Date: 20080317

Docket: T-1943-06

Citation: 2008 FC 353

BETWEEN:

BERNARD VINCENT CAMPBELL, SHARLE EDWARD WIDENMAIER, LENARD ROY LINK, and WILLIAM A. HEIDT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL DEFENCE

Defendants

REASONS FOR ORDER

HANSEN J.

[1] The within proceeding is a proposed class action. These Reasons arise from a dispute between the parties regarding the scheduling of the Plaintiffs' certification motion and the Defendants' motion to strike the Plaintiffs' Amended Statement of Claim. A brief account of the relevant procedural history provides a backdrop for the current dispute.

[2] Early in the proceeding, the case management Prothonotary suspended the requirement to serve and file a statement of defence. The Defendants filed a motion to strike the Statement of Claim and to stay the whole or any part of the Statement of Claim not struck. The Defendants' motion and the Plaintiffs' certification motion were initially scheduled for hearing at the same sitting on December 10-13, 2007 (later moved to December 11-14, 2007). Prior to the hearing, in response to an earlier concern raised by the Defendants and no position having been taken by the Plaintiffs, the Court directed that the motion to strike would be heard first.

[3] At the start of the December hearing, the Plaintiffs' counsel made submissions regarding the order in which the submissions on the two motions should be made. He took the position that he was not opposed to the Defendants proceeding with their submissions on their motion to strike, however, he argued that he should be permitted to make combined submissions on the motion to strike and the certification motion followed by the Defendants' response to the certification motion and the Plaintiff's submissions on the motion to strike. Plaintiffs' counsel was of the view that given the overlap in the issues between the two motions this approach would avoid unnecessary repetition.

[4] Counsel for the Defendants strongly opposed this approach on the basis that, having indicated earlier that they would not be filing evidence on the motion to strike, it was an attempt by the Plaintiffs in their submissions on the motion to strike to rely on the evidence they had filed on

the certification motion. I directed that the motion to strike would be heard in its entirety before the certification motion.

[5] Once the motion to strike had been completed, it became evident there was insufficient time to complete the certification motion. On January 3, 2008, after canvassing the availability of all counsel, I directed that the certification motion would be heard February 19-22, 2008. Subsequently, the Plaintiffs filed an Amended Statement of Claim. After hearing submissions from the parties, I concluded that the motion to strike had been rendered moot and dismissed the motion.

[6] In mid-February, the Defendants filed a motion to strike the Amended Statement of Claim and to stay the whole or any part of the Statement of Claim not struck and for directions fixing a schedule for the steps leading up to and the hearing of the motion to strike. They also filed a motion for an adjournment of their reply to the certification motion; the fixing of a schedule for the filing of supplemental affidavit evidence, for the further cross-examination of the Plaintiffs and to serve and file supplemental written submissions in relation to the Plaintiffs' certification motion. The Defendants also requested directions regarding the evidence each party could reply upon for the motion to strike and the certification motion. The Defendants sought additional orders that are not relevant for the purpose of these reasons.

[7] On February 19, 2008, after hearing submissions from the parties, I granted the adjournment request, allowed the Defendants to file new affidavits in response to the certification motion and to conduct further cross-examination on the Plaintiffs' affidavits filed on the certification motion on

matters arising from the amendments in the Amended Statement of Claim. We then met to establish a proposed schedule for the completion of the various steps for the motion to strike and the certification motion and to determine available dates for the hearing of these motions.

[8] Based on the proposed schedule prepared by the parties, the Court indicated that the motion to strike could be heard the week of June 16, 2008 and the certification motion could be heard the first week of September.

[9] At this juncture, counsel for the Plaintiffs objected to the motion to strike being heard first. I granted the Plaintiffs an adjournment to the following morning to make further submissions and to give the Defendants an opportunity to respond.

[10] The Plaintiffs submit that the certification motion should be heard and determined prior to the motion to strike. Alternatively, they submit that the two motions ought to be heard together. It should be noted that their position goes beyond simply scheduling the two motions to be heard in succession at the same sitting. They submit that the Plaintiffs' submissions on the certification motion and their submissions on the motion to strike should be heard together and prior to the Defendants' submissions on their motion to strike and the certification motion.

[11] In support of their first position, the Plaintiffs rely on the decisions in *Hoofman v. Monsanto Canada Inc.*, 2002 SKCA 120, 220 D.L.R. (4th) 542 (*Monsanto*); *Attis v. Canada (Minister of Health)* 2005, 75 O.R. (3d) 302, [2005] O.J. No. 1337 (*Attis*); *Baxter v. Canada (Attorney General)*,

[2005] O.J. No. 2165 (*Baxter*); *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (*Stewart*). As to their alternative position, the Plaintiffs rely on *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 1428 (*Carom*); *Chadha v. Bayer Inc.,* 45 O.R. (3rd) 29, [1999] O. J. No. 2497 (*Chadha*); *Pearson v. Inco Ltd.*, [2002] O. J. No. 2764 (*Pearson*); and *Direnfeld v. National Trust*, [2001] O.J. No. 1706 (*Direnfeld*).

[12] The Defendants submit that since the motion to strike may be dispositive of the action or may narrow the issues on the certification motion, it should be heard first.

[13] There are no rules in the *Federal Courts Rules*, SOR/98-106 regulating the order in which certification and other motions, such as, motions to strike out pleadings must be heard and determined. Rule 221 governing the striking out of pleadings provides that such a motion may be brought at any time. Rule 334.11 provides that the rules applicable to actions and applications, except to the extent that they are incompatible, apply to class proceedings.

[14] Although there is an overlap between the ground upon which a pleading may be struck under Rule 221(a) and the requirement in Rule 334.16(1)(a) for certification, namely, reasonable cause of action, this alone does not create an incompatibility rendering Rule 221 inapplicable to class proceedings. As Prothonotary Aalto stated in *Pearson v. Canada (Minister of Justice)*, [2008] F.C.J. No. 73, at paragraph 23, to conclude that a proposed class action could not be subject to a motion to strike until the certification motion has been determined would "… 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."

[15] The question remains, however, whether as a matter of principle a certification motion should be decided before a motion to strike.

[16] In general, Canadian courts have consistently concluded that having regard to the purpose and objectives of class proceedings and the requirement that a certification motion must be brought very early in the proceeding, the certification motion should take precedence over other preliminary motions.

[17] In *Monsanto*, at paragraph 18, the Saskatchewan Court of Appeal observed that the objectives of the class action procedure include "… economies of time, effort and expense, as well as uniformity of decision for persons similarly situated." As well, "The modern class action is designed to avoid, rather than encourage, the unnecessary filing or repetitious papers and motions." At paragraphs 28 and 29 the Court stated:

> In this case the timely determination of the certification application will advance the litigation without generating unnecessary motions and applications. If one of the purposes of the modern class action is designed to avoid, rather than encourage unnecessary filling of repetitious papers and motions, it is in the interest of all parties to have the "appropriateness of the class action determined at the outset by certification": See *Dutton, supra* at p. 552, paras. 33 and 38.
>
> In this way, motions to strike or similar proceedings will be unnecessary since the Court can address such issues on the certification application. …

[18] In *Attis*, at paragraph 7, and later in *Baxter*, at para. 9, Justice Winkler found that from the requirement in the class proceedings legislation in Ontario, similar to this Court's Rule 334.15(2), that a certification motion must be brought within 90 days after the last statement of defence, it could be inferred that a certification motion should have priority over other motions and should be the first procedural matter to be heard and determined. (See also, *Moyes v. Fortune Financial Corp.*, [2001] O.J. No. 4455)

[19] The Courts have also identified other considerations that weigh in favour of proceeding with the certification motion first. In *Baxter*, at paras. 11-12, Justice Winkler observed that given the fluidity surrounding class definitions and common issues "… motions brought prior to certification may turn out to have been unnecessary, over-complicated or incomplete." He also pointed out that there may be insufficient information to determine motions brought prior to the certification motion. This is particularly true in those cases where the certified common issues form the foundation for the Court's assumption of jurisdiction over extra-territorial parties. Finally, in those cases where there are elderly potential class members they are entitled to have a timely determination as to whether their proceeding is certifiable.

[20] The Courts have also consistently found that other considerations may override the general proposition that the motion for certification should proceed first. As the Court stated in *Baxter*, at para. 14:

> Admittedly, there are instances where, as indicated in both *Attis* and *Moyes*, there can be exceptions to the rule that the certification motion ought to be the first

> procedural matter to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly. (See: *Moyes, supra* at para. 12; *Re Holmes and London Life v. London Life Insurance Co. et al.* (2000), 50 O.R. (3d) 388 (S.C.) at paras. 7-8; *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.), at para. 15, leave to appeal dismissed [2002] S.C.C.A. No. 446; *Segnitz v. Royal and SunAlliance Insurance Co. of Canada*, [2001] O.J. No. 6016 (S.C.); *Stone v. Wellington County Board of Education* (1999), 29 C.P.C. (4th) 320 (C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 336.); *Vitelli v. Villa Giardino* (2001), 54 O.R. (3d) 334 (S.C.); *Pearson v. Inco* (2001), 57 O.R. (3d) 278 (S.C)).

[21] In the alternative, the Plaintiffs submit that since the issue on a motion to strike is identical to the issue under rule 334(16)(1)(a), reasonable cause of action, and a determination of this issue on a motion to strike constitutes a determination for the purposes of the certification motion, the motions ought to be heard together in the manner described earlier.

[22] It is clear that a determination as to whether there is a reasonable cause of action made in the context of a motion to strike constitutes a determination for the purpose of the certification motion (see, for example *Carom*, at para. 14). However, it does not necessarily follow that the two motions ought to be heard together as the Plaintiffs contend. Indeed, in *Carom*, *Chadha*, *Direnfeld*, and in *Pearson* with respect to one of the Defendants, the cases relied on by the Plaintiffs, the motions to strike were all heard and decided prior to the certification motions.

[23] It is evident from the jurisprudence that although, in principle, a certification motion ought to take precedence over other preliminary motions, in the end, the order of the proceedings will be determined on the basis of the circumstances of the particular case.

[24] In the present case, in their preliminary motion, the Defendants allege that the Plaintiffs' claims are barred pursuant to sections 8 and 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50; that those claims for breaches of *Charter* rights alleging breaches before the *Charter* came into force do not disclose a reasonable cause of action; and that the remaining claims for *Charter* breaches do not disclose a reasonable cause of action. The Defendants also seek to have the claim of one of the Plaintiffs stayed pursuant to section 111 of the *Pension Act*, R.S.C. 1985, c. P-6 on the basis of the allegation that he has not applied for a pension for any of the alleged injuries or losses he has sustained and to have the claims of the other Plaintiffs stayed pursuant to the same provision for those alleged injuries or losses for which they are not already in receipt of a pension.

[25] It is evident from the grounds on which the Defendants' motion is based that it may resolve, narrow or give greater definition to the nature and the scope of the case for certification. This potential saving of time and resources for both the parties and the Court displaces the general principle that the certification motion should take precedence.

[26] For these reasons, I conclude that the motion to strike should be heard and determined prior to the certification motion. I also reject the Plaintiffs' alternative position as any potential savings would be lost by proceeding in that fashion.

[27] I am aware of the fact that there are potential members of the class who are elderly. I also note that counsel for the Plaintiffs suggested that the motion to strike be scheduled for the latter part of September and the certification motion in late November, December or even in January in the event the Court determined that the motion to strike would be heard prior to the certification motion. While this position is at odds with the concern expressed earlier by counsel about aging potential class members, the Court will nonetheless take this important factor into account when scheduling.

[28] An order will issue regarding the scheduling of the motion to strike.

"Dolores M. Hansen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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