Date: 19981124
Docket: C976108
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice K. Smith
Pronounced in Chambers
November 24, 1998

BETWEEN:

EDWARD KILLOUGH, PATRICIA NICHOLSON, IRENE FEAD and DAPHNE MARTIN

PLAINTIFFS

AND:

THE CANADIAN RED CROSS SOCIETY, HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA, and THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

Counsel for the Plaintiffs:	D. Klein, B. Nayer
Counsel for the Defendant, The Attorney General of Canada:	J. Haig, L. Wanamaker
Counsel for the Defendant, The Canadian Red Cross Society:	W. Branch, J. MacMaster
Counsel for the Defendant, HMTQ in Right of British Columbia:	D. Prowse, K. Johnston

[1] **THE COURT:** The issue that I raised, which caused me concern, arises out of the position of the plaintiffs that, because

the Ontario Court has issued a stay of proceedings against the Red Cross under the ***Companies' Creditors Arrangement Act***, I should proceed to certify this action as a class proceeding against the Federal Crown and the Provincial Crown, the question being whether this court has power to certify a class proceeding against one or more defendants and not against others.

[2] It is the position of the plaintiffs, of course, that so long as the stay of proceedings is extant against the Red Cross, proceedings cannot be taken; that when the Red Cross presents its plan of arrangement and compromise to the Ontario Court, it may result in a settlement of claims against the Red Cross or it may not; and, depending on how events transpire, it may be necessary for the plaintiffs at some later point in time to come back before me to seek to have the action certified as a class proceeding against the Red Cross.

[3] The concern I raised arises from a literal reading of s. 2 of the ***Class Proceedings Act***, which refers to "an order certifying the proceeding as a class proceeding", the "proceeding" being referred to as an entity, as opposed to the various claims that comprise it. Section 9, which allows the court, on refusing to certify a class proceeding, to "permit the proceeding to continue as one or more proceedings between different parties", seems to support the view that the court has jurisdiction to certify the proceeding as a

whole or to not certify it, but not to certify it piecemeal, as Mr. Haig put it, against discrete defendants.

[4] Section 11 of the ***Act***, as well, seems to support that interpretation. I note further that s. 40 provides that the Rules of Court apply to the extent that they are not in conflict with the ***Act***, and subrule (8) of Rule 1 provides that "'proceeding' means an action, suit, cause, matter, appeal or originating application".

[5] Mr. Klein points out that that interpretation, if it were applied, would raise practical difficulties with ramifications not only for this case but for many other class proceedings. He referred to several cases for the proposition that "proceeding" can mean a step in the action depending on its context, and also to s. 8 of the ***Interpretation Act*** which says that every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[6] More importantly, in my view, he refers to other decisions where this court has made orders certifying class proceedings against one or more of several defendants. The point was raised, without being decided, by Mr. Justice O'Brien in the Ontario Court General Division, Divisional Court in ***Abdool v. Anaheim Management Limited*** 21 O.R. (3d) 453, in a passage found at pages 465 and 466,

it apparently being his view that under similar Ontario legislation it is not possible to certify against discrete defendants but that the action as a whole must either be certified or not certified.

[7] However, as I said, in ***Sawotski*** versus a number of defendants, and I will not attempt to pronounce the names, a decision of this court, in action number C954740, Vancouver Registry, pronounced on September 9, 1996, an order was made certifying a class proceeding against one defendant of several.

[8] In ***Harrington v. Dow Corning Corporation*** and several other defendants, a decision of this court, 22 B.C.L.R. (3d) 97, the court certified against some defendants and refused to certify against others. The passages in which the issue was dealt with commence at paragraph 53 of the reasons for judgment at page 114.

[9] In accordance with the principle in the ***Hansard Spruce Mills*** decision of Wilson, J., as he then was, I consider that I should and must follow prior decisions of this court on the point, and accordingly I will conclude, on the basis of the ***Harrington*** decision, that I have the power to certify against the Federal and Provincial Crown, leaving the question of certification against the Red Cross to be dealt with later, if at all.

[10] That brings me to the application by the Provincial and

Federal Crown to adjourn the certification hearing against them. Their position amounts essentially to the suggestion that it would be prudent to wait and to not certify this action until after the Canadian Red Cross presents its plan of arrangement and compromise to the Ontario Court, which, as presently scheduled, could be in mid-January of next year. Their position is that it may provide some way of resolving the liability of the Red Cross, that it may deal with third party claims against the Red Cross, and that it may result in settlement of claims against the Red Cross. They say that if the plan is rejected and the stay of proceedings against the Red Cross expires, then the plaintiffs can come back to this court to apply for certification at that time.

[11] They do not identify any particular prejudice to themselves from going ahead with certification now other than the spectre of procedural complexity that might be raised down the line if it is necessary at some point for the Red Cross to be brought in. They argue that the Red Cross is a necessary party and that a class action should not go ahead against them without the Red Cross being involved as a party. I reject that submission. The pleading is that the Red Cross was their agent and that they are vicariously liable, and it is clear that in such circumstances a plaintiff has a choice of whether to sue the principal or the agent or both. So the Red Cross is, in my view, not a necessary party.

[12] On the plaintiffs' side, Mr. Klein points out that there is no certainty that the Red Cross will present its plan by mid-January, and, indeed, on the basis of past extensions, he suggests that there is a good likelihood that they will not and that there will be further delay. He points out as well that there are other delays inherent in the proceedings in the Ontario Court in getting notice to all creditors, in getting all creditors involved in negotiating with the Red Cross, and in having a vote conducted, all of which are likely to be lengthy.

[13] He says that if the plan presented by the Red Cross provides compensation for his clients, it is likely that his clients will accept it but, as he points out, that does not resolve his clients' claims against the Federal and Provincial Crowns. He says that the Red Cross has not objected and has not asserted any prejudice if this matter is allowed to proceed against the governments at this stage, and he points out that the disease with which his clients are infected is a progressive and debilitating disease and that delay works to the prejudice of all persons so infected.

[14] On an adjournment application, I am of course obliged to balance the respective prejudice caused by granting or by not granting the adjournment. Here the prejudice to the plaintiffs of delay, in my view, outweighs any prejudice that could arise, which is only potential, to the Crown Federal and Provincial, if

certification should be granted. For those reasons, the application to adjourn the certification hearing is dismissed.

(SUBMISSIONS BY COUNSEL)

[15] **THE COURT:** In my view, s. 37 has no application here. Subsection (1) deals with costs of the certification application. We have not dealt with that yet. Subsection (2) deals with costs in a class proceeding and it is clear from s. 2 of the ***Act*** that there is no class proceeding until a certification order is made under s-s. (2). In my view, we are dealing with an ordinary action at this stage and the ordinary rules should apply. The plaintiffs should have their costs of the adjournment application in the cause and I so order.

(SUBMISSIONS BY COUNSEL)

[16] **THE COURT:** I will make the order on this basis. The Provincial and Federal Crowns' opposition was limited to the submission that I cannot certify against the government defendants and leave the Red Cross out because the Red Cross is a necessary party to the proceedings.

[17] I ruled earlier today on the adjournment application that the Red Cross is not a necessary party and that I may, following

Harrington, certify against the government defendants and defer certification against Canadian Red Cross. As I understand it, the application for certification of the common issues as they are set out in the notice of motion is unopposed. Accordingly, the order will go for certification against these two defendants in the terms set out in the notice of motion.

[18] There will be an order that Ms. Nicholas be added as a representative plaintiff. The applications for certification and for naming of a representative plaintiff for the subclass of non-British Columbia residents will be adjourned. The application, when it is brought on, will not have to comply with Rule 65. The contents of the notice to class members and the timing of the notice to class members will be as set out in the notice of motion but with liberty to the parties to apply as negotiation on the details of those items is likely. If there is an inability to agree on that, then counsel may come back and speak to the matter. The application to certify against the Red Cross is adjourned.

"K.J. Smith J."

The Honourable Mr. Justice K. Smith