Federal Court  Cour fédérale

Date: 20220606

Docket: T-1105-20

Citation: 2022 FC 824

Ottawa, Ontario, June 6, 2022

PRESENT: The Honourable Mr. Justice Southcott

PROPOSED CLASS PROCEEDING

BETWEEN:

GARRETT MOORE, KELLY MCQUADE, DAVID COMBDEN, AND GRAHAM WALSH

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] This decision addresses the sequencing of two motions in this proposed class action: (a) the Plaintiffs' motion to have this matter certified as a class proceeding [the Certification Motion]; and (b) the Defendant's intended motion seeking that the Court exercise its discretion to stay this action on the basis that another class proceeding overlaps and encompasses the same class and subject matter [the Stay Motion].

[2] Prothonotary Alexandra Steele and I are case managing this proceeding. As the parties were unable to agree on the sequencing of their motions, they requested that the Court adjudicate the sequencing dispute through the case management process without the need for a formal motion on sequencing. The Court endorsed this process, and the parties filed written submissions in support of their respective positions, following which they made oral submissions at a case management conference on June 1, 2022 [the CMC]. I reserved my decision, which is now provided herein.

[3] As explained in greater detail below, I have concluded that the sequencing should take place as proposed by the Plaintiffs, i.e., that the Stay Motion should be heard at the same time as the Certification Motion.

II. **Background**

[4] The Plaintiffs commenced this proposed class proceeding against the Defendant, the Attorney General of Canada representing Her Majesty the Queen in Right of Canada, on September 16, 2020. Their Statement of Claim was subsequently amended on August 19, 2021. In general terms, the Plaintiffs' claim seeks to address what they allege were negligently implemented and discriminatory mental health services provided to certain members of the Royal Canadian Mounted Police [RCMP]. The Plaintiffs propose a national class defined as follows:

> all persons who are or have been regular members (as defined in section I of the *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281) and who have been diagnosed with, and/or suffer or have suffered from, an Occupational Stress Injury. For certainty, the Class excludes civilian and public service members of the Royal Canadian Mounted Police;

[5] The term “Occupational Stress Injury” is defined in the Statement of Claim as:

> any persistent psychological difficulty that results from operational duties within the RCMP and causes impaired functioning, including but not limited to diagnosed medical conditions such as Post-Traumatic Stress Disorder, depression, anxiety, and panic attacks.

[6] Since the commencement of this action, the parties have been pursuing the steps necessary to argue the Certification Motion, with the assistance of the case management process. On November 13, 2020, Prothonotary Steele issued a Direction approving a schedule for these steps, as proposed by the parties, culminating with the filing of the Plaintiffs’ Reply Brief by April 18, 2022. By further Direction of Prothonotary Steele dated April 21, 2021, this schedule was modified by approximately nine months, again as proposed by the parties, such that the Plaintiffs’ Reply Brief would be filed by December 20, 2022. The hearing itself has not yet been scheduled.

[7] The Plaintiffs filed their certification record on November 25, 2021, in accordance with the above schedule. The schedule contemplated that the Defendant’s certification record would be filed by May 6, 2022, with the parties’ cross-examination of each other’s affiants to be completed by July 15, 2022.

[8] However, in advance of the May 6 deadline, the Defendant’s counsel advised the Plaintiffs’ counsel and subsequently the Court of its position that the within action [the Moore Action] overlapped with the previously certified class proceeding in Greenwood v HMTQ (Federal Court File No. T-1201-18) [the Greenwood Action] and other class proceedings in this and other Courts. The Defendant referenced overlap both in respect of the proposed class

definition (involving RCMP members) and in respect of the subject matter of emotional and physical harm for workplace harassment. The Defendant noted in particular that the certification order in the Greenwood Action was issued on January 23, 2020, and included a prohibition against any other class proceeding being commenced with respect to the matters addressed in the Greenwood Action, absent leave of the Court. The Defendant advised of its intention to move to stay the Moore Action based on the asserted overlap, taking the position that the commencement and advancement of the Moore Action represents an abuse of process.

[9] Through its written and oral submissions on the sequencing dispute, the Defendant has explained its position that its Stay Motion should be argued and decided prior to any further advancement of the Certification Motion. The Defendant has proposed a schedule for steps in the Stay Motion, commencing with the filing of its notice of motion and supporting affidavits by June 15, 2022, and culminating with a hearing on October 4-6, 2022. It proposes that the steps in pursuit of the Certification Motion be placed in abeyance until after the decision on the Stay Motion is released.

[10] In contrast, the Plaintiffs take the position that the Certification Motion and the Stay Motion should proceed concurrently, although potentially with different deadlines for the steps in each motion, with the parties to argue the Stay Motion at the same time as the Certification Motion. The Plaintiffs have proposed a schedule that would result in the Certification Motion advancing roughly as presently scheduled, with a view to a hearing of both motions being scheduled for the spring of 2023.

III. **Issue**

[11] The sole issue for the Court's determination is the sequencing issue, i.e., whether the Stay Motion should be heard and decided prior to, or concurrent with, the Certification Motion.

IV. **Analysis**

A. *Jurisprudence*

[12] The parties are largely agreed on the provisions of the *Federal Courts Act*, RSC 1985, c F-7 [the Act], *Federal Courts Rules*, SOR/98-106 [the Rules], and jurisprudential principles governing the sequencing decision.

[13] The Defendant's Stay Motion will rely on s 50(2)(b) of the Act, which authorizes the Court, in its discretion, to stay proceedings in any matter where it is in the interests of justice that the proceeding be stayed. For purposes of scheduling the motion, the parties refer to Rule 3 and Rule 385(1)(a). Rule 385(1)(a) authorizes a case management judge to give any directions or make any orders that are necessary for the just, most expeditious, and least expensive determination of a proceeding on its merits. Similarly, Rule 3 provides that, in general, the Rules are to be interpreted and applied in support of those objectives.

[14] Notwithstanding the general judicial discretion to decide the order of proceedings on a case-by-case basis (see, e.g., *Attis v Canada (Minister of Health)* (2005), 75 OR (3d) 302 (Ont SCJ) [*Attis*] at para 10), it is generally recognized that a certification motion should be the first procedural matter heard in a proposed class proceeding (see, e.g., *Berenguer v WOW Air ehf*, 2019 FC 407 [*Berenguer*] at para 19; *Attis* at para 7). Indeed, the Federal Court has stated that

the Court should only hear another motion prior to certification in exceptional circumstances (see *Berenguer* at para 20).

[15] However, this jurisprudence clearly contemplates the possibility that circumstances may exist which militate in favour of the Court exercising its discretion to schedule a motion prior to certification. While the Plaintiffs take the position that Federal Court jurisprudence supports hearing a stay motion in advance of certification only where pure jurisdictional issues are involved, I am not convinced that the circumstances that may support such an exercise of discretion are so limited. While not emanating from this Court, there is jurisprudence supporting such a result when a stay motion is based on abuse of process, as alleged by the Defendant in the case at hand.

[16] In *Fantov v Canada Bread Company, Limited*, 2019 BCCA 447 [*Fantov*], the British Columbia Court of Appeal drew a distinction between applications to stay a proceeding based on an abuse of process and stay applications based on other considerations. The Court recognized that circumstances might arise where it is appropriate to decide a stay application based on abuse of process in advance of certification (at paras 64-70). Subsequently, in *Reid v Google LLC*, 2022 BCSC 158 [*Reid*], the British Columbia Supreme Court relied in part on *Fantov* in concluding that it was fair and appropriate to decide such a motion prior to certification (at para 167-172).

[17] The parties disagree on whether the present case involves the sort of exceptional circumstances referenced in *Berenguer*. However, they agree that the Court's decision, as to

whether a particular case represents circumstances favouring hearing a motion in advance of certification, should be guided by the factors identified in *Cannon v Funds for Canada Foundation*, 2010 ONSC 146 [*Cannon*] at para 15. Endorsing their adoption by the Federal Court in *Gottfriedsen v Canada*, 2013 FC 1213, as non-exhaustive factors guiding a sequencing decision of this nature, *Berenguer* (at paras 20-21) recites the *Cannon* factors as follows:

> Without being exhaustive, some of the factors that I consider relevant to the exercise of my discretion include:
>
> (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
>
> (b) the likelihood of delays and costs associated with the motion;
>
> (c) whether the outcome of the motion will promote settlement;
>
> (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
>
> (e) the interests of economy and judicial efficiency; and
>
> (f) generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding …

[18] In the analysis that follows, I will consider these factors and the parties' respective submissions on how they apply in the circumstances of this particular case.

B. *Whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined*

[19] In support of its position on the sequencing issue, the Defendant advances arguments (which now focus on the overlap between the Moore Action and the Greenwood Action in particular), intended to demonstrate that the Moore Action is materially duplicative of the Greenwood Action. The Defendant submits that the essence of each claim is that the RCMP

failed to prevent a culture of bullying, intimidation, harassment and discrimination, relying on the legal theory of systemic negligence to ground its allegations and seek remedies. The Defendant identifies similarities in the class definitions (both of which relate to the RCMP) and what it submits are similarities in the claims and damages alleged.

[20] The Plaintiffs dispute the Defendant's position that the two actions are materially duplicative but also argue that it is inappropriate to address the issue of the alleged overlap between the actions in the sequencing decision. Rather, the Plaintiffs submit that the overlap issue should be addressed only when the Court ultimately considers the Stay Motion, with the benefit of the motion records that will then be available. In response, the Defendant relies on the explanation in *Berenguer* that, while a sequencing motion is not the forum to determine the merits of a party's stay motion, it is appropriate to consider the *prima facie* strength of the motion and determine whether allowing it to be heard before the certification hearing militates in favour of judicial economy and efficiency (at para 17).

[21] I am conscious of not engaging in any detailed consideration of the merits of the Stay Motion. However, in my view, it is necessary to consider at a high level the alleged overlap between the two actions, as this examination informs my assessment of whether the Stay Motion will dispose of the entire Moore Action or substantially narrow the issues to be determined therein.

[22] The Defendant takes the position that the Moore Action is entirely subsumed by the Greenwood Action. I remain amenable to considering the Defendant's submissions to this effect,

with the benefit of a full motion record when the Stay Motion is argued. However, based on the preliminary assessment that the Defendant advocates I now perform, the Defendant has not currently convinced me of this position.

[23] Both actions advance allegations of negligence. However, while the Greenwood Action is framed as a claim about bullying, intimidation and harassment, the Moore Action is framed as a claim of discrimination under s 15 of the *Charter* in the delivery of mental health services to RCMP members suffering an Occupational Stress Injury resulting from operational duties. The defining feature of the proposed class in the Moore Action is the existence of an Occupational Stress Injury. Such claimants may well fall within the class definition in the Greenwood Action, as that definition is framed broadly in terms of RCMP membership. However, as the Plaintiffs submit, members experiencing an Occupational Stress Injury, but who were not harassed, intimidated or bullied, would appear not to have a claim in the Greenwood Action. It is therefore not immediately obvious to me that all members of the proposed class in the Moore Action would necessarily be captured by the Greenwood Action.

[24] The Plaintiffs also make the point that, if the Defendant succeeds in establishing partial (but not full) overlap between the actions, then it will still be necessary for the Moore Action to proceed to certification, albeit perhaps with a more limited class or set of claims or common issues in comparison to those presently pleaded. I accept that this is a possible outcome, but I do not presently have a basis to assess the degree to which such an outcome may narrow the issues in the Moore Action.

[25] I repeat that, with the benefit of full argument and a supporting record, the Defendant may succeed in establishing partial or even full overlap between the actions. However, I cannot presently conclude that the Stay Motion will either entirely dispose of the Moore Action or substantially narrow the issues therein.

C. *Likelihood of delays and costs associated with the motion / whether the motion could give rise to interlocutory appeals and delays that would affect certification / interests of economy and judicial efficiency*

[26] In the context of the present case, I consider these three factors to be significantly related. I find most compelling the Plaintiffs' argument that the potential for interlocutory appeals and resulting delays militates against hearing and adjudication of the Stay Motion in advance of the Certification Motion. As noted in *Berenguer*, the Court should curb litigation by instalments, which could result in appeals and significant delay in disposing of a class proceeding on its merits (at para 19).

[27] If the Stay Motion were successful, there is at least a foreseeable possibility that the Plaintiffs would pursue an appeal in an effort to avoid termination of their action. If the Stay Motion were unsuccessful, the Defendant would have other avenues available to resist the Moore Action, including opposing the Certification Motion. However, the Defendant has explained that its concern about overlap between the Moore Action and Greenwood Action forms part of a larger concern about overlap among a number of class actions or proposed class actions currently pending in this and other Courts. Therefore, again, there is at least a foreseeable possibility that the Defendant would appeal if unsuccessful in the Stay Motion.

[28] For similar reasons, an appeal by the unsuccessful party on the Certification Motion is a foreseeable possibility. Therefore, in my view, the interests of economy and judicial efficiency, achieved by avoiding delay and resulting cost, favour simultaneous hearings of the motions such that, if either party chooses to appeal the resulting decisions, those appeals can be presented to the Federal Court of Appeal at the same time. In contrast, placing the Certification Motion in abeyance, pending a hearing and decision on the Stay Motion, raises a significant prospect of a succession of interlocutory appeals.

D. *Whether the outcome of the motion will promote settlement*

[29] Neither party made any particular submissions on the application of this factor. I find no basis to conclude that the outcome of the Stay Motion will promote settlement of the Moore Action.

E. *Whether scheduling the motion in advance of certification would promote the fair and efficient determination of the proceeding*

[30] In considering this factor, which includes matters of fairness, I have taken into account the Defendant's argument that it is an abuse of process to require it to defend a proposed class action that is materially duplicative of a certified class action in the same Court. The Plaintiffs emphasize that whether the Moore Action represents an abuse of process will not be determined until the Court decides the Stay Motion. However, consistent with the reasoning in *Reid* and *Fantov*, I consider the fact that the Stay Motion requires the adjudication of allegations of an abuse of process to favour the Defendant's argument in favour of early adjudication.

[31] The Defendant also draws a parallel between the issue of overlapping proceedings raised by its Stay Motion and the practice in adjudicating carriage motions, where a proposed representative plaintiff brings a motion for authorization to have his or her action proceed on behalf of all class members and to stay pending or future proceedings related to the same issues. The Defendant relies on jurisprudence to the effect that fairness generally favours a carriage motion being decided prior to certification of the proposed class proceeding (see, e.g., *Thompson v Minister of Justice of Manitoba*, 2016 MBQB 169 at para 19, aff'd 2017 MBCA 71; *Strohmaier v British Columbia (Attorney General)*, 2017 BCSC 2079 at para 31, aff'd 2019 BCCA 388).

[32] While the Plaintiffs dispute this parallel, I find merit to the Defendant's argument, which is supported by reasoning in *Reid*, to the effect that the practice of adjudicating carriage motions prior to certification favoured early adjudication of the stay motion under consideration in that case (at para 172).

[33] On the other hand, fairness also warrants consideration of the Plaintiffs' argument that the Moore Action was commenced close to two years ago and that the parties have been working towards a certification motion, pursuant to an agreed and Court-endorsed schedule, for a considerable period of time. Indeed, the Plaintiffs filed their certification record more than six months ago, and the May 6, 2022 deadline for the Defendant to file its certification record was looming when it announced its intention to pursue the Stay Motion. It can be inferred from this timing that the Defendant's work to prepare its record is substantially underway.

[34] In this respect, I agree that the present matter involves circumstances that appear to differ from those in Pierrot v HMTQ (Federal Court File No. T-142-22) [the Pierrot Action], in which the Defendant identifies that the Court has scheduled a stay motion, based on alleged overlap with another class action, to be heard in October 2022 in advance of certification. The Plaintiffs emphasizes that the Pierrot Action was filed on January 24, 2022, and, unlike the Moore Action, is therefore at a very early stage.

[35] I acknowledge the Defendant's position that it raised its intention to pursue the Stay motion in a timely fashion. The Defendant notes that the certification in the Greenwood Action became a settled issue only on March 17, 2022, when the Supreme Court of Canada declined leave to appeal in that matter. Nevertheless, it remains the case that the progress of the Certification Motion in the Moore Action was materially advanced by that time.

[36] In my view, fairness also requires consideration of the prejudice that would be suffered by either party if the other party's position on the sequencing issue is preferred. If the Defendant's position is preferred, the progress of the Certification Motion will be halted pending adjudication of the Stay Motion and potentially ensuing appeals, with the result that any continuation of the Certification Motion that will be significantly delayed. I appreciate that I have considered this delay earlier in these Reasons and wish to note at this juncture only that this delay represents prejudice to the Plaintiffs.

[37] In contrast, there is little prejudice to the Defendant in being required to litigate the Certification Motion in the same timeframe as the Stay Motion. I acknowledge the Defendant's

position that it should not be required to defend an action that it considers an abuse of process. However, as the Plaintiffs emphasize, the Certification Motion represents a purely procedural step focusing on the appropriate form for advancement of the Plaintiffs' claims, not an adjudication of the merits of the proceeding. Moreover, as canvassed earlier in these Reasons, it is possible that the Stay Motion may identify some, but not complete, overlap between the Moore Action and the Greenwood Action, such that the Certification Motion will proceed in some form in any event.

V. **Conclusion**

[38] There are elements of the last factor canvassed above that favour both parties. However, when combined with the other factors, I find the *Cannon* analysis to favour exercising my discretion to adopt the Plaintiffs' position on sequencing, i.e., that the Stay Motion should be advanced in parallel with the Certification Motion, with both motions to be heard and adjudicated at the same time.

[39] I note that the Plaintiffs' written submissions provided a proposed timetable for the remaining steps in the Certification Motion and steps in the Stay Motion. However, I did not seek the Defendant's position on this timetable at the CMC, in advance of making the sequencing decision. As such, my Order will direct the parties to develop an appropriate timetable for each of the motions, including setting a hearing date, with the assistance of Prothonotary Steele through the case management process.

ORDER IN T-1105-20

THIS COURT ORDERS that:

1. The Stay Motion shall be advanced in parallel with the Certification Motion, with both motions to be heard and adjudicated at the same time.

2. The parties shall develop an appropriate timetable for each of the motions, including setting a hearing date, with the assistance of Prothonotary Steele through the case management process.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	GARRETT MOORE, KELLY MCQUADE, DAVID COMBDEN, AND GRAHAM WALSH V THE ATTORNEY GENERAL OF CANADA
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