Federal Court of Appeal | Cour d'appel fédérale

Date: 20150706

Docket: A-165-14

Citation: 2015 FCA 159

CORAM: **RYER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

GAELEN PATRICK CONDON
REBECCA WALKER
ANGELA PIGGOTT

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 19, 2015.

Judgment delivered at Ottawa, Ontario, on July 6, 2015.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RYER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision of Gagné J of the Federal Court (2014 FC 250, [2014] F.C.J. No. 297). The Federal Court Judge allowed the Appellants' motion to certify their action as a class proceeding but only in relation to certain claims that are being made by the Appellants. The Appellants appeal this decision and request that their claims for negligence and breach of

confidence (which the Federal Court Judge did not include as part of the class proceeding) also be included as part of this class proceeding.

Background

[2] The Appellants are individuals who applied for and who received students loans through the Canada Student Loans Program during the period from 2002 to 2006. Personal information of such individuals was stored on a hard drive that had been kept in a filing cabinet at the offices of Human Resources and Skills Development Canada. This hard drive was lost and had not been recovered as of the date of the hearing of this appeal.

[3] The Appellants commenced an action against the Respondent on various grounds. The Federal Court Judge, in paragraph 33 of her reasons, noted that:

> **33** As the Defendant argues that the Plaintiffs failed to plead a factual basis for any of the types of damages alleged, the causes of action advanced by the Plaintiffs will be separated into two categories: one in which damages are argued not to be an essential element of the cause of action; and one in which they are.

[4] The first category included the claims for breach of contract and warranty, and the tort of intrusion upon seclusion. The Federal Court Judge certified the action related to these claims as a class proceeding.

[5] The claims for negligence and breach of confidence were treated as part of the second category of claims. In paragraph 79 of her reasons, the Federal Court Judge concluded that:

> **79** Accordingly, it is plain and obvious that the claims based on negligence and breach of confidence would fail for lack of compensable damages.

[6] As a result the Federal Court Judge did not include the claims for negligence and breach of confidence as part of the class proceeding. While she also concluded that the claim based on a violation of Quebec law should also not be part of the class proceeding, the Appellants have not appealed this determination.

Standards of Review

[7] The standards of review applicable to the decision of the Federal Court Judge are those as set out by the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 2002, 235 SCC 33. The standard of review is correctness for questions of law. Findings of fact (including inferences of fact) will stand unless it is established that the Federal Court Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and the standard of palpable and overriding error will otherwise apply. An error is palpable if it is readily apparent and it is overriding if it would change the result.

Issue

[8] The issue in this appeal is whether the Federal Court Judge erred in failing to include the claims for negligence and breach of confidence as part of the class proceeding.

Analysis

[9] Rule 334.16 of the *Federal Courts Rules* SOR/98-106 (the Rules) sets out the conditions that must be satisfied for a proceeding to be certified as a class proceeding. The only condition that is relevant in this appeal is the condition in paragraph (*a*) which is the requirement that the pleadings disclose a reasonable cause of action. Barnes J in *Manuge v Canada*, (2008 FC 624 at paragraph 24, rev'd 2009 FCA 29, certification restored 2010 SCC 67), noted that the class proceedings provisions of the Rules are modeled on similar provisions applicable in British Columbia (*Class Proceedings Act*, RSBC 1996, c. 50) and Ontario (*Class Proceedings Act*, SO 1992, c. 6).

[10] The Federal Court Judge, in her reasons, identified the approach to be taken in relation to the certification motion:

> 27 The proper approach to be taken by this Court was summarized by the British Columbia Court of Appeal in Pro-Sys v Infineon, 2009 BCCA 503 at paragraphs 64-65:
>
> > [64] The provisions of the [*Class Proceedings Act*] should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII), 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].

> [65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* 2004 CanLII 45444 (ON CA), (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
>
> [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

(emphasis added by the Federal Court Judge)

[11] The Federal Court Judge also referred to the decision of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 in relation to the test to be applied to determine if pleadings should be struck. As noted by the Supreme Court, at page 980:

> **33** Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[12] In *R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45 (which is a more recent decision), the Supreme Court noted that:

> **17** The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[13] As stated by the Supreme Court, the determination of whether the pleadings disclose a reasonable cause of action is to be based on the assumption that the facts as pleaded are true. This would mean that evidence is not to be submitted at the hearing of the motion. Otherwise, the hearing of the motion could turn into a full hearing on the merits.

[14] In this case, the parties submitted affidavit evidence. In paragraphs 68 and 69 of her reasons the Federal Court Judge noted that:

> **68** In addition, a summary review of the evidence adduced by both parties leads the Court to the conclusion that the Plaintiffs have not suffered any compensable damages. The Plaintiffs have not been victims of fraud or identity theft, they have spent at most some four hours over the phone seeking status updates from the Minister, they have not availed themselves of any credit monitoring services offered by the credit reporting agencies nor have they availed themselves of the Credit Flag service offered by the Defendant.
>
> **69** Nor does the evidence adduced support a claim for increased risk of identity theft in the future. Since the Data Loss, Equifax has produced reports pertaining to the credit files of the 88,548 individuals who availed themselves of the Credit Flag service. These reports show that there had been no increase in the relevant indicia that would be consistent with an increase in criminal activities involving those individuals' Personal Information. The rate of criminal activities

> registered was not higher than the 3% of the population generally victim of identity theft. Moreover, the Plaintiffs submitted a CBC news article concerning a Class Member who had been a victim of identity theft yet the article noted no proven causal link between the Data Loss and that theft.

[15] It appears that the Federal Court Judge evaluated the evidence in concluding that the Appellants had not suffered any "compensable damages". The determination of whether the Appellants had a reasonable cause of action in negligence or breach of confidence should have been made based on the facts as pled, not on the evidence adduced in support of the motion.

[16] The Federal Court Judge also stated in paragraph 66 that:

> **66** The damages sought by the Plaintiffs fall into two categories: i) compensation for wasted-time, inconvenience, frustration and anxiety resulting from the Data Loss; and ii) increased risk of identity theft in the future.

[17] However, in the damages section of the Consolidated Statement of Claim, the Appellants claimed damages that were common to all claims and these claimed damages included "costs incurred in preventing identity theft" and "out-of-pocket expenses". There is no indication that the Federal Court Judge considered either of these claims for damages in determining that the claims for negligence and breach of confidence had no reasonable prospect of success.

[18] In my view the Federal Court Judge erred in law in evaluating the merits of the claims for negligence and breach of confidence based on the evidence submitted by the parties and in failing to address the claims for special damages for "costs incurred in preventing identity theft" and "out-of-pocket expenses" in her analysis.

[19] The Respondents also argue that the Appellants failed to plead a factual basis for any damages. The Rules that are applicable to pleadings and the claim for damages are Rules 174 and 182:

174. Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	174. Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.
…	[…]
182. Every statement of claim, counterclaim and third party claim shall specify	182. La déclaration, la demande reconventionnelle et la mise en cause contiennent les renseignements suivants :
(a) the nature of any damages claimed;	a) la nature des dommages-intérêts demandés;
(b) where monetary relief is claimed, whether the amount claimed, exclusive of interest and costs, exceeds $50,000;	b) lorsqu'une réparation pécuniaire est réclamée, une mention indiquant si le montant demandé excède 50 000 $, intérêts et dépens non compris;
(c) the value of any property sought to be recovered;	c) la valeur des biens réclamés;
(d) any other specific relief being claimed, other than costs; and	d) toute autre réparation demandée, à l'exclusion des dépens;
(e) whether the action is being proceeded with as a simplified action.	e) le cas échéant, une mention portant que l'action est poursuivie en tant qu'action simplifiée.

[20] With respect to damages, the Rules only require that the claim specify the nature of the damages claimed. A general description of the nature of the damages claimed was sufficient in *Brazeau v. Canada (Attorney General)*, 2012 FC 648, [2012] F.C.J. No. 1489, to deny a motion to strike that part of the pleadings related to a negligence claim.

[21] In *Biladeau v. Ontario (Attorney General)*, 2014 ONCA 848, [2014] O.J. No. 5679, the Ontario Court of Appeal noted that:

> **15** The motion judge in this case was ruling on a self-represented plaintiff's second attempt to plead the complex private law tort of malicious prosecution and the public law claim for *Charter* damages. The burden on the moving party under rule 21.01 is significant. To succeed, MAG must demonstrate that neither claim has a chance of succeeding; indeed, that the claims are certain to fail. Put another way: is it plain and obvious that no reasonable cause of action is disclosed? At this preliminary stage, the alleged facts are to be taken as true and the statement of claim is to be read as generously as possible with a view to accommodating any inadequacies in the allegations: see *Guergis v. Novak*, 2013 ONCA 449, at paras. 35-36.
>
> (emphasis added)

[22] Reading the Consolidated Statement of Claim with this principle in mind, the Appellants have claimed that they have suffered damages and they have identified the nature of the damages that they are claiming. In particular, the Appellants have claimed special damages for "costs incurred in preventing identity theft" and "out-of-pocket expenses" and, as noted above, it is to be assumed that these costs have been incurred. As a result there was no basis to not include the claims for negligence and breach of confidence as part of the class proceeding.

Conclusion – Proposed Disposition

[23] As a result I would allow the appeal and refer the matter back to the Federal Court to include the claims for negligence and breach of confidence in the nature of the claims asserted on behalf of the Class as defined by the Federal Court Judge and to determine the common questions in the class proceeding in relation to the claims for negligence and breach of confidence. Since the Appellants did not ask for costs, I would not award any costs.

"Wyman W. Webb"
J.A.

"I agree.
C. Michael Ryer J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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