CITATION: Buis v. Keurig Canada Inc., 2023 ONSC 87
COURT FILE NO.: CV-22-88299-CP
DATE: 2023/01/04

SUPERIOR COURT OF JUSTICE – ONTARIO
Action pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6

RE: Nancy Buis, Plaintiff

AND:

Keurig Canada Inc., Defendant

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Jeff Orenstein & Andrea Grass, for the plaintiff in the Buis action

Sean Campbell & Theo Milosevic, for the plaintiff in the Gordon action

Jean-Marc Leclerc & Mohsen Seddigh, for the plaintiff in the Finch action

Chenyang Li, for the defendant

HEARD: December 7, 2022

REASONS AND DECISION

Synopsis

[1] Keurig is a well-known brand of single serve coffee makers and of the K-Cup coffee pods used in those machines. Keurig markets the coffee pods as "recyclable" and the plaintiff alleges this is misleading. She seeks to certify a national class action against Keurig Canada Inc. pursuant to s. 5.1 of the *Ontario Class Proceedings Act*. [1]

[2] As set out in a previous endorsement, the plaintiff is not alone. There are three other proposed class actions based on the same set of facts. [2] The action that concerns the court at the moment is the other Ontario action. That is court file number CV-22-678262-CP (Gordon v. Keurig Canada Inc. et al.) commenced in Toronto.

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[1] *Class Proceedings Act, 1992,* S.O. 1992, c. 6 as amended to December 5, 2022, s. 13.1
[2] See 2022 ONSC 3652. There is also a proceeding in British Columbia and one in the Federal Court.

[3] The matter before the court is a "carriage motion" brought by counsel in the *Gordon* action asking that the *Buis* action be stayed and carriage of the *Gordon* action be awarded to a "consortium" of Tyr LLP and Sotos LLP ("the consortium"). Counsel in the *Buis* action proposes that the *Gordon* action be stayed and carriage awarded to Consumer Law Group P.C. ("CLG").

[4] The question is which proceeding is a better vehicle for advancing the interests of the proposed class or classes and which law firm should be assigned the responsibility of moving it forward? The legislation seeks to avoid a multiplicity of overlapping or identical proceedings and requires the court to make this determination at a preliminary stage.

[5] Both proponents put forward solid plans although they take slightly different approaches to the litigation. But a choice must be made. The legislation demands it and there is no utility to having duplicate class proceedings with overlapping classes.[3]

[6] For the reasons that follow, the *Gordon* action is stayed and the *Buis* action will continue. CLG is appointed as class counsel.

Background and Nature of the Motion

[7] As noted in the introduction, Keurig markets coffee machines and single use coffee pods. The pods are or were marketed as recyclable. This representation has been the subject of litigation in the United States of America and of action by the Commissioner of Competition in Canada. The essence of the problem is that while the coffee pods may be recyclable in theory and with some effort, they are not accepted for recycling in most current recycling programs.[4]

[8] This action (the *Buis* action) was issued by CLG in Ottawa on January 10, 2022. The *Gordon* action was issued in Toronto by Tyr LLP on March 11, 2022. On March 10, 2022, Sotos LLP issued a class proceeding in the Federal Court in Toronto (the *Finch* action). There is also a class proceeding issued in the Supreme Court of British Columbia by an Ontario law firm on January 14, 2022 (the *Dolo* action).

[9] I have no jurisdiction over the *Finch* action or the *Dolo* action, but the Sotos firm undertakes to stay the *Finch* action if this court awards carriage to the consortium in which case the consortium proposes to proceed with the *Gordon* action. I am advised that nothing has transpired with respect to the *Dolo* action in B.C.

[10] There are some differences between the *Buis* action and the *Gordon* action. In the *Buis* action, the proposed class is "all persons residing in Canada who purchased Keurig pods". The sole defendant is Keurig Canada Inc. By contrast, the *Gordon* action seeks to certify a class of

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[3] See s. 13.1 of the Act.

[4] Keurig does not concede that there is or was a misrepresentation. The U.S. litigation has been settled without admission of liability.

"all persons residing in Canada who purchased K-Cup pods and/or a Keurig-branded brewing machine during the period the representations were being made."

[11] I pause to note that I and undoubtedly most of my judicial colleagues would be members of such broad classes given how ubiquitous Keurig machines are in law offices and court houses. Counsel are aware of this and had no objection to my continued role as the class proceedings judge. Needless to say, my own experience as an occasional coffee pod consumer plays no part in any decision I have or will make in this matter.

[12] In addition to Keurig Canada Inc., the *Gordon* action names Keurig Dr. Pepper Inc. (the U.S. Parent Company) and Keurig Green Mountain Inc. (the U.S. Sister Company) as defendants. While based on the same factual background, the *Gordon* action and the *Buis* action rely on different causes of action both at common law and pursuant to statute.

[13] Jurisprudence prior to 2020 had developed a list of non exhaustive factors to be considered on a carriage motion.[5] In 2020, however, the Act was amended to require consideration of litigation efficiency based on four specific factors. Section 13.1 (4) of the Act reads as follows:

> **Considerations**
>
> **(4) On a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and cost-effective manner, and shall, for the purpose, consider,**
>
> **(a) each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory;**
>
> **(b) the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding;**
>
> **(c) the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue; and**
>
> **(d) the funding of each proceeding, including the resources of the solicitor and any applicable third-party funding agreements as defined in section 33.1, and the sufficiency of such funding in the circumstances. 2020, c. 11, Sched. 4, s. 16.**

[14] There has been limited jurisprudence since the amendments, but I am in full agreement with both Justices Perell and Akbarali, that while the common law factors previously identified

[5] See *Kowalyshyn v Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 (CanLII) @ para 143

remain relevant, the amendments mark an important change to the law requiring the court to focus on efficiency, productivity and proportionality.[6]

[15] What is required is a case-by-case analysis rather than a formulaic approach. The overall objective is to select the counsel and the proceeding that will best advance the interests of the class members. Consistent with the focus on efficiency, the amendments also make the carriage motion non appealable. This suggests that the motion itself should be a summary process rather than an opportunity to make extensive contributions to jurisprudence.

[16] In this case, the contest is between the "consortium" formed by Tyr LLP and Sotos LLP on the one hand and Consumer Law Group P.C. ("CLG") on the other. The consortium proposes to use the *Gordon* action as the vehicle to pursue the interests of the proposed classes and CLG proposes to use the *Buis* action for the same purpose.

[17] As noted above, one wrinkle to this matter is the existence of a class proceeding in the Federal Court. One of the members of the consortium (Sotos) is counsel to the plaintiff in the Federal Court *Finch* action. As part of the proposal by the consortium, Sotos undertakes to discontinue or stay the *Finch* action if the *Gordon* action is the Ontario action that will be proceeding. So, while I have no jurisdiction in a matter before the Federal court, the consortium argues that their proposal will lead to a salutary reduction in the number of overlapping cases.

Analysis and Decision

[18] In my view, there is very little to choose between the two actions. Both are advanced by experienced class proceeding law firms. Both concede this point. Indeed, Sotos and CLG have worked together on other class proceedings. All three law firms are highly capable in this arena.

[19] The *Buis* action follows a well trodden path of mirroring the American litigation that has already been settled. In fact, the evidence shows that immediately upon starting the *Buis* action and before it was even served, counsel for the parent company in the United States was in contact with Mr. Orenstein to discuss the possibility of a Canadian settlement along similar lines to the resolution that took place in the United States. This discussion ceased when the *Gordon* action was started as Keurig needs to know who to negotiate with.

[20] It is not uncommon for Canadian class proceeding litigation to piggyback on litigation south of the border. This is because the classes in the United States are much larger due to the larger population and because of the robust class action infrastructure in the U.S. In particular, the United States Federal Court has jurisdiction in the case of multi-state litigation and can appoint a single Multi-District class proceedings judge (MDL judge). Of course, it is not automatic that a

[6] *Blackford-Hall v. Simply Group*, 2021 ONSC 8502 (CanLII), *Longair v. Akumin Inc. et al*, 2022 ONSC 2571 (CanLII)

U.S. settlement will be appropriate in Canada, but it is common that a defendant who has fought litigation in the United States and arrived at a satisfactory conclusion, may be prepared to resolve similar litigation in Canada.

[21] The important point is that CLG proposes to use the same experts and the same approach to damages that U.S. counsel used. Specifically, the U.S. litigation was resolved based on a damages model that does not require individual inquiry into the impact of the "recyclable" representation on the decision of individual class members to purchase Keurig coffee pods. Rather, the expert retained by U.S. counsel and by CLG has used an unjust enrichment model by calculating the premium charged by Keurig after it began to make this representation. That premium appears to be $.01 per pod. The U.S. litigation was settled using a percentage of the resulting calculation.

[22] This means that the *Buis* action is focused on a damages model that would lend itself to certification and also a model that holds out the prospect of prompt settlement. On the other hand, if the Canadian action cannot be resolved, then CLG argues that their relationship with U.S. counsel and access to the experts means that the litigation can be pursued efficiently.

[23] There is some risk in "piggyback" litigation of collusion between class counsel and a defendant to limit the rights of residents of Canada to the damages achieved in an American class proceeding and to foreclose any other remedies. There is no evidence that this is the case in the *Buis* action and in any event, this is a factor that must be considered by the court when and if a settlement is achieved and it comes before the court for approval of a settlement. At that stage, members of the class may oppose a settlement or may opt out if they do not approve.[7]

[24] On the other hand, the *Buis* action uses a narrower class definition than the *Gordon* action. *Gordon* seeks to represent not only the purchasers of coffee pods but also the purchasers of Keurig machines. While it is probable that these classes largely overlap, they are not identical. There will be many purchasers of pods who do not own their own machines and there may be a few individuals who purchased Keurig machines but never purchased K-Cups. For example, there may be those who purchased machines intending only to grind their own coffee and to use refillable pods or there may be purchasers who bought the machines as gifts without themselves making use of them or purchasing coffee pods.

[25] CLG argues that there is no real chance of certification of a class of purchasers of Keurig coffee makers because Keurig sells the coffee machines at very low or no profit in order to maximize the sale of its single use coffee pods. There is no evidence that any premium is charged on the coffee machines relating to the "recyclable" claim on the coffee pods. Arguably, then, it would be necessary to know what, if any, reliance each purchaser placed on the representation.

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[7] S. 27.1 of the Act

[26] It is premature for me to determine whether or not a class of coffee machine purchasers could be certified. This much is clear. Adding the class of coffee machine purchasers adds a complication to the proceeding which makes it less likely that the action can quickly be settled along the lines of the United States settlement. On the other hand, the approach in the *Buis* action potentially leaves a small group of individuals who might benefit from the class definitions in the *Gordon* action and would be excluded by the narrower class definition in the *Buis* action.

[27] In the *Gordon* action, there are three defendants. Two of those are foreign defendants. That is the parent corporation (Keurig Dr. Pepper) and the U.S. sister corporation (Keurig Green Mountain). The reason for this approach is the belief of counsel in the *Gordon* action that some distribution in Canada is carried out by Keurig Green Mountain and the fact that Keurig Dr. Pepper is ultimately responsible for the global marketing and positioning of Keurig single use coffee capsules. This complicates the *Gordon* action slightly because Keurig advises that it may bring a motion to strike the claim against one or other of the American corporations.

[28] On the other hand, Keurig has not yet defended the *Buis* action so at this stage there is no admission that Keurig Canada accepts responsibility for any liability to the Canadian class or classes. It is possible that CLG might also have to amend its pleading to add additional defendants if the action does not settle.

[29] CLG proposes to fund the *Buis* action and to cap its contingency fee at 25 percent. The consortium proposes to self fund the litigation in the early stages but does not rule out the possibility of third-party funding if it becomes necessary later in the litigation. The consortium proposed to charge a higher contingency fee but stated in argument that if that was the key factor in my decision, it would also agree to cap its fee at 25 percent.

[30] There are some cases in which a type of "reverse auction" has been the deciding factor in a carriage motion.[8] While there is no doubt that the fee to be charged will have an impact on the recovery for the class, the fee structure proposed at the time of a carriage motion will usually be only one of a number of factors to be considered particularly having regard to the new statutory direction to focus on efficiency.

[31] It is also important to recognize that all contingency agreements between class counsel and a representative plaintiff must be approved by the court, all third party funding arrangements must be approved by the court and in the case of a settlement, notwithstanding any such approval, the entire settlement including the fees to be charged by the class must also be approved.[9] While these safeguards remain in place despite any representations made on a carriage motion, the proposed fee and whether or not third party funding is contemplated are matters to be assessed at this stage. In that regard, CLG's proposal is marginally more attractive.

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[8] See for example *Chu v. Parwell Investments Inc. et al.,* 2019 ONSC 700

[9] See s. 32, 33, 33.1 and 27.1 of the Act as well as s 28.1 of the *Solicitor's Act.*

[32] In summary, the *Buis* action may be considered to be more advanced insofar as it relies upon a theory of damages which has been advanced in the United States and forms the basis of the U.S. settlement. CLG has retained the necessary experts to calculate and advance its theory of damages on behalf of the Canadian class. The *Buis* action is more focused and has the advantage of being funded by CLG under a more modest proposed fee structure. There is a reasonable prospect that the *Buis* action will lead to a prompt settlement whereas a settlement in the *Gordon* action is a more distant prospect if all of the claims are pursued.

[33] On the other hand, the *Gordon* action may include class members that are not included in the *Buis* action and might potentially result in a greater recovery for the class than the more limited action proposed in *Buis.* It is probable, however, that pursuing a larger damage claim including punitive damages will make settlement less probable and lead to more complex and protracted litigation. A significant consideration, however, is the undertaking of the Sotos firm to discontinue the action in the Federal Court if the *Gordon* action is not stayed and the consortium is given carriage.

[34] Reducing the number of overlapping class proceedings is salutary and is one of the objectives of the Ontario class proceedings legislation but I find the conditional undertaking to discontinue the proceeding to be problematic.

[35] On the one hand, the willingness of the consortium counsel to discontinue the Federal Court action in favour of the *Gordon* action appears to be an acknowledgement that Ontario is a better forum for the class proceeding than the Federal Court. On the other, the implicit threat to continue the Federal Court proceeding if the *Gordon* action is stayed is not a tactic I can condone.

[36] I am not suggesting any impropriety on the part of any member of the consortium but it seems to me if I allow this consideration to predominate it may encourage a proliferation of class proceedings in various forums by counsel who seek carriage of an Ontario action. The fact that counsel in an Ontario action enters into a consortium agreement with counsel who has started a proceeding in another jurisdiction is a relevant consideration but a promise to discontinue the other action only if the consortium is given carriage gives me pause.

[37] There is a further complication as well. Just as in Ontario, a Federal Court class proceeding cannot simply be discontinued or stayed on consent. Section 334.3 of the *Federal Court Rules* requires approval by a Federal Court Judge to discontinue a class proceeding. Section 334.29 (1) requires approval of any settlement.[10] So, one way or another, the fate of the Finch action will be determined in the Federal Court.

[38] In the final analysis, I am persuaded that the *Buis* action is a superior approach to that proposed in the *Gordon* action. As I said at the outset, it is a difficult choice because there are

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[10] *Federal Court Rules,* SOR 98-106 as amended

some advantages to the *Gordon* action and both CLG and the consortium are capable of representing the interests of the class or classes.

Conclusion and Order

[39] In conclusion, there will be an order staying the *Gordon* action. Whether the Finch action should continue is a matter for the Federal Court. Pursuant to s. 13.1 (6) of the Act there will also be an order barring the commencement of any other proceeding in Ontario under the Act in relation to the same subject matter.

[40] Pursuant to s. 13.1 (7) and the agreement between counsel, there will be no costs of the carriage motion.

Justice C. MacLeod

Date: January 4, 2023

Schedule A – List of Current Class Proceedings

Description of Action	**Date Commenced**	**Plaintiff Counsel & Location of Offices**
Superior Court of Justice action no. CV-22-88299-CP (Buis v. Keurig Canada Inc.) commenced in Ottawa.	January 10, 2022	Jeff Orenstein & Andrea Grass, Ottawa, Ontario
Supreme Court of British Columbia action no. S-220208 (Dolo v. Keurig Dr. Pepper Inc. et. al.) commenced in Vancouver.	January 14, 2022	Glyn Hotz, Vaughan, Ontario
Federal Court action number T-557-22 (Finch v. Keurig Canada Inc.) commenced in Toronto.	March 10, 2022	Jean-Marc Leclerc & Mohsen Seddigh, Toronto, Ontario
Superior Court of Justice CV-22-678262-CP (Gordon v. Keurig Canada Inc. et. al) commenced in Toronto.	March 11, 2022	Sean Campbell & Theo Milosevic, Toronto, Ontario

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SUPERIOR COURT OF JUSTICE

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Sean Campbell & Theo Milosevic, for the plaintiff in the Gordon action

Jean-Marc Leclerc & Mohsen Seddigh, for the plaintiff in the Finch action

Chenyang Li, for the defendant

DECISION AND REASONS

Regional Senior. Justice C. MacLeod

Released: January 4, 2023