Federal Court  Cour fédérale

Date: 20150603

Docket: T-1971-14

Citation: 2015 FC 707

Toronto, Ontario, June 3, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

ROSE MARIE JOAN RAE

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a motion by the applicant, Ms. Rose Marie Joan Rae, against the Minister of National Revenue [the Minister] for certification of proceeding as a class proceeding pursuant to Rule 334.12(2) of the *Federal Courts Rules*, SOR/98-106 [the Rules].

[2] In 2013, Ms. Rae participated in what is known as a "widely-marketed gifting tax shelter." In April 2014, her accountant delivered her 2013 income tax return to the Canada

Revenue Agency [CRA], but Ms. Rae has yet to receive her Notice of Assessment for the 2013 taxation year from the Minister.

[3] Ms. Rae is seeking an Order certifying this application as a class proceeding and appointing her as the representative applicant of the class.

[4] The foundation for this motion is an application brought by Ms. Rae for a writ of *mandamus* requiring the Minister to comply with section 152 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) [the ITA]. According to section 152 of the ITA, the Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine the amount of refund payable to the taxpayer or the amount of tax payable by said taxpayer. Ms. Rae is therefore asking the Minister to assess her and the other proposed members of the class' 2013 tax returns forthwith, to issue a corresponding tax assessment and send the proper Notice of Assessment.

[5] On the merits, Ms. Rae will also seek a declaration that the Minister has no authority to delay the assessment of an income tax return and the issuance of a Notice of Assessment to a taxpayer on the grounds that the taxpayer has participated in a widely-marketed gifting tax shelter as described by the Gifting Tax Shelter Initiative of the CRA. In the alternative, Ms. Rae will seek a declaration that the Minister has no authority to delay the assessment of an income tax return and issuance of a Notice of Assessment to a taxpayer as a means of deterring or otherwise limiting participation in a registered widely-marketed gifting tax shelter.

[6] The Court must examine if each of the conditions for certification provided at Rule 334.16 of the Rules have been met. For the reasons discussed below, I find that some of these conditions have not been met and, accordingly, I will dismiss the motion to certify the application as a class proceeding.

II. Factual background

[7] Ms. Rae is a Canadian citizen living in Kelowna, British Columbia.

[8] In 2013, she participated in a widely-marketed gifting tax shelter called the Pharma Gifts International Inc. [Pharma Gift 2013], which is registered with the Minister under the identification number TS075200. She made two donations, one in cash and one in kind, claimed a charitable donation tax credit in her 2013 income tax return, and asked for a tax refund.

[9] On or about April 28, 2014, Ms. Rae's tax income return was hand-delivered to the Minister by her accountant, but she has not yet received a Notice of Assessment from the Minister.

[10] On July 24, 2014, Ms. F. Caligiuri, Manager at the Compliance Service Initiative Branch in the Winnipeg Tax Center of the CRA, wrote to Ms. Rae, advising her that her 2013 income tax and benefit return had not been assessed as the CRA was reviewing her donation claim related to a gifting tax shelter. The letter also indicated that the CRA was undertaking an audit of the associated tax shelter gifting arrangement, and that it could take up to two years to complete this audit.

[11] Ms. Caligiuri briefly outlined the history and general outcome of these audits and indicated the timeline of the interest that would be paid, or claimed, depending on the outcome. Alternatively, the CRA suggested that Ms. Rae could withdraw her donation claim and agree to a proposed waiver agreement which would allow for the assessment of her 2013 tax return prior to the completion of the audit. In substance, the proposed waiver agreement required that Ms. Rae withdraw her claim to the donation tax credit for the 2013 taxation year with respect to her contribution in the Pharma Gift 2013, and that she waived any right of objection or appeal related to the issue of her eligibility to said claim for taxation year 2013. Ms. Rae did not agree to this waiver.

[12] Along with her letter, Ms. Caligiuri enclosed a copy of a January 10, 2014 news release published by the CRA, warning that it would not "assess taxes owed or provide a refund to taxpayers who claim a tax credit under a gifting tax shelter scheme until the CRA has audited the tax shelter", and providing a few statistics on the history of denials of the gifting tax shelter claims following the audits.

[13] The validity of the tax shelters is not to be evaluated by this Court. The definition of a tax shelter is found under subsection 237.1(1) of the ITA and refers to gifting arrangements, also defined in subsections 237.1(1).

[14] A "widely-marketed gifting tax shelter" is a type of tax shelter which is subject to the Gifting Tax Shelter National Program [the GTS Program] of the CRA.

[15] "Widely-marketed" means the same as "mass-marketed." (Mr. André Émile Malouf's October 17, 2014 affidavit at paragraph 31) The CRA initiated the GTS Program for the 2012 taxation year and it continued for the 2013 taxation year.

[16] Based on the record, Pharma Gift 2013 is a kind of "leveraged-donation program." In this type of program, a taxpayer typically receives a prearranged loan and makes a donation of the loan proceeds and additional cash to a charity, while the charity must use the donation in a pre-determined manner. Some programs involve a loan of property rather than cash. Under the Pharma Gift 2013, certificates to acquire pharmaceuticals were loaned instead of cash.

[17] Although it was not mentioned by this name or acronym, the GTS Program is said to have been first publicised by a news release dated October 30, 2012, which was attached to Mr. André Émile Malouf's October 17, 2014 affidavit. The CRA declares that this national program aims to protect Canadians from gifting tax shelter schemes, avoid the issuance of invalid refunds, and discourage participation in what it qualifies as abusive systems.

[18] Under the GTS Program, the assessment of the tax returns for taxpayers claiming a credit for either the 2012 or 2013 taxation year after participating in a widely-marketed gifting tax shelter in 2012 or 2013 was put on hold by the CRA pending the completion of the tax shelter's audit. The GTS Program also applies to taxpayers who filed their tax return for the 2012 or 2013 taxation year without making a claim for a charitable donation tax credit in respect of participation in a widely-marketed gifting tax shelter in 2012 or 2013, but had filed a T1 Adjustment Request Form after their assessment, requesting a charitable donation tax credit in

respect of participation in a widely-marketed gifting tax shelter in 2012 or 2013. The T1 Adjustment Requests of those taxpayers are also delayed until the completion of the tax shelter's audit. The GTS Program can also apply to the spouse of a taxpayer.

[19] The GTS Program applied to four widely-marketed gifting tax shelters for 2013, one of them being Pharma Gifts 2013, and to eight widely-marketed tax shelters for 2012. All the audits for 2012 started between May and early July 2013, while the audits of three tax shelters for 2013 began in June, July and September 2014. One of them was not yet started as of October 17, 2014.

[20] About 2,438 other taxpayers would have similarly participated in a widely-marketed gifting tax shelter for the 2013 taxation year, and approximately 1,245 have been offered waivers similar to that offered to Ms. Rae. Moreover, 40 taxpayers made a T1 Adjustment Request claiming a charitable donation tax credit for their participation in a widely-marketed gifting tax shelter in 2013.

III. Issues

[21] The issue in the present motion is whether this proceeding is suitable for class action certification pursuant to the conditions set out in Rule 334.16(1) of the Rules.

IV. Position of the parties

A. *Rule 334.16(1)(a): Reasonable cause of action*

(1) Ms. Rae's position

[22] Ms. Rae submits that the Minister conceded that he has failed to examine her 2013 tax return, to issue a corresponding tax assessment, and to send her a Notice of Assessment.

[23] She further submits that the Minister has adopted a policy of delaying or postponing the processing of returns where a taxpayer participated in a widely-marketed gifting tax shelter, and that this Court has already found this to be in contravention with section 152 of the ITA in *Ficek v Canada (Attorney General)*, 2013 FC 502 [*Ficek*]. According to Ms. Rae, the cause of action raised in *Ficek* mirrors the issues raised in her application for the certification of a class proceeding. Therefore, she submits that the underlying application has a valid cause of action and has a strong chance of success.

(2) The Minister's position

[24] The Minister accepts that there is a reasonable cause of action pursuant to Rule 334.16(1)(a), although it does not accept Ms. Rae's conclusion on the impact of the *Ficek* decision.

B. *Rule 334.16(1)(b): Identifiable class of two or more persons*

(1) Ms. Rae's position

[25] Ms. Rae relies particularly on the Minister's identification of approximately 2, 438 taxpayers who participated in a widely-marketed gifting tax shelter in 2013 to submit that there is a readily identifiable class. Ms. Rae also indicates that among those taxpayers, 1,245 individuals were offered a waiver, although it is unclear how many have accepted it. Ms. Rae asserts that there is an easily identifiable class of individuals affected by the GTS Program,

which have all received the same treatment and that more than two individuals' assessments remain unprocessed for the 2013 taxation year.

[26] Hence, Ms. Rae proposes that the Class be defined as: "any person who is not a non-resident of Canada, as defined by the Income Tax Act, who participated in a widely-marketed gifting tax shelter in 2013 and transmitted their 2013 income tax return to the Minister. Excluded from the class would be any taxpayer who otherwise meets the proposed definition but who has since accepted and/or acted on any waiver offered by the Minister." During the hearing, Ms. Rae also refined the class to exclude the taxpayers who are assessed before the hearing of the application on the merits. Ms. Rae submits that the Court must examine if the conditions for certification are met and that neither possible mootness, nor any possible variation should have an impact at this stage.

(2) The Minister's position

[27] The Minister submits that Ms. Rae has not properly identified a class of two or more individuals. In fact, during her cross-examination, and subsequently during the hearing, Ms. Rae refined the proposed class to exclude any taxpayers who are assessed before the hearing of the application on the merits. Hence, the Minister's position is that the class is too narrow as it excludes other taxpayers than those in the proposed class who have claimed charitable donation tax credits related to a widely-marketed gifting tax shelter in 2013 and are affected by the GTS Program, namely those who are assessed before the hearing. In this regard, Ms. Rae herself could become excluded, which could put an end to the class proceeding.

C. *Rule 334.16(1)(c): Common questions of law or fact*

(1) Ms. Rae's position

[28] Ms. Rae submits that one question unites the class members on a single common issue, namely: "whether the policy adopted by the Minister and the excuse given for delaying the assessments of those members of the proposed class is consistent with the Minister's duty to assess their income tax returns "with all due dispatch" pursuant to section 152(1) of the Income Tax Act."

(2) The Minister's position

[29] The Minister argues that the proposed common question must avoid duplication of fact-finding or legal analysis, but that the question of law proposed here by Ms. Rae is one that has no factual or legal foundation.

[30] After a review of the Supreme Court's instructions on the matter in *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 [*Dutton*], the Minister puts Ms. Rae's proposed common question in the context of a *mandamus* application and asserts that the essential question is whether the delay for the Minister to assess Ms. Rae's income tax return and to issue a Notice of Assessment is unreasonable. The Minister submits that Ms. Rae takes the rationale behind the GTS Program for granted as she argued this rationale has already been "canvassed, considered and rejected" in *Ficek*. The Minister submits this argument is unfounded as the *Ficek* decision did not concern the GTS Program but the Pilot Project of the Winnipeg Tax Center [the Pilot Project], a CRA program which, for the purposes of the decision in *Ficek*, applied to individuals in the Prairie Region who claimed charitable donation tax credits through their

participation in 2010 and 2011 into the Global Learning Gifting Initiative [GLGI], a widely-marketed gifting tax shelter.

[31] The Minister submits that the rationale behind the Pilot Project is different than the rationale behind the GTS Program since the former was only aimed at deterring participation in the GLGI, while the latter aims to both deter participation in widely-marketed gifting tax shelters and to review the validity of donation claims before issuing tax refunds that might prove invalid.

[32] Further, the Minister submits that Ms. Rae erroneously contends that the findings of fact in *Ficek* are binding on another judge of this Court since the principle of judicial comity does not apply to findings of fact.

D. *Rule 334.16(1)(d) : The Preferable procedure for the just and efficient resolution of the common questions of law or fact*

(1) Ms. Rae's position

[33] Ms. Rae submits that a class proceeding is the preferable procedure as it respects the criteria set forth in Rule 334.16(2) of the Rules and favours judicial economy, access to justice, and the modification of the Minister's behaviour.

[34] Ms. Rae submits that having a single representative taxpayer acting for all taxpayers is a logical, cost-effective and preferable procedure for adjudicating this issue. Ms. Rae relies on the fact that the underlying issue has already been canvassed by this Court in *Ficek* and that there

have been a significant number of taxpayers affected by the Minister's policy to support her position that a class action is the preferable procedure in the present case.

[35] Ms. Rae argues that although the underlying issue has been raised in several applications by taxpayers, none of those have been adjudicated, none have been certified as a class proceeding and none address the 2013 taxation year.

[36] According to Ms. Rae, the certification of this application will extend the benefits of the decision in *Ficek* to all taxpayers, will resolve the underlying issue, and will address the central issue of her application: the modification of the Minister's behaviour.

(2) The Minister's position

[37] The Minister submits that Ms. Rae has not shown that the class proceeding would be a fair, efficient and manageable method of advancing the application or that it would be preferable to other reasonably available procedures.

[38] The Minister argues that a *mandamus* application as part of a judicial review is supposed to be a summary process as it can move to a hearing relatively quickly, and that the certification "bogs this summary process down." Hence, a judicial review of Ms. Rae's case would be more efficient, and the resolution of her claim may provide guidance in the determination of the claims of other taxpayers affected by the GTS Program.

[39] Moreover, the Minister submits that if Ms. Rae is excluded from the class, the class proceeding will come to an end even if other class members who have not been assessed may still have an interest in the resolution of the proposed common question. Therefore, the Minister submits that a class proceeding is not the preferable procedure for the just and efficient resolution of the proposed common question.

E. *Rule 334.16(1)(e): Appropriateness of the representative plaintiff*

(1) Ms. Rae's position

[40] Ms. Rae submits that she is a suitable representative applicant for the proposed class action and would fairly and adequately represent the interests of the members for the following reasons : (1) she is not, and never has been, a promoter of any widely-marketed gifting tax shelters; (2) she is a typical taxpayer; (3) she is committed to fulfilling her responsibilities to the benefit of all members of the class; (4) she does not have any conflict of interests with any members of the proposed class; (5) she has prepared a suitable litigation plan; and (6) she has submitted a summary of the agreement respecting fees between her and her counsel.

[41] In particular, Ms. Rae proposes three methods for giving notice of the proceeding to the taxpayers. The first method requires the Court to direct the Minister to provide to Ms. Rae the names and contact information for each member of the class in order for her to provide them with the Notice of Proceeding. If the Minister objects to the first proposed method, Ms. Rae proposes a second method under which the Minister will undertake to deliver the Notice of Proceeding to the taxpayers. The third proposed method is that she will undertake to publish the Notice of Proceeding in such publications considered as fair and appropriate by the Court.

(2) The Minister's position

[42] The Minister submits that in assessing whether Ms. Rae is fairly and adequately able to represent the interests of the class, the Court must consider her motivations, whether she will vigorously and capably prosecute the interests of the class, her capacity to bear any costs that she may incur and the competence of her counsel (*Dutton* at para 41). The Minister asserts that an adequate representative applicant must control the litigation, and that said representative does not control the litigation if she receives funding for the litigation from a third party. According to the Minister, a third-party funding agreement should not operate secretly.

[43] Ms. Rae refused to answer some of the Minister's questions during her cross-examination, in particular, questions related to possible third-party funding. The Minister submits that given this refusal, it may be inferred that a third party is funding the litigation.

[44] The Minister submits that if a third-party is funding the litigation, Ms. Rae may have ceded control to a third-party or allowed them to have give influence over the litigation, and she would thus not be an adequate representative, as she would not have the control of the litigation.

[45] Moreover, the Minister submits that the litigation plan is inadequate as it fails to deal with the contingencies arising from the litigation. The Minister also points out that the means of notifying class members would rely unnecessarily on taxpayers or on their personal information. According to the Minister, Ms. Rae's first and second proposed methods for notice raise concerns under section 241 of the ITA and under sections 3, 7 and 8 of the *Privacy Act*, RSC 1985, c P-21. The Minister submits that the information sought by Ms. Rae is not necessary for

the administration and enforcement of the ITA, and that this case is not a situation covered by the law where the disclosure of personal information should be allowed. Alternatively, the Minister submits that if the Court finds that the taxpayers' information should be used for the purpose of sending out notices to the potential class members, the Minister, acting through the CRA, should do it so as to limit the intrusion.

[46] The Minister submits that the plan fails to provide for the questions that may remain and require individual adjudication. Moreover, it fails to address individual issues arising from the fact that since the class members participated in different widely-marketed gifting tax shelters, the audit of these may be completed at different times.

[47] The Minister also submits that the litigation plan fails to address the issue of mootness. For instance, if the class is refined to include taxpayers who are affected by the GTS Program but have been assessed before the hearing of the application on the merits, the proceeding will become moot and the Court will have to decide whether it allows the proceeding to continue. However, Ms. Rae has not made any submissions to that effect.

[48] The Minister submits that Ms. Rae is in a conflict of interest with other members of the proposed class. The Minister submits that since Ms. Rae's definition of the class excludes tax payers who received their Notice of Assessment, she has put herself in a situation of potential conflict of interest. Indeed, if she is assessed in the meantime, she would be forced to abandon the proceeding to the detriment of the taxpayers who still have not been assessed.

[49] Finally, the Minister submits that Ms. Rae has not provided a satisfactory summary of agreement respecting fees as it does not provide sufficient detail to allow the Court or a class member to decide whether the fees are reasonable.

V. Analysis

[50] Rule 334.16(1), which is reproduced in the annex to this decision, outlines the five conditions that must be reunited in order for the Court to certify an application as a class proceeding. The Court must examine if the conditions are reunited in this case.

[51] The general principles developed with respect to class proceedings in British Columbia and Ontario may guide this Court in the application of the Rules in respect of class actions (*Vézina c Canada (Défense nationale, Chef d'État Major)*, 2011 CF 79 at para 29 [*Vézina*]; *Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2006 FC 197 at para 45). In fact, Rule 334.16 is similar to the provisions relating to class proceedings of the British Columbia and Ontario legislation (*Class Proceeding Act*, RSBC 1996, c 59; *Class Proceedings Act*, SO 1993, c 6).

[52] As the Supreme Court stated in *AIC Limited v Fisher*, 2013 SCC 69 at para 48 [*Fisher*], the onus to establish some basis in fact for every certification criterion lies with the applicant. Hence, Ms. Rae must satisfy the Court that the criteria of Rule 334.16(1) are met (*Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 13).

[53] Ms. Rae must establish that there is some "basis in fact" for each of the requirements in Rule 334.16(1) except for the requirement that the pleadings disclose a reasonable cause of action (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 102 [*Pro-Sys*]; *Hollick v Toronto (City)*, 2001 SCC 68 at para 25 [*Hollick*]).

A. *Rule 334.16(1)(a): Reasonable cause of action*

[54] The threshold to be met for a pleading to show a reasonable cause of action is very low (*Buffalo v Samson Cree Nation*, 2008 FC 1308 at para 43 [*Buffalo FC*]). "[A] pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists" (*Hollick* at para 25).

[55] The parties agree, and I am satisfied, that there is a reasonable cause of action.

B. *Rule 334.16(1)(b) : Identifiable class of two or more persons*

[56] The definition of the class must be made objectively and allow the Court to assess if a particular person falls under the definition of the class. The class must not be unlimited (*Hollick* at para 17). Also, it "must not be unnecessarily broad – that is that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue" (*Hollick* at para 21). Over-inclusion and under-inclusion are not fatal to the certification as long as they are not illogical or arbitrary (Ward Branch, *Class Actions in Canada* (Toronto (ON): Canada Law Book, 2014) (looseleaf updated 2014, release 38) ch 4 at para 4.250 [Branch]; *see also Hollick* at para 21).

[57] In the present case, I find that the exclusion of taxpayers assessed before the hearing on the merits from the class is illogical or arbitrary. These taxpayers share the same interest in the resolution of the common issue, regardless of whether or not they have received their Notice of Assessment. Moreover, the class excludes the taxpayers who filed their tax return for the 2013 taxation year without making a claim for a charitable donation tax credit in respect of participation in a widely-marketed gifting tax shelter in 2013, but filed a T1 Adjustment Request Form after their assessment, requesting a charitable donation tax credit in respect of participation in a widely-marketed gifting tax shelter in 2013. Thus, I find the proposed class to be too narrow.

C. *Rule 334.16(1)(c) : Common questions of law or fact*

[58] At paragraph 108 of *Pro-Sys*, the Supreme Court of Canada, citing its previous decision in *Dutton* at paragraphs 39-40, listed McLachlin C.J.'s instructions for determining whether the proposed issues for a class proceeding fulfill the requirements of Rule 334.16(1)(c) :

> (1) The commonality question should be approached purposively.
>
> (2) An issue will not be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It is not necessary that common issues predominate over non-common issues. However, the class member's claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessary to the same extent.

[59] In the present case, the resolution of the common question submitted by Ms. Rae is necessary to the resolution of each class member's claim, and each of them will benefit from the successful prosecution of the action. Further, the resolution of the issue submitted by Ms. Rae as a common question under a class action will "avoid duplication of fact-finding or legal analysis" (*Dutton* at para 39).

[60] I agree with the Minister in that I read Justice Phelan's decision in *Ficek* as being tied to the facts of that case, and I am satisfied that the factual findings and rationale in *Ficek* cannot be transposed here. However, I fail to see how it affects the assessment of the proposed common issue, as it is described in this case. I do not find that the issue, as it reads, imports *per se* the factual findings of the *Ficek* decision.

[61] I am therefore satisfied that the question submitted by Ms. Rae constitutes a common question of law or fact which fulfills the requirements of Rule 334.16(1)(c).

D. *Rule 334.16(1)d) : The Preferable procedure for the just and efficient resolution of the common questions of law or fact*

[62] The Supreme Court of Canada has held that the determination of whether a class action is the preferable procedure requires comparing the class proceeding with other procedural options while bearing in mind the three goals of class proceedings: access to justice, behaviour modification, and judicial economy (*Fisher* at para 16). Rule 334.16(2), reproduced in the annex to these reasons, states a non-exhaustive list of factors to be taken into consideration in assessing whether a class proceeding is the "preferable procedure."

[63] The Supreme Court in *Hollick* stated that in order to satisfy the requirement under Rule 334.16(1)(d), an applicant has to show: (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claim (*Hollick* at paras 28, 31). Hence, under this requirement:

> [i]t is not necessary to show that it would be impossible for each member to sue individually in order to justify certification, merely that it would be difficult in the circumstances, by reason of the number of class members as well as other factors (*Branch* at para 4.1030)

[64] I will now address factors under Rule 334.16(2) in turn.

(1) Predominance under Rule 334.16(2)(a)

[65] In the present case, Ms. Rae has submitted only one common question of law or fact. The Minister has only referred to one issue that will require individualized assessment, namely, that in the event that the Court finds that the rationale for delaying the assessments was not unreasonable, the Court will have to decide whether the Minister is simply taking too long to raise the assessments depending on the particular widely-marketed gifting tax shelter in which the class member participated. As stated in *Buffalo FC*, in order to establish whether the common questions of law or fact predominate over questions affecting only individual members, the Court must determine "whether there are common issues that could advance the litigation by their resolution" (*Buffalo FC* at paras 100, 130). I am satisfied that the resolution of the common question identified by Ms. Rae will determine the heart of the claims that would be advanced by the class members and any individual issue that may remain could be efficiently dealt by the

judge hearing the class action. Therefore, I am satisfied that this factor favours the finding that a class action is the preferable procedure.

(2) Valid interest individual control of action under Rule 334.16(2)(b)

[66] The only submission of the parties with respect to this issue is from the Minister and relates to the possibility that the class action come to an end if Ms. Rae is being assessed before the resolution of the proposed common question. In fact, the Minister relies on the fact that Ms. Rae refined the class to exclude any taxpayers who are assessed before the hearing of the application on the merits.

[67] However, a motion to remove Ms. Rae as the representative plaintiff and to substitute her by another class member or to decertify the class proceeding could be brought in the event that she is effectively assessed before the hearing of the application on the merits, which would prevent the class action from coming to an end (*Grant v Canada (Attorney General)*, [2009] OJ No 5232 at para 136 (ONSCJ)).

[68] Therefore, there is no evidence that there is a significant number of the members of the class who have a valid interest in individually controlling the prosecution of separate proceedings, I am satisfied that this factor favours the finding that a class action is the preferable procedure.

(3) Claims that are or have been the subject of other proceedings under Rule 334.16(2)(c)

[69] As previously stated, Ms. Rae submits that there are several applications that have been filed by taxpayers with respect to the common issue submitted in the present case but none of those have finally been adjudicated, none have been certified as a class proceeding and none address the 2013 taxation year. The Minister does not make any submission on this factor.

[70] On the sole basis that the present proposed class action concerns the 2013 taxation year and that the parties pointed to no other applications filed in this respect, I am satisfied that this factor favours the finding that a class action is the preferable procedure.

(4) Comparative practicality under Rule 334.16(2)(d) and (e)

[71] The Minister argues that a class proceeding would be less efficient than an individual action, relying on paragraph 18.4(1) of the *Federal Courts Act*, RSC 1985, c F-7 which provides that a judicial review is a summary proceeding. The Minister points out that a judicial review "can move to a hearing relatively quickly [and that certification] bogs this summary process down."

[72] Ms. Rae could seek relief through a judicial review which would probably be heard more expeditiously than would a class proceeding. I agree with the Minister that the resolution of this claim may provide guidance in dealing with other taxpayers' claims.

[73] However, I disagree with the Minister that individual actions would be more efficient than a class action. The Minister has not submitted evidence that a class proceeding would create greater difficulties than other litigation alternatives. All taxpayers that are affected by this same

issue would have to bring this matter in front of this Court individually and given the number of those taxpayers, I cannot conclude that this option would be more efficient than a class proceeding. Therefore, bearing in mind the goals of class proceedings (access to justice, behaviour modification, and judicial economy), I find that this factor favours the finding that a class proceeding is the preferable procedure.

[74] Accordingly, I am of the view that a class proceeding is the preferable procedure for the just and efficient resolution of the common issue raised by this case.

E. *Rule 334.16(1)(e) : Appropriateness of the representative plaintiff*

[75] During Ms. Rae' cross-examination, her counsel objected to the questions related to third-party funding on the basis that such questions were not relevant. On this basis, the Minister submits that there are some concerns regarding Ms. Rae's independence.

[76] In *Fairview Donut Inc v The TDL Group Corp*, 2012 ONSC 1252 [*Fairview*], Justice Strathy for the Superior Court of Justice of Ontario found that a third-party funding "might be reason to question the independence and suitability of the representative plaintiff" (*Fairview* at para 358). During cross-examination, the plaintiffs had refused to answer questions about whether they have any arrangements with any third party for the funding of the litigation. Justice Strathy ruled that before granting the certification motion, the class representative would have to answer the questions related to third-party funding (*Fairview* at para 364). In fact, third-party funding raises concerns about the person who is actually controlling the litigation (*Fehr v Sun Life Assurance Company of* Canada, 2012 ONSC 2715 at para 139).

[77] In light of the above, I am of the view that Ms. Rae's refusal to answer those questions raises some concerns.

[78] In order to demonstrate that she could fairly and adequately represent the interests of the class, Ms. Rae must show that she prepared a plan for the proceeding which sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing.

[79] At the certification stage, the Court will not scrutinize the plan in order to determine whether it is adequate and could carry the case through to trial without being amended. In *Buffalo FC*, the Court set out a list of non-exhaustive matters to be addressed in a litigation plan at paragraph 151:

> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and

> (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.

[80] The litigation plan must show that the representative applicant and his or her counsel "have thought the process through, and that they grasp its complexities" (*Buffalo FC* at para 148). However, a litigation plan may be found adequate even if not enough detailed, and the Court can grant leave to review the plan where the other certification requirements are met (see *Glover v Toronto (City)* (2009), 176 ACWS (3d) 947 at para 97 (ONSCJ); *Branch* at para 4.590). The nature, scope and complexity of the particular litigation will determine how detailed a litigation plan should be (*Buffalo FC* at para 150).

[81] The litigation plan submitted by Ms. Rae proposes three methods for the notification of the proceeding to the class member and provides for delays in general procedural steps. I do not find that the litigation plan fulfills the requirement set out in the jurisprudence. I am also not convinced that Ms. Rae would fairly and adequately represent the interests of the class.

[82] Ms. Rae must also provide a summary of any agreements respecting fees and disbursements between her and the solicitor of record in order to show that she is an appropriate representative plaintiff. As stated by Justice De Montigny of this Court at paragraph 57 of *Vézina*, the purpose of such a disclosure is to :

> [permettre] à un membre de décider s'il entend s'exclure du groupe ou s'il entend chercher à faire modifier la convention d'honoraires puisque cette convention liera tous les membres du groupe et affectera le montant de la réparation qu'ils pourraient obtenir alors même qu'ils n'ont pas participé à la négociation de la convention.

[83] In my view, the fee agreement submitted by Ms. Rae does not allow the fees' reasonableness to be gauged. In fact, the letter specifies the hourly rate for the counsel of the record and the hourly rate for other personnel. However, this fee agreement is not sufficient for a class member to determine the amount that will be due monthly by the class members to the counsel of the record. Therefore, I am not satisfied that the fee agreement, as submitted by Ms. Rae meets the requirements of Rule 334.16(1)(e)(iv).

[84] In light of the above, I cannot find that Ms. Rae would fairly and adequately represent the interests of the class. Since this requirement is not met, it is not necessary to address the issue of the proper method to give notice of the proceeding to the class members.

VI. Conclusion

[85] In the present case, I find that Ms. Rae has failed to meet the criteria set in Rule 334.16(1). Specifically, she does not meet the requirement of Rule 334.16(1)(b) as she has not properly identified a class of two or more individuals. Moreover, there are some issues that remain undetermined regarding her independence. Therefore, I cannot conclude that Ms. Rae is an appropriate representative applicant as per Rule 334.16(1)(e). Furthermore, the litigation plan and fee agreement submitted by Ms. Rae both lack detail and are not sufficiently developed in order to fulfill the requirements of the Rules and the case law.

[86] I will therefore dismiss the motion.

[87] Each party will bear their own costs for this motion.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion is dismissed, without costs.

"Martine St-Louis"

Judge

Federal Courts Rules, SOR/98-106

By class member

334.12 (1) Despite rule 302, a member of a class of persons may commence an action or an application on behalf of the members of that class, in which case the originating document shall be prefaced by the heading "Proposed Class Proceeding".

Motion for certification of proceeding

(2) The member shall bring a motion for the certification of the proceeding as a class proceeding and for the appointment of the member as representative plaintiff or applicant.

[…]

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only

Règles des Cours fédérales, DORS/98-106

Par un membre du groupe

334.12 (1) Malgré la règle 302, une action ou une demande peut être introduite par un membre d'un groupe de personnes au nom du groupe, auquel cas la mention « Recours collectif — envisagé » est placée en tête de l'acte introductif d'instance.

Présentation d'une requête en autorisation

(2) Le membre présente une requête en vue de faire autoriser l'instance comme recours collectif et de se faire nommer représentant demandeur.

[…]

Conditions

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci

individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared 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 as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact

prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

a) la prédominance des points de droit ou de fait communs

common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[…]

sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1971-14
STYLE OF CAUSE:	ROSE MARIE JOAN RAE v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2014
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	JUNE 3, 2015

APPEARANCES:

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