CITATION: ALS Society of Essex County v. City of Windsor, DC-13-52-ML
Belle River District Minor Hockey Association v. Town of Tecumseh, DC-13-53-ML
2013 ONSC 6276
DATE: 20131030

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	Court File No. DC-13-52-ML
Amyotrophic Lateral Sclerosis Society of Essex County Plaintiff	Peter W. Kryworuk and John A. Nicholson, for the Plaintiffs
– and –	
The Corporation of the City of Windsor Defendant	Scott C. Hutchison and Brendan Van Niejenhuis, for the Defendant
BETWEEN:	Court File No. DC-13-53-ML
Belle River District Minor Hockey Association Inc. and Essex County Dancers Incorporated Plaintiffs	Peter W. Kryworuk and John A. Nicholson, for the Plaintiffs
– and –	
The Corporation of the Town of Tecumseh Defendant	Scott C. Hutchison and Brendan Van Niejenhuis, for the Defendant
	HEARD: July 15, 2013

Proceedings under the *Class Proceedings Act, 1992*

ENDORSEMENT ON MOTION FOR LEAVE TO APPEAL

NOLAN J.:

INTRODUCTION

[1] The defendants seek leave to appeal to the Divisional Court from two orders of the motions judge, Patterson J., dated December 31, 2012. By way of background, the plaintiffs in the two proceedings are charitable or religious organizations who are seeking restitution of lottery licensing and administration fees paid by them to the Corporation of the City of Windsor and the Corporation of the Town of Tecumseh, the defendants, after January 1, 1990, alleging that the fees were illegal and unconstitutional taxes.

[2] The plaintiffs had sought an order in 2011 certifying all the claims in the two proceedings as class proceedings. In two orders dated January 20, 2011, Patterson J. certified only those claims he found were not *prima facie* time-barred pursuant to s. 4 and 5(2) of the *Limitations Act, 2002*, finding that those claims revealed no reasonable cause of action pursuant to the requirement of s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*").

[3] The plaintiffs sought leave to appeal Patterson J.'s orders to the Divisional Court, which was granted by Leitch J. on July 15, 2011. The Divisional Court heard the appeal in April 2012. In an oral decision dated April 25, 2012, the Divisional Court granted the appeal, finding that Patterson J. had erred in law when he refused to certify the portion of the claims which were *prima facie* time-barred finding that there was no cause of action as required by s. 5(1)(a) of the *C.P.A.* That court held that the proposed class could not be truncated in this way under that section of the *C.P.A.* The Divisional Court, however, declined to review the record and render a decision on the certification motion that had been before Patterson J. and instead referred the matter back to him for reconsideration. In doing so, the court expressed the view that "it is better for the complex and nuanced decision on the certification motion to be decided in the first instance by one of the judges designated to hear class proceedings" (para. 19).

[4] The oral judgment of the Divisional Court also discussed various aspects of Patterson J.'s decision, recognizing that the case as presented on the appeal was different than the case that had originally been before him. In that regard, the Divisional Court said that Patterson J. may have confused the considerations of s. 5(1)(a) of the *C.P.A.* with other considerations under s. 5(1), based on the way he had been asked by the parties to decide that issue. In particular, the Divisional Court found that Patterson J. made his determination based on the Supreme Court decision of *Kingstreet Investment Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, a decision that Patterson J. may have found to be dispositive of the issues on which the parties had asked him to adjudicate during the first motion. In that case, however, there was no issue of discoverability or concealment which are issues specifically raised by the plaintiffs in these cases in their pleadings.

[5] The Divisional Court went on to comment that it was unclear from the reasons of Patterson J. whether he had considered any evidence on the s. 5(1)(a) inquiry, pointing out that if he did so, that would constitute an error of law (*578115 Ontario Inc. (o/a McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 4571, at para. 33

("*McKee's*")). The Divisional Court also said that while it was an error in law to refuse to certify the older claims because of s. 5(1)(a) of the *C.P.A.*, on a reconsideration of those issues, those same claims might still not be certified if some other provision of s. 5(1) of the *C.P.A.* applied. At para. 18 of the decision, the Divisional Court said:

> When considering clauses 5(1)(b), (d) and (e) of the CPA it is open to the motion judge to make a certification order that truncates the class or class issues, in the exact same manner he did, or on some other basis such as the date of publication of information by the defendant, or in the case of Town of Tecumseh the date the amalgamated municipality came into being. Without a temporal limit on the class, he might dismiss the motion for certification altogether. On the other hand, the motions judge might conclude that the class proceeding is still the "preferred procedure" on the terms proposed by the plaintiff.

[6] At para. 20, the Divisional Court said "On reconsideration of the common issues, Patterson J. will have an opportunity to analyze the certification issues through the prism set out in paragraph 43 of *McKee's Carpet Zone v. Sears*, 2010 ONSC 4571."

[7] Patterson J. reheard the motions for certification on November 1 and 2, 2012 and released his decision on December 31, 2012. Having reconsidered his decision in light of the decision of the Divisional Court and the directions given to him therein, Patterson J certified all the claims going back to January 1, 1990, including the *prima facie* time-barred claims. The defendants now seek leave to appeal this decision of Patterson J. to the Divisional Court.

NATURE OF THE APPEAL

[8] In their notice of motion, the defendants asserted that these cases meet both preconditions for leave to appeal to be granted. They argued that his decision is in conflict with many decisions of other judges and courts in Ontario and elsewhere on the matters involved in the proposed appeal and that after assessing their arguments, I should find that it is desirable that leave should be granted. In regard to conflicting decisions, the defendants referred me to the decisions of *Graham v. Impark*, 2010 ONSC 4982, leave to appeal denied 2011 ONSC 991 (Div. Ct.), *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235 and *Magill v. Expedia Canada Corporation and Expedia.ca*, 2010 ONSC 5427.

[9] With respect to the correctness of the decision, the defendants argued that Patterson J.'s certification of the class defined by an arbitrary start date offends s. 5(1)(b) of *C.P.A.* Setting such an arbitrary date bears no rational connection to the common issues and excludes some persons with similar claims.

[10] As well, the defendants argued that Patterson J erred by finding that a class proceeding that certified all claims after January 1, 1990, was the "preferable procedure for the resolution of the common issues" as set out in s. 5(1)(d). They alleged that Patterson J.

failed to consider the manageability of a class action which would combine claims which had a *prima facie* limitation problem with claims that had no such hurdle. They alleged that he erred when he found that to do otherwise would require a "merits-based analysis" or would have denied those claimants their "day in court".

[11] The defendants also argued that Patterson J erred in his consideration of s. 5(1)(e) by finding that the proposed representative plaintiff "would fairly and adequately represent the interests of the class" and that that representative did not have a conflict of interest with the interest of other class members. The defendants asserted that a representative plaintiff had admitted facts in cross-examination that will make it impossible for the plaintiff to rebut the presumption of discovery in s. 5(2) of the *Limitations Act, 2002* which, according to the defendants, means that the plaintiff has no incentive to try to rebut that presumption for other class members. Rather, the plaintiff's true interest is only in claims that are not *prima facie* time-barred and that this interest diverges from the interest of other members. The defendants also argued that leave should be granted because the issues involved in the certification of parties in a class proceeding is a matter of importance to others besides the parties in this particular proceeding and important to the development of the law in class proceedings.

[12] In addition, the defendants argued that Patterson J. failed to consider s. 5(2) of the *C.P.A.* which requires the court to appoint a representative plaintiff for a "sub class whose members have claims...that raise common issues not shared by all the class members" where "the protection of the interests of the sub class members requires that they be separately represented."

[13] The defendants also argued that the proposed appeal involves matters of such importance that leave to appeal should be granted. In that regard, the issues concern the development of the law and the administration of justice because the decision of Patterson J. may result in an arbitrary and erroneous class definition going forward which will prejudice the proper course of litigation. It may also permit a class proceeding to continue where it is not the preferable method of resolving the common issues and would thus squander public and private resources and undermine the reputation of the administration of justice.

[14] The defendants argued that Patterson J. failed to follow specific direction of the Divisional Court as to how he was to consider the factors in the *C.P.A.* in the circumstances of the case. In particular, they argued that Patterson J. failed to consider the options available to the claimants of the older claims, such as individual actions, and instead determined that all the claims must be certified to permit the claimants to have their "day in court".

[15] The plaintiffs opposed the granting of leave on the basis that the conflicting decisions relied on by the defendants could be distinguished on their facts. They also argue that Patterson J. made his decision to certify all the plaintiffs based on principles set out in numerous cases by the Ontario Court of Appeal that class actions can extend over periods of time prior to basic limitation periods. The Court of Appeal has held that a class action is preferable because deciding the liability issue in one proceeding is preferable rather

than having the same issue litigated in numerous proceedings, thus meeting the objectives of the *C.P.A.*: judicial economy, access to justice and behaviour modification for wrong doers. The plaintiffs also argued that the Court of Appeal has also found that cases which raise limitation issues can be certified and referred me to a number of them including: *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.*, [2010] O.J. No. 3921 (S.C.J.); *Brown v. Canada (Attorney General)*, [2010] O.J. No. 2253 (S.C.J.); *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.); *Fairview Donut Inc. v. The TDL Group Corp.*, [2012] O.J. No. 834 (S.C.J.); *Kherani v. Bank of Montreal*, [2012] O.J. No. 1623 (S.C.J.); *MacDonald v. BMO Trust Co.*, [2012] O.J. No. 407 (S.C.J.); *Ontario v. Mayotte*, 2010 ONSC 3765; *Pearson v. Inco* (2005), 205 O.A.C. 30; *Plaunt v. Renfrew Power Generation Inc.*, [2011] O.J. No. 2995 (S.C.J.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184; *Seed v. Ontario*, [2012] O.J. No. 2006 (S.C.J.); *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, [2011] O.J. No. 3746 (S.C.J.).

ANALYSIS

[16] The test for leave to appeal an interlocutory order set out in rule 62.02(4) of the *Rules of Civil Procedure*, R.R.O. 190, Reg. 194 provides that:

> 62.02(4) Leave to appeal shall not be granted unless,
>
> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[17] To be successful on the first part of the test set out in rule 62.02(4)(a) it is not sufficient to show that two different courts have exercised their discretion to produce two different results. In *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 70 O.R. (3d) 542, the court was clear that it was necessary to demonstrate a difference in the principles chosen as a guide in the exercise of discretion. It is not enough to say the judge was wrong or it appears the judge is wrong and, therefore, there is a conflict. It is necessary that the moving parties can demonstrate that there is a conflict in the principles that the judge applied to the particular facts before him or her.

[18] With respect to the certification of a class, s. 5(1)(a) of the *C.P.A.* requires the court to certify an action as a class proceeding if:

> (a) the pleadings 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 the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[19] The Divisional Court also specifically directed Patterson J. to consider his analysis through the prism of para. 33 of *McKee's*:

> There is no dispute with respect to the following principles set out in the factum of plaintiff's counsel:
>
> (a) No evidence is admissible for the purposes of determining the s.5(1)(a) criterion: *Hollick v. Toronto (City)*, above, at para. 25.
>
> (b) All allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true.
>
> (c) The pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 at para. 41 (C.A.).
>
> (d) The novelty of the cause of action will not militate against the plaintiff.

(e) Matters of law not fully settled in the jurisprudence must be permitted to proceed.

(f) The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at paras. 33-37; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758, [2005] O.J. No. 1118 at para. 17 (S.C.J.).

(g) Matters of policy cannot be decided under s. 5(1)(a) because the court can only decide policy matters with the benefit of a trial record: *Anger v. Berkshire Investment Group Inc.* (2001), 141 O.A.C. 301, [2001] O.J. No. 379 at paras. 14 and 15 (C.A.).

CONCLUSION

[20] I find that leave to appeal should be granted pursuant to rule 62.02(4)(b). When the matter was returned to Patterson J. to reconsider the certification of the plaintiffs in accordance with s. 5(1)(b), (d) and (e), he was required to conduct an analysis set out in the various cases to which I have already referred.

[21] In order to determine whether a class proceeding is the "preferable procedure", (s. 5(1)(d)), in all the circumstances of the case, Patterson J. was required to consider whether "given all the circumstances of the particular claim it would be preferable to other methods of resolving these claims and in particular, that it would be preferable to the use of individual proceedings." (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 30.).

[22] Such an analysis required that Patterson J. compare the advantages and disadvantages of proceeding with all the plaintiffs by way of a class proceeding and consider the advantages and disadvantages with respect to the three goals of class proceedings. Rather, Patterson J. at paras. 22 and 23 of his decision determined that the defendants could proceed with a motion for summary judgment once pleadings, discovery and exchange of documents had been completed. He went on to say that the *prima facie* statute barred claimants "have a right to their day in court either at a common trial or at an individual trial". He appeared to focus his reasoning on the principle of permitting them "to have an opportunity to be heard". It was not clear whether he analyzed the issue of preferability in relation to the manageability of combining the two classes of claims together. Rather, he determined that after "the defence is filed, discovery is completed and affidavit of documents are provided, there will be a clearer picture to evaluate those issues on a merits based analysis, either by summary judgment motion or at the hearing."

[23] In *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), at paras. 73, 74 and 76 Goudge J.A. identified a number of principles that apply in determining whether the plaintiff has met the preferable procedure requirements. They are:

> As explained by the Supreme Court of Canada in Hollick, supra, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behavior modification, and must consider the degree to which each would be achieved by certification.
>
> Hollick also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.
>
> ...
>
> In Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues. The preferability finding in Hollick itself was just this and the requirement was therefore found not to be met. That decision tells us that the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.

[24] The wording of Patterson J.'s decision makes it difficult to determine whether he considered the preferability of the class proceeding within the context of the provisions set out by Goudge J.A. in *Cloud*. There was no analysis of the other avenues available to the plaintiffs and thus, it is unclear whether he took those alternatives into consideration.

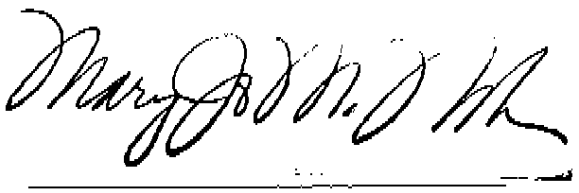
[25] Patterson J. did not provide an analysis of whether the *prima facie* time-barred claims actually formed a sub-class which are specifically contemplated in s. 5(2) of the *C.P.A.* If a sub-class is appropriate, it is necessary that they be separately represented where it is necessary to protect their interests. That provision is set out in s. 5(2)(a), (b) and (c). It was not clear from Patterson J.'s reasoning whether he considered the appropriateness of creating a sub-class.

[26] Having found that there are reasons to doubt the correctness of Patterson J.'s order, I must consider whether the issues sought to be appealed are of general importance. In that regard, I am guided by the words of the late Associate Chief Justice Callaghan of the

High Court of Justice sitting as a judge of the Divisional Court in *Greslik v. Ontario Legal Aid Plan* (1980), 65 O.R. (2d) 110. In commenting on the need for the conditions for granting leave to be satisfied, particularly matters of "such importance" before granting leave, he clarified that the matters have to be of public importance and matters relevant to the development of the law. In my view, the development of the law with respect to class actions has broader implications beyond this particular case and fit within the definition.

[27] Having found that the defendants have met the test set out for leave to appeal in accordance with rule 62.02(4)(b), it is unnecessary for me to consider rule 62.02(4)(a).

[28] In accordance with the agreement of the parties, the costs shall be adjourned to the Divisional Court at the hearing of the appeal.



Mary Jo M. Nolan
Justice

Released: October 30, 2013