Federal Court  Cour fédérale

Date: 20120301

Docket: T-504-09

Citation: 2012 FC 282

Ottawa, Ontario, March 1 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE MOHAWKS OF KANESATAKE AS REPRESENTED BY THE MOHAWK COUNCIL OF KANESATAKE

Plaintiff

and

HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED BY THE DEPUTY ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] It does not much matter whether or not I grant the plaintiffs' appeal from an order of Prothonotary Morneau in which he dismissed their motion for leave to further amend their amended statement of claim. In my opinion, the Prothonotary's discretionary decision was not unreasonable. However as it was "vital" to the outcome of the case, as that word has been dealt with in previous cases, I am obliged to exercise my own discretion. In my opinion, the appeal should be granted and the plaintiffs given leave to file its proposed further amended statement of claim.

[2] The dispute, as it currently stands, relates to various funding arrangements between the parties. Due to an alleged default by the plaintiffs thereunder, the defendant appointed PriceWaterhouseCoopers in May 2003 to act as third-party manager of programs and services. In this action, filed 31 March 2009, the plaintiffs seek a declaration that Her Majesty breached statutory, contractual, extra-contractual and fiduciary obligations owed to them with respect to the said third party management of various programs and services between 2003 and 2006. Damages with interest and costs, as well as equitable relief, including an accounting, are also sought. The underlying allegation is that the third party mismanaged rather than managed.

[3] In his amended statement of defence, the Deputy Attorney General of Canada, on behalf of Her Majesty, denies any and all liability for the three fiscal years in question: 2003-2004, 2004-2005 and 2005-2006. In any event, it is alleged that even if there were any liability on behalf of Her Majesty, the claim is prescribed or time-barred. As aforesaid, the statement of claim was filed 31 March 2009. Section 39 of the *Federal Courts Act* provides:

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	39. (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.
(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising	(2) Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une

otherwise than in a province shall be taken within six years after the cause of action arose.	province.

[4] Her Majesty takes the position that if any cause of action arose, it arose in the Province of Quebec and, therefore, is subject to article 2925 of the *Civil Code of Quebec* which provides for a three-year prescription:

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise established.	2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

[5] It has yet to be established where the alleged cause of action arose.

[6] The motion to re-amend deals with Her Majesty's position that the plaintiffs did not spend some $510,985 of funding during the 2002-2003 fiscal year. The lynchpin of the proposed amendments is that on 19 January 2009, Mr. Jacques Giroux, Regional Director of Funding Services for the Department of Indian and Northern Development (DIAND) declared that this alleged surplus had to be recovered from the plaintiffs, which was being achieved through withholding of funding which would otherwise have been payable.

[7] In their proposed amendments, the plaintiffs allege that even if DIAND had a cause of action, it is prescribed by the same article 2925 of the *Civil Code of Quebec*. The plaintiffs' ultimate concern is that if all disputes do not get resolved in the same proceedings, Her Majesty

might claim a six-year time bar with respect to the 2002-2003 matter contrary to the position she has taken with respect to the 2003-2004 and following years.

PROTHONOTARY MORNEAU'S DECISION

[8] The Prothonotary was aware of the approach taken by the Federal Court of Appeal in these matters, as can be seen from paragraph 6 of his reasons, delivered 29 November 2001, 2011 FC 1385:

> The Court is aware from the start, as is reflected in the following passage from *Canderel Ltée v. Canada*, [1994] 1 F.C. 3 (C.A.), at page 10, that, with regard to the principles that apply to amendments to pleadings, a liberal approach must be taken:
>
> > …while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.
>
> [His emphasis.]

[9] However, he took the plaintiffs' amended statement of claim as relating to the obligation of the defendant in regards to the appointment of a third-party manager and the execution of third-party management agreements, while the proposed amendments relate to alleged obligations in regards to a request for repayment arising from a comprehensive funding agreement from an earlier fiscal year. He concluded that there was no injustice and that the

amendments in dispute would not assist in determining the real questions in controversy in the action as it presently stood.

SUBSEQUENT DEVELOPMENTS

[10] The hearing of the appeal was delayed for various reasons, none of which was caused by the parties. Concerned that a three-year prescription might apply, the plaintiffs parcelled their proposed amendments into a separate action which they filed 18 January 2012 under court docket T-171-12, and which has been stayed by Court order pending the outcome of this appeal.

DISCUSSION

[11] Appeals from orders of prothonotaries are to be brought to a judge of the Federal Court by way of motion pursuant to rule 51 of the *Federal Courts Rules*. It is well established that if the order in question is discretionary, as this one is, the judge hearing the motion in appeal can only exercise his or her discretion *de novo* if the questions raised are vital to the final issue in the case, or the orders are clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or a misrepresentation of the facts (*Merck & Co v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459; *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, [1993] FCJ No 103 (QL); and *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450).

[12] The passage from *Canderel Ltd v Canada*, [1994] 1 FC 3, [1993] FCJ No 777 (QL) (FCA), quoted by the Prothonotary in no way created new law. In *Tildesley v Harper* (1878), 10 ChD 393, Lord Justice Bramwell stated at pages 396-397:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

For a most scholarly and historical review of the practice, see the decision of Prothonotary Hargrave in *Fox Lake Indian Band v Reid Crowthers & Partners Ltd*, 2002 FCT 630, [2003] 1 FC 197.

[13] Nonetheless, the Prothonotary did not grant the motion to re-amend, and as I have said at the outset, I do not consider that decision unreasonable. However this Court has always held that amendments to add new causes of action are vital, and so I must exercise my discretion *de novo*. As stated by Mr. Justice Décary in *Merck*, above, at paragraph 25:

> When is an amendment a routine one as opposed to a vital one? It would be imprudent to attempt any kind of formal categorization. It is much preferable to determine the point on a case by case basis (see *Trevor Nicholas Construction Co. v. Canada (Minister for Public Works)*, 2003 FCT 255, per O'Keefe J. at para. 7, aff'd 2003 FCA 428). I note that amendments that would advance additional claims or causes of action have consistently been found, in the Federal Court of Canada, to be vital for the purposes of the *Aqua-Gem* test (see *Scannar Industries Inc. et al v. Minister of National Revenue* (1993), 69 F.T.R. 310, Denault J., aff'd (1994), 172 N.R. 313 (F.C.A.); *Trevor Nicholas Construction Co.*, (*supra*); *Louis Bull Band v. Canada*, 2003 FCT 732 (Snider J.).

[14] In exercising my discretion *de novo*, I must consider whether Her Majesty would be prejudiced in a way that could not be compensated by an order of costs or in some other fashion.

In this case, the parties have yet to proceed to discovery and the claim set out in the proposed amendments is not subject to a time bar defence, even if the whole cause of action arose in Quebec. The question is whether our rules of practice prohibit the granting of an amendment. Rules 75, 76 and 201 provide:

75. (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.	75. (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.
(2) No amendment shall be allowed under subsection (1) during or after a hearing unless	(2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :
(*a*) the purpose is to make the document accord with the issues at the hearing;	*a*) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;
(*b*) a new hearing is ordered; or	*b*) une nouvelle audience est ordonnée;
(*c*) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.	*c*) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.
76. With leave of the Court, an amendment may be made (*a*) to correct the name of a party, if the Court is satisfied that the mistake sought to be corrected was not	76. Un document peut être modifié pour l'un des motifs suivants avec l'autorisation de la Cour, sauf lorsqu'il en résulterait un préjudice à une partie qui ne pourrait être réparé au moyen de dépens ou

such as to cause a reasonable doubt as to the identity of the party, or (*b*) to alter the capacity in which a party is bringing a proceeding, if the party could have commenced the proceeding in its altered capacity at the date of commencement of the proceeding, unless to do so would result in prejudice to a party that would not be compensable by costs or an adjournment.	par un ajournement : *a*) corriger le nom d'une partie, si la Cour est convaincue qu'il s'agit d'une erreur qui ne jette pas un doute raisonnable sur l'identité de la partie; *b*) changer la qualité en laquelle la partie introduit l'instance, dans le cas où elle aurait pu introduire l'instance en cette nouvelle qualité à la date du début de celle-ci.
201. An amendment may be made under rule 76 notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of substantially the same facts as a cause of action in respect of which the party seeking the amendment has already claimed relief in the action.	201**.** Il peut être apporté aux termes de la règle 76 une modification qui aura pour effet de remplacer la cause d'action ou d'en ajouter une nouvelle, si la nouvelle cause d'action naît de faits qui sont essentiellement les mêmes que ceux sur lesquels se fonde une cause d'action pour laquelle la partie qui cherche à obtenir la modification a déjà demandé réparation dans l'action.

[15] In reality, rule 201 deals with a potential time bar which has accrued after the original action was filed, and before the motion to amend. In *Scottish & York Insurance Co v Canada* (2000), 180 FTR 115, 94 ACWS (3d) 449, Mr. Justice Teitelbaum held that rule 201 must be interpreted broadly. In his view, rule 201 allowed an amendment to raise a new cause of action if it arose out of substantially the same facts as the original cause of action, notwithstanding that

the amendment may eliminate a potential defence: see also *Louis Bull Band v Canada*, 2005 FC 1041, 141 ACWS (3d) 21 and *Houle v Canada*, [2001] 1 FC 102, 192 FTR 236.

[16] I do not agree with the plaintiffs' submission that the separate causes of action (and in my opinion they are separate in that the Court could reach different conclusions) should be heard together to preclude Her Majesty from raising different time bar defences. That can be done whether or not matters proceed under one docket number or two. It is in the better interests of the administration of justice that these matters be heard together, as they arise out of the same overall relationship.

[17] Rule 3 provides:

These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

As Mr. Justice Pigeon said in *Hamel v Brunelle*, [1977] 1 SCR 147, at page 156: "…que la procédure reste la servante de la justice et n'en devienne jamais la maîtresse." / "…that procedure be the servant of justice not its mistress."

[18] Given the above conclusion, it is unnecessary for me to address the submission that a new cause of action in an amended pleading need only arise out of substantially the same facts as the original cause of action when it would be otherwise prescribed.

COSTS

[19] Prothonotary Morneau dismissed the plaintiffs' motion with costs in the amount of $300. As his order falls, so does the order for costs. In the circumstances, I shall grant this appeal without costs.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The appeal from the order of Prothonotary Morneau dated 29 November 2011 is granted.

2. The plaintiff is at leave to file its re-amended statement of claim on or before 9 March 2012.

3. On consent, the defendant shall have forty-five (45) days from the date of service of the re-amended statement of claim to file a re-amended defence.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-504-09
STYLE OF CAUSE:	THE MOHAWKS OF KANESATAKE v HER MAJESTY IN RIGHT OF CANADA
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	FEBRUARY 13, 2012
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	MARCH 1, 2012

APPEARANCES.

David Schulze Nicholas Dodd	FOR THE PLAINTIFF
Sophie Paquet	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Dionne Schulze Barristers & Solicitors Montréal, Quebec	FOR THE PLAINTIFF
Myles J. Kirvan Deputy Attorney General of Canada Quebec, Quebec	FOR THE DEFENDANT