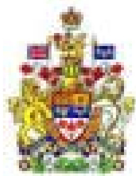
Federal Court of Appeal		Cour d'appel fédérale

Date: 20120209

Docket: A-160-10

Citation: 2012 FCA 45

CORAM: PELLETIER J.A.
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

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

Appellants

and

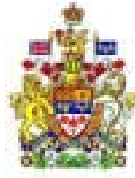
THE ATTORNEY GENERAL OF CANADA
and THE MINISTER OF NATIONAL DEFENCE

Respondents

Heard at Regina, Saskatchewan, on November 14, 2011.
Judgment delivered at Ottawa, Ontario, on February 9, 2012.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: EVANS J.A.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal		Cour d'appel fédérale

Date: 20120209

Docket: A-160-10

Citation: 2012 FCA 45

CORAM: **PELLETIER J.A.**
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

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

Appellants

and

THE ATTORNEY GENERAL OF CANADA
and THE MINISTER OF NATIONAL DEFENCE

Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The issue in this appeal is the scope of Rule 334.39(1) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], which confers a certain immunity from costs on parties to class proceedings. Madam Justice Hansen of the Federal Court (the Motions Judge or the Judge), in a decision reported as *Campbell v. Canada (Attorney General),* 2010 FC 279, [2010] F.C.J. No. 576, decided that the defendants, the Attorney General of Canada and the Minister of National Defence

(collectively Canada), were entitled to their costs, up to but not including the motion for certification. The issue of costs arose because the action was discontinued before the certification motion was heard. The plaintiffs appeal from this order.

[2] For the reasons that follow, I would allow the appeal and return the matter to the Motions Judge to determine if, in light of paragraphs 334.39(1) (*a*), (*b*) or (*c*) of the *Rules*, an award of costs should be made.

THE FACTS

[3] The appellants, former members of the Canadian forces, allege that they were exposed to chemical and biological warfare compounds at various locations in Canada between 1940 and 1945. They allege that they suffered injury as a result.

[4] The appellants' statement of claim was issued on November 7, 2006. On May 28, 2007 they served and filed their certification motion with supporting affidavits. At the same time, Canada served and filed a motion to strike out the statement of claim. Cross-examinations on the parties' affidavits took place in October 2007 over a period of some seven days in Saskatoon, Victoria and Montreal.

[5] The hearing of the motion to strike out the statement of claim and the motion for certification was scheduled for December 11 to 14, 2007. The argument with respect to the motion

to strike was completed on December 13, 2007 and judgment was reserved. By consent, the argument of the certification motion was adjourned to February 19 to 22, 2008 so as to permit it to be heard in one sitting.

[6] To this point, the proceedings were a model of procedural orderliness. However, from the close of sittings in December 2007 until the eventual discontinuance of the action in January 2009, procedural orderliness gave way to disarray and a duplication of efforts already expended.

[7] In January 2008, in addition to requesting further production of documents, the appellants circulated an amended statement of claim that had not yet been filed. At a Case Management Conference in late January, the appellants undertook to file this amended statement of claim. The Court then asked for submissions as to the effect of the amended statement of claim on the motions that were pending before the Court. On January 24, 2008, the Court decided that the amended statement of claim rendered Canada's motion to strike moot, dismissed it, and reserved its decision on the matter of costs.

[8] In early February 2008, Canada served and filed another motion to strike out the appellants' statement of claim, as amended, together with a motion seeking an adjournment of the certification motion. The request for an adjournment of the certification motion was granted. Canada was also granted leave to file new affidavits and to conduct further cross-examination on the appellants' affidavits.

[9] In March 2008, the Court determined that Canada's second motion to strike should be heard before the appellants' motion for certification. The Court also set out a timetable with respect to the certification motion. In April 2008, Canada served the appellants with four affidavits, comprised of 996 pages in total, in support of its motion to strike and in June 2008, it served and filed its motion record for its second motion to strike.

[10] On June 25, 2008, the appellants served Canada with a notice of discontinuance of their action without having obtained leave of the Court. Subsequently, in July 2008, the appellants and others commenced a proposed class action, in relation to substantially the same subject matter, in the Court of Queen's Bench for Saskatchewan.

[11] On July 15, 2008, the Court ruled that the appellants were required to obtain leave of the Court to discontinue their action. On September 3, 2008, the Court heard argument on the motion for discontinuance and on January 9, 2009, it gave the appellants leave to discontinue their action. The issue of costs remained outstanding.

[12] In due course, Canada brought a motion seeking its costs for all steps taken in the action, arguing that since the action had never been certified as a class proceeding, the normal rule as to costs applied.

THE DECISION UNDER APPEAL

[13] Rule 334.39(1) is set out below:

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.

[14] Subsection (2), referred to in the opening words of the subsection 334.39(1), is not material to this appeal.

[15] After summarizing the arguments of the parties, the Judge reviewed some of the jurisprudence from British Columbia upon which Canada relied in support of its motion for costs. Canada argued that the British Columbia jurisprudence supported the conclusion that until an action was certified, the normal rule as to costs applied: see *Consumers' Assn. of Canada v. Coca-Cola Bottling Co.*, 2007 BCCA 356, [2007] B.C.J. No. 1625 [*Consumers' Assn.*], at para. 12; *Killough v.*

Canadian Red Cross Society, [1998] B.C.J. No. 3019 [*Killough*], at para. 15; and *Edmonds v. Actton Super-Save Gas Stations Ltd.*, [1996] B.C.J. No. 2051, 5 C.P.C. (4th) 105, [*Edmonds*], at para. 4.

[16] The Judge found that the cases relied upon by Canada did not support its contention that immunity from costs did not come into play until a proposed class proceeding was certified.

[17] The Judge found that Canada's claim for costs in respect of the certification motion was at odds with the wording of Rule 334.39(1), which specifically precludes an award of costs in relation to a motion for certification. The Judge also rejected Canada's argument that it was entitled to costs in relation to other steps taken in the action on the basis of the exceptions set out in Rule 334.39(1). She rejected the latter argument, reasoning that the exceptions were meant to apply only to the proceedings described in Rule 334.39(1); they could not be used as a basis for awarding costs with respect to other proceedings. The Judge also found that the exceptions did not apply to the motion for certification in this case since "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": see paragraph 15.

[18] In the end, the Judge awarded Canada its costs for all steps taken in the proceeding other than the certification motion. The Judge relied on Rule 402 of the *Rules* which provides that a party against whom an action is discontinued is, unless otherwise ordered, entitled to costs. While acknowledging that the *Rules* incorporate a "no costs" regime in relation to class proceedings, the Judge found that nothing in the circumstances of the case warranted a departure from Rule 402.

[19] However, the Judge did not award Canada its full claim for costs. After reviewing a number of considerations, the Judge awarded costs in a lump sum "in light of the history of the matter", by which I assume she meant the fractious relationship between the parties and their counsel. The Judge awarded Canada costs of $60,000, inclusive of disbursements. This was a substantial discount on the original $137,676.59 sought by Canada. The Judge discounted Canada's claim for the costs of the certification motion itself on the basis of Rule 334.39(1).

ANALYSIS

Standard of Review

[20] A trial judge's decision on costs is a discretionary decision and is entitled to deference from an appellate court. The latter will not interfere unless the decision is based on an error of law, a misapprehension as to the facts or the judge has failed to take into account all relevant considerations: see *Monsanto Canada Inc. v. Schmeiser*, 2002 FCA 449, [2002] F.C.J. No. 1604 at para. 2.

The Interpretation of Rule 334.39(1)

[21] At the hearing of this matter, the argument centered on the question of whether Rule 334.39(1) applied at all, since the appellants discontinued their action prior to certification. The Attorney General argued that Rule 402, which deals with costs in the event of a discontinuance, applied to the facts of this case. The appellants argued that the policy behind the "no costs" rule

should inform the interpretation of Rule 334.39(1) so that no costs should be awarded, whether in respect of the certification motion itself or any other proceeding ancillary to that motion. The Motions Judge, as noted, took the position that the immunity from costs applied only to the proceedings described in Rule 334.39(1) but not to other proceedings.

[22] There has been little consideration of this issue in the jurisprudence of the Federal Court. Aside from the present case, the question of costs under Rule 334.39(1) has only been considered in two cases. The first is *Pearson v. Canada (Minister of Justice)*, 2008 FC 1367, [2008] F.C.J. No. 1797 [*Pearson*], a proposed class action in which the statement of claim was struck out, prior to the hearing of the certification motion, for failing to disclose a cause of action . At paragraph 52 of his reasons dismissing the plaintiffs' claim, Hughes J. wrote:

> This is a motion brought before the action has been certified as a class action and is dispositive of the action. The class action rules and concepts such as one-way costs, even if applicable at a later stage, are not yet engaged.

[23] To my knowledge, the only other Federal Court case in which the question of costs arose is *Always Travel Inc v. Air Canada*, 2004 FC 675, [2004] F.C.J. No. 832 [*Always Travel*], a proposed class action by travel agents against a number of airlines. In that case, it appears that the motion for certification had been filed, though no further steps were to be taken with respect to that motion until further order. In disposing of two motions after the filing of the certification motion, Hugessen J. awarded costs against the plaintiffs in one of the motions, and declined to award costs against certain defendants in the other. In both cases, the learned Judge relied upon the exceptions to the rule limiting costs in class actions.

[24] In the case of the plaintiffs, Hugessen J. found that their conduct was vexatious and justified an order of costs "in the special circumstances, notwithstanding the general no costs rule contained in Rule 299.41(1) [the predecessor to Rule 334.39(1)]": *Always Travel*, at para. 9. In the case of the defendants, Hugessen J. wrote: "I do not think that the criteria laid down in Rule 299.41(1) (above) which are a prerequisite to my making an order for costs have been met": *Always Travel*, at para. 11.

[25] The difference between these two cases is that in *Pearson*, it was held that the "no costs" rule did not apply until the action was certified as a class proceeding, while in *Always Travel*, the "no costs" rule (including the exceptions to the rule) was applied prior to certification of the action.

[26] Some guidance as to the intention of the Rules Committee with respect to the "no-costs" rule may be found in the working papers prepared prior to the amendments to the class action Rules. The Federal Court of Canada Rules Committee issued *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Ottawa: June 9, 2000), in which the issue of cost barriers to representative plaintiffs was raised. The authors of the Discussion Paper frame the issue at page 97 as follows:

> Cost barriers would exist if representative plaintiffs were fully exposed to a two way ("losers pay winners") costs regime. This regime would be a barrier in light of the fact that most plaintiffs would be exposed to a substantial downside in terms of costs even as they would have comparatively little to gain if the class action were successful.

[27] The Discussion Paper concludes at page 104 that a "no costs" provision is "an important measure in removing the barriers to class proceedings…" and records the decision of the Rules Committee as follows:

> Decision #37A
> The rule will contain a provision that, subject to exceptions that are stated, there shall be no costs awarded in class proceedings…

[28] The *Rules Amending the Federal Court Rules*, *1998 (No.1): Regulatory Impact Analysis Statement*, Canada Gazette, Part I: December 8, 2001, Vol. 135, No. 49, at 1 which accompanied the publication of the proposed Rule changes, also dealt with the issue of costs:

> The discussion paper [quoted above] indicated that there would be a "no costs" provision. Costs would not be awarded up to the determination of the common questions subject to exceptions, including "exceptional circumstances that make it unjust to deprive the successful party of costs." …
>
> The suggested Rule 299.4 incorporates this "no costs" (up to the disposition of common questions subject to exceptions) provision. This "no costs" provision is also incorporated in the British Columbia *Class Proceedings Act*, section 37, *The Class Actions Act* of Saskatchewan, section 40, and the *Uniform Class Proceedings Act*, section 37 (alternative)…

[29] These comments suggest that the intention of the proponents of the "no costs" rule was that no costs would be awarded prior to the determination of the common questions.

[30] The fact that a class proceeding begins its life as a statement of claim to which the normal rule as to costs applies created a challenge for the legislative draftsman. The question is, at what point after the issuance of the statement of claim should the "no costs" rule begin to apply? It must

apply early enough in the process to give substantial protection to the representative plaintiffs but not so early as to shelter plaintiffs whose actions never proceed to certification.

[31] With this background in mind, I reproduce again, for ease of reference, the terms of Rule 334.39(1):

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 (*a*) the conduct of the party unnecessarily lengthened the duration of the proceeding; (*b*) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or (*c*) exceptional circumstances make it unjust to deprive the successful party of costs.	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*) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance; *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*) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

[32] A careful reading of Rule 334.39(1) reveals at least two possible interpretations. The first is that no costs can be awarded with respect to a motion for certification, a class proceeding or an appeal from a class proceeding. According to this interpretation, immunity from costs attaches to the proceedings designated in the Rule. The Motions Judge gave effect to this interpretation when she refused to award costs with respect the certification motion itself, but awarded them with respect

to other steps, specifically the motion to strike the statement of claim for failing to disclose a cause of action.

[33] A second interpretation of Rule 334.39(1) focuses on the words "a party to" so that costs are not to be awarded against a person who is a party to any of the designated proceedings. For example, once a party to a proposed class proceeding becomes a party to a certification motion, that is, once the certification motion is served and filed, that person is immune from costs with respect to any and all steps taken before and during the certification process. If the certification motion is successful, the party is then sheltered from the costs of the class proceeding by the reference in the Rule to "any party…to a class proceeding…". In the present case, this interpretation would preclude an order for costs for any steps taken after May 28, 2007, the date the appellants served and filed their motion for certification.

[34] Presumably, an order for costs made against a party to a proposed class proceeding prior to that person becoming a party to a certification motion would not be affected by Rule 334.39(1) but that is not a question which arises on these facts. It is therefore not one which we have to answer.

[35] Both of these interpretations are, of course, subject to the three exceptions set out at paragraphs 334.39(1) (*a*), (*b*) and (*c*) of the Rule.

[36] The jurisprudence of the courts of Saskatchewan and British Columbia tends to the view that immunity from costs is a function of the proceeding. The "no costs" rule is found at s. 37 of British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c. 50:

> 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.
>
> (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
>
> > *(a)* at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
> >
> > *(b)* at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
> >
> > *(c)* at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

[37] Subject to some differences which are immaterial, the Saskatchewan legislation is essentially identical: see *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 40.

[38] In *Edmonds*, cited above, at para. 4, the British Columbia Supreme Court held that the "no costs" rule "only applies and becomes operative once the court embarks upon an application for certification...". The Court went on to say the following, at paragraph 8 of its reasons:

> In my view it is important to recognize that an intended class proceeding, until it is certified, is an ordinary action governed by the Rules of Court. Even after

> certification the Rules of Court apply to the extent that they are not inconsistent with the Act. While the *Class Proceedings Act* does provide that no costs are recoverable from the plaintiff in respect of a certified action or in respect of a certification hearing, the statute contains no such provision in respect of actions prior to the certification hearing stage. In the case at bar there is nothing which would justify a departure from the usual rule that costs follow the event. The defendants will have their costs on Scale 3.

[39] The *Edmonds* case is of interest because of the way in which the British Columbia Supreme Court dealt with the issue of the starting point for the application of the "no costs" rule. It chose to apply the "no costs" rule as of the commencement of the hearing of the certification motion. This has the effect of sheltering parties from the costs of the certification motion itself, but excludes preliminary matters that may be intimately related to the certification motion. The adverse consequences of this choice can be seen in *Killough v. Canadian Red Cross Society*, [1998] B.C.J. No. 3019, in which the British Columbia Supreme Court awarded costs with respect to an unsuccessful motion to adjourn the hearing of the certification motion. Unfortunately, arbitrariness of this kind will necessarily arise if the starting point for the application of a "no costs" rule is anything other than the issuance of the statement of claim itself.

[40] The British Columbia Court of Appeal referred to *Edmonds* without adverse comment in *Secure Networx Corp. v. KPMG LLP*, 2003 BCCA 227, [2003] B.C.J. No. 903, and in *Samos Investments Inc. v. Pattison*, 2002 BCCA 442, [2002] B.C.J. No. 1771. In *Consumers' Assn.,* cited above, the British Columbia Court of Appeal held that s. 37 of the *Class Proceedings Act* did protect parties from costs "but not prior to the certification application": *Consumers' Assn.*, at para. 12.

[41] The Saskatchewan Court of Queen's Bench came to a similar conclusion in *McKinnon v. Martin (Rural Municipality No. 122)*, 2011 SKQB 313, [2011] S.J. No. 572, at para. 6, where Mills J. wrote:

> In my opinion, applications prior to certification are subject to the normal jurisprudence and Rule 545 respecting the award of costs.

[42] In coming to this conclusion, Mills J. referred to a decision of the Saskatchewan Court of Appeal in which that Court suggested that the Saskatchewan "no costs" rule does not apply to applications made prior to the certification application: see *Englund v. Pfizer Canada Inc*., 2007 SKCA 62, 284 D.L.R. (4th) 94, at para. 57.

[43] I began this analysis by pointing out that Rule 334.39(1) could be construed in at least two ways. As I read the jurisprudence of the courts of Saskatchewan and British Columbia, they have chosen to attach immunity from costs to the proceeding itself. In the case of the application for certification, this leaves representative plaintiffs exposed to costs for steps taken prior to the certification motion, although such steps may be intimately connected with that proceeding: see for example, *Killough*, cited above.

[44] In my view, this approach gives too narrow a scope to the "no costs" rule. If one accepts that the intention of the proponents of the "no costs" rule was to limit the role of costs as a disincentive to class action plaintiffs, then one should construe the rule so that it does so.

[45] I believe that the construction of Rule 334.39(1) that gives fullest effect to the intention of the Rules Committee is to have the “no costs” rule apply as soon as the parties to the action are made parties to the certification motion. While this still leaves room for the possibility of an award of costs in relation to a step undertaken after the issuance of the statement of claim but prior to the service and filing of the certification motion, the scope for costs orders is reduced to a minimum, having regard to the wording of Rule 334.39(1) itself. If one assumes that the bringing of the motion for certification will follow the issuance of the statement of claim without delay, the risk to representative plaintiffs would appear to be minimal.

[46] To the extent that an expansive interpretation of the “no costs” rule has the potential to shelter a party’s improper or abusive behaviour, it is important to remember that paragraphs (*a*), (*b*) and (*c*) of Rule 334.39(1) give the Court the option of imposing costs where the conduct of a party justifies such an award.

[47] As a result, I would find that the appellants were immune from costs, subject to paragraphs 334.39(1) (*a*), (*b*) and (*c*), as of May 28, 2007, which is the date the certification motion was filed. Since all of the matters that could have given rise to an award of costs occurred after that date (save for one motion), the Motions Judge erred in law in awarding costs as she did. However, the Motions Judge did not address the question of whether the appellants’ conduct fell within one of the exceptions to the “no costs” rule. She did refer to the application of paragraphs 334.39(1) (*a*), (*b*) and (*c*) but only to the extent of saying that they did not provide a basis for awarding costs where Rule 334.39(1) itself did not apply

CONCLUSION

[48] I would therefore allow the appeal, set aside the Order of the Federal Court and return the matter to the Motions Judge for a decision as to whether, in light of paragraphs 334.39(1) (*a*), (*b*) or (*c*), an award of costs should be made.

"J.D. Denis Pelletier"
J.A.

" I agree
John M. Evans"

" I agree
Carolyn Layden-Stevenson"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-160-10
STYLE OF CAUSE:	BERNARD VINCENT CAMPBELL, SHARLE EDWARD WIDENMAIER, LENARD ROY LINK, and WILLIAM A. HEIDT v. THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL DEFENCE
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	November 14, 2011
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	EVANS J.A. LAYDEN-STEVENSON J.A.
DATED:	February 9, 2012

APPEARANCES:

E.F. Anthony Merchant, Q.C.	FOR THE APPELLANTS
Catherine A. Coughlan	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Merchant Law Group Regina, SK	FOR THE APPELLANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENTS