Federal Court of Appeal | Cour d'appel fédérale

Date: 20201103

Docket: A-139-20

Citation: 2020 FCA 186

Present: **STRATAS J.A.**

BETWEEN:

NOELLA HÉBERT, RAYE SINGMASTER, JANET KIM CARTWRIGHT, PAUL RICHARD and YVON ROBICHAUD

Appellants

and

BRUCE WENHAM and ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 3, 2020.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The Federal Court approved a settlement of a class proceeding: 2020 FC 588. In its view, the settlement is "fair, reasonable and in the best interests of the class as a whole" (at para. 96). The Federal Court also awarded costs.

[2] The representative of the class, Mr. Wenham, is dissatisfied with the award of costs. He has appealed it. But five class members—the moving parties in this motion—want to bring a separate, wider appeal. They are dissatisfied with the Federal Court's approval of the settlement.

[3] The settlement sets out the terms of a new government program to compensate certain members of the class. It has now been implemented by Order in Council. Under the new program, only those born during a certain period are eligible to receive compensation. The Federal Court estimates 42 of 158 class members are born outside of that period and will be ineligible. The moving parties are among the 42. Under the settlement, all class members, including the 42, may bring applications for judicial review of the new program or decisions made under the program.

[4] Normally, only the representative of the class, here Mr. Wenham, can appeal from the Federal Court's decision approving a settlement. But, with leave of the Court, a class member can exercise the representative's right to appeal: *Federal Courts Rules*, Rule 334.31(2).

[5] The five moving parties are class members. They move for an order granting them leave to exercise the representative's right to appeal.

[6] A single judge can determine this motion. This is a motion to exercise the representative's right to appeal—basically a request for standing to appeal. It is not an application for leave to appeal that must be determined by three judges of this Court: see section 16 of the *Federal Courts Act*, R.S.C. 1985, c. F-7; *Frame v. Riddle*, 2018 FCA 204 at para. 25.

[7] The test is set out in *Frame*; see also *Ottawa v. McLean,* 2019 FCA 309. The class member "must show that he or she will fairly and adequately represent the class on appeal" and "the appeal is itself in the best interests of the class": *Frame* at para. 24.

[8] Only an appeal that has "some arguable ground upon which the proposed appeal might succeed" can be "in the best interests of the class": *Frame* at para. 17, citing *Kurniewicz v. Canada (Minister of Manpower and Immigration)* (1974), 6 N.R. 225 (F.C.A.) at para. 9. This makes sense. An appeal doomed to fail only wastes resources. And in a situation like this, it can delay the implementation of the settlement.

[9] In assessing this, we must keep front of mind what happens in settlement approval proceedings and the settlement process. A party seeking approval must adduce cogent evidence the settlement is fair and reasonable: *McCarthy v. Canadian Red Cross Society* (2001), 8 C.P.C. (5th) 340 (Ont. S.C.J.). The Court must review the evidence, appreciating the inevitable disappointments caused by the settlement process. Strongly held views of individuals in different circumstances collide and are compromised or even cast aside, and sometimes, as a result, some are left out in the cold: *Manuge v. Canada,* 2013 FC 341, [2014] 4 F.C.R. 67 at para. 24; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 at para. 79. Settlements do not achieve the impossible. They are not perfect. They do not please all.

[10] We must also appreciate the challenges confronting the Court. It has to apply the amorphous standard of "fair and reasonable" to a settlement that affects different people in different ways, some superficially, some deeply. It cannot apply its vision of the ideal and do

what it personally feels is right and just. It cannot meddle by changing the settlement terms, imposing its own terms or promoting the interests of certain class members over those of the whole class: *Manuge* at paras. 5, 19. It has to give "[c]onsiderable deference" to "the end product" expressed in the settlement: *Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24 at para. 38. Essentially, as the Federal Court recognized (at para. 51), the Court must apply the standard of "fair and reasonable" to the settlement and make a tough choice: take it or leave it.

[11] In this case, the approval decision was one of mixed fact and law, factually suffused and highly discretionary: *Parsons*; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Gen. Div.); *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (S.C.J.) at para. 89; *McLean v. Canada*, 2019 FC 1075 at paras. 76-77. As a result, it can be set aside only for palpable and overriding error.

[12] The standard of palpable and overriding is seldom met:

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman* [*v. Waxman* (2004), 186 O.A.C. 201]. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

(*Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46, approved by *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729 at para. 33 and *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38.)

[13] Under the palpable and overriding standard, we do not reweigh the evidence, fill in gaps in first-instance reasons or read them divorced from the evidentiary record: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 66-74.

[14] In assessing whether the proposed appeal has an arguable issue, we must look at its real essence and essential character: see, *e.g.*, *Canada (National Revenue) v. J.P. Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 50; *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, [2019] 2 F.C.R. 376 at para. 18. In real essence and essential character, the proposed appeal focuses on the bottom-line result of the settlement—the exclusion of the moving parties and others like them from eligibility for compensation based on birthdate—and not anything the Federal Court did when it approved the settlement. Like the Federal Court, we cannot rework the settlement to the moving parties' liking, nor can we impose our views of what a "better" settlement might look like or give effect to our personal feelings.

[15] The Federal Court's reasons are thorough, well reasoned and explicitly address the same concerns now raised by the moving parties. On appeal, it is not for this Court to re-weigh these considerations and arrive at a different conclusion.

[16] The moving parties also submit that Mr. Wenham, the representative of the class, was in a conflict of interest in seeking approval of the settlement. This too is doomed to fail. For a representative to be disqualified from representing the class or, for that matter, a sub-class to be created, a conflict on the common issues needs to exist: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 at paras. 76-78; *Western Canadian Shopping Centres Inc. v.*

Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 37. Here, the common issues broadly concern the evidentiary criteria and the documentary proof requirements in the program challenged in the class proceeding. On those issues, Mr. Wenham has no conflict of interest with any other class member.

[17] Overall, the moving parties have not persuaded the Court that they have an arguable case that the Federal Court committed palpable and overriding error in approving the settlement. Nor have they demonstrated any arguable errors of law on the part of the Federal Court in approving the settlement. Their proposed appeal is doomed to fail.

[18] The proposed appeal also seeks a judgment permitting the moving parties and others like them to opt out of the class proceeding. That relief is unavailable given the particular and unexceptional circumstances here.

[19] Well in advance of the settlement agreement, the Federal Court set a date for opting out. By the time of the settlement, that date had passed. For good measure, the settlement agreement provides that there shall be no late opt-outs.

[20] As explained above, this Court cannot affirm the settlement agreement in its entirety, including the prohibition against late opt-outs, yet attach a term allowing late opt-outs. The cases cited by the moving parties, such as *Riddle v. Canada*, 2018 FC 901 and *McLean* are distinguishable on this basis.

[21] As well, the moving parties knew that they could opt out. Knowing of the risks of an adverse result in litigation or settlement, they did not do so. The opt-out procedure must be respected and those who do not opt out should not be relieved from the consequences of their choice: Rule 334.25(1); *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, 115 O.R. (3d) 653; *Cannon v. Funds for Canada Foundation*, 2014 ONSC 2259, 68 C.P.C. (7th) 180 at paras. 11, 18; *Jones v. Zimmer GMBH*, 2016 BCSC 1847, 92 C.P.C. (7th) 65 at para. 58; *Silver v. IMAX Corp.*, 2013 ONSC 1667, 36 C.P.C. (7th) 254 at para. 73.

[22] Class members can opt out after a deadline only exceptionally, such as where the evidence shows they could not make a fully informed and voluntary decision about whether or not to remain a member of the class: *Pet Valu*, above, at para. 2. Here, there is no such evidence. The Federal Court set the opt-out deadline for May 27, 2019. At that time, the uncertainties and risks about the outcome were sufficiently known for class members to decide whether or not to opt out.

[23] As well, in the approval hearing in the Federal Court, the moving parties did not bring a motion to opt out. At best, the issue arose only during questioning at the hearing. This Court does not normally hear new issues on appeal: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678.

[24] Contrary to the foregoing, the moving parties nevertheless maintain that they requested the Federal Court to give them the ability to opt out but the Court did not rule on it. As a result,

they submit they have an appeal as of right on that issue under subsection 27(1) of the *Federal Courts Act*.

[25] Even if the moving parties did request that relief, the Federal Court dealt with it by approving the settlement which confirmed the opt-out deadline and prohibited further opt-outs. As well, in a class proceeding, only a representative party, not a class member, has standing to appeal under subsection 27(1). A class member has standing to appeal an issue in a class proceeding only under Rule 334.31(1) or Rule 334.31(2). Rule 334.31(1) does not apply because the issue raised by the moving parties is not an "individual question" under Rule 334.31(1); it is not a matter decided under Rule 334.26(1) that gives rise to an "individual question". As for Rule 334.31(2), leave should not be granted because the moving parties' appeal is doomed to fail.

[26] Therefore, the Court will dismiss the moving parties' motion. The respondents do not seek their costs. Therefore, the Court's order will provide that there will be no costs.

[27] One last procedural wrinkle remains. The moving parties filed a notice of appeal in this Court. After doing so, they realized that they needed leave to exercise the representative's right to appeal so they brought this motion. With the dismissal of the motion, the notice of appeal that never should have been filed remains in the file and the appeal will never proceed. To rectify this, the Court must remove the notice of appeal from the file under Rule 74 and close the file.

[28] When that is done, the appeal is terminated. Except in the case of appeals related to or in contravention of a vexatious litigant order, only a panel of three judges can terminate an appeal:

Federal Courts Act, s. 16; *Virgo v. Canada (Attorney General)*, 2019 FCA 167; and see, *e.g.*, *Hicks v. Canada (Attorney General)*, 2019 FCA 311 at para. 12; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 259. Therefore, a panel of three judges will be constituted to issue the order removing the notice of appeal from the file and closing the file.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-139-20
STYLE OF CAUSE:	NOELLA HÉBERT *et al.* v. BRUCE WENHAM *et al.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 3, 2020

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