a suggestion in submissions that this decision to price the same product differently, with different language or emphasis as to contents, was a simple marketing decision. A study was conducted. It was determined that consumers valued certain words associated with solvent, and some of those words suggested to consumers higher levels of quality, “Varsol” being most highly regarded.

[7] The allegations are that the defendant never disclosed that the solvent products contained the exact same mixtures. It is alleged they attached different

attributes representing one at a certain price point as containing “mineral spirits”, another at a different price point being “professional grade” and one attached a trademark term “Varsol” and was represented as “premium quality”. The allegation, again not denied, is that these three or four allegedly different products, marketed at different price points, contained the exact same product within their containers.

[8] The claim, as I read it articulated in the pleadings, is that Recochem engaged in deceptive marketing, made false representations to consumers, attached to products distinguishing characteristics which did not exist and, as such, breached the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], breached the *Sale of Goods Act*, R.S.B.C. 1996, c. 410 [*SGA*], breached the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38 [*CPLA*] and breached the *Competition Act*, R.S.C. 1985, c. C-34 [*CA*].

[9] Additionally, as this is purported to be a nationwide class action, similar provincial legislations in virtually every other province in Canada, legislation similar to the *BPCPA* in British Columbia, are also alleged to have been breached by Recochem in regards to the above-noted marketing of solvents.

Legal Framework

[10] The law on class proceedings in BC is governed by the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. In order to certify a class proceeding, the court must be satisfied that all criteria from s. 4(1) of the *CPA* are met:

Class certification

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

- (a) the pleadings **disclose a cause of action**;
- (b) there is an **identifiable class of 2 or more persons**;
- (c) the **claims of the class members raise common issues**, whether or not those common issues predominate over issues affecting only class 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.

[11] The test for certification should be interpreted generously with a view to promoting the goals of class proceedings, namely:

- a) to provide access to justice for litigants;
- b) to discourage bad behaviour; and
- c) to use court resources efficiently.

Hollick v. Toronto (City), 2001 SCC 68 [*Hollick*] at paras. 15–16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Dutton*] at paras. 26–29.

[12] In plain language, and in light of the case law on these criteria, the court must ask whether:

- a) The plaintiff's pleadings will plainly and obviously fail on the merits;
- b) The proposed class is too broad, too narrow, too vague, or too subjective;
- c) The proposed class members share an interest in seeing certain issues resolved in common;
- d) The class proceeding is preferable to individual actions or another alternative; and
- e) The representative plaintiff is compromised by conflicts of interest or ineptitude.

Is there a cause of action?

[13] For the plaintiff to meet the statutory requirement under the *CPA*, s. 4(1)(a), the court must ask whether, assuming the facts alleged are true, the pleadings disclose a cause of action. The test is the same as the one applied in a motion to strike pleadings. The certification only fails at this step if it is plain and obvious that the underlying claims cannot succeed: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 2; *Pioneer Corp v. Godfrey*, 2019 SCC 42 at para. 27; and *Hansma v Atira Property Management Inc.*, 2024 BCSC 2023 [*Hansma*] at para 23.

Is there an identifiable class?

[14] For the plaintiff to meet the requirements of *CPA*, s. 4(1)(b)-(e), the court must ask whether there is “some basis in fact” that the requirements are met. This standard is a low threshold, and at this stage the court does not weigh evidence in detail. Still, the court should provide “more than superficial scrutiny” of the evidence and not allow “mere speculation” to meet this burden: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27, leave to appeal to SCC ref'd 2022 CanLII 19055; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, at para. 70.

[15] In assessing whether there is an identifiable class, the Court must bear in mind the goals of this requirement. Those goals are to identify who is entitled notice in relation to the class proceeding, who will be bound by the final judgment, and who will share in any awards made: *Jiang v. Peoples Trust Company*, 2017 BCCA 119, para. 82.

[16] These goals are especially important to bear in mind when assessing whether the class definition is adequately related to the common issues. There must be a rational relationship between the class and the common issues. This inquiry is sometimes framed in terms of overbreadth or over inclusivity. As stated in *Hollick* at para. 21:

There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without

arbitrarily excluding some people who share the same interest in the resolution of the common issue

[Emphasis original.]

[17] A class will be defined too broadly if it includes people who have no connection to the common issues. It would not be good if those people were to share in awards or be bound by a final judgment. However, the class should not be defined too narrowly either, since that would prevent deserving people from sharing in the awards. It would also mean that people affected by the common issues would not be bound by the judgment, meaning they could start duplicate litigation.

[18] The class must be defined using objective criteria. The objective component means that the class should not be solely based on potential class members' subjective identification—membership should be ascertainable by a court or a reasonable person: *Dutton* at para. 38

[19] The class definition should also not depend on the outcome of the litigation. For example, in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 [*Kwicksutaineuk*], the Court of Appeal declined to allow a class to be defined as people who “have” a s. 35 Aboriginal right to fish, because ascertaining who had the right to fish was “central to the litigation”: *Dutton* at para. 38; *Kwicksutaineuk* at paras. 86 and 89.

[20] The class must plausibly have at least two members. The legal test is whether the plaintiff has shown that there is some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82.

Are there common issues?

[21] “Common issues” are defined s. 1 of the *CPA* as:

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[22] The plaintiff must provide some basis in fact to show that the common issues exist, and they can be answered in common for everyone in the class: *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 at para. 38, leave to appeal to SCC ref'd 2023 CanLII 103771.

[23] An issue can be characterized as common if resolving it in a class proceeding will avoid duplicating fact-finding or legal analysis. This is the “underlying foundation” of a common issue. A common issue should not be dependent on individual findings of fact or law: *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at para. 85, citing *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para 140.

[24] To be called a common issue, the issue should be necessary to resolve each class member’s claim. It should also be a “substantial ingredient” of each claim. Class members should be aligned on the outcome of a common issue; success on the issue for one class member should mean success for all: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 [*Finkel*] at para. 22.

[25] However, the common issues need not dispose of the litigation completely—individual issues will often persist, and that is no bar to certification. It is also fine if class members are not identically situated vis-à-vis the defendant, as long as the resolution of the common issues will advance their claim: *Dutton* at paras. 39–40; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at para. 108.

[26] Where questions of causation or damages are proposed as common issues, the plaintiff must show that there is a workable methodology for determining those issues on a class-wide basis. That methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement: *Pro-Sys* at para.118.

Is class proceeding the preferable procedure?

[27] Section 4(2) of the *CPA* provides guidance on determining whether a class proceeding is “preferable” in the sense of s. 4(1)(d):

(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.

[28] A court must consider all five factors when deciding whether to certify. It must keep in mind the objectives of class proceedings: judicial economy, behaviour modification, and access to justice: *Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145 at para. 42; *Hansma* at para. 96.

[29] To be certified under this criterion, a class proceeding must be a fair, efficient and manageable method of advancing the claims, and it must be preferable to other realistically available avenues for resolving the claims: *Jastram Properties Ltd. v Tan*, 2019 BCSC 475. Those alternatives can include non-judicial processes: *Finkel* at para. 25. It is legitimate to consider the impact of the certifying a class proceeding on class members, defendants, and the courts: *Jastram* at para. 22 and

[30] Preferability has substantive and procedural components. The substantive component involves asking whether the class members will have access to a just and effective remedy through a class proceeding. The procedural component involves asking whether the class members will have access to a fair process, bearing in mind the existence of economic, social, psychological, and other possible barriers: *Finkel*; *AIC Limited v. Fischer*, 2013 SCC 69; and *Hansma*.

[31] In other provinces, the common issues must “predominate” over the individual issues. In British Columbia, predomination is “not a precondition to certification, but merely one factor to be considered alongside the non-exclusive list contained in s. 4 of the CPA”: *Haghdust v. British Columbia Lottery Corporation*, 2013 BCSC 16 at para. 89.

Is there an appropriate representative plaintiff?

[32] Section 4(1)(e) of the CPA sets out the requirements for the representative plaintiff. They must be someone 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.

[33] Some other factors identified by the Supreme Court of Canada in *Dutton* at para. 41 include the representative’s motivations, their capacity to bear the costs of the litigation, and the competence of their counsel:

[34] Courts are reluctant to dismiss the certification solely based on an inadequate representative plaintiff. If the other criteria are met, the court should make an effort to allow the proceeding to advance, whether by providing the representative plaintiff with directions or by allowing a more suitable plaintiff to be substituted in: *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165 at para. 60

Analysis

[35] The application for certification advanced by the plaintiff is quite broad. The allegations are all encompassing. They allege breach of contract. They allege fraudulent misrepresentation. They allege breaches of numerous *BPCPA* claims, including the *Civil Code of Québec*, C.Q.L.R. c. CCQ – 1991 [CCQ]. They advance claims under the *CA*, under the *SGA*, under the *CPLA*, and they allege unjust enrichment.

[36] After considering the matter for some time and reviewing the capable arguments of both plaintiff and defendant, and considering the law as I understand it, I have most reluctantly concluded that the claim as presented for certification cannot succeed. I do so on the grounds that the plaintiff has not established the requirement of s. 4(1)(a) that the notice of civil claim discloses a cause of action.

[37] Central to the argument of the plaintiff are a number of assertions. They argued that the defendant made assertions of superiority in the higher priced packages, and that a balanced view of the representations contained on the packaging would lead a consumer to believe that there were comparatively stronger or better products at a higher price point. The plaintiff asserted that effectively, the defendant in their labeling was asserting a “good, better, best” comparison, with an increased level of quality as you considered a higher price point product.

[38] The descriptive language they rely upon is set out in paragraph 10 of their “Fresh As Amended Notice of Civil Claim” dated 11 January, 2024.

[39] There is a burden on the plaintiff to show the pleadings disclose a cause of action, and that is generally not a rigorous test, but it is a test that need be made out on the pleadings. In other words, the pleadings as a whole, when read, must show a clear cause of action, a tort, or a breach of contract, or a breach of some legislation, in this case legislation designed to protect consumers. In the pleadings numerous provincial and federal pieces of legislation are briefly referred, as is the CCQ.

[40] It is not for the court at this stage to weigh the merits of the cause of action. In fact, this type of application presents somewhat of a reverse onus, in that the defendant really needs to show that it is plain and obvious that the pleadings do not disclose a reasonable cause of action. But the basics, an alleged tort, an alleged breach of contract, a direct act against a piece of legislation, needs to be not only asserted, but plead with sufficient facts to warrant, on the pleadings, an arguable or possible case.

[41] Crucial to the plaintiff's claim before me is their allegation that the defendant has represented the solvent products as having different attributes, or being of different quality, and thus justifying a different price. They say that is a false representation.

[42] Unfortunately for the plaintiff, based on the current state of the pleadings, that claim is speculation.

[43] Again, I point out what is noted in paragraph 10 as the case is currently plead:

10. On the label of each Solvent Product whether it be the Recochem, Solvable or Recordosol brand that they sold, specified the primary use for that specific product, which recently, *inter alia*, included:

- (a) Solvable Paint Thinner Professional Grade (53-321) – Ideal for the Toughest Cleaning Jobs, spotless removal of oil and grime, degreases tools and auto parts, fast cleaning for brushes, rollers and trays;
- (b) Recordosol Paint Thinner with Mineral Spirits – Good for cleaning up after painting, improving flows and penetration;
- (c) Recordosol Paint Thinner;
- (d) Varsol (53-371) – Premium Quality, Trusted by more Professional Contractors, easier paint clean up, fast degreasing and spot cleaning, smoother application of oil based paints, varnish and stains and premium quality; and
- (e) Solvable Mineral Spirits Professional Grade (53-341) – Gentle Yet Effective on Multiple Surfaces, cleans multiple surfaces, removes grease, cleans paint brushes and rollers.

[44] Within the pleadings, or even the surrounding evidence which relates to the packaging of the materials presented in court, which, based on the pleadings I feel it appropriate for the court to observe, there does not appear to be any representation made by the plaintiff that is fundamentally, or even arguably false.

[45] Upon consideration of the language used on the various products marketed by the defendant, and noting that the apparent actual chemical make-up on all impugned products is identical, it cannot be said that any of the statements are inherently false. The marketing language, the descriptors on the packaging is just, in

reality, different. They are not comparative directly or indirectly with any of the other offered products, be they of greater value or lesser value.

[46] Additionally, upon reflection, it cannot be said that any of the representations and labelling of the product can form a misleading impression. None of the representations are of a comparative nature. They simply attribute qualities individually and not in comparison to others.

[47] Much was said by plaintiff's counsel at the hearing about the "good, better, best" comparatives, and about the use of the term "Premium Quality". None of those attributes appear on any of the labels reproduced before the court in the pleadings, nor is there any specific allegation in the pleadings of a representation, or implied representation, of a "good, better, best" comparison amongst the products themselves or generally.

[48] Secondly, I am not convinced that Recochem's failure to disclose on its three or four classes of products, that the contents of the products are all identical, as alleged, is in fact actionable.

[49] In *Apotex Inc. v. Hoffmann-La Roche Ltd. (October 22, 1999) Toronto, 99-CV-170379 (ONSC) unreported*, [Apotex], the Superior Court of Justice and the Ontario Court of Appeal held that it was not actionable for those who market branded drugs and generic drugs to price them substantially different. There was no misleading of consumers by marketing drug products which resulted in consumers paying a premium for brand name drugs, as opposed to generic drugs.

[50] The representations on the solvent products appear to be true, at least at this stage as the case is plead, as there is no suggestion that the representations contained on the solvent products are in fact untrue. Calling one paint thinner, calling one mineral spirits, calling one paint thinner with mineral spirits, calling one professional grade or of premium quality, is simply marketing language. It cannot be said, nor is it succinctly alleged in the pleadings as I read them, that any of the representations advanced on the products by the defendant are false

representations. Calling something premium grade or premium quality is not a false representation, especially in the absence of a direct comparison to an allegedly inferior product.

[51] Finally, and again reluctantly, I agree with the submissions of counsel for Recochem that labelling a product in a certain way, pointing out certain characteristics in one product and not in another, and pricing them for retail purposes at different price points, does not constitute a false representation. Pricing is not a representation of quality – it is simply pricing.

[52] Turning to the specific claims of breaches of contract, tort and various legislation advanced in the pleadings, a claim of breach of contract requires privity of contract between the plaintiff and the defendant.

[53] Here, the plaintiff is an indirect purchaser and does not have a contractual relationship with Recochem, nor do any of the members of the proposed class. Simply put, the contractual relationship that exist is between the purchaser of these products and the entity which sold them to the purchaser. There is no allegation of direct sales from this defendant to the plaintiff, or anyone within the class as it is currently defined.

[54] I agree with the submissions of counsel for Recochem that the pleadings as they currently stand do not include a breach of duty of good faith, though that was raised in his argument. That claim may arise at a later date.

[55] As for a tort claim of false misrepresentation, I have concluded, as noted earlier, that the representations of Recochem on its various products, are not false. They are different on different products. They employ different language to represent different qualities on different products, but they make no comparative claims to other products to suggest that in some way the contents of the more expensive product, as an example, is superior to the lesser expensive product.

[56] As a general rule of pleadings, the plaintiff is required to plead the particular representations which they believe are fraudulent and no such particular

representations that could be viewed as fraudulent have been plead to date. Again, this may result in subsequent application.

[57] As for claims against the various provincial consumer protections acts, there is not a lot of detail in the pleadings or in the submissions of the general requirements, or individual requirements, of various provincial consumer protection act legislation. In these reasons, I am assuming, perhaps incorrectly, that most, if not all, provincial consumer legislation is of a similar nature to that found in the *BPCPA*.

[58] In their pleadings, the plaintiff relies on what it characterizes as Recochem's intentional misrepresentations, which they say would constitute an unlawful trade practice, employing deception and concealment of material facts under the *BPCPA*. Again, as was referenced in *Apotex*, there is no obligation on a manufacturer to educate consumers as to best prices or best value. Again, without a direct comparison, an actual representation of a "good, better, best" attribute as between the various products, there is no deception or concealment. There is no misrepresentation.

[59] Finally, in regards to the plethora of claims under various provincial consumer protection legislation, I note the decision of Madam Justice Iyer, as she then was, in *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794, where the proposed class made reference to the *BPCPA* and "the equivalent provisions of the consumer protection legislation in the rest of Canada". In that case, Iyer J. did not certify the claims under the provincial consumer protection acts because the pleadings failed to articulate the exact provisions of the various pieces of legislation, any different tests or different criteria within those legislations and, as such, a blanket certification of a Canada-wide class action under various consumer protection legislation was refused.

[60] In my view, to simple reference legislation from other provinces, without pleading the specific attributes of the legislation, leaves an unfair burden on a Court hearing this type of application. It is not the role of a Court to do a plaintiff's job, or their counsel's job, by reviewing in detail the provisions in close to 20 different

provincial acts, as plead, to determine outside of court and without submissions how or if there is an established cause of action.

[61] In regards to the *CCQ*, the plaintiff has not particularized any breach of it. As such, that general claim does not disclose a reasonable cause of action.

[62] As for the *CA*, again having concluded that Recochem has not made any false or misleading representations, claims under the *CA*, in my view, are deemed to fail. There is nothing in the *CA* that was brought to my attention that imposes a general duty of disclosure such that there was a positive obligation, which the defendant breached, related to pointing out the similarities or commonalities of all its marketed solvents.

[63] The claim for unjust enrichment must also fail, again because it cannot be said on the basis of the pleadings before the court, that there is any false or misleading representation made by Recochem to the plaintiff, or others generally.

[64] As for claims under sales of good legislation, that legislation deals primarily with defective goods, or to use a commonly found term in regards to sales of good legislation, goods that are “not fit for purpose”. Generally speaking, sale of good claims are claims which involve a seller and a purchaser. Claims are based on that direct or implied contract. The plaintiff, and apparently no members of the proposed class, were involved in a direct purchaser from Recochem. The plaintiff bought from third parties, hardware stores, big box retailers and the like.

[65] Finally, in relation to claims under the *CPLA*, there is no privative cause of action for a breach of s. 71. Accordingly, any claim under that legislation cannot succeed.

[66] Having determined, reluctantly, that the plaintiff has not made out the requirement of s. 4(1) (a) of the *CPA*, I need not deal with the remaining aspects of the test as set out on s. 4(1) (b) to (e).

Conclusion

[67] I have said in these reasons a number of times, I have reluctantly concluded that as the pleadings are currently drafted, they do not disclose a cause of action, a basic requirement for certification under s. 4(1) of the *CPA*.

[68] It may well be the case that this matter can be rethought or reformulated so as to again allow a claim for certification. That is for a later date.

[69] While not encouraging people to litigate, it strikes me as, perhaps best put, morally concerning that a corporate entity would be so bold as to cleverly market products, all of which are the same, at different price points, with seemingly legal, non-misleading, apparently true, cleverly worded descriptions, in a brazen attempt to maximize profit and to “pull the wool” over the eyes of the ultimate consumer of their product. I say this in part because the suggestion before me was that at one point in time all these products were different, but a decision was made to simply do the legal equivalent to what the “Duff” beer company did in the noted episode of the Simpsons, market three products as having different attributes, when in fact all the products had all the same attributes.

[70] In light of my concern in regards to the conduct of the defendant as I have attempted to articulate, I am exercising my discretion to order that each party is to simply bear their own costs of the certification.

[71] The application for certification is dismissed with no costs to either party.

“J.R. Groves J.”

GROVES J.