IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.,* 2021 BCSC 2072

Date: 20211022
Docket: S172912
Registry: Vancouver

Between:

676083 B.C. Ltd.

Plaintiff

And

Revolution Resource Recovery Inc.

Defendant

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. September 23-24, 2021
Place and Date of Judgment:	Vancouver, B.C. October 22, 2021

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I. Introduction

[1] This is the second application by the plaintiff 676083 B.C. Ltd. ("676") seeking to have this action certified as a class proceeding pursuant to s. 2(2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. In my earlier reasons for judgment dated November 22, 2019 and indexed as 2019 BCSC 2007 (the "Certification Reasons"), I refused 676's first such application but granted it leave to re-apply on certain terms.

[2] 676 appealed my decision. The defendant, Revolution Resource Recovery Inc. ("Revolution") cross-appealed. 676's appeal was allowed in part. Revolution's cross-appeal was dismissed. In the result, the terms under which 676 could apply again for certification were varied by the Court of Appeal (see 2021 BCCA 85, the "Certification Appeal Reasons").

[3] 676 argues that it has satisfied the terms stipulated in my order, as revised by that of the Court of Appeal, and that the action should now be certified. Revolution responds that the application should be dismissed because 676 has, for various reasons, again failed to meet the test for certification.

[4] For the reasons that follow, I have concluded that the application should be allowed.

II. Procedural History

A. The First Certification Application

[5] The factual background to this action is described at length in the Certification Reasons and the Certification Appeal Reasons. In summary, Revolution provides waste disposal and recycling services to commercial customers in the Lower Mainland area of British Columbia. 676 is one of Revolution's former customers. In this action, 676 advances two discrete claims against Revolution.

[6] The first aspect of the claim pertains to Revolution's billing practices. 676 had originally pleaded that, since April 2015, Revolution has been routinely overcharging its customers by billing them for amounts in excess of what it was entitled to charge

under the standard form of agreement that it uses. Revolution was alleged to have done so by means of a surcharge appearing on customer invoices, labelled as "Government Surcharge/Material Ban". 676 originally sought damages for breach of contract and unjust enrichment in respect of that aspect of the claim.

[7] Second, 676 had pleaded that Revolution routinely relies on certain clauses in its standard form of agreement in order to make it difficult for its customers to avoid an automatic renewal of the term or otherwise to terminate their agreements and change service-providers. 676 originally sought to have those clauses declared void and unenforceable as unconscionable and in restraint of trade.

[8] As set out in the Certification Reasons, I found that:

a) the claims that were then being advanced by 676 disclosed viable causes of action for the purpose of s. 4(1)(a), except for the claim in unjust enrichment;

b) 676 had identified two classes capable of being certified under s. 4(1)(b), namely, a so-called "Surcharge Class" alleging a breach of contract and a "Restraint of Trade Class" alleging that certain terms in Revolution's standard form of agreement were in restraint of trade;

c) of the 21 common issues proposed by 676, most of those pertaining to the restraint of trade claim were properly certified under s. 4(1)(c), but those pertaining to the claims for breach of contract, unjust enrichment and unconscionability were not;

d) 676 had met its burden under s. 4(1)(d) of showing that a class action was the preferable procedure for resolving the certifiable common issues identified for the Restraint of Claim Class; and

e) 676 had not demonstrated that it was a suitable representative plaintiff to advance the restraint of trade claim on behalf of the Restraint of Trade Class, primarily because it was not a member of that class and it had not

shown that appointing a representative outside the class was necessary, but also because of certain deficiencies in its litigation plan.

[9] In the result, my order refused 676's application but gave 676, or a substitute, leave to re-apply on a different footing to certify the claim in restraint of trade on behalf of the proposed Restraint of Trade Class.

B. On Appeal

[10] In allowing 676's appeal in part, the Court of Appeal revised the terms under which 676, or its substitute, could apply again for certification. In particular, the following orders were made so as to permit a renewed application to certify a reformulated contract claim on behalf of a reconstituted Surcharge Class as well:

a) the description of the Surcharge Class was restated to read as follows:

> All persons resident in British Columbia who had contracts with [Revolution] for the provision of waste and recycling disposal services from April 1, 2015 to the present and who were charged a Government Surcharge/Material Ban of 18%;

b) 676 was granted leave to amend its pleading by reformulating the contract claim in accordance with the Certification Appeal Reasons; and

c) the following were stated to be suitable common issues to be certified for that reconstituted Surcharge Class advancing that reformulated contract claim:

> BREACH OF CONTRACT
>
> (a) Did Revolution breach the terms of the customer service agreements by charging class members a Government Surcharge/Material Ban in the amount of 18%?
>
> (b) If the answer to common issue (a) is yes, is Revolution liable to the Class Members for breach of contract, and if so, in what amount?
>
> AGGREGATED DAMAGES
>
> (c) Can the damages sought by the plaintiff and other members of the Surcharge Class be calculated on an aggregate basis for the Class as provided by the [*CPA*]?

[11] My order was otherwise left unchanged.

C. The Second Certification Application

[12] 676 has taken a number of steps aimed at fulfilling the conditions for certification set out in my order and that of the Court of Appeal.

[13] First, 676 has amended its pleading to align with those orders. It has deleted the causes of action that the Court of Appeal and I found to be unsustainable. It has also reformulated the claim in contract so that it now pleads the specific allegation identified by the Court of Appeal as giving rise to the common issues specified.

[14] Second, the application now before the Court seeks to have the action certified for both classes, with the Surcharge Class now defined in the manner ordered by the Court of Appeal. 676 seeks to proceed on behalf of the Surcharge Class with the three common issues that the Court of Appeal held to be suitable for that class.

[15] Finally, 676 argues that it has solved the problems that precluded it from being appointed as the representative plaintiff at the first certification application. It says that, assuming the Surcharge Class is certified, it can, as a member of that class, properly serve as the representative plaintiff for both classes. Alternatively, it claims to have adduced evidence satisfying the test under s. 2(4) of the *CPA* by demonstrating that appointing a representative outside the Restraint of Trade Class is necessary to avoid a substantial injustice to that class. It has also prepared a more robust litigation plan.

[16] 676 also seeks, in the further alternative, to have a different representative appointed for the Restraint of Trade Class should that prove to be necessary. For reasons that I will explain later, however, I directed this application to proceed, at least in the first instance, with 676 as the only proposed representative plaintiff.

[17] Revolution argues that 676 has, on this second application, failed to satisfy many elements of the certification test, as follows:

a) with respect to the contract claim, all elements are in dispute, other than the existence of an identifiable class as required by ss. 4(1)(b); and

b) with respect to the restraint of trade claim, the only element in dispute is the suitability of 676 to serve as representative plaintiff for that class under ss. 4(1)(e).

III. The Test for Certification

[18] The test for certification is set out in s. 4(1) of the *CPA*, which states, in relevant part, as follows:

> (1) … the court must certify a proceeding as a class proceeding on an application under section 2 … if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

IV. Discussion

A. Subsection 4(1)(a) – Cause of Action (Contract Claim)

[19] 676 pleads the reformulated claim in contract in the following paragraphs of the proposed 5th Amended Notice of Civil Claim (“ANOCC”):

> Part 1 (Statement of Facts)

11. Revolution provides waste management and recycling disposal services to its clients in the GVRD. The terms of Class members' contracts with Revolution are set out in Revolution's customer service agreements, which include Revolution's written standard form "General Conditions". The General Conditions include a term that Revolution may charge its customers surcharges, fines, or levies where those costs were incurred by Revolution in the course of providing services to the customer.

12. Beginning in April, 2015, and continuing throughout the Class Period, Revolution charged the Surcharge Class a Government Surcharge/Material Ban in the amount of 18% of the Surcharge Class Member's invoice (excluding the charges for "Processing Fee", "Fuel and Environmental" and GST).

13. The Government Surcharge/Material Ban was charged at a uniform, fixed rate of 18% and bears no relation to the surcharges, fines, or levies incurred by Revolution in relation to the Organics Disposal Ban, the Tipping Fee Bylaws, or other any other surcharges, fines or levies incurred by Revolution in the course of providing services to the Surcharge Class Members.

Part 2 (Relief Sought)

19. The plaintiff claims against Revolution as follows:

…

(b) damages for breach of contract in the form of expectation damages, and in the alternative, nominal damages …

Part 3 (Legal Basis)

21. Revolution breached the customer service agreements by charging the Government Surcharge/Material Ban at a uniform, fixed, and arbitrary rate of 18%, which bears no relation to any corresponding fines, levies, or surcharges incurred by Revolution in the course of providing services to the Surcharge Class Members. The customer service agreements do not authorize Revolution to charge the Surcharge Class Members a fine, surcharge or levy at a fixed rate of 18% of each Surcharge Class Member's invoice.

22. In particular, the Government Surcharge/Material Ban is not authorized by any of the "General Conditions", including the "Fines" clause, which would require Revolution to establish, prior to charging a fine, levy or surcharge, that the fine, levy or surcharge was actually incurred by Revolution in the course of providing services to the customer. No such analysis was conducted by Revolution in relation to the Government Surcharge/Material Ban, which it charged to all Surcharge Class Members at an arbitrary and uniform rate of 18%.

23. Revolution is liable to the Surcharge Class Members for damages for breach of contract in the total amount of the Government Surcharge/Material Ban paid by the Surcharge Class Members minus any portion of the

> Government Surcharge/Material Ban actually incurred by Revolution in the course of providing services to the Surcharge Class Members.

[20] Revolution argues that those pleadings fail to disclose a valid cause of action for damages in contract, for a number of reasons.

[21] First, Revolution says that 676 cannot properly seek expectation damages as a remedy for the narrow breach of contract that is now alleged. The only breach now alleged, Revolution says, is a failure to analyse the amount that could properly be charged for the Government Surcharge/Material Ban under the customer service agreements ("CSAs"). Such a breach, it is argued, is not causally connected to any quantifiable loss and therefore can be compensated only with nominal damages.

[22] The difficulty I have with that submission is that the alleged breach, as now pleaded, extends beyond a mere "failure to analyse." It includes the following discrete elements, each of which is a step on the path to liability:

a) Revolution was permitted by contract to charge only for those fines, levies or surcharges that were actually incurred in the course of providing services to the individual class members;

b) Revolution did no analysis to determine what it was contractually entitled to charge in each case; and

c) Revolution instead charged all class members an arbitrary flat fee of 18% without authority under the CSAs.

[23] I agree with Revolution that para. 23 of the ANOCC is potentially problematic insofar as it might be read to suggest that 676 intends to establish liability using aggregated totals. As 676 argues, however, that paragraph describes only the measure of expectation damages alleged to be payable to the Surcharge Class as a whole, once liability is already established. The alleged basis for a class-wide liability ruling is set out elsewhere.

[24] I am satisfied that 676 has pleaded a viable claim for expectation damages measured as the difference between the 18% charged and what the class members, in each case, should have paid had Revolution complied with its obligations under the contract. The loss for which 676 seeks to be compensated is the difference between those two figures, which is alleged to have been caused by the breach that is pleaded. But for Revolution's wrongful imposition of the surcharge at that arbitrary rate, it is alleged, the class members would not have suffered such a loss.

[25] If, in any particular case, it turns out that the class member suffered no such loss, or 676 is unable to show that it did, then nominal damages may indeed be the only remedy available. At this early stage, however, it is impossible to predict how many class members, if any, will ultimately find themselves in that position. In any event, none of that is relevant in assessing the viability of the claim as pleaded.

[26] Revolution also argues that the reformulated contract claim is deficient for failure to plead essential facts, including which terms of the contract are alleged to have been breached, and whether those terms were express or implied.

[27] I find no fault with 676's pleading on that ground either. It is sufficient that 676 pleads that Revolution had no right under the CSAs to impose the Government Surcharge/Material Ban as it did. It is for Revolution, in its response, to identify the contractual source of its authority to do so.

[28] In summary, I am satisfied that 676's latest pleading discloses a valid cause of action in damages, including expectation damages, for breach of contract.

B. Subsection 4(1)(b) – Identifiable Class

[29] It is not disputed that 676 has satisfied this element of the test for both classes.

C. Subsection 4(1)(c) – Common Issues (Contract Claim)

[30] As I mentioned earlier, the Court of Appeal has already found the three proposed common issues that 676 now seeks to have certified for the reconstituted

Surcharge Class to be suitable common issues for that class. Those issues, as they appear in the order of the Court of Appeal, are as follows:

> BREACH OF CONTRACT
>
> (a) Did Revolution breach the terms of the customer service agreements by charging class members a Government Surcharge/Material Ban in the amount of 18%?
>
> (b) If the answer to common issue (a) is yes, is Revolution liable to the Class Members for breach of contract, and if so, in what amount?
>
> AGGREGATED DAMAGES
>
> (h) Can the damages sought by the plaintiff and other members of the Surcharge Class be calculated on an aggregate basis for the Class as provided by the [*CPA*]?

[31] Revolution does not argue that these proposed common issues are entirely unsuitable, nor can it. Rather, it argues that they can properly be certified as common issues now, in light of 676's current pleading, only if it is made clear that they can lead only to the alternative claim for nominal damages, and then only with respect to the initial imposition of the Government Surcharge/Material Ban in April 2015.

[32] Revolution notes that in the Certification Reasons, upheld on this point by the Court of Appeal, I specifically found the quantification of any overcharge in each case to raise individual issues that would be ill-suited to class-wide adjudication. It follows, argues Revolution, that these proposed common issues must be reformulated further so that the available remedy is restricted to nominal damages alone.

[33] I disagree. In the Certification Appeal Reasons, the Court of Appeal identified a possible path to liability and an award of damages on these pleadings that may not require 676 to broach the individual issues that I was concerned with. The viability of that path depends on the outcome of the common issues trial. For the reasons set out in paras. 153-158 of the Certification Appeal Reasons, moreover, I cannot assume that that outcome will foreclose 676 from obtaining, through the common issues trial, a class-wide finding of liability or even quantification of damages,

including expectation damages, which may be held to be calculable as aggregate damages.

[34] The Court of Appeal has since reiterated that the availability of aggregate damages is a suitable common issue on the facts of this case: *Sharp v. Royal Mutual Funds Inc*., 2021 BCCA 307, at paras. 133-139.

[35] It follows that 676 has satisfied this element of the certification test for both classes.

D. Subsection 4(1)(d) – Preferability (Contract Claim)

Background and Legal Framework

[36] I have already found that a class proceeding is the preferable procedure for the resolution of the restraint of trade claim. However, neither I nor the Court of Appeal have considered whether the same is true for the contract claim, even in its previous iteration, let alone the current one.

[37] At para. 151 of the Certification Reasons, I set out the principles governing this element of the certification test. In doing so, I relied primarily on the judgment of Dickson J.A., writing for the Court, in *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 24-26. As Dickson J.A. noted, the analysis begins with the non-exhaustive criteria set out in s.4(2) of the *CPA*, which states as follows:

> (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.

[38] After citing that provision, Dickson J.A. conveniently summarised the jurisprudence dealing with this element of the test, stating as follows:

> [25] Two questions predominate in a preferability analysis: (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives. As to the first question, the common issues must be considered in the context of the action as a whole and their relative importance taken into account when preferability is determined. As to the second, the impact of a class proceeding on class members, the defendants and the court must be considered and a practical cost-benefit approach applied: *AIC* [*AIC Limited v. Fischer*, 2013 SCC 69] at paras. 21, 23; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230; affirmed 2015 BCCA 252; leave to appeal dismissed [2015] S.C.C.A. No. 326 (S.C.C.).
>
> [26] In *AIC*, Justice Cromwell explained the analytical approach to the preferability issue from the access to justice perspective. In doing so, he noted that the preferable procedure requirement has interconnected substantive and procedural aspects. The substantive aspect is concerned with whether class members will receive a just and effective remedy if their claims are established; the procedural with whether they will have access to a fair process, bearing in mind the existence of economic and other possible barriers. As Chief Justice Strathy stated in *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, *AIC* requires the court to consider the barriers to access to justice; the potential of a class action to address those barriers; and the alternatives to a class action, including the extent to which the alternatives address the relevant barriers and how the two proceedings compare: *AIC* at paras. 4, 24, 27, 37-38; *Fantl* at para. 27.

The Parties' Arguments

[39] Revolution argues that a class action is not the preferable procedure for resolving the contract claim in this case because:

a) too many individual issues will remain outstanding following the conclusion of the common issues trial and 676 has made inadequate provision for resolving them in its litigation plan; and

b) the Civil Resolution Tribunal ("CRT") offers a preferable procedure for resolving the claims in issue.

[40] 676 disputes both of these assertions. While 676 acknowledges that some individual issues may remain to be addressed following the common issues trial, Revolution has, it is argued, overstated their likely number and relative significance in the context of the litigation as a whole. 676 says that forcing members of the Surcharge Class to seek their redress exclusively at the CRT would impede access to justice by compounding the power imbalance between them and Revolution. It would, 676 argues, also lead to wasteful duplication of effort and deprive class members of the benefit of the tolled limitation periods available to them in this proceeding if it is certified on their behalf.

Predominance of the Common Issues

[41] The first of the enumerated statutory considerations is "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members" (*CPA*, s. 4(2)(a)).

[42] I have already noted that the proposed common issues trial offers the potential to resolve many if not all of the disputed questions of liability and damages for the Surcharge Class. The extent to which that potential is likely to be realised is difficult to assess at this early stage of the litigation.

[43] Revolution has adduced new evidence on this second application with a view to demonstrating the various kinds of individual issues that, Revolution says, will still need to be addressed before it can be found liable. That evidence speaks to whether:

a) Revolution conducted individualised assessments justifying the imposition of the Government Surcharge/Material Ban at 18%; and

b) class members can be said to have agreed or acquiesced individually to the imposition of the Government Surcharge/Material Ban at that rate.

[44] I am not persuaded that this new evidence, alone or in combination with the evidence previously adduced, demonstrates the predominance of individual issues pertaining to liability or damages.

[45] The fact that Revolution may have conducted "waste audits" for some customers with a view to determining whether and to what extent to depart from the standard 18% charge may, but need not necessarily, give rise to individual issues. The degree to which any individual issues will predominate depends on the nature of the evidence to be adduced. The evidence pertaining to the waste audits may also be helpful in resolving the common issues, insofar as it illustrates the kind of analysis that 676 says should have been done for everyone but in most cases was not. The results of those audits may also assist, if liability is ultimately established, in quantifying the damages payable.

[46] The complications that may arise because some class members agreed or acquiesced to various other written or oral terms were addressed at the first certification application. At para. 153 of the Certification Reasons, I rejected a similar argument in the context of the preferability analysis relating to the restraint of trade claim, stating as follows:

> [153] What will be left to be resolved following the conclusion of the common issues trial for the proposed Restraint of Trade Class, if 676 is successful, are any individual issues that may arise from the various handwritten and oral terms that delete or materially modify one or more of the impugned clauses. Many of those variations appear to fall into their own smaller categories, such as those that delete one or more of the impugned clauses, those that set shorter terms, those that allow for early termination by the customer, or those that stipulate that there is to be no automatic renewal. Some of those categories may be capable of being considered as subclasses within the rubric of the common issues trial itself. On the other hand, there may be many CSA's that will still require individual attention, depending on the outcome of the common issues trial. The complications that can be foreseen in that regard do not appear to be insurmountable, however. It does not appear that the individual issues would overwhelm the litigation, even at that stage.

[47] Similarly, in the Certification Appeal Reasons, the Court of Appeal concluded, in relation to the reformulated contract claim, that differences in the forms of agreement used "can likely be addressed through the creation of one or more

subclasses" (at para. 145). The same reasoning can be applied to differentiate the treatment of those class members who may have agreed or acquiesced to pay the Government Surcharge/Material Ban at a rate of 18%, insofar as Revolution is able to establish that that occurred.

[48] This case is therefore distinguishable in various ways from *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273 and *Winter v. British Columbia*, 2017 BCSC 871, which Revolution cites for the proposition that individualized defences "should not be brushed aside merely to fit the action into the mould of a class proceeding" (*Winter* at para. 31).

[49] *Gary Jackson* involved a joint venture to develop a commercial property. The plaintiff was one of only 15 or 16 investors in the project. Justice Hinkson, as he then was, refused to certify the action on behalf of a class comprised of those investors, for failure to meet the "preferable procedure" element of the certification test. In particular, he concluded that the defences raised (including "knowledge and consent, acquiescence, ratification and/or estoppel") made it likely that "evidence from and with respect to the various proposed class members" would have to be heard before the question of liability could be resolved (at para. 67). As a result, he concluded, the individual issues would "predominate the litigation if it is certified as a class proceeding, thus offering no real advantage in terms of judicial economy" (at para. 68). Furthermore, the fact that there were only 15 or 16 other class members meant that it would be equally efficient simply to join the other investors as co-plaintiffs without the need to certify the action under the *CPA* (at para. 69).

[50] *Winter* involved a claim brought on behalf of a number of employees of a college concerning their entitlement to severance pay on termination. Justice Kent refused to certify the action, for failure to state any properly-framed common issues (at para. 29). He went on, in *obiter*, to cite extensively from *Gary Jackson* in the context of the preferability analysis, concluding as follows:

> [34] The same may be true in the present case if three or four other individuals who signed the other versions of employment contract were joined as co-plaintiffs in this action or issued their own individual proceedings which

> were then tried together with this case. If the outcomes were favourable to the plaintiffs, resolution of similarly situated claims by others might readily follow.

[51] In this case, on the other hand, it is not yet clear whether the Court will have to hear from any class members individually in addressing the defences that Revolution has raised. Moreover, the economies of scale are of an entirely different order in a case such as this, involving thousands of class members with an interest in resolving common issues that, it has already been established, will significantly advance the litigation on their behalf.

[52] Revolution also cites the recent decision of this Court in *Lewis v. WestJet Airlines Ltd.*, 2021 BCSC 228, as an example of a case, said to be like this one, in which a certification application was refused solely for failure to meet the preferability element of the certification test. One of the main grounds for that result was held to be the lack of a coherent plan for allocating among the proposed class members any damages award that might be made. In *Lewis*, the plaintiff was seeking disgorgement of monies alleged to have been saved by the defendant employer in failing to put in place an adequate workplace harassment policy. At para. 114, Horsman J. enumerated a number of unresolved “methodological difficulties” that would have to be addressed in any such allocation, many of which were seen to be all but intractable.

[53] Although, as Revolution argues, the allocation of aggregate damages to the class members in this case may likewise present “methodological difficulties” of a similar kind, they are unlikely to rise to the same level. If liability is established in this case, it may be possible to calculate, or at least approximate, the total value of the overpayments made by the class as a whole. Thereafter, it may also be possible to allocate damages among groups of class members according to criteria grounded in the evidence to be adduced, such as the total amount of fees that they paid over the relevant period, the duration of the particular contracts they had, the physical locations of the businesses involved and the nature of the waste that they generated.

[54] In any event, many of Revolution's arguments about the need to address individual issues going to liability and damages are answered by s. 7 of the *CPA*, which states as follows:

> Certain matters not bar to certification
>
> 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[55] Thus, it has been held that "the fact that damages may not be amenable to aggregate assessment at the conclusion of a common issues trial is not fatal to certification of a class proceeding": *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781; *Sherry v. CIBC Mortgage Inc*., 2014 BCSC 1199.

[56] In summary, it is not yet clear whether, or to what extent, the common issues predominate over the individual issues, or vice versa. I am satisfied, however, that resolution of the common issues will at least be likely to advance the litigation significantly for the members of the Surcharge Class.

Proceedings before the CRT

[57] The remaining statutory criteria in ss. 4(2)(b) - (e) deal in various ways with the possible alternatives to a class action. Revolution argues that individual claims before the CRT would be the preferable procedure for the Surcharge Class, noting that it has already seen numerous disputes with its customers on other topics adjudicated in that forum, with mixed results. Nevertheless, Revolution does not argue that there are class members with a valid interest in controlling the prosecution of separate actions.

[58] In *Lewis*, another pivotal factor that moved Horsman J. to conclude that a class action was not the preferable procedure for the resolution of the plaintiff's claim was the availability of a preferable alternative in the form of a complaint under federal human rights legislation. The latter was seen to offer a suite of advantages over the proposed class action, including "a wider range of potential remedies" (at para. 160), the opportunity for the putative class members to have the complaint advanced by an independent investigator (para. 161) and the subject-matter expertise of the tribunal concerned (paras. 164 and 168). Revolution has not identified any comparable advantage in favour of the CRT here.

[59] I agree with 676, for many of the reasons it advances, that adjudicating the contract claim within the rubric of this action would be fairer and comparatively more efficient than leaving individual claims to be prosecuted by the class members on their own before the CRT, with the attendant risk of inconsistent results. That is so even if a substantial number of individual issues may remain to be resolved following the common issues trial (see: *Sherry*, at para. 132).

Conclusion on Preferability

[60] I have found that while it is not yet clear whether common issues predominate over individual issues in this case, resolution of the common issues will at least be likely to advance the contract claim significantly for the members of the Surcharge Class. I have not been persuaded that it would be fairer or more efficient to leave the Surcharge Class members to pursue their claims individually before the CRT.

[61] A final factor that leads me to conclude that a class proceeding is the preferable procedure for resolving the contract claim is my earlier finding that it is the preferable procedure for resolving the restraint of trade claim. In the Certification Reasons, at para. 162, I noted that the CRT did not offer a realistic alternative for the Restraint of Trade Class due to the nature of the claim being advanced on their behalf. Given the overlap in membership in the two proposed classes, I am satisfied that it would be more efficient to litigate both claims together in one action, which must, of necessity, be heard in this Court.

[62] Having considered the factors set out in in s. 4(2) of the *CPA* in light of the goals of access to justice, judicial economy and behaviour modification, I am satisfied that a class action is the preferable procedure for resolving the contract claim.

E. Subsection 4(1)(e) – Suitability of 676 as Representative (Both Claims)

[63] The last element of the certification test is set out in s. 4(1)(e) of the *CPA*, which requires the proposed representative plaintiff to demonstrate that it:

> (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.

[64] In refusing 676's first certification application, I concluded that 676 had, with respect to the restraint of trade claim, satisfied all of the elements of the certification test save for that last one (Certification Reasons at para. 184). In particular, I found that:

a) 676 had not been shown to be a suitable representative for the Restraint of Trade Class because, not being a member of that class, it had not shown that its appointment was necessary in order to avoid a substantial injustice to the class, as required by ss. 2(4) of the *CPA*; and

b) the litigation plan that 676 had put forward was inadequate.

[65] Those findings were not disturbed on appeal.

[66] On this second certification application, 676 says that the first problem has now been solved in at least one of the following ways:

a) assuming the contract claim is certified, 676 is a member of the Surcharge Class and can therefore properly represent both classes;

b) the evidence now before me demonstrates that appointing a non-member, like 676, is necessary in order to avoid a substantial injustice to the Restraint of Trade Class; or

c) if 676 is found to be unsuitable, then a suitable substitute is now available.

[67] 676 says that the second problem has been solved by the more robust litigation plan that it has put forward on this application.

[68] So matters stood when 676 delivered its application materials to Revolution on July 15, 2021. At that time, the substitute that 676 had put forward was a strata corporation known as Strata VR1072 ("VR1072"), which was then a current customer of Revolution, and hence a member of the Restraint of Trade Class. VR1072 had last renewed its CSA with Revolution on September 1, 2017.

[69] According to one of its elected council members, VR1072 was dissatisfied with the service it was receiving from Revolution and had given notice of termination on May 5, 2020 and again on May 12, 2021. Relying on some of the contractual terms in issue in the restraint of trade claim, Revolution, at least initially, did not accept that VR1072's termination notices had been validly given and insisted, as late as July 5, 2021, that the CSA remained in effect.

[70] On September 3, 2021, however, the same day that Revolution delivered its response to this application, it also retrieved its bins from VR1072's premises and took the position in that response that VR1072 could not be a suitable representative for the Restraint of Trade Class because, among other things, it was no longer a member of that class, having recently elected to terminate its CSA.

[71] On September 15, 2021, 676 delivered its reply materials. Among them was a new affidavit from a second substitute in place of VR1072. Revolution objected to this evidence, on the grounds that it was not proper reply, among other things.

[72] On the first day of the hearing, Revolution brought its own application seeking to have me disregard that aspect of the reply materials or alternatively, to adjourn

the certification hearing so that Revolution could have a better opportunity to address the suitability of the second proposed substitute. I directed that the parties argue the certification application with 676 as the only proposed representative for both classes, on the grounds that if I conclude that 676 is fit to serve in that capacity, Revolution's objection would be moot. In the event, I have indeed come to that conclusion.

[73] Revolution argues that 676 remains unsuitable because, among other things, it has not adduced any additional evidence to demonstrate the necessity of appointing a representative outside the Restraint of Trade Class. In the Certification Reasons, I described what was missing in that regard as follows:

> [177] It may be that the risk that no one will advance the claim if 676 is denied the opportunity to do so, is itself a "substantial injustice to the class" that ought to be avoided. What is missing here, however, is evidence to justify the conclusion that appointing a non-member such as 676 is necessary to avoid that risk. That evidence would have to include, at a minimum, an explanation as to why appointing a class member to serve in that capacity is not feasible in this case: *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director),* 2009 ABQB 96.

[74] In my view, the history of VR1072's attempts to terminate its CSA with Revolution and then, having apparently been unsuccessful in that effort, to serve as the representative for the Restraint of Trade Class, fills that gap.

[75] The restraint of trade claim is aimed at addressing the difficulties that current customers of Revolution are alleged to encounter when they attempt to terminate their CSAs. A class member will be unlikely to come forward with a complaint about the termination process until it has sought to terminate its CSA and has encountered such a difficulty. Revolution may respond, as it did with VR1072 (at least in the first instance), by resisting the attempt to terminate. If, however, the frustration borne of that experience moves the class member to come forward to represent the entire class in this proceeding, as VR1072 sought to do, Revolution can frustrate that attempt too by relenting and accepting the termination.

[76] In these circumstances, I am satisfied that it is necessary to permit a former customer like 676, who claims to have encountered similar difficulties in terminating its CSA, to represent the Restraint of Trade Class in advancing the restraint of trade claim. To continue to insist that only current customers can do so gives rise to a "substantial injustice", inasmuch as it leaves Revolution in a position to disqualify any aspiring representative and thereby avoid a successful certification application.

[77] Revolution offers two other reasons that are said to preclude 676 from serving as the representative plaintiff for both classes.

[78] First, Revolution argues that 676's principal, Amrit Toor, is not a sufficiently credible witness to enable 676 to fill that role effectively. That is apparent, it is argued, from the following observations of mine in the Certification Reasons:

> [19] In his affidavit, Amrit Toor, one of the co-owners of 676, states that when he executed the CSA, he believed that those General Conditions were non-negotiable. No one from Revolution, he says, drew his attention to the termination provisions in particular.
>
> [20] Contrary to Mr. Toor's assertion, however, it appears that 676 did, on both of the occasions when it executed a CSA with Revolution, negotiate at least some changes to the preprinted terms. Those changes are reflected in the handwriting that was added in the "Special Instructions" section appearing in the middle of the main page of both documents. In the initial version executed November 16, 2009, for example, the special instructions section contains the following handwritten annotation: "One year terms [as opposed to "sixty months"]. 2% fuel surcharge. One month free service." In the most recent CSA executed November 3, 2011, the following handwritten annotation appears in the same place: "Negotiate rates, increase service on garbage & card board service."

[79] Revolution cites *Cloud v. MTS Allstream Inc.*, 2013 MBQB 16, as an example of a case in which the plaintiff was found to be unsuited to serve as the representative of a proposed class, due to concerns about his personal credibility, among other things. Justice Dewar explained his conclusion in that regard as follows:

> [45] Given my concerns about his credibility, I am of the view that the plaintiff is not a suitable representative plaintiff. Even if the other criteria had been met, it would not be in the interests of other class members to permit the plaintiff's claim with all of its warts to govern their cases. If allowed to proceed as a class, resources would be expended to press on with a class

> action when there is a significant risk that the action could be dismissed by reason of matters personal to the plaintiff, including the nature of the representations made to him as well as his credibility. Putting the deficiencies in the plaintiff's material in its best light, they show a cavalier attitude to details which are important in civil litigation. Class members, if there be such a class, need a representative who is focused on the details and diligent in his recitation of the facts. I have not seen that in this plaintiff in this case.

[80] I agree with 676 that *Cloud* is distinguishable. The lone inconsistency in Mr. Toor's evidence that I noted in the Certification Reasons, by itself, does not give rise to a comparable "risk that the action could be dismissed by reason of matters personal to the plaintiff." Indeed, the evidentiary record adduced by the parties to date is insufficient to allow for any general findings on credibility to be made at this stage. I am therefore not persuaded that the personal credibility of Mr. Toor has any adverse bearing on the suitability of 676 to serve as the representative plaintiff for both classes.

[81] Finally, Revolution argues that 676's revised litigation plan still suffers from many of the same deficiencies that led me to conclude that its predecessor was inadequate. In the Certification Reasons, I expressed the following concerns in that regard:

> [181] The litigation plan that 676 has put forward is comprised almost entirely of boilerplate terms that have barely been modified to address the exigencies of this particular action. It appears to contemplate that the only claim to be advanced is that of the proposed Surcharge Class. It makes no provision for the claim of the proposed Restraint of Trade Class, which is the only class I have found to be capable of being certified. Moreover, it makes no provision for the complexities arising from the many *sui generis* versions of the CSA's that are in evidence. The only acknowledgment in the litigation plan that there may be issues left outstanding after the common issues trial states as follows:
>
> > If the common issues trial does not determine injury on a class-wide basis, liability and damages will be determined on an individual basis in a manageable process.
>
> [182] There is no discussion of what that "manageable process" might look like. In that regard, the plan states, unhelpfully, only that "[t]he process which will be required is totally dependent on the nature of the decision at the common issues trial." The only specific step that is contemplated for that stage of the litigation involves the distribution of an anticipated award of aggregate damages to the class – a prospect that is no longer applicable to this case in light of my earlier findings.

[82] 676 has attempted to cure those deficiencies by bolstering the plan in various ways. For example, it now includes numerous references to the restraint of trade aspect of the claim as well. Provision has been made to resolve any individual issues that may remain outstanding following the common issues trial. In a new section, entitled “Outstanding Individual Issues”, the plan sets out some “examples of processes to address issues remaining after common issues trial.”

[83] Revolution argues that these additions do not go far enough, inasmuch as they continue to offer little more than boilerplate drawn from the *CPA*. I disagree. 676 has revised the plan so that it now anticipates the complications that the parties may have to face in this litigation and proposes solutions.

[84] In *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149, Hunter J.A., writing for the Court, rejected an argument similar to that advanced by Revolution in this case, to the effect that more is needed. In *Jiang*, the appellants had argued that a litigation plan should be considered inadequate for the purpose of s. 4(1)(e)(ii) if it does not delineate a clear path through to final judgment for every class member on all issues. In rejecting that argument, Hunter J.A. explained that the statutory requirement is more modest, and can be satisfied by the following means:

> [57] … The purpose of the plan is to provide a framework for the class proceeding that shows that the representative plaintiff and class counsel understand the complexities of the case. It is not to resolve all procedural issues before certification has taken place.

[85] I am satisfied that 676’s revised plan meets that standard.

[86] In summary, I have concluded that 676 has now fulfilled all of the requirements set out in s. 4(1)(e) of the *CPA* so as to justify its appointment as the representative plaintiff for both classes.

V. Summary and Disposition

[87] Having found all elements of the certification test to have been satisfied, I am granting the order certifying this action on the terms sought.

"Milman J."