

SUPREME COURT OF NOVA SCOTIA

Citation: *Champagne v. The Roman Catholic Episcopal Corporation of Halifax*,
2019 NSSC 395

Date: 20191014

Docket: Hfx 479060

Registry: Halifax

Between:

Douglas Champagne and Steven Gallant
on their own behalf and on behalf of their class

Plaintiffs

v.

The Roman Catholic Episcopal Corporation of Halifax
and
The Roman Catholic Episcopal Corporation of Yarmouth
and
The Archbishop of Halifax-Yarmouth

Defendants

DECISION

Judge: The Honourable Justice Christa M. Brothers

Heard: September 26, 2019, in Halifax, Nova Scotia

Written Decision: January 9, 2020

Counsel: John A. McKiggan, Q.C., Kirk Baert, Celeste Poltak and
Garth Myers, for the Plaintiffs
Daniel Wallace, Melanie Comstock and Natasha Puka, for the
Defendants

By the Court:

[1] The plaintiffs in this proposed class proceeding seek damages arising from abuse allegedly perpetrated by priests of the Roman Catholic Archdiocese of Halifax-Yarmouth and its predecessor dioceses. The Statement of Claim alleges the defendants are liable for negligence, breach of fiduciary duty, and vicarious liability. These are historical claims.

[2] In advance of the hearing of the motion for certification, the defendants move for the following orders:

- (a) striking and/or staying the claim as against the Archbishop of Halifax-Yarmouth; and
- (b) striking the following evidence filed by the plaintiffs on the motion for certification:
 - (i) four (4) paragraphs of a ninety-four (94)-page expert report by Father Thomas Doyle and Dr. David A. Wolfe; and
 - (ii) one (1) sentence of a nine (9)-page expert report from Drs. David A. Wolfe and Peter Jaffe.

[3] The parties have a schedule of deadlines as well as a date for the certification motion. The motion is to take place on February 24, 25, and 26, 2020.

[4] In the course of preparing for the pending certification motion the defendants contend that one of the named defendants, the Archbishop of Halifax-Yarmouth, is not an entity capable of being sued. The defendants argue that these two motions should be heard prior to the certification motion. The plaintiffs contend that these motions should be heard at the same time as the motion for certification.

The Parties' Positions

[5] The defendants argue that the motion to determine whether the Archbishop of Halifax-Yarmouth is an entity capable being sued should be heard prior to certification for the following reasons:

1. The defendants' motion will dispose of the claim against the Archbishop of Halifax-Yarmouth in its entirety;

2. There is no likelihood of delay or costs associated with the motion, which would be heard in half a day;
3. There would be no foreseeable delay to the certification motion, and there would likely be savings resulting from having the status of the Archbishop of Halifax-Yarmouth determined in advance;
4. A determination of whether the Archbishop of Halifax-Yarmouth can be a party would promote settlement;
5. Any appeals would be delayed by agreement and not brought until the certification decision was rendered; and,
6. There are practical questions regarding insurance coverage related to defending the Archbishop of Halifax-Yarmouth at a certification hearing.

[6] The plaintiffs argue that the *Class Proceedings Act*, S.N.S. 2007, c. 28, clearly indicates the Legislature's intention that certification be the first motion heard in a class action. They say the defendants' motions will not dispose of the entire proceeding or substantially narrow the issues. The plaintiffs indicate that even if the defendants are entirely successful, the certification hearing will still be required.

[7] The plaintiffs further argue that the arguments to be advanced and the tests to be employed in the proposed pre-certification motions duplicate and overlap with the arguments on the certification motion, including the test under s.7(1)(a) of the *Class Proceedings Act*.

[8] Furthermore, the plaintiffs say the defendants' motion to strike expert evidence overlaps with the determination the court must make at certification as to whether the plaintiff's expert evidence is admissible. The plaintiffs argue that costs will increase and delays will occur because of this "litigation through installment".

[9] The plaintiffs argue that the outcome of either of these two motions will not promote settlement, as at least two episcopal corporations are properly named in the proposed action and will continue as defendants regardless of the outcome of the defendants' motions.

[10] Lastly, the plaintiffs argue that there is no prejudice to the defendants in having the motion to strike and certification motions heard at the same time.

Law and Analysis

General Principle: The certification motion should be the first motion heard

[11] The parties agree on the law with respect to sequencing a pre-certification motion. The decision as to whether the proposed motions should be heard pre-certification is a discretionary decision, dependent on the specific facts of any particular case.

[12] I refer to Ward Branch, *Class Actions in Canada*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 2019), at section 5.200, where the author sets forth a non-exhaustive list of factors that may be relevant when the court is exercising its discretion:

(5) Sequencing of Certification Application with Other Motions

5.200 Whether and which types of preliminary motions should be heard prior to certification has been the subject of a great volume of case law. The general rule is that the motion for certification should be heard first. In *Cannon v. Funds for Canada Foundation*, the court set out a non-exhaustive list of factors that should be considered when the court is deciding whether to use its discretion to allow another motion to proceed in advance of certification, a list that many other courts have adopted.

- 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) in general, whether scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding.

Several other courts across Canada have adopted this same list of factors.

[Footnotes omitted]

[13] As noted earlier, the defendants in this proposed class proceeding are seeking a preliminary pre-certification hearing of motions to:

1. Strike and/or stay the claim under Civil Procedure Rules 13.03(1)(c) and 35.11(5) before the certification hearing as against just one (1) of three (3) defendants; and,
2. Strike very small portions of the two (2) expert reports filed by the plaintiff.

[14] The principle that the certification motion should be heard first was discussed by Winkler, J., in *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (Sup. Ct. J.):

9. Although the CPA does not expressly require the certification motion to be the first order of business, the 90 day time-frame imposed by section 2(3) provides a clear indication that the certification motion should be heard promptly and normally be given priority over other motions. In another case involving the scheduling of motions in a class proceeding, *Attis v. Canada (Minister of Health)*, [2005] O.J. No. 1337 (S.C.), this court held that “as a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined.”

10. Similarly, in *Moyes*, Nordheimer J. stated as para. 8:

The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that that reality detracts from the intent to be drawn from this section.

Nordheimer, J. ultimately determined that the defendant’s motion for summary judgment could not be heard until after the determination of the certification motion. ...

[15] In Nova Scotia, the time frame in which a certification motion is to be heard is 120 days. This is approximately four months, obviously a very short time frame in the context of litigation. While this matter will not have a certification motion heard within 120 days, the parties are moving expeditiously towards the certification motion scheduled for February 2020.

[16] The case law indicates that pre-certification motions are allowed, *albeit* in limited circumstances. Such circumstances have included where the courts have not had jurisdiction to hear the matter or where a summary judgment motion has the potential to effectively bring the proceeding to an end.

[17] The parties agree that the appropriate test to determine whether a pre-certification motion should be scheduled was set forth by Justice Strathy in

Cannon v. Funds for Canada Foundation, 2010 ONSC 146 as noted earlier in the context of the Branch text.

[18] I will now review the *Cannon* factors.

Will the motion dispose of the entire proceeding or substantially narrow the issues

[19] With regards to the motion to strike expert evidence, the contemplated motion is not to strike the evidence in its entirety, but only small portions of a large report. This will not substantially narrow the issues to be determined. The substantial issues on the motion for certification will remain. Furthermore, the defendant's motion to strike expert evidence is duplicative of aspects of the motion for certification, where the court must determine whether the plaintiff's expert evidence is admissible.

[20] The motion to strike or stay the claim against the Archbishop of Halifax-Yarmouth will not dispose of the entire proceeding. It will remove a defendant. There will be two remaining defendants involved in the certification motion. There is no evidence to satisfy me that the issues would narrow as a result of this motion.

[21] The defendants' motion to strike (i.e. for summary judgment on the pleadings) is duplicative of part of the test for certification. Section 7(1)(a) of the *Class Proceedings Act* states:

Certification by the court

7(1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,

(a) the pleadings disclose or the notice of application discloses a cause of action;

[22] This rule is similar to Rule 13.03(1)(c), under which the defendants seek to bring their preliminary motion. This rule states as follows:

Summary judgment on pleadings

13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

[...]

(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[23] The test under section 7(1)(a) of the *Class Proceedings Act* is the same as the test on the motion to strike (i.e. summary judgement on the pleadings) under Rule 13.03. A certification judge, like a judge on a motion to strike, determines whether it is plain and obvious that the pleading discloses no reasonable cause of action. I conclude that the proposed pre-certification motions duplicate or overlap with the certification motion. I refer to the comments of Chief Justice Baumaun in *Watson v. Bank of America Corporation*, 2012 BCSC 146, at paras. 30 and 33, as follows:

Further, much, if not all, of the argument on the strike motion would simply duplicate the “cause of action” argument under s. 4(1)(a) of the *CPA* at the certification hearing. I agree with the plaintiff that in the circumstances of this case, there is a strong argument, based on encouraging judicial efficiency and cost containment (factor (e)), to resist effectively bifurcating the certification process by hiving off judicial treatment of one of the certification considerations to a pre-certification application.

...

But here it is not a question of postponing the defendants’ strike motion until sometime after the certification decision, and thereby potentially significantly undermining any decision favouring certification. Here, the issues on the strike motion are integral to the s. 4(1)(a) cause of action consideration under the *CPA*. These issues will be fully aired at the certification hearing itself.

Delays and costs associated with the motion

[24] The defendant argues that savings would result by determining in advance whether the Archbishop of Halifax-Yarmouth is an entity capable of being sued. The defendants cannot say for certain that savings will result, and they did not explain how these savings would be effected.

[25] The defendants suggest that the plaintiffs cannot complain of delay when the plaintiffs amended their Statement of Claim 10.5 months after the original pleading, and after the defendants had agreed to the certification schedule.

[26] On the contrary, I find that there has been no delay in this matter. The plaintiffs commenced an action and have had ongoing discussions with the defendants, agreeing to amend their pleadings as a result of those discussions, and

agreeing to a certification schedule and a date for the certification motion in February 2020.

[27] I agree with the plaintiffs that permitting the defendants to bring the motions in advance of certification has the potential to lead to some delay and increase costs through duplication. It does not appear that there will be the potential of litigation through installment. At the motion, counsel for the defendants indicated that they would not appeal any decisions until after certification. However, counsel would be required to prepare twice for a motion that they should only need to prepare for once. This is not efficient.

[28] While the defendants have promised not to bring a motion to appeal any adverse decision with regards to its motions, the plaintiffs have not made such a commitment. If an appeal is commenced, it is likely that litigation by installment would result and delay and inefficiencies would ensue.

Will the outcome of the motion promote settlement

[29] The defendants assert that these motions would promote settlement. I am not satisfied that this is the case. There is no effective connection drawn between these motions and the promotion of settlement. Two of the named defendants are admitted as being properly named in the proceeding. The claims against those named defendants will continue regardless of the outcome of the defendants' motions. It is unclear how this will promote settlement.

[30] The defendants point out that the plaintiffs' pleadings contend that the Archbishop of Halifax-Yarmouth assumed the liabilities of the Archbishop of Halifax and the Bishop of Yarmouth, and say this is a contentious issue that may be resolved by the defendants' motion. The defendants do not explain how that issue potentially being resolved will lead to a settlement.

Interests of economy and judicial efficiency

[31] While the defendants' motion to strike one of the named defendants as a non-suable entity deals with a fundamental issue, the defendants' reliance on a non-class proceeding authority is not of assistance in weighing the factors. The defendants refer to the Alberta Court of Appeal decision in *Re Indian Residential Schools*, 2001 ABCA 216, where the court said the following:

45 The salient question of whether the Church is a suable entity is discrete from the irrelevant question of whether Doe has a cause of action against the Church.

Rather than exclusively considering whether there was evidence that the Church was capable of being sued, the case management judge also considered whether there was evidence of the Church's involvement in running the schools and of its relationship to other bodies alleged to have operated the schools. Certainly, this latter type of evidence is typical of that which would be appropriately adduced at trial to establish the Church's liability, given it is a proper party to the action. However, the only question before the case management judge was whether the Church is capable of being a party at all; evidence going to liability is simply irrelevant to that question.

[32] However, the distinguishing fact in that case is it was not a claim brought as a class proceeding.

What prejudice is there in having the motions heard at the same time as certification

[33] In *Cannon, supra*, the court noted there was no prejudice to the defendants in having the motion to strike and the certification motion heard at the same time since the defendants were represented by the same counsel. The same situation exists in the case at bar.

Will the proposed pre-certification motions promote a fair and efficient determination of the proceeding

[34] The defendants suggest that there are practical questions concerning the availability of insurance coverage for the defence of the Archbishop of Halifax-Yarmouth. In other words, it is convenient to the defendants to have this issue determined so that they can decide amongst themselves who may have the duty to defend. I do not see how this is a relevant consideration or why the plaintiffs should be burdened by this pre-certification motion to satisfy a potential coverage dispute between the defendants.

[35] The only class proceeding case that the defendants rely upon to support their contention that these motions should take place pre-certification is *Strohmaier v. British Columbia (Attorney General)*, 2014 BCSC 2078. In that case, the defendants sought to proceed with an application to strike in advance of certification. While the plaintiffs filed a Notice of Claim on October 23, 2012, no Application for Certification had yet been filed as of 2014. In determining that a pre-certification motion to strike should be permitted, the court's reasoning included the following:

1. The plaintiff was not ready to proceed with the certification application.
2. The plaintiff had not complied with the requirements of the *Class Proceedings Act* and no certification materials had been delivered almost two years after the commencement of the action. The court found this was a delay which was both significant and not adequately explained. The court found that the application had significantly narrowed the issue and simplified the process.
3. The defendants committed to accept any determination at the pre-certification motion and to combine the appeals.
4. Lastly, the court was satisfied that it served the interests of judicial economy and efficiency.

[36] Despite the many reasons articulated, throughout the course of the decision, Justice Skolrood focused on the plaintiffs' failure to move the matter forward with any dispatch. This was the undercurrent of that whole decision. Any such similar claim in the case before me is unfounded. There has been no delay and no failure by the plaintiffs to move with dispatch.

[37] The court in *Moyes v. Fortune Financial Corp.*, [2001] O.J. No. 4455 (Sup. Ct. J.), stated that a certification motion should be the first motion before the court. However, as Justice Strathy stated in *Cannon, supra*:

12. It seems to me that in using the words "no reasonable cause of action revealed by the statement of claim *at all*", Nordheimer J. was referring to a situation in which the motion under Rule 21 would result in a dismissal of the entire proceeding.

[38] Like the circumstances in *Cannon, supra*, if the defendants are successful on a pre-certification motion to strike it will only affect one defendant and not the remaining defendants. *Cannon, supra*, dealt with a request by some of the defendants, five in total, who were collectively referred to as the directors, for a motion to strike portions of the Statement of Claim that related to them. Justice Strathy did not allow that motion to take place prior to certification because it would not bring an end to the entirety of the motion. Instead, in *Cannon*, the Court ordered that the directors must bring their proposed motion at the same time as the certification motion. I find that this result is appropriate in the case before me.

Conclusion

[39] Based on the *Cannon* factors, I deny the defendants' request to schedule the two identified motions prior to the certification motion. The motions shall be heard at the same time as the certification motion.

Brothers, J.