

Federal Court



Cour fédérale

Date: 20180802

Docket: T-2293-12

Citation: 2018 FC 814

Ottawa, Ontario, August 2, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

**PARADIS HONEY LTD.,
HONEYBEE ENTERPRISES LTD.
AND ROCKLAKE APIARIES LTD.**

Plaintiffs

and

**HER MAJESTY THE QUEEN AS
REPRESENTED BY THE MINISTER OF
AGRICULTURE AND AGRI-FOOD AND THE
CANADIAN FOOD INSPECTION AGENCY**

Defendants

ORDER AND REASONS

[1] The issue to be determined on this motion is the ambit of documentary production at the post-certification stage of a class action commenced in the Federal Court.

I. Overview

[2] The Attorney General of Canada moves on behalf of the Defendants, Her Majesty the Queen as represented by the Minister of Agriculture and Agri-Food and the Canadian Food Inspection Agency [collectively referred to as the Crown] for an order requiring each of the representative Plaintiffs [the Plaintiffs] to file an accurate, complete affidavit of documents or, in the alternative, an order granting leave to cross examination of each of the Plaintiffs on their affidavits of documents.

[3] The Crown submits that the Plaintiffs' documentary production does not comply with the *Federal Courts Rules*, SOR/98-106 [the Rules] as very little relevant documentation has been produced about whether damages occurred at all, whether such damages were caused by the Crown or other causes, and the quantification of the alleged damages – all certified common issues.

[4] For the following reasons, I conclude that the Crown's motion is well-founded and that an order compelling each of the Plaintiffs to serve a further and better affidavit of documents should be granted.

II. Facts

[5] The underlying action is a certified class proceeding brought on behalf of commercial beekeepers who claim to have suffered damages as a result of the Crown's restrictions on the importation of honeybees from the United States. The three Plaintiffs are Canadian commercial

beekeepers seeking damages on behalf of a class of approximately 1,400 commercial beekeepers for the Crown's alleged negligence, or through abusive administrative action.

[6] The action was certified as a class proceeding by Mr. Justice Michael Manson on February 17, 2017 (see *Paradis Honey Ltd v Canada*, 2017 FC 199 [*Paradis Honey*]). Justice Manson concluded that nine common issues proposed by the Plaintiffs, set out at paragraph 70 of his reasons for judgment, should be certified as common issues, including whether the Crown owed each commercial beekeeper a duty of care and breached the requisite standard of care, whether the Crown's actions resulted in a recoverable loss, and what is the proper measure of damages, broken down into three sub-issues:

- a. whether or not aggregate damages are available, and, if so, on what basis and in what amount;
- b. what are the appropriate criteria for the distribution of the aggregate damages among the members of the proposed Class;
- c. alternatively, if individual damages are to be awarded, what is the framework or formula for the calculation of such damages.

[7] Justice Manson stated at paragraph 94 of his reasons that it was appropriate to treat the issues of damages from the claim in negligence and the claim in abusive administrative action as common issues for the purposes of certification, adding that:

[94] [...] Particularly, the questions of whether aggregate damages are available to the Class and how those damages should be distributed are common issues. If it is found that individual damages are appropriate, it may be that the framework for calculating such damages will have to be done on the basis of sub-classes, and the necessary changes to the certification order can be made by the Court at that time.

[8] In February 2018, the three Plaintiffs served their affidavits of documents listing documents in their possession, custody, and control. The affidavits are reproduced in the Crown's motion record.

[9] Two Plaintiffs, Rocklake Apiaries Ltd. and Honeybee Enterprises Ltd., did not list any documents related to damages in Schedule 1 to their respective affidavits of documents. The other Plaintiff, Paradis Honey Ltd. [Paradis Honey], served an affidavit of documents listing 1050 producible documents. These include some financial records, such as a "Comparative Income Statement," "Comparative Balance Sheet" and "General Ledger Report", but only for the years ending March 31, 2006 and 2007. Paradis Honey also listed and produced an estimate of its profit losses for the period of 2007, when damages are alleged to have commenced, to 2014. None of the source documents that underlie these records have been listed or produced.

[10] Dissatisfied with the Plaintiffs' documentary production, the Crown has brought the present motion.

III. Analysis

A. *Discovery of Documents in Class Proceedings*

[11] The obligation of a party to an action to identify and produce relevant documents in its power, possession or control is well established. Rule 223 of the Rules provides that every party shall serve an affidavit of documents setting out all relevant documents in or previously in their

possession, among other requirements. In class proceedings, a representative plaintiff is defined by Rule 2 as both a “plaintiff” in respect of the common issues and a “party”.

[12] Rule 334.11 provides that except where incompatible with the rules specific to class actions, which are contained in Part 5.1, the rules pertaining to actions apply to class proceedings. As there is no specific rule dealing with discovery of documents in class proceedings, Rules 222 to 233 govern by default. Accordingly, based on a plain reading of the Rules, each representative plaintiff must serve an affidavit of documents that sets out all relevant documents in or previously in its possession.

B. *Ambit of Documentary Production at the Common Issues Trial Phase*

[13] The dispute between the parties centers primarily on the test to be applied by this Court for documentary production in a class proceeding and, more particularly, post-certification and before trial of the common issues. As there does not appear to be any jurisprudence from this Court that examines the extent of the duty of representative plaintiffs in class actions to produce relevant documentation, different approaches taken by courts in other Canadian jurisdictions on this subject was considered.

[14] In Ontario, discovery is, as a general rule, limited to the common issues: *Abdulrahin v. Air France*, 2010 ONSC 3953, [2010] O.J. No. 3126 at para 21 (*Abdulrahin*). As stated by Master MacLeod in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, 2003 CanLII 21408 (ON SC) at para. 6:

[6] [...] Discovery of the representative plaintiffs at the present stage in the case before me is limited by the definition of common issues. In other words, the pleadings inform interpretation of the common issues and set out the facts to be relied upon but a question is only a proper question in this phase of the action if it relates to the common issues and not the individual claims.

[15] In British Columbia, the scope of discovery in class actions is broader and not limited by the common issues: *Stanway v Wyeth Canada Inc*, 2013 BCSC 369 at para 26 [*Stanway*]. Questions led in examination are subject to the evidentiary principles of materiality and relevance, the key determinant of relevance and materiality being the certified common issues.

[16] As for Québec, a party to a civil action has an ongoing obligation under the *Code of Civil Procedure*, c C-25.01 to disclose all documents it intends to rely on or that are requested by another party and are relevant to the proceedings. The Québec Court of Appeal highlighted that the class action process does not create or modify substantive rights: *Letourneau v. JTI-Macdonald Corp*, 2014 QCCA 944 (CanLII) at para. 14.

[17] The jurisprudence in this Court on the scope of documentary discovery is well settled. It is clear that the primary consideration is relevance. The principle for determining what document properly relates to the matters in issue is that it must be one which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences: *Novopharm Ltd. v. Eli Lilly Canada Inc.*, 2008 FCA 287 at paras 61-65. As stated by the Federal Court of Appeal in *Canada*

v Lehigh Cement Ltd, 2011 FCA 120 at para 34: “Whether this test is met will depend on the allegations the questioning party seeks to establish or refute.”

[18] The Crown submits the obligation of a representative plaintiff to produce relevant documents in this Court is wider than in other jurisdictions and is not limited only to those relevant to the common issues. The Crown is essentially asking the Court to adopt the British Columbia approach to this issue as set out in *Stanway* that production in a class proceeding should be handled the same way as production in a conventional action. I disagree.

[19] The difference in approach taken by others courts is largely based on differences between their rules of procedure. However, the consensus view is that documents relevant to the common issues must be produced by the representative plaintiff. Moreover, a matter is to be conducted in a manner proportionate to the amount involved in the proceeding, the importance of the matters in dispute and the complexity of the issues.

[20] In *Abdulrahin* at at paras. 12 - 13, Justice Strathy emphasized that a class proceeding is not a usual action and that it would not serve “efficiency or economy” to conduct discovery of the representative plaintiffs on matters that are not relevant to the common issues. He went on to state at para. 21 that this approach is consistent with the objective of judicial economy as well as the principle expressed in rule 1.04 of *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: “These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.”

[21] A similar approach has been adopted by the Federal Court rooted in proportionality and reasonableness: see Rule 3. The Federal Court's Practice Direction dated June 24, 2015, "*Case Management: Increased Proportionality in Complex Litigation Before the Federal Court*" also places emphasis on increased proportionality in proceedings before this Court. Among other recommendations, it provides that parties must ensure that the steps taken in proceedings are proportionate, in terms of the costs and time required, to the nature and complexity of the dispute.

[22] It is apparent from the case law and the Rules that several policy considerations are at play in discovery in all proceedings before the Federal Court. On one hand, the Court is concerned that an overly broad request for relevant documents will lead to an unfair imposition on parties, thereby compromising the expediency and efficiency of the class action certification hearing. On the other hand, the Court must have access to an evidentiary record that is sufficient with respect to make an accurate determination of the issues.

[23] In the circumstances, I conclude that the appropriate approach at the post-certification stage of a class proceeding is to follow the general rule that discovery of documents will be tied to the common issues and to depart from this approach is the exception.

C. *Application to the Facts*

[24] The Crown's motion addresses the basic obligation to produce documents relevant to the common issues. It is well established that the party seeking further documentary production must offer persuasive evidence that documents are available, but have not been listed and produced.

The burden of showing that another party's productions are inadequate lies with the party making the allegation. In my view, the Crown has met its burden.

[25] The Plaintiffs have refused to produce documents, including their personal financial records, on the grounds that they are not relevant to the common issues. They submit that there is an important difference between the "common issues", which are certified by the certification judge and can be determined in common for the entire class, and the "individual issues", which are issues that are uniquely individual to each class member and whose resolution cannot be determined on a class-wide basis. The Plaintiffs submit that experts will ultimately answer these questions.

[26] However, to proceed as proposed by the Plaintiffs would run counter to the Crown's full rights of discovery. Discovery is a very important tool of civil litigation. It is especially important in cases of this type, where issues of causation, measure of damages and right to aggregate damages are vigorously contested.

[27] With respect to the issue of aggregate damages, the Plaintiffs rely on case law from Ontario in resisting production, including the decision of Mr. Justice Perrell of the Ontario Superior Court of Justice in *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp*, 2012 ONSC 6549 [*Quizno's*]. Justice Perrell concluded that an aggregate assessment is not the tallying of the individual class members' claims but rather is a communal assessment of the totality of the claims where the underlying facts permit such an assessment to be done with reasonable accuracy.

[28] The present case is distinguishable in that, unlike in *Quizno's* where extensive production had already been made, two of the three representative plaintiffs have produced no documents for the relevant time period of 2006 to 2012. As for Paradis Honey, it has only produced three months of financial information for January to March 2007, and a few other documents pertaining to its claimed losses, which clearly do not include all relevant financial and other documents.

[29] A party cannot simply restrict production based on their preferred method of assessing alleged damages. In *Berry v Pulley et al*, 2008 CanLII 53850 (ONSC) [*Berry*], Master Joan M. Haberman rejected an argument that damages should be approached in a certain way, which would have limited the obligation to produce documents. In that case, the measure of damages was a common issue. The plaintiffs sought more fulsome discovery with respect to all defendants' seniority and earnings. The defendants resisted production, stating that it was their position that individual assessments would be necessary. Master Haberman rejected that argument, stating that "at this stage" the other party might not share that view, and that the defendants' "preferred approach was not a basis to restrict production: the debate about how damages should be calculated has yet to take place" (*Berry* at p. 10, fourth para).

[30] In order to consider the damages claimed, and in order to determine how such damages, if any, might be calculated in the aggregate or otherwise, a court needs to consider a particular representative plaintiff's circumstances, and "but for" the allegedly negligent or improper actions, what the circumstances of that particular representative plaintiff would be. Further, it

must consider how such circumstances might differ between plaintiffs in this class action. This exercise cannot be performed in a factual vacuum.

[31] The same can be said about the issues of causation and the measure of damage, which have also been certified as common issues. Like in *Berry*, the debate about whether the Crown's actions resulted in damages to the Plaintiffs and how damages should be calculated has not yet occurred. The Plaintiffs' preferred approach on these issues is not a basis to restrict production.

[32] Given the breadth of the common issues, and in the absence of any evidence that further production would be onerous, I consider it both efficient and fair to require the parties who have been identified as representatives of the class to provide financial records and other documents relevant to this matter. Proper production preceding examinations for discovery allows the parties to efficiently and properly prepare for examinations.

[33] The Plaintiffs' productions manifestly do not include all documents relevant to common issues. While it is impossible for the Crown or the Court to know what precise documents a particular Plaintiff ought to have listed in the affidavit of documents, each corporation should have, at the very least, financial and other records relating to their business and damages claimed during the relevant period.

[34] In their affidavit filed in support of the certification motion, representatives of the corporate Plaintiffs stated that they had taken steps to adequately represent the interests of the proposed class and provided information and background to counsel and obtained documents and

other information at counsel's request. And yet, two of the Plaintiffs have listed no documents in their affidavits of documents and, in the case of Paradis Honey, only a few documents are listed showing the costs they incurred, or avoided, in importing (or not importing) honeybee packages or queens from the United States or other countries. No Plaintiff has produced documents relevant to their labour, pest and disease control, overwintering, and other input costs. No Plaintiff has produced documents relating to their sales. No Plaintiff has produced documents relevant to the value of their property, or any business failure.

[35] The Crown does not seek disproportionate disclosure. In this case, the amount involved is \$200 million. The issues in dispute are important, including whether a regulator can be said to cause compensable damages to plaintiffs such as these. These are complex factual and legal questions, including complex damages questions.

[36] The Plaintiffs' collective production in this very significant claim is negligible, and in two cases absent or virtually absent, far less than a single plaintiff would be required to provide in a simple loss or income claim. It is not appropriate to wait for examinations for discovery and to seek proper production by way of undertakings at discovery. The purpose of requiring a plaintiff to list and produce relevant documents before examinations for discovery are conducted is self-obvious. Otherwise, the defendant's rights of discovery would be frustrated and the result would be additional costs and delay.

ORDER IN T-2293-12

THIS COURT ORDERS that:

1. The motion is granted in part.
2. Each representative Plaintiff shall serve a further and better affidavit of documents in a form consistent with these Reasons.
3. There shall be no order of costs of this motion.

"Roger R. Lafrenière"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2293-12

STYLE OF CAUSE: PARADIS HONEY LTD., HONEYBEE ENTERPRISES LTD. AND ROCKLAKE APIARIES LTD. v HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER OF AGRICULTURE AND AGRI-FOOD AND THE CANADIAN FOOD INSPECTION AGENCY

PLACE OF HEARING: OTTAWA, ONTARIO

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ORDER AND REASONS: LAFRENIÈRE J.

DATED: AUGUST 2, 2018

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