Federal Court  Cour fédérale

Date: 20200508

Docket: T-1499-16

Citation: 2020 FC 592

CLASS PROCEEDING

BETWEEN:

BRUCE WENHAM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER
(Applicant's Motion for Costs)

PHELAN J.

I. INTRODUCTION

[1] These are the reasons for the Court's dismissal of the Applicant's motion for costs in this class proceeding. Many of the considerations which justified the Court's approval of Class Counsel's fees work against the Applicant's motion for costs.

[2] An award of costs (whether party and party or solicitor-client) would be a credit toward the maximum fee approved by the Court for Class Counsel. It would operate to reduce the legal fees that the Thalidomide survivors are required to pay for their litigation against Canada. As previously noted, Canada has contributed to class legal fees on many other cases but not meaningfully to this one, thereby virtually leaving Class Members with the full burden of the litigation.

[3] In the motion, the Applicant asks for an award of $850,000 on a solicitor-client basis and $40,797.05 in disbursements. The award would halve the Class' legal fees.

[4] As sympathetic as the Court may be to the Thalidomide survivors, for the reasons that follow, the exceptions to the no-cost rule in Federal Court class actions have not been made out.

II. BACKGROUND

[5] The factual background has been laid out in the Court's reasons in respect of approval of the settlement and in its approval of Counsel fees.

[6] The Applicant's motion is grounded firstly in the argument on "anticipatory compliance" and secondly on Canada's argument that the Canadian Thalidomide Survivors Support Program [CTSSP] was largely inevitable regardless of the class proceeding.

[7] The Court has recognized that the Class was successful in securing for itself another chance to apply, be recognized and receive the financial support offered under the Thalidomide

Survivors Contribution Program [TSCP] amended into the CTSSP. The Class received other benefits provided under the Settlement Agreement.

[8] The Court has rejected Canada's overarching position that the class proceeding played virtually no role in the amendment to the TSCP as found in the CTSSP and its position that Canada was always going to implement the changes to the TSCP, and in the time frame as occurred, regardless of the class proceeding.

[9] The Court has also dealt with the Applicant's argument that this case is an example of "anticipatory compliance", as referred to in *Tetzlaff v Canada (Minister of the Environment)*, 1991 FCJ No 113 (FCTD); affirmed 1991 FCJ No 1277 (FCA) [*Tetzlaff*]. The principle of anticipatory compliance (other than deliberate dilatoriness) may be applicable to justify costs in the usual sense and usual case but is not relevant to a "no costs" regime.

III. ANALYSIS

A. *No Costs Regime*

[10] Class actions generally and are, in this Court, no costs regimes. Rule 334.39, the no costs provision, applies to the parties when they are parties to the certification process and thereafter.

No costs	**Sans dépens**
334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal	**334.39 (1)** Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel

arising from a class proceeding, unless	découlant d'un recours collectif, que dans les cas suivants :
(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;	**a)** sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;
(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or	**b)** une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;
(c) exceptional circumstances make it unjust to deprive the successful party of costs.	**c)** des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.
Individual claims	**Réclamations individuelles**
(2) The Court has full discretion to award costs with respect to the determination of the individual claims of a class member.	**(2)** La Cour a le pouvoir discrétionnaire d'adjuger les dépens qui sont liés aux décisions portant sur les réclamations individuelles de membres du groupe.

[11] There is little judicial guidance for the circumstances of this case. However, in adopting a purposive approach to the Rule, the Court has the assistance of some previous decisions. While the Supreme Court was commenting on the Ontario *Class Proceedings Act. 1992*, SO 1992, c 6, its comments apply with equal validity to the Court's class action rules. In *Hollick v Toronto (City)*, [2001] 3 SCR 158 at 169-170, the Chief Justice commented:

> 14 The legislative history of the *Class Proceedings Act, 1992*, makes clear that the Act should be construed generously. Before Ontario enacted the *Class Proceedings Act, 1992*, class actions were prosecuted in Ontario under the authority of Rule 12.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. That rule provided that

> [w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

While that rule allowed courts to deal with relatively simple class actions, it became clear in the latter part of the 20th century that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 26. They often involved vast numbers of interested parties and complex, intertwined legal issues – some common to the class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise ad hoc solutions to procedural complexities on a case-by-case basis: see *Western Canadian Shopping Centres*, at para. 51. The *Class Proceedings Act, 1992*, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), 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. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. 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.
>
> [Underlining by Court for emphasis]

[12] Consistent with the principles of access to justice and avoiding unduly narrow interpretation and application of class action rules, the Court of Appeal in *Campbell v Canada (Attorney General)*, 2012 FCA 45, focused particularly on the "no costs" rule to remove a barrier to class proceedings and the exception to that rule:

> [26] Some guidance as to the intention of the Rules Committee with respect to the "no-costs" rule may be found in the working papers prepared prior to the amendments to the class action Rules. The Federal Court of Canada Rules Committee issued *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Ottawa: June 9, 2000), in which the issue of cost barriers to representative plaintiffs was raised. The authors of the Discussion Paper frame the issue at page 97 as follows:
>
> > Cost barriers would exist if representative plaintiffs were fully exposed to a two way ("losers pay winners") costs regime. This regime would be a barrier in light of the fact that most plaintiffs would be exposed to a substantial downside in terms of costs even as they would have comparatively little to gain if the class action were successful.
>
> [27] The Discussion Paper concludes at page 104 that a "no costs" provision is "an important measure in removing the barriers to class proceedings..." and records the decision of the Rules Committee as follows:
>
> > Decision #37A
> > The rule will contain a provision that, subject to exceptions that are stated, there shall be no costs awarded in class proceedings...
>
> [28] The *Rules Amending the Federal Court Rules, 1998 (No.1): Regulatory Impact Analysis Statement*, Canada Gazette, Part I: December 8, 2001, Vol. 135, No. 49, at 1 which accompanied the publication of the proposed Rule changes, also dealt with the issue of costs:

> The discussion paper [quoted above] indicated that there would be a "no costs" provision. Costs would not be awarded up to the determination of the common questions subject to exceptions, including "exceptional circumstances that make it unjust to deprive the successful party of costs." ...
>
> The suggested Rule 299.4 incorporates this "no costs" (up to the disposition of common questions subject to exceptions) provision. This "no costs" provision is also incorporated in the British Columbia *Class Proceedings Act*, section 37, *The Class Actions Act* of Saskatchewan, section 40, and the *Uniform Class Proceedings Act*, section 37 (alternative)...

[13] The presumption in favour of no costs is strong and essential for the proper operation of the class proceedings regime. Although the no costs rule is generally designed to assist plaintiffs' access to justice, the policy choice that the rule applies to both parties is clearly deliberate.

[14] In recognition of its importance, the no costs rule has a limited exception. In my view, it is generally but not necessarily only, designed to discipline defendants' behaviour particularly where a defendant seeks to delay, frustrate or even prevent the plaintiff's "day in court". The type of conduct described is more usually that for which defendants have been criticized.

[15] The exception provision is important to the class proceeding regime and as such should be given an equally fair and liberal interpretation which serves the purpose of disciplining inappropriate conduct.

[16] Having set the natural tension and balance within the no costs rule, it does not mean that class proceedings are easy, non-contentious litigation. There is no presumption that class

proceedings are a “cake walk” for plaintiffs. Nor should there be a presumption or assumption that government defendants will not vigorously contest litigation in what they view as the public interest or as guardians of public funds.

[17] As the Court held in the Class Counsel Fee decision, Canada had a legitimate legal issue – justiciability – which it was not prepared to concede. It was an issue on which Federal Court judges were divided and which was not wholly resolved in the Federal Court of Appeal’s certification decision. It was legitimate for Canada to litigate this issue.

[18] I have also previously rejected the Applicant’s reliance on the notion of anticipatory compliance in the sense of deliberate stalling and late compliance to frustrate the litigation, as I have also rejected Canada’s argument that the CTSSP and/or Settlement were inevitable in the particular timeframe.

[19] In *Tetzlaff* at the Federal Court, the Court commented on the use of costs in instances of anticipatory compliance:

> In circumstances such as this, where a respondent makes anticipatory compliance before the Court grants an applicant's request, it is not unusual to award costs to the applicant because he or she was right to make the application in the first place, and so far as can be known the respondent perhaps complied with alacrity just because the litigation was instituted. Certainly, in this instance, the applicants incurred their costs quite legitimately.

[20] It is important to note that in avoiding costs in instances of anticipatory compliance, the Court was referring to costs in the usual circumstances to the successful party. These are the very

type of costs which the class proceeding regime does not permit. Further, this is a case of settlement where "success" is very much a subjective evaluation.

[21] Therefore, I am of the view that the Applicant cannot succeed in this motion unless it can make out the exception to the no costs rule even if there were anticipatory compliance.

B. *Exception*

(1) Lengthened proceedings

[22] I cannot find that Canada unnecessarily lengthened proceedings. While there is no explanation for the delay in promulgating the Order in Council, and no explanation of the alleged privileges now invoked, there were no unusual delays within the litigation.

[23] With respect to the litigation itself, it proceeded in the usual course. It became entangled in the certification process but whether these claims should be common or individual was a legitimate issue. The certification hearing was ready four months after service on Canada – a reasonable timeframe. One of the most significant delays is from the time the certification appeal was launched to the decision – a usual type of delay and not attributable to Canada.

(2) Improper; vexatious

[24] While the Rule might suggest a minute (step-by-step) consideration of each part of the litigation, it does not mean every act in the course of litigation is to be scrutinized. The "step"

contemplated in the Rule should be defined more broadly to cover steps such as major motions, obstreperous discovery conduct and matters of that nature.

[25] If this had been a case of "inevitability" and Canada's position to aggressively defend was pursued, then that type of conduct might well fall into this category of the exception.

[26] Having not accepted the anticipatory compliance argument, there is nothing in Canada's conduct of the litigation which falls within R 334.39(1)(b). Its conduct was consistent with an aggressive defence which it was entitled to mount.

[27] The fact that Canada proceeded through a public policy process to resolve the issue, and not to do so exclusively within the litigation context, is not improper. That a matter of public policy is pursued in many venues does not make any of the processes illegitimate. It does, as in this case, have the potential to undercut the argument that the class proceedings were irrelevant to the eventual result.

[28] The Applicant's complaints about the public policy aspects – lack of consultation, inconsistency and uncertainty in the process – are not matters which fall *per se* within the exception to the Rules unless these acts were designed to frustrate the litigation. There is insufficient evidence to ground that kind of finding.

(3) Exceptional circumstances

[29] The above comments also address this exception. It is fair to say, as found in the Class Counsel Fee decision, that this was a novel case, that the class proceedings had an impact on the end result. This justified the fees claimed but it does not justify such a marked departure from a core principle of class proceedings.

[30] These are not exceptional circumstances created by Canada which justify an award of costs.

IV. CONCLUSION

[31] For these reasons, the motion will be dismissed and, consistent with the Rule in issue, without costs.

"Michael L. Phelan"
Judge

Ottawa, Ontario
May 8, 2020

FEDERAL COURT

SOLICITORS OF RECORD

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