IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Anderson et al v. The Attorney General of Canada* 2008NLTD166
Date: 2008 10 28
Docket: 2007 01T 4955 CP

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Before: The Honourable Mr. Justice Robert A. Fowler

Place of hearing:	St. John's, Newfoundland and Labrador
Summary:	Preliminary applications at the certification hearing stage of a class action suit should be heard following the certification hearing and not prior to such hearing.
Appearances:	
Mr. Kirt M. Baert and Ms. Celeste Poltak	Appearing on behalf of the Plaintiffs
Mr. Jonathan D.N. Tarlton and Ms. Corinne Bedford	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: Hollick v. Toronto (City) [2001] 3 S.C.R. 158, 2001 S.C.C. 68 (CanLII); **Baxter v. Canada,** [2005] O.J. No. 2165 (S.C.J.); **McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.,** (2001) 10 C.P.C. (5th) 1 (C.A.); **Montreal Trust Co. of Canada v. Hickman,** (2001), 204 Nfld. & P.E.I.R. 58; **Miawpukek Band v. Ind-Rec Highway Services Ltd.** (1999) 172 Nfld. & P.E.I.R. 245 (NLCA); **Potter v. Bank of Canada** (2005) 9 C.P.C. (6th) 36 (On S.C.); **Hughes v. Sunbeam** (2002) 61 O.R. (3) 433 (C.A.) and **Re: Holmes and London Life Insurance Company et al** (2000), 50 O.R. (3d) 388 (S.C.).

STATUTES CONSIDERED: *Class Action Act*, S.N.L. 2001, C-18.1.

RULES CONSIDERED: *Rules of the Supreme Court,* 1986.

REASONS FOR JUDGMENT

FOWLER, J.:

INTRODUCTION

[1] The issue before me at this time is whether or not to hear and determine certain defence motions prior to or following the certification hearing of a class action application.

[2] Section 3 of the *Class Action Act*, S.N.L. 2001, C-18.1 states:

> 3. (1) One member of a class of persons who reside in the province may commence an action in the court on behalf of the members of that class.
>
> (2) The member who commences the action shall apply to a judge of the court within the time period in subsection (3) for an order

certifying the action as a class action and appointing the member as the representative plaintiff.

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

(a) within 90 days after

(i) the day on which the defence was served, and

(ii) the day on which the time set in the Rules of the Supreme Court, 1986 for filing the defence expires, if a defence is not served,

whichever is later; or

(b) with leave from a judge of the court.

(4) A judge of the court may certify a person who is not a member of the class as the representative plaintiff if it is necessary to avoid a substantial injustice to the class.

[3] While certification is not the issue at this time, it is the main procedural issue that the court will be asked to determine following these preliminary applications. Section 4 of the *Act* makes it mandatory to certify an action as a class action when certain elements have been established.

[4] That section reads as:

5. (1) On an application made under section 3 or 4 , the court shall certify an action as a class action where

(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 a common issue, whether or not the common issue is the dominant issue;

(d) a class action is the preferable procedure to resolve the common issues of the class; and

(e) there is a person who

(i) is able to fairly and adequately represent the interests of the class,

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

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

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

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[5] And further at section 13:

Notwithstanding section 12 , the court may make an order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[6] How then does a determination of the sequencing of the defendant's applications advance or impair the courts ability to determine the status of the matter as being a class action or not?

[7] It is apparent from these statutory references that courts are to be sensitive to time expenditures when moving these matters through the certification process to ensure a "fair and expeditious determination" (s. 13).

[8] The very nature and purpose of class action proceedings is to hear the many, as one; rather than one after the other, in order to facilitate time and efficiency without compromising fairness. To that end the *Act* mandates that the certification hearing commence within the 90 day time period set out in section 3, subsection 3.

[9] The Supreme Court of Canada in **Hollick v. Toronto (City)** [2001] 3 S.C.R. 158, 2001 S.C.C. 68 (CanLII) set out the advantages of proceeding by way of class action where McLachin, C.J. stated at paragraph 15:

> ... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

[10] It seems therefore that to engage in procedures that tend to defeat the efficiencies of class action proceedings is to be discouraged unless the court is satisfied that such procedures will advance the fair and expeditious determination of the class action.

[11] In the present case counsel for the Defendant; Attorney General of Canada (Canada) has served the Plaintiffs Carol Anderson, Allen Webber and Joyce Webber with a Demand for Particulars and intends to apply to this court for an order to provide such, pursuant to *Rule 14.23* of the *Rules of the Supreme Court*, 1986 of this province. That *Rule* states:

> 14.23. (1) Where a party, upon receipt of a notice in writing demanding a further and better statement of the nature of the claim or defence of the party, or further and better particulars of any matter stated in any pleading, affidavit or statement of facts of the party, fails to supply them within the time specified in the notice, which time shall not be less than ten days, the Court may, upon such terms as are just, order the particulars to be delivered within a specified time, or, if no time is specified, then the particulars shall be filed and delivered within ten days from the date of the order.

[12] As well, the Defendant Canada intends to apply to the court for an order compelling the Plaintiffs to add other parties as Defendants to the proposed class actions rather than to proceed by way of third party application itself.

[13] The issue before me relates only to the sequencing of these proposed applications, that is; showed they be heard prior to or following the class action certification hearing? It is not for me, at this stage, to determine the merits of these proposed applications.

[14] It is clear that a class action certification hearing is a procedural mechanism only and is not designed to consider or determine the merits of the suit itself. Section 6, subsection (2) makes this very clear when it states:

> An order certifying an action as a class action is not a determination of the merits of the action.

[15] I take this to mean, as well, that I am not to consider the merits of any preliminary applications that would impact on the merits of the class action itself

other than the effect such applications would have on administering the certification hearing itself. I would add that it is easy to slip into an analysis of adding third parties or ordering particulars especially when the respective positions of the parties tend to go in that direction, however at this point I am only concerned with determining when I should hear these applications.

[16] In the instant matter it is the position of the Plaintiffs that these preliminary applications be heard following the certification hearing. On the other hand, it is the Defendant's position that we deal with the preliminary applications prior to the certification hearing. At this stage, therefore, I will not comment on the respective strengths of the Defendant's applications but only decide whether these applications be heard prior to the certification hearing itself as argued by the Defendants.

[17] To argue the merits of the preliminary applications at this time is clearly premature yet much of the authorative references and focus of the parties respective submissions tend to go in that direction.

[18] It seems that the default position is that the first order of business in any class action proceeding is to deal with the certification hearing. The *Act* implies this; however, the *Act* is not to be seen as restricting any application that would more readily promote a fair and expeditious result. In **Hollick v. Toronto (City)**, **supra,**, McLachlin, C.J. stated at paragraph 15 that:

> In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the *Act* in a way that gives full effect to the benefits foreseen by the drafters.

[19] In **Baxter v. Canada**, [2005] O.J. No. 2165 (S.C.J.), W.K. Winkler, J. in dealing with the same issue of the sequencing of motions as is before this court, stated at paragraphs 9 through 12 that:

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 at para. 7 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 at 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 the 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. (See also: Ward-Price v. Mariners Haven Inc., [2002] O.J. No. 4260 (S.C.), supra, at para 36).

11 Prior to certification, an action commenced under the CPA is nothing more than an intended class proceeding: Logan v. Canada (Minister of Health) (2003), 36 C.P.C. (5th) 176 (S.C.) at para. 23, aff'd 71 O.R. (3d) 451 (C.A.) (See also: Boulanger v. Johnson & Johnson Corp. (2003), 64 O.R. (3d) 208 (Div. Ct); Attis, supra at para 14.) In the pre-certification period it is not clear whether a proceeding will ultimately be certified. Further there is an element of fluidity in respect of the class definitions and the common issues. Accordingly, motions brought prior to certification may turn out to have been unnecessary, over-complicated or incomplete.

12 Moreover, courts will not always have sufficient information to adequately determine motions at the pre-certification stage. This is particularly apparent with respect to the Jurisdictional Motions.

[20] It was not the position however in **Baxter (supra)** that certain motions or applications that would tend to more efficiently move the certification hearing along would not be permitted in advance of the certification hearing. On that, W.K. Winkler, J. stated at paragraph 14 as:

14 Admittedly, there are instances where, as indicated in both Attis and Moyes, there can be exceptions to the rule that the certification motion ought to be the first procedural matter

> to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly. (See: Moyes, supra at para. 12; Re Holmes and London Life v. London Life Insurance Co. et al. (2000), 50 O.R. (3d) 388 (S.C.) at paras. 7-8; Hughes v. Sunbeam Corp. (Canada) Ltd. (2002), 61 O.R. (3d) 433 (C.A.), at para. 15, leave to appeal dismissed [2002] S.C.C.A. No. 446; Segnitz v. Royal and SunAlliance Insurance Co. of Canada, [2001] O.J. No. 6016 (S.C.); Stone v. Wellington County Board of Education (1999), 29 C.P.C. (4th) 320 (C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 336.); Vitelli v. Villa Giardino (2001), 54 O.R. (3d) 334 (S.C.); Pearson v. Inco (2001), 57 O.R. (3d) 278 (S.C)). [Emphasis added]

[21] In **McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.,** (2001) 10 C.P.C. (5th) 1 (C.A.), Sharpe, J.A. writing for the Ontario Court of Appeal acknowledged that there were circumstances when it might be necessary to determine a legal issue prior to the hearing of the certification hearing. In that case both parties had consented to the preliminary issue prior to certification. Even in these circumstances Sharpe, J.A. took the position that such applications should not be entertained without careful consideration. He stated at paragraph 36:

> [36] We must not lose sight of the fact that this proceeding is an intended class proceeding and that, if certified, it will affect the rights of a significant number of individuals. In certain circumstances, it may be appropriate to make a substantive determination of law at the request of the proposed representative plaintiff prior to certification: see e.g. Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.). In the present case both parties were content to have the substantive issue of the interpretation and the effect of the statutory condition resolved before certification. I see no reason why we should not grant declaratory relief determining the appellant's rights. However, we must also exercise a measure of restraint lest we put our substantive cart before the procedural horse. While I think it appropriate to give a declaration as to the effect of the statutory condition, it would be inappropriate to go any further before there has been an order certifying the matter as a class proceeding. In particular, we should avoid attempting to resolve the many controversial issues that flow from the declaration of right. [Emphasis added]

[22] Counsel for the Defendant Canada at paragraph 15 of his Pre-hearing Memorandum submits that "the legislators clearly intended that preliminary applications essential to the objectives of class actions should be heard before the certification hearing". For the reasons I have stated earlier I am not convinced that this is what the framers of the *Class Action Act* intended, but rather; short of some fatal circumstance in the application, certification should be the first order of business.

[23] Counsel for the Defendant Canada refers me to **Montreal Trust Co. of Canada v. Hickman**, (2001), 204 Nfld. & P.E.I.R. 58 at para. 14 (NLCA) where the Newfoundland and Labrador Court of Appeal considered the appropriateness of striking a statement of claim on the ground that no cause of action was disclosed. Green, J.A. (as he then was) stated at paragraph 10 of that decision that:

> **10** "As a starting point, three principles can be stated: (a) a statement of claim will be struck out only if it is 'plain and obvious' that it cannot succeed: **Hunt v. T & N plc et al.**, [1990] 2 S.C.R. 959; 117 N.R. 321" ...

[24] He further added at paragraph 14 that:

> **14** In like manner, where the pleading is deficient in the sense that the pleaded facts disclose a potential cause of action but not in favor of or against the right party, the court must give consideration to whether the litigation can be saved by adding the proper party under Rule 7.04(1) before taking the drastic step of striking out the claim solely on the basis that no cause of action involving the existing parties is disclosed.

[25] In **Montreal Trust** above the Court had to deal with an application to strike certain pleadings on the ground that no cause of action was disclosed by them. Green, J.A.'s reference also related to a pleading that was deficient and risked being struck because the right party had not been identified. In that case the court did consider adding the proper party. That is not the situation before me. In the present case the Plaintiffs have identified the Defendant and none other. The Defendant is not claiming that the wrong party is named but rather that there may

be other defendants who should be included (this may prove to be the case but at this stage it is only suggestion or speculation). Generally, the Plaintiff can choose who it intends to sue and while not absolute, short of scuttling the litigation by not dealing with the issue as a preliminary matter as implied by Green, J.A. in **Montreal Trust (supra),** or where it can readily be determined that no cause of action exists, the choice should be not interfered with. There are other avenues open to the Defendant in this case to have other parties added as defendants such as *Rule 7.04(1)* or to Third Party these potential defendants. However, the Defendant Canada chooses not to proceed by another route other than have this matter decided prior to the certification hearing itself.

[26] In **Miawpukek Band v. Ind-Rec Highway Services Ltd.** (1999) 172 Nfld. & P.E.I.R. 245 (NLCA), Green, J.A. in determining the circumstances under which it is appropriate for a court to determine preliminary points of law or fact under *Rule 38* of the *Rules of Supreme Court, 1986* acknowledged the profound implications associated with the ruling on the legal structure of community life for not only the Miawpukek Band, but for all other groups of aboriginal peoples in the province ... as well as for governmental agencies ... affecting both the federal and provincial levels of government (see paragraph 5 **Miawpukek Band, supra**).

[27] The specific issue concerning Green, J.A. in **Miawpukek Band (supra)** was whether or not the hearing of the pre-trial application would substantially dispose of the issues between the parties (see paragraph 9 of **Miawpukek Band, Supra**).

[28] At paragraph 11 Green, J.A. stated:

> **11** The decision to deal with an issue or question as a preliminary question under Rule 38 is a discretionary one. See, Bank of Montreal v. Mercer (1998), 163 Nfld. & P.E.I.R. 119 (NFCA). The parties are not entitled, as of right, to carve out a discrete issue or question from a proceeding heading to trial or hearing and have it heard separately. The general principle is that all issues relating to a particular proceeding should be disposed of at one time. There will be many situations where the fragmentation of issues for determination would cause more problems that it would solve. [Emphasis added]

[29] Green, J.A. then went on to identify a number of principles governing whether or not to permit a preliminary question of law or fact prior to the trial or hearing itself. He stated these principles at paragraphs 14 to 20 inclusive as follows:

> **14** First, to justify fragmentation of the determination of the issues, there should be some discernible advantage to proceeding in that way rather than dealing with them as part of an overall trial or hearing. The most obvious example would be if the determination of a preliminary issue will substantially dispose of the case (Henley et al. v. Torbay Estates Ltd. et al. (1993), 109 Nfld. & P.E.I.R. 285 (NFSC,TD), thereby enabling the court to enter a judgment pursuant to Rule 38.01(2) (See Etheridge v. Witless Bay (Town) (1997), 155 Nfld. & P.E.I.R. 346 (NFSC,TD). Even if ordering the hearing of a preliminary issue would not dispose of all of the issues in the litigation, however, it still may be appropriate to have a preliminary determination of one or more discrete issues if those issues are "capable of being compartmentalized and dealt with separately" (Bank of Montreal v. Mercer, at para [6]) and doing so would simplify the remainder of the trial, thereby saving time or costs, in the sense of their being an overall net gain to the litigation process (Bank of Montreal v. Mercer; Druken v. R.G. Fewer and Associates, Inc.; (1996), 138 Nfld. & P.E.I.R. 165 (NFSC,TD); Non-Marine Underwriters, Lloyd's London v. Menchions (1996), 149 Nfld. & P.E.I.R. 61 (NFSC,TD).
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> **15** Secondly, the court must be satisfied that a hearing conducted pursuant to Rule 38 is a "suitable vehicle" to determine the questions that have been posed (Stagg et al. v. John Cabot (1997) 500 Anniversary Corporation et al., [1998] N.J. No. 328, [1997] No. 185 (NFCA; filed November 26, 1998), per Gushue J.A. at para. [19]). Central to this determination is whether a sufficient evidentiary record can be provided. This is equally important where the questions posed are ones of law, since legal questions are not to be answered in the abstract, but against the factual background of the particular dispute. This requirement of a proper record is particularly important in constitutional cases (Leyte v. Newfoundland (Minister of Social Services) (1998), 164 Nfld. & P.E.I.R. 278 (NFCA) but it is also applicable in other cases (Stagg).
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> **16** Thirdly, where the issue for determination is a point of law, the discretion to determine the issue as a preliminary matter should generally be exercised only if the evidentiary background can be established by an agreed statement of facts or if the facts underlying the resolution of the legal issue are a matter of public record. (See, Leyte; Henley; Druken)

17 Fourthly, as an exception to the third principle, the court may, in exceptional cases, receive evidence that may be necessary to provide a background for the resolution of the legal issue, but that would only be appropriate where the issues of fact and law on the preliminary issue and on the remaining issues are not "complex and intermingled" (Human Rights Commission (Newfoundland) v. Newfoundland (Minister of Health) et al (1998), 164 Nfld. & P.E.I.R. 251 (NFCA), per Cameron J.A. at para. [21]); or the facts are not in dispute and their resolution does not depend on determination of the credibility of witnesses (Druken; Henley));or the party asserting that the facts are in dispute holds an "untenable position" (Royal Bank of Canada v. Colonial Fire and General Insurance Co. (1996), 146 Nfld. & P.E.I.R. 66 (NFSC,TD), as where the party raising the question as to disputed facts has not presented any evidence to rebut the evidence of the party alleging that the facts are not in dispute (Bank of Nova Scotia v. Marco Limited et al (1998), 169 Nfld. & P.E.I.R. 166 (NFSC,TD). The rationale for this limitation is that if, in order to resolve the legal question the court has to resolve the evidentiary issues as well, it will usually be just as well to hold a trial.

18 Fifthly, although Rule 38.01(1)(a) (as well as Rule 40.04) also contemplates the possibility of preliminary determination of questions of fact as opposed to questions of law, as a practical matter if the result would simply be a trial in another form there would generally be no justification for doing so. If, on the other hand, the determination of one contentious issue has the reasonable prospect of leading to a resolution of other issues thereby obviating the need for a further trial, or has the potential, if decided in a particular way, of disposing of the whole case or substantially simplifying the trial on remaining issues, there might well be justification for invoking the rule. (See, e.g., Mutual Life Assurance Company of Canada v. Porter, [1996] N.J. No. 283, [1994] St. J. No. 2136 (NFSC,TD; filed November 7, 1996).

19 Sixthly, even where the court is persuaded that it is appropriate to make a preliminary determination of law or fact, it should turn its mind to the giving of directions both with respect to the manner of the conduct of the preliminary hearing as well as with respect to how the remainder of the proceeding is to proceed in the event that the preliminary determination does not dispose of the whole case. Thus, if the preliminary issue involves a constitutional question, the court would have to ensure that the appropriate notices were delivered pursuant to s. 57 of the Judicature Act (if not already attended to) or even if the issue is not a constitutional one, to consider, in exceptional cases, notification of others who might have an interest in the issue and might have a claim to intervene, if the issue engaged has public implications extending beyond the parameters of the particular case. Furthermore, the court would have to consider whether, as a result of a ruling on a preliminary question, subsequent amendments to pleadings or changes in the status of parties may be necessary with respect to the remaining issues to be

tried. See, Pelley's Estate v. Pelley's Estate (1987), 65 Nfld. & P.E.I.R. 238 (NFSC,TD) at paras [7],[22].

20 Seventhly, where the issue which is being sought to be determined as a preliminary point, either as a question of law or fact, involves the status of a party, it is generally more appropriate to determine that matter by way of an application under Rule 7.04 relating to misjoinder of parties, rather than an application under Rule 38, even though examples do exist of issues of party status being determined under the rubric of a Rule 38 application (Pelley's Estate). This is because the issue, whenever the status of a party is involved, is not simply whether the existing party is a proper party but also whether another, appropriate, party should be substituted. This follows from Rule 7.04(1) which provides that no proceeding will be defeated by the misjoinder on non-joinder of any party or person, and from Rule 7.04(2) which provides broad powers to the court to add, strike out or substitute parties, even on its own motion, to enable the matter to be effectually adjudicated. The danger in attempting to deal with such issues under Rule 38 is that attention may become deflected from the question as to whether the matter may nevertheless proceed with the addition of or change in status or description of a party and become immediately focused instead on issues of dismissal of the claims under Rule 38.01(2).

[30] In addition to the preliminary question of whether or not the court should entertain submissions on the inclusion of third parties, the Defendant Canada requests the court to allow it to argue on a preliminary application a demand for particulars from the plaintiffs. The physical dimensions of what is being sought consists of a 21 page document requesting expansion on just about every element in the Statement of Claim. Whether or not such clarification is necessary is not for me to comment on except to say that to allow this request for particulars prior to the certification hearing would consume an enormous amount of time and in addition has the real potential to delay the application for certification indefinitely. In that regard, where a large number of the potential class of plaintiffs is aged it would only serve to bog down the process and categorically deny them access to the court. In any event, without commenting on the merits of the Defendant Canada's Demand for Further Particulars, I find that the Statement of Claim is sufficiently stated to inform the Defendant of the case to be met and permit the Defendant to proceed on at least this Application for Certification. If further particulars are necessary to move the matter forward an application can be made following the Certification Hearing in the normal course of the trial. I can see no prejudice to the Defendant Canada's case to proceed in this manner. The

Defendant Canada will retain the opportunity to have its position stated and determined on this issue following the Certification Hearing.

[31] In relation to these two issues; that is, the Defendants Demand for Particulars; and the Defendant's demand to compel the Plaintiffs to add further defendants, I am convinced that the hearing of these preliminary applications would do nothing to advance a fair and expeditious determination of the certification hearing. On the contrary, lengthy preliminary proceedings with their inevitable delays for the serving of notices especially in relation to potential new defendants will almost certainly de-rail the certification hearing and render the *Class Actions Act* ineffective.

[32] There is no discernible advantage such as the substantial disposal of the case that is apparent by permitting these preliminary applications. I cannot agree with counsel for the Defendant when he states that "access to justice, judicial economy, and behaviour modification are all better served by having Canada's applications heard prior to certification" (see para. 35, Pre-hearing Memorandum of the Defendant).

[33] Counsel for the Defendant relies on **Potter v. Bank of Canada** (2005) 9 C.P.C. (6th) 36 (On S.C.), **Hughes v. Sunbeam** (2002) 61 O.R. (3) 433 (C.A.) and **Re: Holmes and London Life Insurance Company et al** (2000), 50 O.R. (3d) 388 (S.C.) as authority where the courts had decided that the preliminary applications could be heard prior to the motion for certification.

[34] In **Potter (supra)** case the court decided to grant the preliminary application on the basis that to do so might result in the certification hearing being an inappropriate vehicle in which to proceed, in other words that it would potentially dispose of the class action in favour of some other procedure. Sanderson, J. stated at paragraph 16 that:

> "If on the preliminary motion this Court were to declare the CPA to have no application, the Plaintiffs' proposed certification motion would be clearly inappropriate".

[35] And further at paragraph 27 he stated:

> "Depending on the result, the hearing of the certification motion may be entirely avoided or the length of the certification motion may be substantially shortened".

[36] In **Hughes (supra)** Laskin, J.A. on the Ontario Court of Appeal once again made it clear that it is appropriate to hear a preliminary motion on the ground that it discloses no reasonable cause of action in relation to a class action proceeding. He stated at paragraph 15:

> [15] Section 35 of the Class Proceedings Act provides that "[t]he rules of court apply to class proceedings." Thus, even before certification, a defendant may bring a motion under rule 21.01(1)(b) to strike a representative plaintiff's claim on the ground that it discloses no reasonable cause of action. See Stone v. Wellington (County) Board of Education (1999), 29 C.P.C. (4th) 320 (Ont. C.A.). And, if the representative plaintiff does not have a cause of action against a named defendant, the claim against that defendant will be struck out. Put differently, as Nordheimer J. said in Boulanger v. Johnson & Johnson, [2002] O.J. No. 1075 (Quicklaw) (S.C.J.): "for each defendant who is named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant."

[37] The same reasoning follows from **Re: Holmes (supra)** where Cumming, J. of the Ontario Superior Court of Justice, in considering the proper sequencing of events in a class action matter stated at paragraphs 6, 7 and 8 inclusive that:

> [6] In my view, there is not any provision in the CPA which requires that the certification motion be heard first when the representative applicant (or plaintiff) so requests. Rather, discretion is conferred by s. 12 upon the court respecting the conduct of the proceeding, with the objective of ensuring "its fair and expeditious determination".
>
> [7] Where the class proceeding is by way of a civil action with a statement of claim, significant issues are routinely dealt with prior to certification. This can include a determination of the merits through summary judgment by way of a Rule 20 motion to the effect that there is no genuine issue for trial. Indeed, the Ontario Court of Appeal has approved the procedure of pre-certification summary judgment motions: Stone v. Wellington (County) Board of Education (1999), 29 C.P.C. (4th) 320 (Ont. C.A.) at p. 322.
>
> [8] It is also not uncommon for a Rule 21 motion to be brought by a defendant asserting that the statement of claim does not disclose any reasonable cause of action.

[38] I agree with the position that where a preliminary application has the potential to dispose of the litigation or more efficiently address the objectives of the *Class Actions Act*, then it should be heard prior to the certification hearing.

[39] That is not the case in the present matter and I am convinced that to permit these two applications to proceed prior to the certification hearing will cause this certification hearing stage of the intended class action to spiral down a timeless rabbit hole wherein one particular application begets another. As well, to permit preliminary submissions on the inclusion of potential third parties will surely necessitate notice to be served on these potential third parties, with their resultant responses and corresponding applications.

SUMMARY

[40] I can find no "discernible advantage" to proceeding on these applications prior to the certification hearing (**Miawpukek Band, Supra** at para. 14).

[41] For these reasons the applications of the Defendant Canada are denied at this certification stage of the class action and are to follow the determination of the certification hearing.

COSTS

[42] The Plaintiffs will be awarded costs in these applications on a taxation basis and to be paid forthwith following taxation.

ROBERT A. FOWLER
Justice