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# A delicate balancing act: certifying multi-jurisdictional class actions in British Columbia

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The British Columbia Court of Appeal (BCCA) recently dismissed an appeal of an order certifying a multi-jurisdictional class proceeding. *N&C Transportation Ltd. v. Navistar International Corporation*, 2022 BCCA 164 is the appellate court's first decision that substantively considers section 4.1 of the B.C. *Class Proceedings Act* (*CPA*), which was added as part of amendments to the statute made on October 1, 2018.

In upholding the decision of the Supreme Court of British Columbia in *N&C Transportation Ltd. v. Navistar International Corporation*, 2021 BCSC 2046, the BCCA provided succinct (the decision is just over 50 paragraphs) but authoritative guidance on how certification judges should exercise their discretion when considering applications to certify multi-jurisdictional class proceedings in B.C.

## The decision of the Supreme Court

Against the background of parallel class actions in Manitoba, Alberta, Québec, and Ontario — some only proposed, some already certified — the Supreme Court held that the already-certified B.C. action should be certified as a multi-jurisdictional class proceeding, excluding class members in Québec. Justice Skolrood granted this order as a result of the comparatively advanced stage of the B.C. proceedings, the uncertainty surrounding next steps in the Alberta action, and the fact that a settlement hearing had already been scheduled in the Québec action.

The decision indicates that multi-jurisdictional certification cannot be avoided simply because there are parallel actions, even if the parallel actions have advanced further on paper. Courts will also consider the viability of litigation plans in the parallel actions, as well as the reasons for any delays with the B.C. action that class counsel seeks to have certified on a multi-jurisdictional basis.

## History and progression of parallel actions

The various actions allege, among other things, that the defendants were negligent in the design of exhaust systems in heavy-duty diesel truck engines installed in Navistar EGR trucks.

On June 24, 2014, the B.C. action was the first proposed class action commenced in Canada concerning the allegations. A parallel action was filed in Manitoba two months later. The Alberta action was commenced a few months after that, closely followed by the Québec action. The next year, two proposed class actions were commenced in Ontario. In 2021, counsel in the Québec action negotiated proposed settlements with the defendants in the Alberta and Québec actions.

The Alberta action was commenced on November 10, 2014, but almost no steps were taken until a proposed settlement was reached with the defendants in September 2021. Justice Skolrood highlighted certain deficiencies with the Alberta action (at the time):

- There was no valid representative plaintiff, as the plaintiff corporation was dissolved in 2019 and a hearing to replace it had not yet been scheduled;
- The action had not been certified and no application for such had been scheduled; and
- The proposed settlement excluded class members resident in Québec and B.C.[1]

The proceeding in Québec was commenced on November 28, 2014. After being stayed in 2018 while the defendants in the B.C. action sought leave to appeal a separate BCCA decision upholding certification (of a national opt-out class action) to the Supreme Court of Canada, the defendants in the Québec action agreed to a settlement with the plaintiff in May 2021.[2]

## Certification of multi-jurisdictional class proceedings

The *CPA* was amended on October 1, 2018 to include section 4.1, which provides a framework for courts in that province to certify multi-jurisdictional class actions. This turned B.C. from an "opt-in" jurisdiction to an "opt-out" one: that is, when a multi-jurisdictional class proceeding is certified, class members located outside the province will automatically be included in the class *unless* they opt out.

That section provides, in relevant part:

4.1 (1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order

a. certifying the proceeding as a multi-jurisdictional class proceeding, if

I. the requirements in section 4 (1) are met, and

II. the court determines, having regard to section 4 (2) and (3), that British Columbia is the appropriate venue for the multi-jurisdictional class proceeding, [...].

If the usual requirements to certify a class proceeding are satisfied, B.C. courts are then required to determine whether the province is the appropriate venue for a multi-jurisdictional class proceeding (or whether it would be preferable for the claims or common issues to be resolved in other proceedings). The factors enumerated in section 4(4)(b) of the *CPA* inform this determination:

I. the alleged basis of liability, including the applicable laws;

II. the stage that each of the proceedings has reached;

III. the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan [...];

IV. the location of class members and representative plaintiffs in each of the proceedings, [...]; and

V. the location of evidence and witnesses.

## Factors informing the multi-jurisdictional certification of the B.C. action

In considering whether to certify the action as multi-jurisdictional, and applying the factors set out in section 4(4)(b) of the *CPA*, Justice Skolrood held as follows:

- Whether the defendants engaged in a "reverse auction" by attempting settlements in multiple jurisdictions before settling on the least costly one is, contrary to the plaintiffs' argument, not strictly relevant to certifying a multi-jurisdictional class proceeding;
- The alleged basis of liability was substantially the same across the parallel actions;
- Although the Alberta and Québec actions had progressed further than the B.C. action, they would not have reached the stages they did if the plaintiffs in the B.C. action had not obtained certification and defended that decision on appeal;
- The advanced stage of the Québec proceeding militated in favour of it continuing;
- Although there was also a proposed settlement in the Alberta action, the deficiencies with that action (summarized above) meant that "it cannot credibly be argued that the Alberta Action is at a more advanced stage than the B.C. action";
- Counsel in the B.C. action carried out considerable work to advance the case; and
- The locations of class members, representative plaintiffs, evidence, and witnesses were largely neutral.

Balancing these factors, Justice Skolrood certified the B.C. action as a multi-jurisdictional class proceeding, but excluded class members residing in Québec. Notably, although it is not an express factor under section 4(4)(b) of the *CPA*, Justice Skolrood appears to have been influenced by the work of the B.C. plaintiffs to advance their claim.

## The decision of the Court of Appeal

The defendants appealed the judgment to the Court of Appeal. On appeal, the Court was asked to decide one main issue: whether the certification judge erred in certifying the action as a multi-jurisdictional class proceeding and, in particular, whether the judge had made such a decision "as though he were addressing the prospect of multiple class proceedings in multiple provinces proceeding to multiple trials", instead of comparing the B.C. action with the two proposed settlements in Alberta and Québec.

The Court of Appeal also addressed several "concerns" raised by the appellants:

- There are differences between the B.C. action and other actions (i.e., the vehicles or engines are not identical, and the B.C. action does not include leased vehicles);
- The respondent "did nothing" in the B.C. action for a lengthy period of time;
- The certification judge did not adequately address the viability of the respondent's litigation plan;
- The certification judge credited the respondent and class counsel for work they did up to 2019 instead of considering whether a multi-jurisdictional proceeding was in putative class members' best interests going forward; and

- The certification judge should not have tried to "jealously guard its own jurisdiction" or "favour or protect the interests of class counsel within th[e] jurisdiction".

The certification decision was reviewed on a deferential standard (with the Court rejecting the appellants' submission that it should be given less deference as it was a "case of first impression").

The Court dismissed the appeal. As to the main issue, Justice Voith concluded that, contrary to the contentions of the appellants, the certification judge viewed the proposed Alberta and Québec settlements centrally in his reasoning, as opposed to the risk of multiple trials.

As for the appellants' other "concerns", Justice Voith quickly dismissed them as meritless. In reaching these conclusions, the Court laid out certain useful principles:

- Whether it is "preferable" that an action be certified as a multi-jurisdictional class proceeding is a discretionary decision;
- Although certification judges must be "guided by" and "consider" the objectives and factors in sections 4(4)(a)-(b) of the *CPA*, the specific weight to be attached to each of those is within the judge's discretion;
- Certification judges are not required to adjourn applications for multi-jurisdictional certification where settlements have been reached, but not yet considered, in other jurisdictions; indeed, if that were the case, "real mischief" could result as such applications would turn, in part, on "whether class counsel in another province had been able to negotiate a hurried settlement with the defendants";
- Parties who settle related litigation in other provinces may apply to amend a multi-jurisdictional certification order pursuant to sections 8(3) and 10(1)-(2) of the *CPA*; and
- Related ongoing proceedings in other jurisdictions need not concern "identical" subject matter; instead, section 4(3) of the *CPA* contemplates that "the same or similar subject matter" may be raised in such other actions.

## Key takeaways

- B.C. courts will likely certify multi-jurisdictional class proceedings in appropriate cases, even in the face of related parallel proceedings in other jurisdictions;
- Class action defendants should carefully consider the circumstances of parallel proceedings when arguing that a proposed multi-jurisdictional class proceeding should not be certified;
- B.C. courts will take a critical look at the stages and plans for each of the proceedings, and the reasons underlying those stages and plans, when considering applications for multi-jurisdictional certification; and
- There is no "bright line rule" that, just because related proceedings have been nominally settled in other provinces, multi-jurisdictional class proceedings in B.C. will be adjourned.

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[1] Following the Supreme Court of British Columbia's decision, the plaintiffs filed an application to stay the Alberta action on December 1, 2021, and the plaintiff in the Alberta

action filed an application for approval of the proposed settlement in that action on December 6, 2021. Those applications are expected to proceed in the fall of 2022 (see *N&C Transportation Ltd. v. Navistar International Corporation*, 2022 BCSC 289).

[2] The settlement in the Québec action was approved on January 20, 2022 (see *N&C Transportation Ltd. v. Navistar International Corporation*, 2022 BCSC 289).