Date: 20090109

Docket: T-1943-06

Citation: 2009 FC 30

Ottawa, Ontario, January 9, 2009

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

BERNARD VINCENT CAMPBELL, SHARLE EDWARD WIDENMAIER, LENARD ROY LINK, and WILLIAM A. HEIDT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL DEFENCE

Defendants

REASONS FOR ORDER

[1] The within proceeding is a proposed class action. These reasons arise from the Plaintiffs' motion to obtain the Court's approval to discontinue this proceeding as required by Rule 334.3 of the *Federal Courts Rules*, SOR/98-106.

[2] The Plaintiffs commenced this action in November 2006. At the same time, similar actions were commenced in eight provincial superior courts including one in Saskatchewan. Two of the named Plaintiffs in this proceeding are Plaintiffs in all of the other actions.

[3] The procedural history of the within action up to March 2008 is set out in my reasons issued at that time (2008 FC 353). At that point in time, an earlier motion to strike had been dismissed for mootness and the Defendants had brought a new motion to strike the Plaintiffs' Amended Statement of Claim. The issue giving rise to the March reasons was whether the motion to strike should be heard before the certification motion. I concluded that the motion to strike should be heard first. Accordingly, the hearing of the motion to strike was fixed for a date in June 2008.

[4] At the hearing, the Defendants took objection to the affidavit evidence the Plaintiffs' sought to adduce on the basis that it was not in compliance with the Court's earlier direction. On the second day of the hearing, the Plaintiffs produced a "2nd Amended Statement of Claim" that had not been filed. For the purpose of the present motion, further details as to what transpired at that hearing is unnecessary. Suffice it to say that the motion to strike was rescheduled to a date in September.

[5] On June 25, 2008, the Plaintiffs forwarded a Notice of Discontinuance of this proceeding to the Defendants. Following an exchange of correspondence amongst the parties and the Court, I issued a direction indicating that if the Plaintiffs wished to discontinue this proceeding, they had to bring a motion to obtain the Court's approval. In the interim, on July 11, 2008, the named Plaintiffs

in the within action together with an additional Plaintiff commenced a second proposed class action in Saskatchewan based on the same subject matter and served the new Statement of Claim on the Defendants. As a result, this motion was heard in place of the motion to strike.

[6] The Plaintiffs argue that a discontinuance would be in the best interests of the class citing their superior pleadings in the recent claim filed in Saskatchewan, juridical and personal advantages, and their unwillingness to pursue the claim in this Court.

[7] In opposition to the motion, the Defendants advance two main arguments. First, they submit that the Plaintiffs' evidence does not demonstrate that a discontinuance "will not prejudice the interests of the plaintiffs, putative class members and the defendants." Second, the Defendants submit that the "motion to discontinue is an abuse of the Court's process".

[8] Although a party may discontinue an ordinary proceeding without the consent of the other party or leave of the Court, Rule 334.3 provides that a "proceeding commenced by a member of a class of persons on behalf of the members of that class may only be discontinued with the approval of a judge." Unlike the legislation in provinces such as British Columbia, Alberta, Saskatchewan and Manitoba where court approval to discontinue is required only after an action has been certified, as in Ontario, the Federal Court rule requires court approval prior to certification as well.

[9] As Justice Cullity observed in *Sollen v. Pfizer Canada Inc.*, [2008] O.J. No. 866, at para. 34, the requirement to obtain court approval of a discontinuance "recognizes the responsibility of the

court to ensure that the interests of putative class members will not be prejudiced by a discontinuance."

[10] The Defendants, however, take the position that the Court must also ensure that their interests and those of the Plaintiffs are not prejudiced. The Defendants maintain that their interests are relevant since the purpose of the discontinuance is not to conclude the lawsuit but to pursue the same claims in a different forum. The Defendants rely on Justice Slatter's statement in *Davey v. Canadian National Railway Co.*, [2006] A.J. No. 1193 at para. 8, that a "… Court should authorize a discontinuance of a proposed class action unless some prejudice can be shown …" as authority for the proposition that their interests are a relevant consideration.

[11] Having reviewed the extensive jurisprudence referred to by the parties, I have been unable to find any support for the Defendants' assertion that the Court must also be satisfied that they will not be prejudiced by the discontinuance. In particular, the Court's statement in *Davey*, above, has been taken out of context and does not support the assertion. In *Davey*, above, the Plaintiffs brought an unopposed motion to discontinue a proposed class action. As Justice Slatter pointed out, since the action had not been certified, the Plaintiffs were entitled to discontinue as a matter of right and without court approval. He added, however, that it was prudent to have any discontinuance of a proposed class action reviewed by the Court. It is clear from the subsequent considerations that he was only concerned with the possible prejudice to the putative class members.

[12] It should be noted that although the Defendants take the position that prejudice to their interests is a relevant consideration, they set out their specific allegations of prejudice within their submissions on abuse of process. Having regard to the rationale for the rule, I am not persuaded that potential prejudice to the Defendants is a relevant factor on this motion. This will be the subject of further comment under the abuse of process analysis.

[13] As to the prejudice accruing to the Plaintiffs and the putative class members, the Defendants submit that they will be prejudiced from the further delay in the advancement of the claims. They point out that this is particularly significant given the advanced age and failing health of some of the Plaintiffs and putative class members. As well, the Defendants submit that there is potential prejudice to the Plaintiffs arising from the possibility of a significant cost award on the discontinuance and from the duplication of expenses in another action. The Defendants take the position that the evidence discloses concerns regarding the Plaintiffs' understanding of the proceedings and the nature of the instructions to the Plaintiffs' counsel to discontinue and commence a new action in Saskatchewan.

[14] Turning first to the Plaintiffs' interests, the Plaintiffs have decided that they wish to pursue their litigation in the Saskatchewan Court. They are represented by counsel with whom they have had an opportunity to discuss that course of action. It is for the Plaintiffs and their counsel to consider and weigh the potential advantages and disadvantages of a particular litigation strategy and not the Court. As to the alleged concerns regarding the Plaintiffs' capacity to instruct counsel and to

make informed decisions concerning their litigation strategy, although it is relevant to the certification, it is not relevant on this motion.

[15] As stated in *Sollen*, above, the central consideration on a motion for approval to discontinue, is the potential prejudice to the putative class members. The only potential prejudice raised by the Defendants is the delay associated with having to "re-litigate" the claims in Saskatchewan.

[16] While there is no doubt that some delay will result if the claims are pursued in the Saskatchewan Court, the Defendants' position of significant delay is premised on their assertion that the within action is in an "advanced state of readiness". I am unable to agree with this characterization. Despite extensive efforts and commitment of time and resources to move the action forward, no significant procedural or substantive determinations have been made. In my opinion, any delay will not be significant in terms of the overall action and is off set by another consideration that will be discussed below.

[17] Before considering the Defendants' second argument, as the circumstances surrounding this case bear some similarity to two interrelated cases, *Boehringer Ingelheuim (Canada) Ltd. v. Englund*, [2007] S.J. No. 273 (C.A.) in Saskatchewan and *Sollen*, above, in Ontario, it is useful to set out a brief overview of those two cases.

[18] One day after having commenced a proposed class action in Saskatchewan, the Plaintiffs together with two additional Plaintiffs commenced the same action in Ontario. One of the

Defendants, Boehringer, sought a stay of the Saskatchewan proceeding on the basis that Saskatchewan was not a convenient forum and that the commencement of identical proceedings in two jurisdictions was an abuse of process. The motion was dismissed. On appeal to the Saskatchewan Court of Appeal, the Plaintiffs sought to introduce new evidence showing that the Ontario action had been discontinued. In fact, the action had not been discontinued as the Plaintiffs had not obtained the requisite approval of the discontinuance in Ontario.

[19] In reaching its decision, the Court observed that for the same reasons courts have recognized the bringing multiple actions in a single jurisdiction as an abuse of process, the bringing of multiple actions in two or more jurisdictions may also be an abuse of process. The Court also observed that where there is no suggestion that multiple claims serve any useful purpose, "the courts are being used in a manner which serves no proper purpose or which is vexatious or oppressive." The Saskatchewan Court of Appeal concluded that the action in that province should be stayed on the ground of abuse of process. The Court added, however, that the stay was not unconditional. The Plaintiffs could litigate their action in Saskatchewan provided that the Ontario action was discontinued.

[20] In the course of its analysis, the Court observed that although it had not been raised by the Plaintiffs, arguably any abuse of process flowed from the Ontario action rather than from the Saskatchewan action since the Saskatchewan action was started first. The Court commented that this could be, however, an overly "formalistic" view and that in the circumstances it would be unjust to defeat the appeal on the ground that the Defendant had sought to stay the wrong case. This

was in large measure based on the Court's conclusion that the stay should not permanently prohibit the Plaintiffs from proceeding in that province.

[21] Subsequently, the Plaintiffs moved for leave to discontinue the Ontario action. Although the motion in the Ontario Court was unopposed, the Court undertook the requisite inquiry in relation to the potential prejudice to the interests of the putative class members should the discontinuance be approved. In this respect, the Court's observations are helpful in the present case.

[22] In reaching the conclusion that there would be no substantial prejudice to the putative class members, Justice Cullity took into account the following: no substantial steps had been taking in the proceeding; the statement of claim had not been served by the Plaintiffs; no notice of the action had been given to the putative class members; any possible cost consequences in Ontario would only be relevant to the Plaintiffs; and that it would not be in the best interests of the class to refuse to approve the discontinuance.

[23] The Court also noted that there was no evidence that the limitation period in Saskatchewan would not continue to be suspended. The Court commented on an additional matter that has no relevance to this proceeding. The Court concluded that as it was unlikely that there would be any substantial prejudice to the class, there was 'no possible justification for denying approval and frustrating the Plaintiffs' choice of Saskatchewan as a more appropriate forum."

[24] Turning now to the Defendants second argument, they submit that the motion to discontinue this proceeding constitutes an abuse of process for the following reasons: first, it violates the public policy against duplicative and vexatious proceedings; second, there is no juridical advantage to re-litigating this lawsuit in the Saskatchewan Court; third, it would be manifestly unfair to the Defendants; and fourth, it entails an unnecessary waste of both court and litigant resources.

[25] I accept that the multiplicity of actions commenced by the Plaintiffs, in particular, the recent action commenced in Saskatchewan may amount to an abuse of process. However, given that this is the Court in which the Plaintiffs opted to pursue their claims before commencing the second action in Saskatchewan, in my opinion, the abuse of process, if any, arises from the newly filed Saskatchewan action and it is in that forum that it should have been raised.

[26] I appreciate the Court's observation in *Boehringer*, above, with respect to taking an overly "formalistic" view concerning the forum in which the allegations of abuse of process should be adjudicated. However, the circumstances in that case and the reason for not penalizing the Defendant for having raised the issue of abuse of process in the wrong court are distinguishable from those in this case.

[27] In the Saskatchewan and Ontario cases, the two actions were started at the same time and, other than a motion for a change of venue in the Ontario case, no procedural or substantive steps had been taken by any of the parties. As the Saskatchewan Court of Appeal stated, the Plaintiffs had to choose where they wanted to litigate their claims.

[28] In contrast, in this case, the Plaintiffs chose some months ago to litigate their claims in this Court. The Plaintiffs filed their motion for certification and the Defendants have filed motions to strike the Statement of Claim. Although time and resources have been devoted to the file by the parties and the Court, the Plaintiff have been able to thwart any attempts to move the file forward. It is not necessary to review the complete procedural history once again. In these circumstances, the abuse of process ought to have been raised in the Saskatchewan Court.

[29] My view in this regard is reinforced by two additional considerations. First, the no juridical advantage, "manifest unfairness", and the waste of resources submissions arise in the context of the Saskatchewan action and it is in that action that the arguments should be advanced. Additionally, it is in that forum that appropriate relief can be awarded if the abuse is established.
Second, the relief being sought by the Defendants in this case is a dismissal of the motion for approval of the discontinuance. As in *Sollen,* above, I am not persuaded that this would be in the best interests of the putative class members. The Plaintiffs have stated that they do not wish to pursue the action in this Court and I cannot force them to do so. Further, as the Court also pointed out in *Sollen*, above, in the end, the only available sanctions would be a motion to dismiss for failure to prosecute the action and an order for costs.

[30] In conclusion, I am satisfied that it is unlikely that there will be substantial prejudice to the putative class members if this action is discontinued. Accordingly, approval to discontinue will be granted.

[31] In their alternative submissions, the Defendants ask that if the motion is allowed, that it be conditional on the Plaintiffs notifying the class of the discontinuance and payment of any cost awards in favour of the Defendants.

[32] Although no formal notification has been given to the putative class, the record shows that there was significant publicity at the time the original actions were filed. Putative class members should be made aware of the fact that this action has been discontinued. Accordingly, the order will require that notice of the discontinuance be given.

[33] At the time that the motion to discontinue was filed, it had been agreed earlier that the question of costs in connection with the motions to strike and certification would be dealt with at the time of the determination of these motions. As a result, submissions on costs are still outstanding.

[34] As I do not wish to delay the action in Saskatchewan, I will convene a case management conference with the parties to discuss the content of the notice to the putative class and the method of notification, as well as, a process to deal with the outstanding cost issues. An order will issue after the case management conference.

"Dolores M. Hansen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1943-06
STYLE OF CAUSE:	BERNARD VINCENT CAMPBELL, SHARLE EDWARD WIDENMAIER, LENARD ROY LINK AND WILLIAM A. HEIDT v. THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF NATIONAL DEFENCE
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 3, 2008
REASONS FOR ORDER:	HANSEN J.
DATED:	January 9, 2009

APPEARANCES:

Mr. E.F. Anthony Merchant, Q.C. Mr. Casey Churko	FOR THE PLAINTIFFS
Ms Catherine Coughlan Mr. Peter Barber Ms Jaxine Oltean	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Merchant Law Group LLP Regina, Saskatchewan	FOR THE PLAINTIFFS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANTS