CITATION: Bennett v. Hydro One Inc. et al, 2018 ONSC 7741
DIVISIONAL COURT FILE NO.: 770/17
DATE: 20181231

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEITCH, MEW, and MYERS JJ.

BETWEEN:	
Bill Bennett Appellant	Eric R. Hoaken, Ian C. Matthews, Kirk M. Baert, and Garth Myers, for the appellant
– and –	
Hydro One Inc., Hydro One Brampton Networks Inc., Hydro One Remote Communities Inc., Norfolk Power Distribution Inc. and Hydro One Networks Inc. Respondents	Laura KL. Fric, Lawrence E. Ritchie, and Robert Carson, for the respondents
	HEARD at Toronto: October 22, 2018

[1] The appellant appeals an order of Perell J. dated November 28, 2017 dismissing a motion for certification of this action as a class proceeding pursuant to the *Class Proceedings Act*, 1992, S. O. 1992, C.6 (the "*Act*").

[2] Pursuant to s. 30(1) of the *Act* a party may appeal to this court from an order refusing to certify a proceeding as a class proceeding.

Brief background facts

[3] The appellant is the proposed representative plaintiff in a proposed class proceeding against the respondents. He alleges that the respondents engaged in systemic negligence in connection with overcharging for electricity supply caused by a new billing and customer information system (the "CIS") implemented in 2013.

[4] The Statement of Claim seeks declaratory relief for breach of contract, negligence, unjust enrichment, general and punitive damages and an accounting of all sums collected by the respondents since May 2013.

[5] The Ontario Ombudsman investigated the implementation of the CIS and its consequences. The Ombudsman released a report dated May 2015, documenting inaccurate billing by the respondents.

[6] The respondents retained PwC to provide a report regarding the implementation of the CIS and its report "Hydro One Customer Service and Billing Issues – Lessons Learned" was released December 2014.

[7] The appellant retained Mr. Gurusamy, an expert in the "design and configuration/customization" of systems like the CIS and according to his report dated April 13, 2016, the respondents failed to meet industry-wide generally accepted standards they ought to have applied in the design and implementation of the CIS.

[8] The proposed class is all persons and entities, other than excluded persons (defined generally as persons related or connected to the respondents), who purchased electricity from the respondents between May 2013 and the date of certification. It is estimated that the class would include 1.3 million customers.

[9] On the certification motion, the motion judge found that the appellant's action satisfied the cause of action and identifiable class criterion of the *Act.*

[10] The motion judge also found that if all other certification criteria were satisfied, then the appellant would satisfy the representative plaintiff criteria.

[11] It is the conclusions of the motion judge in relation to the non-satisfaction of the common issue and preferable procedure criterion which has led to this appeal.

[12] The appellant sought certification of 13 common issues; two relating to negligence, two relating to breach of contract, three relating to unjust enrichment, one relating to causation of damages, four relating to aggregate damages, and one relating to punitive damages.

[13] These common issues can be summarized as follows:

1. whether the respondents owed the class a duty of care to take reasonable steps to ensure that they employ an accurate and reliable billing system; an accurate system to quantify the consumption of electricity upon which the bill is based; and, a timely, effective, accurate and informed customer service responsive to class members' questions regarding meter accuracy, distribution rates and billing errors (I note that the appeal did not address this latter customer service duty) and whether it breached these duties of care;

2. whether the respondents breached their contractual obligations owed to the class respecting billing;

3. whether each of the elements of unjust enrichment were met;

4. whether the respondents' negligence caused damages to the class;

5. whether damages can be assessed in the aggregate and, if so, the quantum of aggregate damages; and

6. whether the respondents should pay punitive damages and in what amount.

[14] The motion judge found that there was a "fatal flaw" underpinning all common issues in that there was no "common harm" to the class. While there had been multiple errors in billing, some errors were harmful to the class, some were neutral, and some were beneficial to the class.

[15] The motion judge concluded that the proposed common issues of negligence, breach of contract, and unjust enrichment were not capable of being certified since they were not substantial ingredients of class members' claims against the respondents.

[16] The motion judge also concluded that the proposed common issue respecting causation of damages had no basis in fact because the appellant was unable to identify the cause of the billing errors.

[17] He further found that the proposed common issues respecting aggregate damages could not be certified as common issues because there was "no general experience of damages" and individual issue trials would be required.

[18] The motion judge determined that the proposed class action was not the preferable procedure for resolving common issues because he could find no common issues and the preferable procedure was the process provided by the Ontario Energy Board (the "OEB").

Standard of review

[19] On an appeal from a judge's decision, the applicable standard of review is one of correctness with respect to issues of law or legal principle (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[20] Absent matters of general principle, errors of law, or a palpable and overriding error with respect to a finding of fact that is central to the proper application of s. 5 of the *Act*, a certification decision should not be interfered with by an appellate court (see *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321; *Cassano v. Toronto Cominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401).

[21] Appellate courts have recognized the special expertise of class action judges and have held that substantial deference is owed on certification decisions. This deference does not however extend to "errors in principle which are directly relevant to the conclusion reached." *AIC Limited v. Fischer*, 2013 SCC 69 at para. 65, [2013] 3 S.C.R. 949; *Cassano* at para. 23.

The issues on this appeal

[22] The following issues are raised by the appellant:

1. Did the motion judge err in concluding there are no common issues?

2. Did the motion judge err in finding a class action is not the preferable procedure?

Issue number one – did the motion judge err in concluding there are no common issues?

[23] The appellant acknowledges that the motion judge correctly stated the general principles respecting common issues at para. 80-82 of his decision 2017 ONSC 7065. It is useful to repeat these principles here:

> [80] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[1] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[2] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[3] In *Pro-Sys Consultants v. Microsoft*,[4] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.
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> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence

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[1] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[2] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40
[3] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *McCracken v. CNR*, 2012 ONCA 445 at para. 183.
[4] 2013 SCC 57 at para. 106.

> that there is a workable methodology for determining such issues on a class-wide basis.[5]
>
> An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[6] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[7] However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question not give rise to conflicting interests among the members; success for one member must not result in failure for another.[8]
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> The common issue criterion presents a low bar.[9] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[10] Even a significant level of individuality does not preclude a finding of commonality.[11] A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[12]

[24] The motion judge observed at para. 85 that the appellant relied on "systemic negligence as opposed to discrete common error that potentially could harm all the class members", and this was a critical differentiation from *Markson v. MBNA Canada Bank* 2007 ONCA 334 and *Fulawka v. Bank of Nova Scotia* 2012 ONCA 1148 upon which the appellant was noted to principally rely. The motion judge concluded at para. 85 that:

> The misplaced reliance on systemic negligence is the fatal flaw in the theory of commonality for the case at bar… the case at bar produces no common harm but rather the alleged systemic negligence produces

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[5] *Pro-Sys Consultants v. Microsoft* 2013 SCC 57 at paras. 114-119; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C. ref'd [2003] S.C.C.A. No. 106.
[6] *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).
[7] *Nadolny v. Peel (Region),* [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.,* [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), varied on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.,* [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).
[8] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 44-46.
[9] Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003),
[10] *Cloud v. Canada (Attorney General),* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.)
[11] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.
[12] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

> a multiplicity of errors, some harmful, some neutral, and some even beneficial.

[25] Ultimately, the motion judge concluded at para. 96 that:

> The common issue of whether Hydro One Networks was systemically negligent is not a substantial ingredient of each member's claim and for some class members, the common issue of systemic negligence would be an ingredient of Hydro One Systems' potential counterclaim. All members of the class would not benefit from the successful prosecution of the action and indeed some would be potentially harmed if Hydro One were to assert a counterclaim.

[26] As a result of these conclusions, the motion judge found that the common issues respecting negligence did not satisfy the common issues criterion and for similar reasons, found there was no common issue about breach of contract or unjust enrichment.

[27] For similar reasons, the motion judge found that there are no common issues about aggregate damages as factual and legal issues other than those relating to monetary relief would still remain undetermined and he observed at para. 105 and 107 "there inevitably will be individual issues trials to determine both liability and damages" because "every class member is not exposed to the risks of systemic negligence associated with the CIS".

[28] The motion judge declined to certify the common issue respecting punitive damages because he considered it peripheral and in his view, expressed at para. 111, "punitive damages alone cannot justify the certification of an action as a class proceeding".

[29] The appellant asserts that the motion judge plainly and clearly made erroneous findings of fact, over-emphasized individual differences, and impermissibly used merit evidence provided by the respondents to make such findings. Put simply, the appellant's position is that the motion judge was led into error by the respondents' evidence of some under-billing of the class.

[30] The appellant also contends that the motion judge erroneously focused on the issue of causation and concluded that individual inquiries are required.

[31] According to the appellant, the evidentiary record including the Ombudsman report, the PwC report, and Mr. Gurusamy's opinion is more than sufficient to conclude that there is "some basis in fact" to certify the proposed common issues.

[32] In addition, the appellant says that such evidence provides "some basis in fact" to support a conclusion that the systemic errors of the respondents in the design and implementation of the CIS caused harm to some or all class members. They emphasize that, in his supplemental report, Mr. Gurusamy expressed confidence that he could "build a model replicating Hydro One's business logic that can be used to generate customer bill data".

[33] The appellant provided evidence from an expert on damages who opined that, based on the information from Mr. Gurusamy, any loss to the class "can be calculated on an aggregate basis with reasonable precision". As summarized in para. 35 of the appellant's factum:

> In essence, what is occurring is a parallel test of Hydro One's CIS (which generated the invoiced amounts) against Mr. Gurusamy's model (which will generate the proper amounts). If there is a difference between the invoiced amount and the proper amount so that the former is higher than the latter, this can be attributed to CIS error, with a delta being the overbilling caused by the CIS.

[34] The appellant emphasizes that the respondent's representative, who responded to the certification motion, acknowledged in his evidence that the respondents accepted the findings in the ombudsman report and the respondents have filed no expert evidence responding to the opinions of the expert they retained.

[35] The appellants' arguments raised the question of whether the motion judge improperly focused on evidence respecting the merits of the claim and whether the action could succeed.

[36] It is proposed that each member of the class could advance a claim alleging they were overcharged because of the CIS, that is, each class member was exposed to being improperly billed. The appellant analogizes these circumstances, in particular to the exposure to not being paid overtime wages in *Fulawka.*

[37] The appellant acknowledges that he does not know the precise technical defect that caused the erroneous billings. However, it is his position that he need not prove the precise nature of the breach or the defect in the design, testing, and implementation of the CIS. Again, the appellant analogizes the circumstances to *Fulawka.*

[38] The appellants say that if there is a basis of fact that there was a breach of a standard of care owed to the class which caused harm to the class such harm is not required to be uniform across the class.

[39] Further, they say that general evidence of causation regarding the defects in the CIS that reveal it had the potential to, or did cause harm to the class is evident on this record by virtue of the Ombudsman's report, the PwC report, and the reports of Mr. Gurusamy.

[40] Despite the able argument of appellant's counsel, we cannot find that the motion judge made an error in the legal principles that he applied. A finding that some bills were wrong and the CIS was poorly designed and implemented does not advance the resolution of the claims for the class. It will still be necessary to determine for each individual, what loss, if any, was suffered, whether the loss was caused by the CIS or something else (computer malfunction or human error, for example), and what recompense has already been received. In other words there is no saving compared to individual trials. Alternatively expressed, no issue is off the table at individual trials because it has been resolved already at the common trial.

[41] As the Supreme Court of Canada made clear in *Hollick* at para. 18 referencing *Western Canadian Shopping Centres Inc.* "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 members' claim'". A common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of the class member's claim.

[42] The common facts that all 1.3 million customers of the respondents have the same contracts, the CIS generated bills to all of those customers, and the negligent design or implementation of the CIS caused risk of error to all customers and continues to present risk of future error to all, do not meet the common issue criterion on the test for certification in relation to the proposed common issues of negligence, breach of contract, and unjust enrichment. Findings on those points are not substantial ingredients in the proposed class members' causes of action.

[43] These circumstances are analogous to those considered by Strathy J. in *Loveless v. OLG*, 2011 ONSC 4744 where he observed at para. 64:

> [64] The first common issue "[h]ave retailers wrongfully deprived purchasers of OLG tickets of their winnings?" is a soft pitch to the plaintiff, but the answer does nothing to advance the claims of class members to first base. A "yes" answer will do nothing to move any class member closer to the resolution of his or her claim. Every single class member with a claim will have to demonstrate that he or she was actually deprived of their winnings by a retailer. The answer to a general question asking whether some retailers have defrauded some ticket purchasers is utterly meaningless.

[44] It is significant that in *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 and *Markson v. MBNA Canada Bank*, 85 O.R. (3d) 321 (CA), leave to appeal to SCC refused, [2007] S.C.C.A. No. 346 where a violation of the *Criminal Code* was alleged, all class members were charged by the contentious billing practice.

[45] Similarly, In *Cassano v. TD Bank*, 2007 ONCA 781, leave to appeal to SCC refused, [2008] S.C.C.A. No. 15, it was known that undisclosed fees were charged to credit card holders on foreign currency transactions.

[46] In *Fulawka* the issue was whether overtime pay was properly paid because the employer did not maintain accurate records and resolution of the common issues in favour of the class could assist individual class members in establishing liability in their favour.

[47] These circumstances can be differentiated from those cases as the motion judge concluded.

[48] Similarly, with respect to the common issue of causation, we agree with the motion judge that even if the work of the appellant's expert revealed a delta, that result would not reveal that the delta (ie. the damages) was caused by the systemic negligence asserted.

[49] As a result of these conclusions we are similarly satisfied the motion judge did not err in his findings in relation to common issues respecting damages.

[50] Also, there is no basis to interfere with the motion judge's finding that these circumstances did not meet the requirements of s. 24(1) of the *Act*. The motion judge was entitled to find that s. 24(1)(b) is not satisfied, as individual inquiries will be required to establish liability. With that finding, as the respondents assert, the motion judge did not need to discuss s. 24(1)(a) in more detail then he did.

Issue number two – did the motion judge err in finding a class action is not the preferable procedure?

[51] Preferable procedure is a question of discretion at its core. Absent an error in principle or a finding that the motion judge was clearly wrong, an appellate court must give deference to the motion judge's exercise of his discretion.

[52] Having found as we have on the common issues discussed above, it is not strictly necessary for us to determine whether, assuming the other criteria having been met, a class action would be the preferable procedure for advancing the claims of the putative class members.

[53] Suffice it to say that we are satisfied that the motion judge properly weighed relevant factors to reach his conclusion that a class action was not the preferable procedure. He noted that the goals of the *Act* are met by the OEB, which is the legislature's chosen and preferred vehicle to regulate the respondents' behaviour and considered what had been and was capable of being accomplished under public law process.

Costs

[54] The parties have agreed that costs fixed at $25,000 ought to be awarded to the successful party. Accordingly, the appellant shall pay the respondent all-inclusive costs of $25,000.

Justice L.C. Leitch

I agree

Justice G. Mew

I agree

Justice F. Myers

Released: December 31, 2018

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Respondents

REASONS FOR JUDGMENT

Released: December 31, 2018