SUPREME COURT OF NOVA SCOTIA

Citation: Morrison Estate v. Nova Scotia (Attorney General), 2010 NSSC 196

Date: 20100520
Docket: Hfx No. 230887
Registry: Halifax

Between:

The Estate of Elmer Stanislaus Morrison, By his Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, By His Legal Guardian Elizabeth Lee and Elizabeth Lee

Plaintiffs

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the province of Nova Scotia, and the Executive Director of Continuing Care for the Province of Nova Scotia

Defendants

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Judge: The Honourable Justice A. David MacAdam

Heard: January 20th and April 12th, 2010 in Halifax, Nova Scotia

Subject: **Class Proceedings Act**; class proceeding certification hearing; criteria for certification of class proceeding.

Summary: The plaintiffs sought certification of a class proceeding. The proposed class proceeding was on behalf of individuals allegedly affected adversely by a provincial government nursing home policy

Issues: (1) Whether the proceeding should be certified as a class proceeding pursuant to section 7 of the **Class Proceedings Act** and (2) interpretation of s.7(1)(a) of the **Act**.

Argument: The only live issue was whether s.7(1)(a) of the **Class**

Proceedings Act, which requires that "the pleadings disclose or the notice of application discloses a cause of action," is satisfied by showing that the pleadings disclose a single cause of action, or whether the court must consider every cause of action pleaded and decide which are disclosed.

Result: The relief sought on a certification hearing is a decision as to whether the proceeding should be certified as a class proceeding. The plaintiffs are not seeking, and are not required by the Act to seek, a determination of whether every cause of action pleaded is sustainable. It remains open to a defendant to pursue a motion to strike. In this case, the pleadings disclosed a cause of action, and certification was ordered.

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Counsel: Raymond F. Wagner and Michael Dull, for the plaintiffs
Aleta Cromwell and Alison Campbell, for the defendants

By the Court:

Introduction

[1] The plaintiffs seek certification of a class proceeding. The proposed class action is on behalf of a group of individuals who have allegedly been adversely affected by a Provincial Government nursing home policy known as "Single Entry Access."

Certification Applications

[2] The test for certification of a class proceeding is found at s. 7(1) of the *Class Proceedings Act*, S.N.S. 2007, c. 28. The subsection provides:

> Certification by the court
>
> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[3] The only issue between the parties relates to the interpretation of s. 7(1)(a), which requires that "the pleadings disclose or the notice of application discloses a cause of action." The plaintiffs submit that in Nova Scotia, it is only necessary to establish that the pleadings disclose "a cause of action," that is, a single cause of action. Moreover, there has already been an unsuccessful motion to strike a cause of action relating to a claim of breach of fiduciary duty. Having failed on the motion, the defendants acknowledge that the pleadings disclose a cause of action. However, the Attorney General takes the position that s. 7(1) "can be interpreted as requiring the Court to scrutinize each cause of action contained in the pleadings." The fact that s. 7(1), on its face, requires only that "a minimum of one cause of action must be pleaded, does not mean that the Court cannot, or should not, look at the other causes of action."

[4] The Attorney General submits that a requirement to survey all the causes of action pleaded is supported by s. 19 of the *Interpretation Act*, R.S.N.S. 1989, c. 235. Specifically, s. 19(i) provides that "[i]n an enactment ... (i) words in the singular include the plural, and words in the plural include the singular."

[5] The Attorney General also refers to the language governing the third part of the test for certification under the *Class Proceedings Act*, at s. 7(1)(c), which requires the court to be of the opinion that "the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members." According to the Attorney General, "this provision requires that at a minimum there must be at least 'a' common issue. It does not mean that as long as a single common issue is found the other proposed common issues need not be examined." That interpretation, the Attorney General argues, would be inconsistent with other elements of the test for certification. For instance, s. 7(2)(a) provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members.

[6] The Attorney General says this provision contemplates that “there will be more than one common issue examined (‘questions of fact or law’) despite s. 7(1)(c)’s reference to ‘a’ common issue.”

[7] The Attorney General proceeds to argue that “in light of the interrelatedness of the certification criteria” the court must apply the “plain and obvious” test (from a motion to strike) to “all the proposed causes of action. The other factors in the test for certification are framed by the causes of action alleged.”

[8] While it appears that there has been little specific interpretation of the phrase “a cause of action,” Nordheimer J. considered this phrase in *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Ont. Sup. Ct. J.). Dealing with s. 5(1)(a) of the Ontario *Class Proceedings Act*, S.O. 1992, c. 6, by which certification requires that “the pleadings or notice of application discloses a cause of action,” Nordheimer J. said:

> 84 While section 5(1)(a) refers to the pleadings disclosing "a" cause of action, I do not interpret that section as meaning that only one cause of action need be established and then the other causes of action alleged can just tag along with that cause of action. Not only it is necessary to demonstrate that the representative plaintiff has a cause of action against each named defendant (see *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.)), in my view it is also necessary that every cause of action alleged against a particular defendant be demonstrated. This is necessary for a number of reasons. First, a defendant should not be subject to any claim, particularly one asserted on behalf of a whole class of plaintiffs, which does not disclose a proper cause of action. Secondly, all of the claims asserted in the statement of claim impact on the question of whether there are common issues. I do not believe that a plaintiff can purport to set up common issues based on causes of action that are not properly pleaded. Thirdly, the nature of the claims advanced very much determines the proper members of the class. In other words, if certain claims are eliminated because they are based on non-existent causes of action, various individuals who might otherwise be members of the proposed class are also removed as prospective class members.

[9] Nordheimer J. refused to certify the proceeding in *Pearson*, a decision that was reversed by the Ontario Court of Appeal: [2005] O.J. No. 4918. The Court of Appeal did not need to deal directly with s. 5(1)(a)(see para. 20), but did hold that it was “important to properly identify the appellant's claim against Inco. The appellant has framed his claim in nuisance, negligence, trespass and strict liability in accordance with the doctrine in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330”

(para. 45). The Court of Appeal went on to consider the negligence aspect of the claim (paras. 46-52).

[10] Nordheimer J. repeated his interpretation of s. 5(1)(a) of the Ontario *Class Proceedings Act* in *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (Ont. Sup. Ct. J.), adding that "it is important that the definition of any class not be overly inclusive, that is, the class should not include persons who do not have a claim" (para. 33).

[11] The plaintiffs submit that the three reasons advanced by Nordheimer J. are adequately addressed by a disposition that is limited to determining whether a cause of action exists, while preserving the defendants' right to bring a motion to strike under the *Civil Procedure Rules* and, if necessary by reason of a successful motion to strike or for other sufficient juristic reasons, to amend or dismiss the certification order under s. 11(4) of the *Class Proceedings Act*. As to the third reason, in particular, the plaintiffs say that in this case, "the nature of the claims advanced has no bearing on a determination of the proper members of the class," since "[t]he nature of this proceeding is that each class member asserts the same causes of action."

[12] The Attorney General submits that the view expressed by Nordheimer J. is "consistent with the general practice in the common law provinces," and offers examples of certification decisions from various provinces in which the court evaluated each cause of action: see *L.R. v. British Columbia*, [1998] B.C.J. No. 2588 (B.C.S.C.), varied 1999 BCCA 689, [1999] B.C.J. No. 2633, Court of Appeal decision affirmed, 2001 SCC 69, [2001] 3 S.C.R. 184; *Rideout v. Health Labrador Corp.*, 2005 NLTD 116, [2005] N.J. No. 228 (Nfld. S.C.T.D.); *Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225, [2005] S.J. No. 304 (Sask. Q.B.), affirmed 2007 SKCA 47, [2007] S.J. No. 182 (Sask. C.A.), leave to appeal refused, [2007] S.C.C.A. No. 347; *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. Sup. Ct. J.); *Phaneuf v. Ontario*, [2007] O.J. No. 3526 (Ont. Sup. Ct. J.), reversed [2007] O.J. No. 3526 (Ont. Sup. Ct. J. – Div. Ct.); *Taylor v. Canada (Minister of Health)*, [2007] O.J. No. 3312 (Ont. Sup. Ct. J.), leave to appeal refused, [2007] O.J. No. 4947 (Ont. Sup. Ct. J. – Div. Ct.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. Sup. Ct. J.), affirmed [2008] O.J. No. 2610 (Ont. Sup. Ct. J. – Div. Ct.); *Doucette v. Eastern Regional Integrated Health Authority*, 2007 NLTD 138, [2007] N.J. No. 259 (Nfld. S.C.T.D.); *Chalmers (Litigation guardian of) v. AMO*

Canada Co., 2009 BCSC 689, [2009] B.C.J. No. 1030 (B.C.S.C.); *Bryson v. Canada (Attorney General)*, 2009 NBQB 204, [2009] N.B.J. No. 237 (N.B.Q.B.).

[13] The plaintiffs refer to *Eaton v. HMS Financial Inc.*, 2008 ABQB 631, 2008 CarswellAlta 1400 (Alta. Q.B.), a decision under the Alberta *Class Proceedings Act*, S.A. 2003, c. C-16.5, where Rooke J. said s. 5(1)(a) "requires only that that the 'pleadings disclose a cause of action', not that there is evidence to support a pleading that discloses a cause of action" (para. 32). Rooke J.'s analysis led to the conclusion that "the Plaintiffs' pleadings disclose one or more causes of action against each of the Defendants" (para. 30). Rooke J. distinguished between a certification motion and a motion to strike:

> 215 As to certification, I did find that there was at least *a* cause of action against each of the Financial Institutions, sufficient for certification. The question in the context of the motions to strike becomes whether, of the several causes of action proposed against the Financial Institutions, some must be struck, as having no chance of success.
>
> 216 While s. 5(1)(a) of the Act requires that a class action disclose at least one cause of action, it is only under Rule 129 that the Court has jurisdiction to strike any alleged cause of action. Rule 129 provides:
>
> > 129.(1) The court may, at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
> >
> > (a) it discloses no cause of action or defence, as the case may be...
>
> 217 In essence, the test under Rule 129(a), upon which HSBC, CIBC and the Credit Unions are relying is, assuming the facts pleaded in the Statement of Claim to be true which is the presumption at law for a Rule 129 motion, is it "plain and obvious" that the Statement of Claim discloses no reasonable cause of action? The Court is not to weigh evidence nor make even a preliminary determination on the merits....While the test in class proceedings is similar to a Rule 129 application, in the latter, the onus is on the Plaintiff, although the threshold is low.... [Emphasis by Rooke J.]

[14] The court went on to assess the specific causes of action as part of the motion to strike. The defendants concede that it is "technically correct" that a claim may only be struck on a motion to strike, but adds that "if the cause of action is not viable, then the common issues based on it should not be certified. The

practical result may be the same, although the claim is not technically struck from the pleading, it would be expected that a result of such an order would be an amendment by the Plaintiffs to the claim." That may well be correct, but the court must deal with the remedy sought, not anticipate the step that may be expected to follow. The defendant further argues that:

> [a]n interpretation of s. 7(1)(a) that would allow a court to set issues to be tried that are based on a cause of action that cannot succeed does not promote judicial economy ... as it would inevitably lead to a multiplicity of hearings including unnecessary trial days, avoidable applications, including applications to strike, applications to amend the common issues and class definition and applications to decertify. It is consistent with judicial economy to determine at certification whether each cause of action in the claim is viable.

[15] Once again, the court must deal with the application before it. Judicial economy is, as the defendants submit, "one of the pillars of class proceedings." But the court cannot read s. 7(1)(a) as if it incorporated a motion to strike, simply to avoid the need for the defendant to advance a motion to strike.

[16] The plaintiffs also cite *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103, 2009 CarswellBC 635 (B.C.C.A.), where the plaintiffs advanced various causes of action relating to "unjust enrichment, conspiracy and *alter ego*" (para. 86). The trial judge had said in the certification decision (at 2007 BCSC 348, 2007 CarswellBC 561):

> 26 The Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The onus is similar to that required to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the *Rules of Court*, B.C. Reg. 221/90. As stated in *Brogaard v. Canada (Attorney General)*, 2002 BCSC 1149 (B.C. S.C. [In Chambers]), at ¶30:
>
> > It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The test is similar to the onus on a defendant to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the *Rules of Court*. However, on a certification application, the burden is on the plaintiffs to demonstrate affirmatively that a cause of action is properly pled.

[17] The trial judge concluded that pleadings disclosed a cause of action for unjust enrichment, and found that the plaintiffs had “pled the material facts necessary to establish an action for unjust enrichment” (para 28). In its decision the Court of Appeal said:

> 86 Dollar's second ground of appeal is that the plaintiffs' claims against it are not appropriate for certification and in particular, that Brown J. erred in ruling that the pleadings disclose causes of action (which the defendants summarize as claims in "unjust enrichment, conspiracy and *alter ego*") against Dollar, that the issues raised against the two defendants are "common" ones within the meaning of the *CPA*, and that a class proceeding is the preferable procedure by which to resolve the claims. The case management judge dealt with these and other arguments in her reasons of July 25, 2008. With respect to the existence of a cause of action, she ruled that this is not one of those rare cases in which the court may conclude at the preliminary stage that the plaintiffs' claim is without merit; nor could it be said the plaintiffs' prayer for equitable relief was bound to fail. (Paras. 14-16.)
>
> 87 On appeal, Dollar argues that the claim for unjust enrichment cannot stand given that (in Dollar's submission) various management and royalty agreements exist between Dollar and Money Mart, supplying a "juristic reason" for any benefit received by Dollar from Money Mart's cheque-cashing business. This may well prove to be the case, but the facts must be proved by evidence at trial. It cannot be said at this stage the claim of unjust enrichment is bound to fail.
>
> 88 Dollar also submits that even if some of the acts allegedly committed by Dollar amounted to a conspiracy by unlawful means, certain "essential elements" of that cause of action — in particular, an intention to injure the plaintiffs — are absent. In response, the plaintiffs contend on the basis of *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.) that an intention to injure may be inferred "from the fact that the defendants should have known injury to the plaintiff would ensue." (At 472.) Again, these are arguments that must await trial, where all the relevant evidence can be adduced and all the legal arguments advanced. At this stage, provided a cause of action is disclosed in the pleadings, the criterion for certification in s. 4(1)(a) of the *CPA* is met. The same is true with respect to Dollar's arguments concerning the remedies of constructive trust and joint and several liability. I would dismiss this ground of appeal.

[18] The plaintiffs’ interpretation of this passage is that, “[a]s the certification judge found that the pleadings disclosed a claim of unjust enrichment, the Court was not required to undertake an analysis into the other causes of [action] pled.”

[19] The defendant adds that *MacKinnon* may stand for the proposition that issue estoppel would prevent the court from reconsidering the decision on whether to strike the causes of action in fiduciary duty and equitable fraud. The defendants say that is not what it is seeking, but rather, it claims that the court should assess all of the other causes of action that have not already been considered on the motion to strike.

Conclusion

[20] The relief sought on this certification application relates only to whether the proceeding should be certified as a class proceeding under the *Class Proceedings Act*. The plaintiffs are not seeking, and are not required by the Act to seek, a determination of whether all of the causes of action pleaded are sustainable or whether they should be struck. The order sought does not preclude a future motion to strike by the defendants, nor does it invalidate any particular cause of action. It is important to be mindful that class proceedings legislation is "a procedural tool" that should interpreted "in a way that gives full effect to the benefits foreseen by the drafters": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, at paras. 14-15. Furthermore, "the certification stage is decidedly not meant to be a test of the merits of the action.... Rather the certification stage focuses on the *form* of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick* at para. 16 (emphasis in original).

[21] A certification hearing relates to the form the proceeding will take, rather than the substance of the proceeding. Denial of a certification motion only means that there will not be a class proceeding. It does not, of itself, prevent the plaintiff or plaintiffs from proceeding on their own, absent, of course, a successful motion to strike. Indeed, it may be open to the plaintiffs to seek a joint trial with other persons asserting similar causes of action against all, or some of, the defendants. Whether such a motion will succeed would depend on the applicable rules of court and the circumstances at the time of the motion. What is clear is that a denial of certification only means that a class proceeding is not the "preferable procedure for the fair and efficient resolution of the dispute," not that the plaintiffs, together with others who may wish to pursue similar causes of action, will not ultimately be successful.

[22] The onus on the plaintiffs under s. 7(1)(a) is to establish that "the pleadings disclose or the notice of application discloses a cause of action." This is, of course, the reverse of the onus on a motion to strike, which rests on the party seeking to strike a pleading to establish that the pleading does not disclose a cause of action.

[23] If a subsequent motion to strike is successful in respect of some of the causes of action, then, if appropriate, the common issues that relate only to the causes of action that are struck can, pursuant to s. 11(4), be deleted from the class proceeding and the order approving the class proceeding can be varied accordingly. If all the causes of action are struck, then there is no proceeding, and the order can be struck pursuant to a motion under s. 38.

[24] The fact that courts have assessed more than one of the causes of action pleaded does not suggest there is a requirement to establish more than one cause of action in order to satisfy s. 7(1)(a) (or its equivalents in other jurisdictions). Judicial reasons often contain more than one legal or factual finding, or line of reasoning, in support of the ultimate conclusion. It is not that resorting to alternatives is necessary, only that they may help to provide substance and support to the court's conclusion. But where, as here, there is admitted to be at least one cause of action that complies with s. 7(1)(a) (in this case, breach of fiduciary duty) an analysis of the other causes of action is unnecessary and would serve no purpose. If the defendants apply to strike any or all of the other causes of action, that will be the time to analyse them and to determine their merits, having regard to the applicable law and onus on such a motion.

[25] There is no dispute that the pleadings disclose "a cause of action." Accordingly, the proceeding will be certified as a class proceeding.

A. David MacAdam