Date: 20080117

Docket: T-1430-07

Citation: 2008 FC 62

Toronto, Ontario, January 17, 2008

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

REVEREND EDWIN PEARSON, REVEREND MICHEL ETHIER and JAMES ROSCOE HOAD

Plaintiffs

and

HER MAJESTY THE QUEEN as represented by THE MINISTER OF JUSTICE OF CANADA, THE ATTORNEY GENERAL OF CANADA, and THE SOLICITOR GENERAL OF CANADA

Defendants

REASONS FOR ORDER AND ORDER

[1] The defendants, as represented by the Attorney General of Canada, have brought a motion pursuant to Rule 221 of the *Federal Courts Rules* in this proposed class proceeding for an order, *inter alia*, striking out the Amended Statement of Claim in its entirety without leave to amend and dismissing the action. At the outset of the hearing of the motion a preliminary objection was raised by counsel for the plaintiffs concerning class proceeding procedure and specifically questioning whether a prothonotary had the jurisdiction to hear and decide a motion to strike a statement of

claim in a proposed class proceeding. After hearing full argument on the preliminary objection, I adjourned the main motion in order to consider the preliminary objection.

Background

[2] The plaintiffs commenced this action as a proposed class proceeding and brought a motion pursuant to former Rule 299.17, now Rule 334.15, of the Rules for certification of the action as a class proceeding. The plaintiffs claim damages for violation of class members' rights under the *Canadian Charter of Rights and Freedoms* (the "Charter") alleged to be caused by the enforcement by the defendants of provisions of the *Controlled Drug and Substances Act* (CDSA) which the plaintiffs allege have been repealed and are of no force and effect.

[3] The proposed class are members of the Assembly of the Church of the Universe. This religion holds as one of its tenets that cannabis is a sacred substance to be used in church sacraments and rituals. It is alleged in the Amended Statement of Claim that the class members use cannabis for sacramental purposes and they believe that no law exists that prohibits possession of cannabis for use as a religious sacrament. In essence, the Amended Statement of Claim alleges that the enforcement of the CDSA against members of the Church of the Universe infringes their right of religious freedom granted under the Charter.

[4] The defendants responded to the Amended Statement of Claim and motion for certification by bringing the motion to strike the Amended Statement of Claim. In support of their motion, the defendants raise a number of arguments summarized as follows:

1. The action is an abuse of process because the alleged improper actions of the defendants were the subject of judicial determinations by the Ontario Court of Justice, the Ontario Superior Court of Justice and the Court of Appeal for Ontario. The defendants argue that the Ontario Courts made judicial determinations, either implicitly or explicitly, that the underlying offence provisions were constitutionally valid and thus, as the plaintiffs are seeking to revisit those decisions, this Court is being asked to sit in appeal of the Ontario Courts. The defendants argue that the action therefore constitutes an abuse of process and should be dismissed.

2. Alternatively, the defendants say that the action is fatally flawed as it is entirely dependent on an incorrect conclusion of law, *viz.*, that there is no valid prohibition against the possession of marijuana. Thus, they argue, the action is doomed to failure and should be struck as disclosing no reasonable cause of action.

3. In the further alternative, the defendants say that the plaintiffs have failed to plead sufficient material facts to sustain an action in misfeasance in public office or any other cause of action and for that reason must be struck.

[5] These arguments of the defendants result in the following issues for determination on the motion to strike:

1. Does the action constitute an abuse of process because it requires this Court to sit in appeal of prior determinations made in the Ontario Courts with respect to the constitutional validity of the provisions of the CDSA?

2. Should the claim be struck in its entirety under Rule 221(1)(a) of the Rules without leave to amend and the action be dismissed because it fails to disclose a reasonable cause of action?
3. Should the claim be struck in its entirety under Rule 221(1)(c) and (f) of the Rules without leave to amend and the action be dismissed because it is frivolous and vexatious?

[6] In their responding submissions the plaintiffs raised a preliminary jurisdictional objection concerning the interplay between the class proceeding rules [formerly Rules 299.1- 299.41, now Rules 334.1 – 334.40 which constitute Part 5.1 of the Rules] and the rules which govern actions generally [Part 4 of the Rules]. They argue that because their certification motion can only be heard by a judge of this Court and the issue of whether a "reasonable cause of action" is one of the required criteria which must be met for certification that the motion to strike and the issues it raises should either be heard by a judge or, preferably, be heard on the certification motion itself.

[7] Further, they argue that because the proposed class proceeding seeks damages in excess of $50,000, a prothonotary does not have the jurisdiction to deal with the motion. They argue that class proceedings are a unique process governed by Part 5.1 which is a complete code whereby only judges have the discretion to certify a class proceeding and as the amount claimed is in excess of $50,000 per claimant a prothonotary does not have jurisdiction.

Preliminary Issues to be Determined

[8] The preliminary objection raises the following issues for determination:

1. Whether a prothonotary has the jurisdiction to hear and decide a motion to strike a Statement of Claim in a proposed class action where there is a pending motion for certification?

2. Whether a prothonotary has the jurisdiction to hear a motion to strike a class proceeding in which the amount claimed is in excess of $50,000 per claimant?

General Jurisdiction of a Prothonotary

[9] The position of prothonotary is a statutory one. A prothonotary is an independent judicial officer of the Federal Court, akin to an Associate Judge, appointed by the Governor in Council pursuant to section 12 of the *Federal Courts Act*. Section 12 (3) of the Act provides that the powers, duties and functions of a prothonotary shall be determined by the Rules.

[10] The primary jurisdiction of a prothonotary is set out in Rule 50 as follows:

> Prothonotaries
> **50.** (1) A prothonotary may hear, and make any necessary orders relating to, any motion under these Rules other than a motion
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> (*a*) in respect of which these Rules or an Act of Parliament has expressly conferred jurisdiction on a judge;
>
> (*b*) in the Federal Court of Appeal;
>
> (*c*) for summary judgment other than
> (i) in an action referred to in subsection (2), or
> (ii) in respect of a claim referred to in subsection (3);
>
> (*d*) to hold a person in contempt at a hearing referred to in paragraph 467(1)(*a*);
>
> (*e*) for an injunction;
>
> (*f*) relating to the liberty of a person;

(*g*) to stay, set aside or vary an order of a judge, other than an order made under paragraph 385(*a*), (*b*) or (*c*);

(*h*) to stay execution of an order of a judge;

(*i*) to appoint a receiver;

(*j*) for an interim order under section 18.2 of the Act;

(*k*) to appeal the findings of a referee under rule 163; or

(*l*) for the certification of an action or an application as a class action.

Actions not over $50,000

(2) A prothonotary may hear an action exclusively for monetary relief, or an action *in rem* claiming monetary relief, in which no amount claimed by a party exceeds $50,000 exclusive of interest and costs.

Class actions

(3) A prothonotary may hear a claim in respect of one or more individual questions in a class proceeding in which the amount claimed by a class member does not exceed $50,000 exclusive of interest and costs.

Foreign judgment

(4) A prothonotary may hear an application under rule 327 for registration, recognition or enforcement of a foreign judgment.

Matters on consent

(5) Despite paragraphs (1)(*c*) and (*k*), a prothonotary may render any final judgment that could be rendered by a judge of the Federal Court, except in a proceeding in respect of which an Act of Parliament expressly confers jurisdiction on a judge, if the prothonotary is satisfied that all of the parties that will be affected by the judgment have given their consent.

[11] The definition of “Court” in Rule 2 includes a prothonotary. Rule 2 provides as follows:

> "Court" means, as the circumstances require,
>
> . . .
> (*b*) the Federal Court, including a prothonotary acting within the jurisdiction conferred under these Rules.

[12] Pursuant to Rule 50 a prothonotary has jurisdiction to deal with **any** motion under the Rules other than those that are specifically excluded. Thus, as can be seen, a prothonotary has a very wide jurisdiction as the majority of the Rules refer to orders of the “Court” or decisions made by the “Court”. Indeed, the role of prothonotary is recognized in the jurisprudence as extensive. In *First Canadians’ Constitution Draft Committee et al.* v. *Canada*, 2004 FCA 93, the Federal Court of Appeal reviewed the jurisdiction of a prothonotary. Justice Décary observed:

> [6] The intention of Parliament cannot be clearer. The office of prothonotary is created to ensure "the efficient performance of the work of the Court that, under the Rules, is to be performed by them" (subsection 12(1) of the Act) and the description of the work of the Court that can be performed by the prothonotary is to be found in the Rules (subsections 12(1) and (3) of the Act).
>
> [7] The role of prothonotaries in the Federal Court has been described by Chief Justice Isaac in *Aqua-Gem*, and his description has most recently been reaffirmed by the Court in *Merck* (*supra*, at para. 22). I wish to quote here from the reasons of Isaac C.J. in *Aqua-Gem*:
>
> Doubtless, in providing for the office of the Registrar or Master in the Exchequer Court and of the prothonotary in this Court, Parliament was mindful of the pre-trial and post-judgment support which the master system provided for superior court judges in the judicial systems of England and Ontario, both of which made extensive use of these judicial officers.
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> In his Hamlyn Lectures (published under the title *The Fabric of English Civil Justice*, London: Stevens & Sons, 1987), Sir Jack Jacob, Q.C., himself a former senior master of the High Court of

> Justice in England, sketched the historical development of the master system in England and the manner of its operation. The following passage at pages 110-111 is instructive of the historical evolution of that system:
>
> The most striking feature of the English pre-trial process is that, save for a few exceptions, the proceedings are conducted not before a judge but before a junior judicial officer, called the Master or Registrar. Before 1837, the judges of the three superior common law courts themselves dealt with pre-trial applications, which were then comparatively few in number and in variety. In 1837, Parliament abolished a great number of administrative and a few quasi-judicial offices and in their place created the Masters of the three Common Law Courts to assist the judges in their pre-trial work. In 1867, Parliament took the bold leap forward to transform the position of the Master from being an assistant to the judge into becoming a separate, distinct and independent judicial officer. This was achieved by enabling the judges to make rules of court empowering the Masters to transact all such business and exercise all such authority and jurisdiction as may be transacted and exercised by the judge in Chambers, except in specified matters and proceedings. Needless to say, the requisite rules of court were immediately made and they have continued with considerable expansion to this day. They operate to confer on the Masters original jurisdiction in respect of the matters and proceedings that come before them. For these purposes in the High Court, the Master is the equivalent of the judge in Chambers and his decision, order or judgment is made or given in his capacity as "the court" itself.
>
> The jurisdiction of the Masters, which has from time to time since their creation been greatly expanded, is very extensive indeed and covers almost the entire range of pre-trial proceedings, with the important exception of applications for an injunction, other than in agreed terms, and it also extends to almost all post-judgment proceedings. They have power to make final as well as interlocutory orders and to give final judgments which are as operative and enforceable and which must be complied with as if made or given by a judge. [emphasis in original]

[13] Justice Décary then concluded with the following summary of the jurisdiction of prothonotaries:

> [8] The jurisdiction of the prothonotaries, as that of the Masters in the English system, has therefore been greatly expanded with time and "covers almost the entire range of pre-trial proceedings, with the important exception of applications for an injunction .... and it also extends to almost all post-judgment proceedings". That jurisdiction is determined by the Rules Committee established under section 45.1 of the Act, which is thus given the exceptional authority to empower the prothonotaries "to transact all such business and exercise all such authority and jurisdiction as may be exercised by the judge in Chambers, except in specified matters and proceedings".

Jurisdiction of a Prothonotary in Actions Where the Claim is Greater than $50,000

[14] In addition to the Rule 50(1) jurisdiction, Rule 50 (2) grants full trial jurisdiction to a prothonotary in actions for monetary relief not exceeding $50,000 exclusive of interest and costs. This monetary amount, however, does not limit the actions over which a prothonotary has jurisdiction. The *First Canadians'* case put to rest the issue of whether a prothonotary has jurisdiction to hear a motion to strike in which the amount in issue exceeds $50,000. In that case, a prothonotary had struck out a Statement of Claim in which the monetary amount claimed exceeded $50,000 and awarded costs to the moving party. On appeal from a judge of the Federal Court affirming the decision of the prothonotary, Justice Décary, speaking for the Court, noted:

> [9] Rule 50(1) has established the principle that a prothonotary has authority with respect to "any motion" under the *Federal Court Rules* "other than" motions expressly identified in Rule 50(1). This is a wide authority indeed and unless a motion falls under one of the headings of Rule 50(1), it may be entertained by a prothonotary. Rule 50(1) has been drafted carefully and does not grant prothonotaries any authority with respect to actions. It is Rule 50(2) which grants prothonotaries authority with respect to actions and the Rule expressly limits that authority to actions that are taken exclusively for monetary relief, or *in rem* actions claiming monetary relief, in which no amount claimed by a party exceeds $50,000 exclusive of interest and costs. The distinction between "motion" and "action" was clearly in the mind of the regulator, and had the latter wished to exclude from the authority of the prothonotary motions made in the context

> of actions in which the amount claimed exceeded $50,000, it would certainly have done it. **There is therefore no doubt, in my view, that a prothonotary has jurisdiction under Rule 50(1) to decide a motion to strike an action made under Rule 221 whatever the amount claimed in the action.** [emphasis added]

Rules Regarding Actions and Class Proceedings

[15] Part 4 of the Rules governs the conduct of actions. Rule 169 specifically provides that Part 4 applies to all proceedings that are not applications or appeals. Class proceedings may be initiated by action or application [Rule 334.12]. However, although the procedure relating to the conduct of class proceedings is set out in Part 5.1, the rules applicable to actions apply to any class proceeding that is an action [Rule 334.11]. There is no rule in Part 5.1 which requires that a motion to strike relating to class proceedings be heard only by a Judge. There is no issue that a **certification** motion falls exclusively within the jurisdiction of a judge [Rule 334.16]. However, there are several aspects of class proceeding procedure that fall to be dealt with by the "Court". For example, Rule 334.22 provides that a party in an action that has been certified may examine a class member for discovery, other than the representative plaintiff, "only on leave granted by the Court". To apply Justice Décary's language from the *First Canadians'* case, the distinction between "certification" and other procedures was clearly in the mind of the regulator, and had the latter wished to exclude a Prothonotary from dealing with Rule 334.22 motions, it would clearly have done it. Thus, there can be no doubt that Prothonotaries have, not only the jurisdiction of Rule 50 (2) in class proceedings, but also have any jurisdiction relating to class proceedings that is not specifically granted to a Judge.

Preliminary Motions in Class Proceedings

[16] Inherent in the position of the Plaintiffs is the suggestion that preliminary motions to strike a Statement of Claim on the ground of not disclosing a reasonable cause of action are somehow not permitted and are to be dealt with only on the certification motion. This suggestion is without merit. To give life to this submission would be to emasculate the Rules as they relate to class proceedings. The Rules are in place to ensure that any proceeding initiated in the Federal Court is regulated by the same procedural principles. The primary principle behind the Rules is to secure the just, most expeditious and least expensive determination of **every** proceeding on its merits [Rule 3].

[17] Motions to strike pleadings are governed by Rule 221, which is found in Part 4 of the Rules. By virtue of Rule 169, Part 4 applies to actions in class proceedings. Rule 221 specifically refers to the Court as having the jurisdiction at any time to order that a pleading be struck out on various enumerated grounds. There is nothing in the rule that exempts class proceedings from its effect nor is their anything inherently in the rule that is incompatible with class proceedings.

[18] Rule 334.16(1) and (2) set out, respectively, the criteria which must be satisfied on a certification motion and the matters to be considered. The rule provides as follows:

> **334.16** (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if
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> (*a*) the pleadings disclose a reasonable cause of action;
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> (*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 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 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.

[19] It is to be noted that Rule 334.16 is imperative in that a Judge **shall** certify the proceeding as a class proceeding if all of the criteria are met. It is a very different exercise than that contemplated by Rule 221. Rule 334.16 speaks only to the pleadings disclosing a reasonable cause of action while Rule 221 grants the Court jurisdiction to strike a pleading on several different grounds including the ground that the pleading discloses no reasonable cause of action. It would be a wasteful exercise and not in keeping with the purpose of the Rules to have a motion based on striking a pleading on the basis of no reasonable cause of action only in the certification process while allowing motions on the various other enumerated grounds in Rule 221 in preliminary motions.

[20] Further support for this conclusion can be found in the case management rules. All proposed class proceedings are specially managed [Rule 384.1]. Rule 385(1) sets out the powers of a case management judge or prothonotary as follows:

> **385.** (1) Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(*c*) **shall deal with all matters** that arise prior to the trial or hearing of a specially managed proceeding and may
>
> (*a*) give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;
>
> (*b*) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;
>
> (*c*) fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and
>
> (*d*) subject to subsection 50(1), **hear and determine all motions** arising prior to the assignment of a hearing date. [emphasis added]

[21] Thus, the case management prothonotary assigned as a case management judge under Rule 383 (b), subject to the exclusions of Rule 50(1), is empowered to deal with all matters that arise prior to the trial or prior to the assignment of a hearing date.

[22] However, the plaintiffs still argue that as the certification rule [Rule 334.16] requires that only a judge may certify a proceeding as a class proceeding and then only if a number of criteria are met, the first of which being that "the pleadings disclose a reasonable cause of action" [Rule 334.16 (1)(a)] only a judge and not a prothonotary can determine if the pleadings disclose a reasonable cause of action. They argue that if a prothonotary determines on a Rule 221 motion that the pleadings do or do not disclose a reasonable cause of action, the prothonotary has usurped the jurisdiction of the judge. Further, they argue that whether there is a reasonable cause of action should be determined at the certification stage before a judge and not on a preliminary motion such as that brought by the defendants here. Putting the issue another way, is a preliminary motion to strike under Rule 221 incompatible with the class proceeding rules?

[23] The simple answer is no. The interpretation urged by the plaintiffs strains the practice and procedure relating to actions found in the Rules. The class proceedings rules simply establish a comprehensive procedural code for the conduct of a class proceeding within the context of the Rules as a whole. They do not oust the rights of defendants to strike a Statement of Claim on any of the enumerated grounds found in Rule 221. It makes no sense that a proposed class proceeding action cannot be struck down until the certification motion. To give this interpretation legitimacy is to undermine the ability of the Court to control its process and strike out proceedings that do not meet

the requirements of pleading a proper cause of action or striking abusive, or frivolous and vexatious proceedings.

[24] Finally, if any additional support is required for the proposition that motions to strike may be brought prior to the certification hearing, Justice Hugessen in *Always Travel Inc. et al* v. *Air Canada*, 2003 FCT 212 implicitly observed that preliminary motions to strike are available to parties prior to certification. In that case, Justice Hugessen, as the case management judge, made an order requiring the parties to file all preliminary motions by a certain date. The only motion brought was for an extension of time for filing statements of defence.

[25] The issue in the case was whether the defendants could delay filing their statements of defence until after the certification hearing. Justice Hugessen determined that it was an appropriate case in which to grant that order, relying in part on Rule 385. However, in the course of his reasons, Justice Hugessen noted that because the only motion brought was for an extension of time in accordance with his prior order, "the defendants are now in my view foreclosed from bringing any further preliminary motions, and therefore may not now move to strike all or any part of the statement of claim, they may still argue on the return of the motion for certification that no cause of action is shown or that some alleged causes of action are not proper causes of action".

[26] Thus, a motion to strike the claim pursuant to Rule 221 may be brought prior to certification. As a prothonotary may now be appointed a case management judge in a specially managed proceeding [Rule 383 (b)] and is empowered under the Rules to deal with any motion not excluded

by Rule 50, a prothonotary has the jurisdiction to hear a motion to strike a class proceeding under the Rules.

ORDER

THIS COURT ORDERS that:

1. The preliminary objection to the jurisdiction of a prothonotary to hear and decide motions to strike a proposed class proceeding is dismissed.

2. Counsel for the defendants shall consult with counsel for the plaintiffs and advise the Court within ten days of the date of this order of mutually convenient dates for the hearing of the defendants' motion on the merits, failing which a case conference shall be arranged to fix a date for the hearing.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1430-07
STYLE OF CAUSE:	REVEREND EDWIN PEARSON ET AL v. HER MAJESTY THE QUEEN, THE ATTORNEY GENERAL OF CANADA AND THE SOLICITOR GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 7, 2008
REASONS FOR ORDER AND ORDER:	AALTO P.
DATED:	January 17, 2008

APPEARANCES:

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