

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Merlo v. Canada (Attorney General)*,
2013 BCSC 1136

Date: 20130625
Docket: S122255
Registry: Vancouver

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Between:

Janet Merlo

Plaintiff

And

**The Attorney General of Canada and
the Minister of Justice of British Columbia**

Defendants

Before: The Honourable Madam Justice Gropper

Corrected Judgment: The text of the judgment was corrected at
paragraph 14 on July 4, 2013

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Vancouver, B.C.
June 4, 2013

Place and Date of Judgment:

Vancouver, B.C.
June 25, 2013

Introduction

[1] This is an application for directions in respect of the certification schedule in this matter, specifically, whether the defendants' motion to strike certain paragraphs of the plaintiff's notice of civil claim ought to be heard in advance of the plaintiff's application for certification, or at the same time. The defendants' application is scheduled for July 15 and 16, 2013.

[2] The plaintiff's proposed class action concerns allegations that female members, civilian members and public service employees of the Royal Canadian Mounted Police (RCMP) were subject to gender-based discrimination and harassment. The plaintiff alleges that the RCMP failed to exercise the duty to women in the RCMP to ensure that they could work in an environment free of gender based discrimination and harassment.

Legislation

[3] Sections 2, 4, and 12 of the *Class Proceedings Act (CPA)*, state:

Plaintiff's class proceeding

2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

(2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.

(3) An application under subsection (2) must be made

(a) within 90 days after the later of

(i) the date on which the last response to civil claim was served, and

(ii) the date on which the period prescribed by the Supreme Court Civil Rules for service of the last response to a notice of civil claim expires without that pleading having been served, or

(b) at any other time, with leave of the court.

(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

Class certification

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Court may determine conduct of proceeding

12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[4] Rule 9-5(1)(a) states:

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

...

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Analysis

[5] The issue before me is a matter of timing. I am not assessing the strength of the plaintiff's claims nor the defendants' arguments concerning whether they should be struck. There is no dispute that a case management judge has the jurisdiction to address such an issue (see s. 12 *CPA*, above). The issue is not novel: there are many authorities on that point.

[6] In *Watson v. Bank of America Corporation*, 2012 BCSC 146, Chief Justice Bauman addressed a similar issue which he referred to as a "sequencing motion". He canvassed the authorities extensively including the decision of Mr. Justice Strathy, then of the Ontario Superior Court, in *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146. Strathy J. set out a list of relevant, but not exhaustive factors, to guide the court in applications such as this, at para. 15:

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.

[7] The defendants' motion is to strike the plaintiff's pleadings on four issues about which it asserts that the plaintiff does not have a reasonable prospect of success. They are:

1. no direct claim in negligence is possible in law against the Federal Crown, the RCMP or the Provincial Minister;
2. there is no possible claim for breach of contract as no contract of employment exists between the RCMP members and the Federal Crown;
3. no *Canadian Charter of Rights and Freedoms* claim is possible because the activity alleged is not government activity; and
4. the plaintiff is out of time to bring her action because the impugned acts occurred while she was a member of the RCMP. She ceased to be a member of the RCMP more than two years before the filing of her notice of civil claim.

[8] In respect of the first factor, I consider that all of these issues are all related to whether the pleadings disclose a cause of action: s. 4(1)(a) of the *CPA*.

[9] The next factor is whether there is a likelihood of delays and costs associated with the motion. I consider that delays in costs are very likely if the application to strike is heard in isolation from the certification hearing. It is anticipated that whatever the outcome on the motion to strike, if it proceeds in July 2013, will lead to an appeal which may delay the certification hearing. It is axiomatic that there are greater costs associated with two hearings than in one.

[10] The next factor is whether the outcome of the motion will promote settlement. I am of the view that this factor is not significant at this stage. It is more likely that the application to certify will promote settlement, as opposed to the defendants' application to dismiss.

[11] The fourth factor is whether the motion could give rise to interlocutory appeals and delays that would affect certification. As noted by the Chief Justice in *Watson*,

litigation by installments often results in delays and inefficiencies and additional costs in light of a real possibility of an appeal by an unsuccessful party: at para. 23.

[12] The interests of economy and judicial efficiency are the fifth factor. This, in my view, supports that there be one hearing concerning whether the plaintiff's claim discloses a cause of action, not two.

[13] The final factor is whether the scheduling of the motion in advance of certification would promote a fair and efficient determination of the proceeding. This factor too supports the plaintiff's position. I do not see any advantage in hearing the defendants' motion before the certification hearing. The motion must be considered in the context of a class proceeding, and the most efficient means of hearing it is in the certification application.

[14] The plaintiff has provided a proposed certification schedule. After hearing from the parties, I set the schedule as follows:

1. the plaintiff delivers a notice of application and affidavits in support of the certification application on June 3, 2013 (this has occurred);
2. the defendants deliver the application response and affidavits in response of the plaintiff's certification application by September 30, 2013;
3. the plaintiff delivers the certification reply affidavits, if any, application response to the defendants' strike application and certification and strike application arguments by November 29, 2013;
4. the defendants deliver certification argument by January 22, 2014;
5. the plaintiff delivers the reply certification argument, if any, and the defendants deliver reply strike application argument, if any, by February 19, 2014; and

6. the certification application and strike application is set for five days in April or May 2014, commencing on the first available date that is convenient for the court and counsel.

[15] As a result of this decision, the hearing dates in July, 2013 are vacated.

“Gropper J.”