Federal Court Cour fédérale

Date: 20230105

Docket: T-1458-20

Citation: 2023 FC 27

Ottawa, Ontario, January 5, 2023

PRESENT: The Associate Chief Justice Gagné

PROPOSED CLASS PROCEEDING

BETWEEN:

NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP, SHALANE ROONEY, DANIEL MALCOLM, ALAIN BABINEAU, BERNADETH BETCHI, CAROL SIP, MONICA AGARD, AND MARCIA BANFIELD SMITH

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

[1] The Defendant is bringing this motion to strike three expert affidavits included in the Plaintiffs' November 15, 2022 reply on certification.

[2] A non-exhaustive summary of steps taken and affidavits filed leading up to the serving and filing of the Plaintiffs' reply on certification on November 15, 2022 is helpful. Where relevant, reference is made to a timetable the Court issued in an Order dated June 24, 2022 [the June timetable]. This timetable was issued further to a motion by the Defendant seeking an order adjourning the certification hearing originally scheduled for September 2022 and revising a previous timetable established in a February 2022 Court direction. Here are the relevant steps:

- September 1, 2021: the Plaintiffs' filed their certification motion record. It included an affidavit sworn by Ms. Adele Furrie, a statistician, as well as a single affidavit jointly sworn by Steve Prince and Stephanie Greenwald, both Partners at RSM Canada [the RSM affidavit]. The Defendant has not formally challenged the joint nature of this affidavit.

- March 29, 2022: the Plaintiffs' filed a supplementary certification motion record. It included a Further Fresh as Amended Statement of claim, which sought to expand the definition of the proposed class. The revised definition would more clearly encompass both Black individuals who at any time from 1970 to the present ***applied*** for work as part of the Public Service and were denied hiring opportunities by virtue of their race, *in addition to* Black individuals who "work or worked" for the Public Service during the same period.

- September 23, 2022: the Plaintiffs filed a second supplementary motion record. This was not provided for in the June timetable. It comprised a single affidavit by Mr. Bernard Dussault, an actuary.

- September 28, 2022: the Further Fresh as Amended Statement of Claim incorporating the expanded proposed class definition is issued by the Court.

- October 3, 2022: the Defendant served and filed two motion records provided for by the June timetable, as well as a notice of motion to strike (not provided for). Firstly (and most relevant to this motion), the Defendant served and filed its responding motion record (certification) which included an affidavit from Dr. John H Johnson, a labour economist whose evidence responds to the RSM Affidavit. Second, the Defendant filed a motion to stay overlapping portions of the claim. Third, the Defendant filed a notice of motion to strike the entirety of the Further Fresh as Amended Statement of Claim, for lack of jurisdiction.

- November 1, 2022: the Plaintiffs served (and subsequently filed on November 2) their reply motion record regarding the Defendant's motion to stay.

- November 15, 2022: the Plaintiffs served (and subsequently filed on November 23), their reply to the Defendant's responding record (certification).

- December 13, 2022: the Defendant filed its motion record for the current motion to strike evidence.

[3] The Defendant is asking the Court to strike three affidavits that were included with the Plaintiffs' reply record (certification). Two are from new proposed experts, namely Dr. Richard Drogin and Mr. Raj Anand. The third is an additional affidavit from Ms. Adele Furrie.

[4] The Defendant characterizes all three affidavits as improper reply evidence, but only seeks to strike the affidavits of Dr. Drogin and Mr. Anand.

[5] Although the June timetable provided that cross-examinations would be held between November 15, 2022 and January 31, 2023, the Defendant has indicated that it would not enable any cross-examinations to proceed until this issue is settled.

I. Issues

[6] The sole issue to be decided is whether the affidavits of Dr. Richard Drogin and Mr. Raj Anand should be struck. This involves two sub-issues: first whether these affidavits constitute improper reply evidence, and second whether per Rule 52.4 the Plaintiffs should be granted leave to call more than five expert witnesses.

II. The parties' positions

[7] The Defendant submits that all three experts' affidavits constitute improper reply, as they contain evidence related directly to issues that were raised by the Plaintiffs in their evidence in chief, and that should have been included in the Plaintiffs' moving certification record. It takes

particular issue with Dr. Drogin's affidavit and argues that it sets out a brand new methodology for calculating aggregate damages that is distinct from the Plaintiffs' original damages experts, RSM. It submits that the purpose of Dr. Drogin's affidavit is to bolster weaknesses, which its responding damages expert, Dr. John H. Johnson, identified with RSM's approach.

[8] The Defendant also highlights that until the Dr. Drogin affidavit, none of the Plaintiffs' expert affidavits set out a methodology for calculating aggregate damages in respect of those class members who applied for jobs but were not hired. The Defendant notes that in his affidavit sworn August 15, 2022, Mr. Bernard Dussault simply indicates that he is qualified to develop an "alternate actuarial methodology" for doing so, but that he does not go on to provide further details of said methodology.

[9] Additionally, or in the alternative, the Defendant submits that Dr. Drogin and Mr. Anand's affidavits should be struck because the Plaintiffs have now in total filed evidence from eight different proposed experts (counting RSM as one expert), without seeking prior leave to do so as required by Rule 52.4(1) of the *Federal Courts Rules*, SOR/98-106.

[10] The Defendant does not seek to strike Ms. Furrie's second affidavit, but seeks an opportunity to respond to it.

[11] The Plaintiffs, on the other hand, submit that the impugned affidavits are directly responsive to the responding record of the Defendant on certification.

[12] They note that the June timetable did not provide for the motion to strike the claim in its entirety for lack of jurisdiction, and that the Defendant served it alongside its voluminous responding record (certification) without notice. They submit that the Defendant had never previously raised the issue of jurisdiction in the past two years.

[13] The Plaintiffs note that their reply record includes evidence relied upon not only in response to the responding certification record, but also in response to the Defendant's motion to strike for lack of jurisdiction. They particularly point to Mr. Anand's affidavit addressing the issue of jurisdiction as an example of this.

[14] At the hearing of the Motion, the Plaintiffs conceded that Dr. Drogin's methodology represents a "slight departure" from RSM's methodology. They submitted that this was at least in part because of changes in terms of the information available to the Plaintiffs. The Plaintiffs submit that the Court must decide if it is in the interests of justice for Dr. Drogin's affidavit to be admitted, considering whether the Court's role will be aided by it. The Plaintiffs further submitted that any prejudice to the Defendant can be remedied by giving the Defendant time to respond. They also emphasize the short and targeted nature of the affidavits, and indicate that they had offered the Defendant the opportunity to reply to Dr. Drogin's affidavit.

[15] Finally, The Plaintiffs argue that the standard for permissible reply evidence is to be applied less strictly for motion and application procedures than it is at trial (citing *Johnson v North American Palladium Ltd,* 2018 ONSC 4496 at paras 13 – 15).

[16] As for the requirements of Rule 52.4(1), the Plaintiffs submit that two of its initial experts were relied upon in relation to a proposed mental health fund. The issue of this fund was at one point in the proceedings the subject of a potential motion, but has since instead been the subject of discussions between the parties. At this hearing, the Plaintiffs indicated openness to withdrawing the evidence of these two experts if necessary.

III. Analysis

[17] Both parties point to the principles governing the admissibility of reply evidence as being those set out in *Halford v Seed Hawk Inc.* 2003 FCT 141, at para 15 (which have been applied in decisions including: *T-Rex Property AB v Pattison Outdoor Advertising Limited Partnership* 2022 FC 1008 at para 34, *Merck Sharp & Dohme Corp v Wyeth LLC,* 2020 FC 1087 at para 9, *Jannsen Inc v Teva Canada Limited*, 2019 FC 1309 at para 16). These governing principles are:

> 1. Evidence which is simply confirmatory of evidence already before the court is not to be allowed.
>
> 2. Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
>
> 3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
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> 4. Evidence which is excluded because it should have been led as part of the plaintiff’s case in chief will be examined to determine if it should be admitted in the exercise of trial judge’s discretion.

[18] As held by Justice Zinn in *Merck-Frosst v Canada (Health),* 2009 FC 914, additional factors to be considered by the Court include [para 10]:

> (i) whether the further evidence serves the interests of justice;
>
> (ii) whether the further evidence assists the Court in making its determination on the merits;
>
> (iii) whether granting the motion will cause substantial or serious prejudice to the other side; and
>
> (iv) whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

[19] In his decision, Justice Zinn further broke down the fourth (iv) factor into a two-pronged analysis [*Merck-Frosst*, at paras 23 & 25]:

> [23] The first step is to ask whether the proposed evidence is properly responsive to the other party's evidence. It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes, or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.
>
> […]
>
> [25] If the proposed evidence is found to be responsive, one must then ask whether it could have been anticipated as being relevant at an earlier date. If it could have been anticipated earlier to be relevant, then it is being offered in an attempt to strengthen one's position by introducing new evidence that could and should have been included in the initial affidavit. Such evidence is not proper reply evidence as the party proposing to file it is splitting his case. A party must put his best case forward for the other to meet, he cannot lie in the weed and after the party opposite has responded file additional evidence to bolster his case in light of the defence that has been mounted. It is improper because it could have been filed in the initial instance and the other party now has no opportunity to respond to it.

[20] The principles articulated in *Halford* have previously been applied by this Court in the context of a certification motion in a proposed class proceeding (see Justice Southcott's reasons in *Sweet v Canada*, 2022 FC 1228, at paras 52 – 57).

[21] I turn now to applying the above principles to the affidavit evidence before the Court.

(1) Dr. Richard Drogin Affidavit

[22] Applying the *Halford* principles as further clarified by subsequent jurisprudence, I find that the issues, or "matters" addressed by Dr. Drogin's affidavit were a) either already part of the Plaintiffs' evidence in chief or b) – in the case of the measuring of any shortfall in external hires – *ought* to have been part of the Plaintiffs' evidence in chief. This is highlighted by comparing the RSM affidavit (from the Plaintiffs' evidence in chief) with Dr. Drogin's (from its reply).

[23] The fact that the two affidavits address the same matters is made especially clear by comparing each experts' mandate. This exercise highlights that, apart from the issue of Black individuals who applied but were not hired (which I address separately), the mandate or question put to Dr. Drogin for reply was more or less the same as the one put to RSM in the Plaintiffs' evidence in chief. In his affidavit, Dr. Drogin states that he was asked to:

> "provide a methodology for measuring the shortfall of internal promotions and external hires awarded to Blacks, if any, and a framework for computing the consequent aggregate class wide monetary damages"
>
> (Dr. Drogin Affidavit para 3)

[24] For its part, RSM described its mandate as follows:

> "to construct a reasonable model and methodology and use government data to calculate damages arising from the loss of income and pension income due to the discrepancy, if any, in promotions of Black employees within the Federal public service"
>
> (RSM Affidavit para 8)

[25] Despite the fact that the overall mandates of Dr. Drogin and RSM are very similar, the methodology they each propose is quite different. Indeed, this appears intentional, as Dr. Drogin notes: “I have been asked to explain how Dr. Johnson’s criticisms do not apply to the methodology that I have proposed in this report.” The Plaintiffs’ conceded at a minimum that Dr. Drogin’s approach represents a “slight departure” from that of RSM.

[26] I find that Dr. Drogin’s report hence constitutes new evidence brought in reply, addressing an issue that was addressed in the Plaintiffs’ evidence in chief. As such, it represents improper case-splitting. Put simply, “a party cannot present some evidence, wait to hear the other side’s evidence and then respond with additional evidence to account for the weaknesses identified by another expert” [*T-Rex Property AB v Pattison Outdoor Advertising Limited Partnership,* 2022 FC 1008, at para 36]. It is particularly so where it seeks to do so by means of an entirely new expert.

[27] Turning to the one major area of difference between the Dr. Drogin and RSM affidavit, the methodology for calculating aggregate damages for the expanded portion of the proposed class, I find that such a methodology properly ought to have been included in the Plaintiffs’ evidence in chief.

[28] As pointed out by the Defendant’s expert, RSM did not put forward a methodology for calculating aggregate damages for this subset of proposed class members (and does not appear to have been asked to do so by the Plaintiffs). However, RSM’s affidavit was sworn months after the Plaintiffs’ had filed their Further Fresh as Amended Statement of Claim proposing the

expanded class definition. Indeed, this amended statement of claim was appended to the RSM affidavit as Exhibit C. While the amended statement of claim was not issued until September 2022 (i.e. after the RSM affidavit was sworn), the Plaintiffs had consistently taken the position that the members of the subset of the proposed expanded class had always been intended to be part of the claim. Even if I accept that a methodology to address calculating these proposed class members' damages was only needed after the amended claim was actually issued, at no point did the Plaintiffs seek leave to introduce an amended affidavit from RSM addressing the issue.

[29] Hence, I find that this issue falls under the second *Halford* governing principle (evidence which ought to have been part of the plaintiffs' evidence in chief), as well as the category of evidence which "could have been anticipated as being relevant at an earlier date". It is improper to have brought it forward only after Canada's expert themselves highlighted the Plaintiffs' expert had not addressed this issue. This is especially so given the Plaintiffs' themselves submit that Dr. Drogin's evidence is central to one of the issues that must be determined by this Court, namely a methodology for the calculation of class-wide aggregate damages.

[30] I do not find it appropriate to nonetheless admit Dr. Drogin's report on the basis of the Court's discretion (as the Plaintiffs' submit I should). As the Federal Court of Appeal has noted, there is good reason to restrict the admission of evidence on reply. The defendant must know the case it has to meet when the defence is presented and an endless alternation between parties in adducing evidence should be avoided (*Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para

12). I am especially mindful of the latter consideration in the context of this case, given the impact further alternation would have on the already delayed schedule for this case.

(2) Mr. Raj Anand Affidavit

[31] As for Mr. Anand's affidavit, I accept the Plaintiffs' submission that its content is either properly responsive to the Defendant's evidence, or addresses issues of jurisdiction relevant to the motion to strike.

[32] I find that parts of the affidavit fall under the category of evidence that comments on, rebuts, challenges, refutes, or disproves the Defendant's evidence; for instance, his reply to the Defendant's evidence on sub-delegation. Additionally, Mr. Anand's affidavit introduces evidence helpful to the Court that was in the Defendant's possession but not produced by it; namely, reports commissioned by the Defendant.

[33] Mr. Anand is properly responding to Canada's evidence regarding the jurisdiction of the Canadian Human Rights Commission, Canadian Human Rights Tribunal and other labour relations and staffing processes and tribunals for both unionized and non-union employees. The context of this evidence is different from the other reply evidence, as it addresses an issue that first arose with the Defendant's notice of motion to strike for lack of jurisdiction.

[34] Any prejudice to the Defendant will be sufficiently remedied by giving it an opportunity to reply. The Court hence exercises its discretion to admit Mr. Anand's affidavit.

(3) Ms. Adele Furrie Affidavit

[35] Given Canada does not seek to strike the second Ms. Adele Furrie affidavit, it remains part of the record and the timeline for Canada to have an opportunity to respond will be an issue discussed at the next case management conference.

(4) Leave under Rule 52.4

[36] Having considered the factors set out in Rule 52.4, below, I grant the Applicants leave to file Mr. Anand's affidavit (their seventh proposed expert, counting RSM as one).

[37] I find per 52.4(2)(a) that the nature and public significance of the proceeding weigh considerably in favour of granting leave. This is very clearly a case that is uniquely broad in its impact, the consequences of which will affect many individuals. I note this context differs from the intellectual property or broadly commercial cases cited by the Defendant on this issue (*Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2018 FC 829 at paras 16-17). I also note that the Defendant acknowledges the public importance of the proceeding and that the amount in dispute (over $2.5 billion) is significant. Per 52.4(2(c), the likely expenses associated with the additional expert witness will be fairly minimal in relation to this amount.

[38] The Court's jurisprudence has identified additional factors to be considered such as proportionality and duplication. I have already found that the topics addressed by Mr. Anand are properly responsive and not overly duplicative. In contrast, I have already struck the affidavit of Dr. Drogin, the most notable instance of duplicative evidence.

[39] Though not directly challenged by the Defendant in this motion, there remains the issue of the Plaintiffs having failed to seek leave to file their sixth expert affidavit, that of Mr. Bernard Dussault. This issue will be revisited at a Case management conference, after having heard from both parties, as its determination may be impacted by any decision on the part of the Plaintiffs to withdraw expert affidavits, which they consider no longer relevant.

ORDER in T-1458-20

THIS COURT ORDERS that:

1. The affidavit of Dr. Richard Drogin is struck;
2. The Defendant's motion regarding the affidavit of Mr. Raj Anand is denied;
3. The Applicants are granted leave in accordance with Rule 52.4 to file the affidavit of Mr. Raj Anand;
4. The Defendant will be given the opportunity to respond to the affidavit of Mr. Anand and to the second affidavit of Ms. Adele Furrie. The timeline for these responses is to be set in a direction from the Court following a case management conference with the parties;
5. No costs are granted.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1458-20
STYLE OF CAUSE:	NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP, SHALANE ROONEY, DANIEL MALCOLM, ALAIN BABINEAU, BERNADETH BETCHI, CAROL SIP, MONICA AGARD, AND MARCIA BANFIELD SMITH v HIS MAJESTY THE KING
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 20, 2022
ORDER AND REASONS:	GAGNÉ A.C.J.
DATED:	JANUARY 5, 2023

APPEARANCES:

Hugh Scher	FOR THE PLAINTIFFS
Paul J. Martin	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Scher Law Professional Corporation	FOR THE PLAINTIFFS
Fasken Martineau DuMoulin LLP Toronto, ON	FOR THE DEFENDANT