Bennett v. Hydro One: The Divisional Court Cuts the Power to a Systemic Negligence Class Action

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On December 31, 2018, the Divisional Court released its decision in *Bennett v. Hydro One Inc. et al* with respect to the appeal of the dismissal of a motion for certification of the action as a class proceeding. The decision provides further guidance concerning the Court's treatment of common issues, the extent to which the merits of a matter may influence the assessment of commonality, and when a regulatory regime will be deemed a preferable procedure for the purposes of the certification test.

By way of background, on November 28, 2017, the Ontario Superior Court dismissed a motion to certify a class action against Hydro One Networks Inc. ("Hydro One") that sought damages of $100 million related to alleged overcharges resulting from the rollout of a new customer information system (CIS) starting in 2013. There was no significant dispute as to the faults with the CIS, and that billing overcharges resulted. Justice Perell held that the representative plaintiff advanced proper causes of action (including claims of negligence, breach of contract and unjust enrichment) and that there was an identifiable class (Hydro One customers post-2013). However, it was concluded that the matter was not an appropriate case to advance as a class action, namely due to the findings that (i) the determination of each class member's claim would require individual trials, and (ii) the Ontario Energy Board ("OEB") offered recourse to address electricity overbilling which would better fulfill the policy objectives of access to justice and behaviour modification.

On appeal, it was argued that the motions judge erred in the determination of the existence of common issues and preferable procedure.

Justice Leitch, on behalf of the Court, dismissed the appeal. In particular, the Divisional Court agreed with the analysis of the motions judge to the effect that the proposed common issues would not avoid duplication of fact-finding or legal analysis of issues that were substantial components of each class member's claim. By way of example, a determination of whether Hydro One was "systemically negligent" in the rollout of the CIS would not significantly advance each class member's own claim, which would require an examination of that ratepayer's individual circumstances to determine if any loss was in fact occasioned by the CIS or a "multiplicity of errors". In addition, even if the representative plaintiff was successful in establishing its overall claims (the common

issues), there would be a host of remaining issues (largely around damages) to be established in individual damages trials. Leitch J. posed the problem as follows:

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.

The Divisional Court also upheld the motion judge's conclusion that recourse through the OEB represented a procedure preferable to that offered by a class action. The OEB was noted to be the "legislature's chosen and preferred vehicle to regulate the respondents' behaviour …" Interestingly, while the OEB has the jurisdiction to determine whether Hydro One overcharged customers, and its legislative mandate is to protect consumer interests, it remains the case that individual consumers cannot initiate OEB proceedings.

It is certainly arguable that *Bennett* represents a judicial tightening of the assessment of commonality where systemic negligence is relied upon and advanced by the plaintiff. In particular, the decision demonstrates an increased willingness of some courts, as endorsed in this instance by the Divisional Court, to look to the defendant's evidence of causation at the certification stage in order to make a determination of whether the proposed common issues are a "substantial ingredient" of the claims.

The decision also provides a useful precedent for defendants facing a putative class action where a regulatory body can be said to possess a mandate to remedy the wrong at issue in the action on behalf of consumers.

By

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