Federal Court  Cour fédérale

Date: 20131204

Docket: T-1542-12

Citation: 2013 FC 1213

Ottawa, Ontario, December 4, 2013

PRESENT: The Honourable Mr. Justice Harrington

PROPOSED CLASS PROCEEDING

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND,VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

and

THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS, AND THE SISTERS OF SAINT ANN

Third Parties

REASONS FOR ORDER AND ORDER

[1] Chief Garry Feschuk and the other plaintiffs have sued Her Majesty the Queen, and Her Majesty alone, for harm they allegedly suffered as a result of Canada's *Indian Residential Schools Policy*. They say they were deprived of their language as well as their culture and suffered social damage and irreparable harm. For the ease of reference, the defendant is referred to as "Canada".

[2] Canada, in turn, seeks contribution and indemnity from the third parties whom it says were responsible for supervision, control and maintenance at the two Residential Schools currently identified in the action, the Kamloops Indian Residential School and the Sechelt Indian Residential School.

[3] Before me now is a motion by the third parties, to whom I shall refer, from time to time, as the Religious Orders, to have the action against them struck on the basis that even if the allegations therein were true, Canada has no claim against them as the plaintiffs only seek redress against Canada severally, that is to the extent it is liable to them and unable to flow that liability through to

third parties in whole or in part by way of contribution or indemnity. Their motion is supported by the plaintiffs.

[4] In my opinion, Canada has no cause of action against the Religious Orders, and there is no reason to keep them in. Therefore, I shall strike the third party claim without leave to amend.

[5] The cornerstone of the motion is rule 221 of the *Federal Courts Rules* which provides that the Court may, at any time, order that a pleading be struck out with or without leave to amend if, among other things, it discloses no reasonable cause of action. There is a heavy burden upon the moving party because, as the Supreme Court held in *Hunt v Carey Canada Inc*., [1990] 2 SCR 959, [1990] SCJ No 93 (QL), a party will not be "driven from the judgment seat" unless it is "plain and obvious" that the pleading discloses no cause of action or defence as the case may be.

[6] More recently, in *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45, [2011] SCJ No. 42 (QL), the Supreme Court explained at paragraphs 19 and 20 why pleadings with no chance of success should be struck. It weeds out hopeless claims and ensures that those that have some chance of success go to trial:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies

> to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

I. The History of the Case

[7] As this is a proposed class action, our rules call for immediate case management. I was appointed case manager along with Prothonotary Lafrenière.

[8] At an early case management conference, Canada announced its intention to seek a stay of the action on the ground that it intended to take third party proceedings against the Religious Orders, but could not do so in the Federal Court, which lacked jurisdiction. Section 50.1 of the *Federal Courts Act* calls for a mandatory stay in such circumstances.

[9] In the event that a stay was not granted, the parties also agreed to a timetable leading up to a motion for certification. The timetable calls for filing of the plaintiffs' affidavits, which has now been done, and approximately a five-month delay for Canada to file its affidavits in response. This delay, as mutually proposed by the parties, is not unreasonable given that the Kamloops Indian Residential School was established in or about 1890, and the Sechelt Indian Residential School in or about 1904. The allegations in the pleadings to date indicate that the relationship among the Bands, Canada and the Religious Orders was lengthy and complex, to say the least. The certification

hearing is tentatively scheduled for next October. The plaintiffs and defendants also agreed that a statement of defence need not be filed before the decision on the certification motion.

[10] I directed that the proposed third parties be given notice of Canada's stay motion, so that the order would not be *ex parte* against them. They fully participated. By order dated 24 May 2013, I dismissed Canada's motion. My reasons are reported at 2013 FC 546. Canada has appealed that order, but did not seek a stay of the timetable.

[11] In the meantime, the plaintiffs amended their statement of claim to resolve any possible ambiguity as to their intentions to seek redress from Canada and Canada alone.

[12] Paragraph 80 of the Amended Statement of Claim reads:

> Additionally, the Plaintiffs hold Canada solely responsible for the creation and implementation of the Residential Schools Policy and, furthermore:
>
> a. The Plaintiffs expressly waive any and all rights they may possess to recover from Canada, or any other party, any portion of the Plaintiffs' loss that may be attributable to the fault or liability of any third-party and for which Canada might reasonable be entitled to claim from any one or more third-party for contribution, indemnity or an apportionment at common law, in equity, or pursuant to the British Columbia *Negligence Act*, R.S.B.C. 1996, c. 333, as amended; and
>
> b. The Plaintiffs will not seek to recover from any party, other than Canada, any portion of their losses which have been claimed, or could have been claimed, against any third-parties.

[13] Nevertheless, Canada filed a third party claim against the Religious Orders for contribution and indemnity for any claim or amount to which it is found to be liable to the plaintiffs.

[14] The Religious Orders have advanced a number of reasons why the third party claim should be struck, such as time bar and fatally defective pleadings with respect to breach of contract or trust or fiduciary duty, or negligence. It is not necessary to consider these allegations. My decision rests on section 80 of the Amended Statement of Claim, and peripheral amendments to the original statement of claim which constitute a waiver of such claim the plaintiffs may otherwise have had against the Religious Orders.

[15] Their case rests on three decisions, in chronological order: *British Columbia Ferry Corp v T&N plc*, 65 BCAC 118, [1996] 4 WWR 161, [1995] BCJ No 2116 (QL) a decision of the British Columbia Court of Appeal; *Taylor v Canada (Health)*, 2009 ONCA 487, 309 DLR (4th) 400, [2009] OJ No 2490 (QL), a decision of the Ontario Court of Appeal; and *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, [2013] SCJ No 37 (QL).

[16] Canada advances several grounds why the motion should be dismissed, at least at this stage.

a. the motions to strike are premature at this early stage before the class and claim are fully defined;

b. it is not plain and obvious on the pleadings that the third party claim does not disclose a reasonable cause of action;

c. the Religious Orders are necessary parties to the litigation;

d. its defence would be prejudiced if the third party claim were struck; and

e. the Religious Orders should not be released from the litigation as a matter of public policy.

[17] In *British Columbia Ferry Corp v T&N plc*, the plaintiffs took action in negligence claiming damages arising from the fact that the defendants had allegedly negligently manufactured asbestos products and failed to warn the plaintiffs of its dangerous properties. As a result, a number of ships were rendered unsafe.

[18] The defendants, in turn, claimed indemnity from various third parties.

[19] Subsequently, the plaintiff and the third parties entered into agreements whereby the plaintiff waived any right to recover from the defendants any portion of the loss which the Court might attribute to fault on the part of any of the third parties. The third parties then moved to have the contribution and indemnity claims against them struck. They succeeded in first instance. The only issue in appeal was the Court's discretion to grant declaratory relief. The question was whether the third party proceedings could be continued for purely procedural purposes.

[20] Mr. Justice Wood, speaking for the British Columbia Court of Appeal, was of the general view that actions should not continue for purely procedural relief, but there would be rare instances where declaratory relief should be granted notwithstanding that it would be purely a point of procedure. He went on to say at paragraph 30:

> In my view this is just such a case. While it is true to say, as did the judge below, that the suit between the plaintiffs and the defendants will require a determination of the fault of the defendants limited as it may be by the fault, if any, of other persons or companies, the fact is that unless those others are joined as parties the ability of the defendants to demonstrate such fault on their part will be adversely affected - perhaps severely so - by the defendants' inability to invoke those procedures under the Rules designed to enhance the ability of one party to an action to prove its case against another. One has only to consider the importance to the process of proof of such procedures as the right of discovery, the notice to admit and the ability to call parties as adverse witnesses, to realize that there will be circumstances in which the need to resort to such procedures will meet the expanded definition given to the term "relief" by Lord Justice Bankes in the Guaranty Trust Company of New York case.

[21] He added at paragraph 31:

> It is important to keep in mind that the defendants had a perfect right to bring third party proceedings against the respondents, based on the allegations of fault attributed to them in the Third Party Notices, for the purpose of seeking contribution or indemnity in the event that the plaintiffs succeed in proving some or all of their claims against the defendants.

[22] While it may well be that Canada was entitled to institute third party proceedings on the original statement of claim, the proceedings were actually taken in the face of section 80 of the Amended Statement of Claim.

[23] In *Taylor*, a class action was instituted in which it was alleged that the plaintiff suffered injuries as a result of the surgical implantation of a device in her jaw. She only sued Her Majesty

based on alleged negligent regulation of the devices by Health Canada. Her Majesty, in turn, instituted third party proceedings against the hospital and the individual surgeon involved.

[24] The statement of claim was amended so that Ms. Taylor only sought from Health Canada "those damages that are attributable to its proportionate degree of fault". The third parties then moved, under the *Ontario Rules of Civil Procedure*, to dismiss the third party claim on the grounds that it disclosed no reasonable cause of action. The motion was granted in first instance and in appeal.

[25] Assuming joint and several liability, Mr. Justice Laskin pointed out that if only one defendant is sued, it would be 100% liable to the plaintiff even if it were only, say, 20% at fault. It would then be entitled to a statutory right of apportionment by taking third party proceedings under the *Ontario Negligence Act*. He went on to say, at paragraph 20, that contribution rights only arise where the defendant is required to pay more than its proportionate share of a plaintiff's damages:

> In other words, she is not seeking all of her damages from Health Canada; she seeks only the portion of her damages attributable to Health Canada's neglect and not the portion of her damages that may be attributable to the neglect of the doctor or the hospital.

Consequently, the apportion provisions of the Act were irrelevant.

[26] He added at paragraph 22:

> […] because Ms. Taylor has limited her claim to those damages attributable to Health Canada's fault, Health Canada can have no claim over against the doctor or the hospital for the damages claimed by Ms. Taylor and the other class members.

[27] Furthermore, the Court may apportion fault against a person who is not a party to the proceedings. He added that: "Permitting apportionment without insisting that they be parties will mean fewer parties at trial, a shorter trial and reduced costs." I agree.

[28] In the *Taylor* appeal, Her Majesty raised for the first time the point that in any event She should be at least entitled to production of documents and to examine each of the putative third parties on discovery. That question was referred back to the trial judge.

[29] In this particular case, the third parties have undertaken to produce documents and to make representatives available for discovery.

[30] The plaintiffs say that this undertaking is unnecessary as the *Federal Courts Rules* give me all the discretion I need - discretion which I have already indicated I would exercise in favour of Canada should the need arise. Pursuant to rule 233, the Court may order production of documents from non-parties, and rule 238 provides that a non-party, with leave, may be examined for discovery.

[31] The third case strongly relied upon by the Religious Orders is *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37. This case dealt with settlement privilege. Sable sued a number of defendants who had allegedly supplied it with defective paint which did not prevent corrosion of its offshore structures. It also sued contractors and applicators who had prepared surfaces and applied that paint. Sable then entered into what are called "Pierringer" agreements with

some of the defendants. Its action was discontinued against them but continued against the non-settling defendants.

[32] Pierringer agreements, named after a Wisconsin case, allow a defendant to settle leaving the remaining defendants only responsible for the loss they actually caused. The issue before the Court was whether the amounts of those settlements should be disclosed prior to judgment. The Court held that the amounts of the settlements were covered by settlement privilege.

[33] Speaking for the Court, Madam Justice Abella noted that settlements of lawsuits are to be favoured, and settlement privilege promotes settlements. She emphasized the value of Pierringer agreements in the settlement of multiparty litigation.

[34] In Canada, such agreements include additional protection for non-settling defendants such as requiring that they be given access to the settling defendants' evidence. Of course, after trial, if liability is established, the amount of the settlements would be disclosed to the trial judge so that a plaintiff would not be overcompensated.

[35] Although there is no Pierringer agreement in place in this case, the underlying philosophy remains relevant. Indeed, the plaintiffs chose not to sue the Religious Orders.

[36] While they were under no obligation to declare why they had chosen not to sue the Religious Orders, the plaintiffs pointed out that they have limited resources and want to spend their litigation money where they think it would do the most good.

[37] The Amended Statement of Claim is very carefully crafted as it contemplates the possibility that the class might be expanded to include others who were not involved with the Kamloops or Sechelt Indian Residential Schools. Those schools may not have been administered by the Religious Orders currently named as third parties. Indeed, in the Ontario case of *Baxter v Canada (Attorney General)*, 2005 OTC 391, [2005] OJ No 2165 (QL), there were well-over 100 third parties represented by 15 different sets of counsel. So far, in the case at bar, the third parties are only represented by three sets of counsel.

[38] Having come to the conclusion that Canada has no cause of action against the Religious Orders, I have to decide if, nevertheless, they should remain as third parties.

II. Canada's Case

A. *The Motion is Premature*

[39] In *Baxter*, above, and in many other cases, it has been held that the certification motion should be heard promptly and is normally given priority over other motions. One factor in Ontario is that the motion to certify should be brought on within 90 days. Rule 334.15 of *Federal Courts Rules* provides that certification motions are returnable no later than 90 days after the day on which the last statement of defence was filed. In this particular case, at the parties' request, and endorsed by the Court, the statement of defence is not due until after the certification motion is decided.

[40] In *Campbell v Canada (Attorney General)*, 2008 FC 353, [2008] FCJ No 456 (QL), Madam Justice Hansen of this Court, ruled with respect to the scheduling of plaintiff's certification motion and defendant's motion to strike. She pointed out that the *Federal Courts Rules* do not cover the sequence in which certification and other motions should be heard. Furthermore, rule 221 provides that a motion to strike out pleadings may be brought at any time, and rule 334.11, within the certification rules, provides that the general rules applicable to actions remain in place, except if incompatible. In the context of that case, she held that the motion to strike should be heard prior to the certification motion.

[41] In this case, Canada had already moved to have the action stayed, without suggesting that it should only be heard after the certification motion.

[42] In *Momi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1484, 283 FTR 143, [2005] FCJ No 1824 (QL), Her Majesty moved at the outset under rule 221 to have the statement of claim in a proposed class action struck. She succeeded in part.

[43] In *Cannon v Funds for Canada Foundation*, 2010 ONSC 416, [2010] OJ No. 314 (QL), Mr. Justice Strathy, as he then was, discussed the Court's discretion in scheduling motions at paragraph 15, 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 (s. 12).

[44] The prime focus of the plaintiffs' Amended Statement of Claim is the *Indian Residential Schools Policy* itself, not abuses that may have occurred in its implementation. Although damages are sought, the various proposed classes seek declarations that Canada was in breach of fiduciary, constitutionally-mandated, statutory and common law duties; that Canada breached their aboriginal rights; that the obligatory attendance at the residential schools intentionally inflicted mental distress; and that damages should include amounts to cover the costs of restoring; and protecting and preserving their linguistic and cultural heritage.

[45] The plaintiffs who attended the residential schools did so as day students and thus were not covered by the *Indian Residential Schools Settlement Agreement* of 2006.

[46] They rely strongly upon a *Statement of Reconciliation* issued by Canada in 2008. As to the *Residential Schools Policy*:

> This system separated many children from their families and communities and prevented them speaking their own languages and from learning about their heritage and cultures. In the word cases, it left legacies of personal pain and distress that continued to reverberate in Aboriginal Communities to this date. […] The Government of Canada acknowledges the role it played in the development and administration of these schools.

[47] In 2008, Prime Minister Harper acknowledged the harm done by the Policy*:*

> Two primary objectives of the *Residential Schools System* were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. […] Indeed, some sought, as it was infamously said, "to kill the Indian in the child".

[48] All of this is simply to say that the focus of the Amended Statement of Claim is on the Policy, not abuses in its implementation which may have occurred in certain instances.

[49] To return to Mr. Justice Strathy's non-exhaustive list of factors, the motion will not dispose of the principal action, but it will dispose of the third party proceedings. It should also narrow the scope of the inquiry in the principal action.

[50] There may well be delays associated with this motion, as Canada may choose to appeal. However, that appeal may well be disposed of before the certification motion. If the Religious Orders are kept in and if they take issue with Canada's affidavits, they may wish to file their own in reply. This may well lead to cross-examinations involving five sets of lawyers rather than just two, and might well require a rescheduling of the certification motion.

[51] Striking the third party proceedings may well promote settlement in that the number of parties involved will be significantly reduced.

[52] In my view, making the decision now to strike the third party proceedings is in the interests of judicial economy and efficiency and will promote the fair and efficient determination of the proceeding.

B. *The Plain and Obvious Test*

[53] It is plain and obvious that Canada does not have a cause of action. It submits that come the certification hearing, other bands and individuals may seek standing but might oppose the waiver of liability which might ultimately fall upon the Religious Orders. However, it is the plaintiffs who control their process. The Amended Statement of Claim makes it clear that should other plaintiffs be added who were involved with other Indian residential schools, they would have to do so on the basis of the waiver. Furthermore, any disgruntled member of the classes currently proposed, or who may be proposed in the future, may opt out.

C. *Are the Religious Orders Necessary Parties?*

[54] It is clear from both *BC Ferries* and *Taylor* that the Court may make a declaration as to the liability of non-parties. Furthermore, Canada will have access to the third parties' documents and will be entitled to examine them for discovery. Consequently, they are not necessary parties. In the circumstances, Canada's defence will not be prejudiced.

D. *Public Policy*

[55] Canada argues that the Religious Orders should not be "left off the hook". This would put the administration of justice in disrepute. I do not agree. The plaintiffs have the right to spend their litigation dollars as they choose. They acknowledge the risk that they may not be made whole as they seek recourse against Canada severally, not jointly with others. However, any fair minded person looking at the pleadings will appreciate the complications should third parties, who cannot be condemned in damages, remain in the suit. Furthermore, those plaintiffs who may have suffered sexual abuse at the hands of those for whom the third parties may be vicariously liable, were

entitled to file claims under the *Independent Assessment Process* provided for in the 2006 *Indian Residential Schools Settlement Agreement.*

[56] Finally, many of the plaintiffs are elderly. We should get on with it.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. The motions of the third parties are maintained, with one set of costs in favour of the Sisters of Instruction of the Child Jesus, and another set in favour of the other third parties.

2. The Third Party Claim is struck in its entirety, without leave to amend. The style of cause shall in future reflect that fact.

3. On consent, the statement of claim is amended to substitute RITA POULSON for her correct name, RITA POULSEN.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1542-12
STYLE OF CAUSE:	CHIEF SHANE GOTTFRIEDSON ET AL v HMQ
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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DATED:	DECEMBER 4, 2013

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