

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240322

**Dockets: A-16-23
A-15-23**

Citation: 2024 FCA 61

**CORAM: WEBB J.A.
RENNIE J.A.
BIRINGER J.A.**

Docket: A-16-23

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MARGORIE HUDSON

Respondent

and

**GEOFFREY GREENWOOD AND TODD
GRAY**

Intervenors

Docket: A-15-23

AND BETWEEN:

HIS MAJESTY THE KING

Appellant

and

HARVEY ADAM PIERROT

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 22, 2024.

REASONS FOR ORDER BY:

BIRINGER J.A.

CONCURRED IN BY:

WEBB J.A.
RENNIE J.A.

Federal Court of Appeal



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REASONS FOR ORDER

BIRINGER J.A.

[1] Canada moves under subsection 397(2) of the *Federal Courts Rules*, SOR/98-106 (the Rules), to have the Court set aside the parts of the Judgments and Reasons for Judgment, dated February 20, 2024, ordering them to pay costs, and to substitute the words “without costs” for the existing words “with costs”.

[2] The respondents, the plaintiffs in *Hudson* and *Pierrot*, did not mention costs in their submissions to this Court on the merits of the appeal and did not provide responding submissions on this motion.

[3] Canada relies on Rule 334.39, which displaces the Court’s broad discretion as to costs with a presumptive “no costs” approach to class proceedings, subject to certain exceptions. Rule 334.39 provides as follows:

No costs

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

(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;

(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or

(c) exceptional circumstances make it unjust to deprive the successful party of costs.

Individual claims

(2) The Court has full discretion to award costs with respect to the determination of the individual claims of a class member.

Sans dépens

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) sa conduite a eu pour effet de prolonger inutilement la durée de l’instance;

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) des circonstances exceptionnelles font en sorte qu’il serait injuste d’en priver la partie qui a eu gain de cause.

Réclamations individuelles

(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.

[4] This Court did not consider Rule 334.39 in rendering the decisions on costs and it is open to us to reconsider that part of the judgments (and reasons) pursuant to subsection 397(2) of the

Rules: *Siddiqui v. Canada (Citizenship and Immigration)*, 2016 FCA 237 at paras. 20-21; *Le Corre v. Canada (Attorney General)*, 2005 FCA 238 at paras. 6-8.

[5] The “no costs” regime applicable to class proceedings, while generally designed to assist plaintiffs in their access to justice, applies to all parties: *Wenham v. Canada*, 2020 FC 592 at para. 13, aff’d 2021 FCA 208 at paras. 19-20.

[6] Rule 334.39 applies as soon as parties to the action are made parties to a certification motion: *Campbell v. Canada*, 2012 FCA 45 at para. 45; *Mohr v. National Hockey League*, 2022 FCA 145 at para. 76.

[7] The parties in this motion are parties to the *Hudson* certification motion, which was served on October 5, 2020. There is no certification motion in *Pierrot v. Canada*. Counsel agreed to hold the action in abeyance if *Hudson* proceeds and, accordingly, *Pierrot* has been stayed pending a final determination in *Hudson: Canada v. Hudson*, 2024 FCA 33 at para. 21.

[8] Subsection 334.39(2) of the Rules is not relevant. Further, there is no reason to apply any of the exceptions contained in paragraphs (a) through (c) of subsection 334.39(1).

[9] Rule 334.39(1) applies to the *Hudson* parties. While Rule 334.39(1) is not, strictly speaking, engaged in respect of the *Pierrot* parties, given the reasons for the matter being stayed, it would be inappropriate to depart from the “no costs” regime. Moreover, the plaintiffs in both *Hudson* and *Pierrot* did not mention costs in their submissions to this Court. Accordingly, none

should be awarded: *Chen v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 170 at para. 60; *Exeter v. Canada (Attorney General)*, 2013 FCA 134 at para. 12.

[10] For the foregoing reasons, I would allow the motion, delete the words “with costs”, and replace them with the words “without costs” in the Court’s judgments and reasons (at paragraph 93), dated February 20, 2024.

“Monica Biringer”

J.A.

“I agree.
Webb J.A.”

“I agree.
Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-16-23 AND A-15-23

DOCKET: A-16-23

STYLE OF CAUSE: HIS MAJESTY THE KING v.
MARGORIE HUDSON AND
GEOFFREY GREENWOOD AND
TODD GRAY

AND DOCKET: A-15-23

STYLE OF CAUSE: HIS MAJESTY THE KING v.
HARVEY ADAM PIERROT

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: BIRINGER J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

DATED: MARCH 22, 2024

WRITTEN REPRESENTATIONS BY:

DOCKETS: A-16-23 AND A-15-23

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DOCKET: A-16-23

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