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Supreme Court of British Columbia grants summary dismissal of fuel price class action

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On March 3, 2022, Justice Milman of the Supreme Court of British Columbia in *Pantusa v. Parkland Fuel Corporation* summarily dismissed a proposed class action against the five largest wholesale gasoline sellers in British Columbia. The plaintiff had alleged common law conspiracy, breaches of the *Competition Act*, and unconscionable pricing of wholesale gasoline under the *Business Practices and Consumer Protection Act* (BPCPA) that the plaintiff claimed had caused inordinately high retail gasoline prices for British Columbia consumers since 2015.

Justice Milman found there was no genuine issue for trial, concluding there was no support whatsoever for the conspiracy claims, the alleged conduct did not amount to unconscionable practices under the BPCPA, and there was no role for the Court in regulating gasoline prices.

Background

On May 21, 2019, the Cabinet of British Columbia directed the British Columbia Utilities Commission (BCUC) to inquire into the factors influencing gasoline and diesel prices in the province since 2015. Later that year, the BCUC released its findings that, among other things:

- the five largest wholesale gasoline sellers in British Columbia rely on the Pacific Northwest (PNW) spot price as a benchmark price;
- gasoline from the PNW makes up the most expensive 3-5% of the wholesale gasoline market; and
- since 2015, the difference in price for retail gasoline in British Columbia compared to neighbouring markets (Western Canada and Seattle) has inexplicably increased (the alleged "Unexplained Difference").

In reliance on the BCUC findings, the proposed representative plaintiff, Mr. Pantusa, commenced a putative class action, alleging that the defendants (Parkland Fuel Corporation, Suncor Energy Inc., Imperial Oil Limited, Shell Canada and Husky Energy Inc.) systematically overcharged their wholesale customers since 2015 by relying on the PNW spot price and charging an Unexplained Difference, which then impacted retail gasoline prices. The plaintiff alleged that both practices breached the unconscionability provisions of the BPCPA and sought to represent a class comprised of millions of British Columbians who purchased retail gasoline for personal, family or household use since 2015. The plaintiff also claimed that the defendants, through various alleged conduct, engaged in common law conspiracy and breached the federal *Competition Act*.

The defendants applied for summary dismissal, and Justice Milman agreed to hear the summary dismissal application concurrently with the certification application.

The Court granted summary judgment

Justice Milman found that there was no genuine issue for trial and, on that basis, granted summary judgment. He then concluded that, as there were no remaining claims, there was no proposed class action to certify.

In doing so, Justice Milman confirmed important limits to the doctrine of unconscionability under the BPCPA, including:

- A consumer transaction is not unconscionable simply because sellers in an oligopolistic market may charge more than they would in a more competitive market. To so find would extend the doctrine of unconscionability to segments of the economy that are less than perfectly competitive.
- Benchmark pricing is not an inherently unconscionable practice.
- The Court will not take on the role of price regulator under the BPCPA. Such issues are matters of public policy, for the government to consider.

Implications

The decision is the latest in a series of British Columbia decisions dismissing proposed class actions at an early stage (or denying certification), highlighting the potential utility of a summary judgment application at the early stages of a putative class proceeding.

Further, the decision confirms several important limits to the doctrine of unconscionability. The Court will not readily employ the doctrine of unconscionability to second guess the independent pricing decisions made by sophisticated companies. Unconscionability is concerned with protecting individuals against improvident bargains, and not price regulation.