Date: 20100311

Docket: T-1943-06

Citation: 2010 FC 279

Ottawa, Ontario, March 11, 2010

PRESENT: The Honourable Madam Justice Hansen

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 AND ORDER

[1] The Defendants bring this motion in writing for costs for all steps taken in this proposed class proceeding up to the Court's decision, 2009 FC 30, granting the Plaintiffs' motion for approval to discontinue. The Defendants claim their costs pursuant to Part 11 of the *Federal Courts Rules*,

SOR/98-106 (Rules), alternatively, pursuant to Rule 334.39 or, in the further alternative, against the Plaintiffs' counsel personally.

[2] The Defendants take the position that as parties against whom an action has been discontinued under Rule 402 they are *prima facie* entitled to their costs. They submit that the "no costs" regime found in Rule 334.39 has no application because the action was never certified and, therefore, never became a class proceeding. The Defendants argue that at the pre-certification stage, the matter is an ordinary action.

[3] In the alternative, the Defendants submit that if Rule 334.39 does apply, it should only apply to those steps respecting the motions for certification and that no other steps should be excluded. However, the Defendants also argue that the circumstances in the present case justify an award of costs under the exceptions set out in Rule 334.9(1) (a),(b) and (c).

[4] The Plaintiffs dispute the Defendants' characterization that pre-certification a proposed class action is an ordinary action. The Plaintiffs submit that a proposed class action does not become an ordinary action unless and until the court refuses to certify the action as a class action. In support of this assertion, the Plaintiffs rely on the decisions in *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418, paras. 11 and 13, (Sup. Ct. Ont.) and *Hoffman v. Monsanto Canada Inc.*, 2002 SKQB 190, Smith J. at para. 19.

[5] The Plaintiffs maintain that there are strong policy reasons for excluding class actions from the normal costs regime, in particular, access to justice. They submit that awarding costs in these circumstances would have a chilling effect on the filing of class actions in the Federal Court.

[6] The central question on this motion is to what extent, if any, does the "no costs" provision, Rule 334.39, in Part 5.1 of the Rules governing class proceedings apply. It reads:

334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless	334.39 (1) Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :
(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;	a) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;
(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or	b) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;
(c) exceptional circumstances make it unjust to deprive the successful party of costs.	c) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

[7] Before turning to a review of the cases upon which the parties rely, it should be noted that there have been no decisions in this Court in relation to the issue raised in this motion. However,

subsection 37(1), the "no costs" provision in the *British Columbia Class Proceedings Act*, R.S.B.C. 1996, c.50 has been considered in a number of decisions in that jurisdiction. Although subsection 37(1) and Rule 334.39(1) are not worded identically, there are no material differences for the purpose of this motion. Subsection 37(1) reads:

> 37 (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

[8] In support of their argument that at the pre-certification stage the matter is an ordinary action, the Defendants rely on a number of decisions from British Columbia: *Smith v. Canada (Attorney General)*, 2006 BCCA 407; *Consumers' Assn. of Canada v. Coca-Cola Bottling Co.*, 2007 BCCA 356, at para. 12; *Killough v. Canadian Red Cross Society*, [1998] B.C.J. No. 3019, at para. 15; and *Edmonds v. Actton Super-Save Gas Stations Ltd.*, [1996] B.C.J. No. 2051, at para. 4.

[9] In *Smith*, on the question of costs following a dismissal of an appeal from a decision striking out an action brought under the *Class Proceedings Act*, the British Columbia Court of Appeal observed, at paragraph 6, that as the action had been struck out before certification "it had not crossed the threshold of the no costs regime." Similarly, in *Consumers*, the British Columbia Court of Appeal, at paragraph 12, stated:

> The *Class Proceedings Act* provides protection to plaintiffs with respect to costs orders, but not prior to the certification application. The statute gives no direction to the Court as to the awarding of costs if the proceedings are dismissed prior to the application for

> certification. It follows that when the action is dismissed prior to the application for certification the ordinary rule applies, namely, the costs follow the event. …

[10] In *Killough*, at paragraph 15, Justice Smith noted:

> In my view, s. 37 has no application here. Subsection (1) deals with costs of the certification application. We have not dealt with that yet. Subsection (2) deals with costs in a class proceeding and it is clear from s. 2 of the Act that there is no class proceeding until a certification order is made under s-s. (2). In my view, we are dealing with an ordinary action at this stage and the ordinary rules should apply.

[11] Lastly, in *Edmonds*, at paragraph 4, Justice Brenner, as he was then, stated:

> With respect to the contention that the court ought to be mindful of s. 37 of the Class Proceedings Act, it is clear in my view that that provision only applies and becomes operative once the court embarks upon an application for certification under the statute. Until such time as a certification hearing commences, the litigation is ordinary litigation and it is governed by the Rules of Court.

[12] As noted above, the Plaintiffs rely on the Ontario decision in *Logan* and the Saskatchewan decision in *Hoffman* as authority for the proposition that a proposed class action does not become an ordinary action unless and until the court refuses to certify the action as a class action. In *Logan*, an Ontario decision, Justice Winkler, as he then was, specifically rejected the Defendants' assertion that "… a class proceeding is not commenced until the action is certified and until that time the

proceeding is merely an individual action." This same view was echoed by Justice Smith in *Hoffman*, a Saskatchewan decision.

[13] In my view, the British Columbia decisions do not support the Defendants' assertion that the "no costs" regime does not come into play until the action is certified. The statement in *Smith* that prior to certification the ordinary costs Rules apply must be read in the context in which it was made. The Court of Appeal was referring with approval to Justice Smith's statement in *Killough* in which he concluded that section 37 had no application in that case because there had been no application for certification and the matter was not a class proceeding. In *Consumers*, the Court of Appeal did not say that if the action was not certified the ordinary Rules applied. Instead, the Court of Appeal, as in the earlier decision in *Edmonds*, held that the legislation provided the Plaintiffs with no protection from a costs award prior to the application for certification.

[14] For the purpose of resolving the main issue in this case, it is not necessary to decide whether under the Rules prior to certification an action is an ordinary action. The Defendants' assertion is also at odds with Rule 334.39(1). The language of Rule 334.39 is clear. It specifically precludes an award of costs in relation to the motion for certification.

[15] In their submissions, the Defendants also argue that "even if the 'no costs' exception applies to this matter, the means by which the Plaintiffs chose to conduct and abandon this matter were such that it would be unjust not to award costs to Canada." They also submit that as the Court stated in *Smith*, at paragraph 7, costs are appropriate to discourage improper or hopeless actions. The

Defendants cite the exceptions in Rule 334.39(a), (b) and (c). In my view, this argument is misplaced. The exceptions in Rule 334.39(a), (b) and (c) relate only to the three situations set out in the Rule and cannot be used as a basis for an award of costs for other steps in an action. With respect to the costs incurred by the Defendants on the motion for certification, although the motion was never adjudicated for the reasons set out in my earlier decisions, at the time the motion was filed and the work was done by the parties, it was an appropriate and timely step in the proceedings. As I indicated in my earlier reasons, if there has been an abuse of process, it arises from the action filed in Saskatchewan and it is in that forum that it should be raised.

[16] As to the other steps taken prior to the discontinuance, under Rule 402 a party against whom an action has been discontinued, unless otherwise ordered by the Court, is entitled to costs. While I appreciate the important policy underlying a "no costs" regime, namely, access to the courts for potential litigants who might not have the financial means, a deliberate choice was made at the time this Court's class proceedings rules were adopted to limit the costs protection to the three situations set out in Rule 334.39. I am unable to conclude that the circumstances in the present case warrant a departure from Rule 402. Having reached this conclusion, there is no need to consider the additional arguments advanced by the Defendants concerning their entitlement to costs.

[17] The Defendants seek a lump sum costs award for fees in the amount of $73,500 plus disbursements in the amount of $61,184.08 for a total of $137,676.59. According to their draft bill of costs, the Defendants calculated the amount for fees on the basis of the top range of Column V. Alternatively, they ask for an award of taxable fees calculated under Column V of Tariff B plus

disbursements in accordance with the draft bill of costs provided to the Court. It should also be noted that these amounts include the fees and disbursements in connection with the motion for certification.

[18] In making a determination on costs, the Defendants submits that the factors in Rule 400(3)(a), (b), (g), (i), (k)(i),(ii), and (o) are particularly relevant in this case. The Defendants also submit that lump sum awards are preferable as they are generally more efficient and save the parties from a further expenditure of time and resources.

[19] There is no doubt that the within proceeding is complex litigation. The factual allegations span a number of decades and occur in a number of geographic locations, the putative Plaintiffs will likely not be similarly situated in either law or in fact and the legal issues are complex. These same considerations create a greater volume of work. As to the result in the proceeding, I have already commented on this factor in my earlier decisions and there is no need for further repetition.

[20] Having said this, I am not persuaded that this particular litigation and the above factors warrant an award of costs at the top range of Column V. Further, based on the above analysis, the Defendants are not entitled to their costs for the certification motion. I also note that in some of the claimed items, the appearance was not solely related to matters other than the certification motion. As well, with regard to the disbursements for items such as transcription services, courier services, on-line research and photocopying, it was not possible to ascertain with any certainty to what extent some of the disbursements were incurred in relation to the certification motion.

[21] While these comments point to the costs being determined on taxation, in my view, given the history of this matter, a lump sum award is preferable. In arriving at the amount for fees, I have reviewed each of the items claimed and I have concluded that costs should be awarded on the basis of the top range of Column IV and the bottom range of Column V. I have also taken into account the Defendants' limited success on the discontinuance motion. With regard to the disbursements, particularly those where it is not possible to discern with any degree of accuracy the disbursements that were incurred on the certification motion, I have apportioned those disbursements between the certification motion and the other steps. I appreciate that this is not an exact calculation, but in my view it far outweighs the further expenditure of time and resources associated with a taxation.

[22] Accordingly, there will be an award of costs in the amount of $60,000.00, inclusive of disbursements. In my view, there is insufficient evidence before the Court to make this award of costs against counsel for the Plaintiffs personally.

ORDER

THIS COURT ORDERS that: the Plaintiffs shall pay the Defendants costs in the amount of $60,000.00, inclusive of disbursements.

"Dolores M. Hansen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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REASONS FOR ORDER:	HANSEN J.
DATED:	March 11, 2010

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