Federal Court  Cour fédérale

Date: 20171109

Docket: T-356-12

Citation: 2017 FC 1011

Ottawa, Ontario, November 9, 2017

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

EDWARD ANDREW DENNIS,
HAROLD BELL,
NATHAN VICTOR MACKLIN and
IAN LORNE MCCREARY

Plaintiffs

and

HER MAJESTY THE QUEEN
IN THE RIGHT OF CANADA, AS
REPRESENTED BY THE
ATTORNEY GENERAL OF CANADA,
HER MAJESTY THE QUEEN IN THE RIGHT
OF CANADA, AS REPRESENTED
BY THE MINISTER OF AGRICULTURE and
AGRIFOOD

Defendants

and

THE CANADIAN WHEAT BOARD

Defendant

ORDER AND REASONS

[1] The Plaintiffs have moved to discontinue this proceeding in favour of prosecuting a corresponding action in the Court of Queens' Bench in Manitoba. Both proceedings are framed as class actions (subject to certification) and it is for that reason and Federal Courts Rule 334.3 that leave of this Court is required for discontinuance.

[2] The Defendant, the Canadian Wheat Board, opposes a discontinuance and seeks the comfort of an Order dismissing the action. That said, it undertakes not to seek any legal advantage in the Manitoba proceedings on the strength of such dismissal. This action has already been discontinued as against the other Defendants on consent along with a modest contribution to their costs.

[3] In my view, Rule 334.3 should be read in light of Rule 165. Under Rule 165, a plaintiff is entitled, as of right, to discontinue a proceeding without the consent of the opposite party or the Court, subject only to bearing any resulting costs: see *Chretien v Canada [AG]*, 2005 FC 925 at paras 35-36, 276 FTR 138; *Pharma v Pfizer*, 2007 FCA 1 at para 4, 54 CPR (4th) 353.

[4] Rule 334.3 modifies the general approach in a proposed or certified class proceeding by requiring the approval of the Court for any discontinuance. The consent of the opposite party is, however, not required. I take from this that the purpose of the class proceeding Rule is to protect the interests of the putative or actual members of the class and not to enhance the interests of defendants or respondents. This is consistent with the holding in *Campbell v Canada*, 2009 FC 30, 342 FTR 312, where the sole focus of the Court was on protecting the interests of the class from substantial prejudice arising from a discontinuance.

[5] In this case there is no asserted prejudice to the proposed class that will arise from a discontinuance. Their asserted cause of action will be prosecuted before the Manitoba courts.

[6] There is no compelling justification in this case to deviate from the usual approach, which is to allow the Plaintiffs to discontinue this proceeding without the concurrence of the Defendant, subject to costs. Furthermore, I cannot find anything in the Rules which, in the absence of bad faith or misconduct, authorizes the Court to impose a dismissal in substitution for a requested discontinuance. To this problem the Defendant contends that the discontinuance could simply be refused. The action could then be brought to an end summarily. I reject such an approach because it would force the Plaintiffs to proceed with an action they no longer want to prosecute and it would waste judicial resources.

[7] For the foregoing reasons, the Plaintiffs' motion to discontinue this action is allowed. This leaves for determination the matter of costs.

[8] The parties agree that the Defendant is entitled to have its costs assessed in connection with the previous motion to strike and they have asked me to fix an appropriate amount. In that matter, Justice Danièle Tremblay-Lamer awarded costs of the motion to the Defendant without stipulation. In that context costs are payable under Column III, typically at the mid-point: see Rule 407 and *Apotex v Sanofi*, 2012 FC 318 at para 5, [2012] FCJ No 435 (QL). The Plaintiffs say that an award of $1,700.00 would be appropriate. The Defendant, however, has calculated its costs under Column III at $2,716.00 plus disbursements of $3,210.00 (including $2,880.00 in copying expenses). Not having heard that matter on the merits and in the absence of much

supporting evidence, I fix the Defendant's costs of that motion at $3,500.00 including disbursements.

[9] The Defendant also seeks its additional costs of this proceeding and has advanced several positions as to an appropriate award ranging from $11,415.80 to $161,149.84.

[10] The starting point for awarding costs in a proposed class proceeding is Rule 334.39(1) which provides:

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 arising from a class proceeding, unless	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 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.

[11] The above provision was considered by the Federal Court of Appeal in *Campbell v Canada*, 2012 FCA 45, [2013] 4 FCR 234, where an expansive interpretation of the "no costs" approach was adopted. The purpose of Rule 334.39(1) was said to be the limitation of "the role of costs as a disincentive to class action plaintiffs" (see para 44). The Court, accordingly, held that, absent improper or abusive behaviour, no costs would be payable for steps taken upon the filing of the motion to certify: also see *Paradis Honey Ltd v Canada*, 2015 FCA 89 at paras 74, 75 and 154, [2015] FCJ No 399 (QL).

[12] In this case, with the exception of the motion to strike discussed above, all material steps taken in this proceeding for which the Defendant seeks costs took place after the filing of the Plaintiffs' motion to certify. While there were a number of amendments made to the Statement of Claim, I can identify nothing in the record before me that could be characterized as improper, abusive, or vexatious. The Plaintiffs' decision to pursue their claim in the Manitoba courts cannot be seen to be recognition of the legal futility of this proceeding but, rather, appears to represent a strategic step intended to avoid the complication of a lately made jurisdictional challenge in this Court.

[13] For these reasons, I make no additional award of costs to the Defendant and no costs of this motion are allowed.

ORDER in T-356-12

THIS COURT ORDERS that this proceeding by the Plaintiffs against the Defendant, the Canadian Wheat Board, is discontinued without costs.

THIS COURT FURTHER ORDERS that the costs of the previous motion to strike awarded to the Canadian Wheat Board are fixed at $3,500.00 inclusive of disbursements.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-356-12
STYLE OF CAUSE:	EDWARD ANDREW DENNIS, ET AL V HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 18, 2017
ORDER AND REASONS :	BARNES J.
DATED:	NOVEMBER 9, 2017

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