IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Morrison Estate v. Nova Scotia (Health), 2009 NSSC 198

Date: 20090626
Docket: Hfx. No. 230887
Registry: Halifax

Between:

The Estate of Elmer Stanislaus Morrison, By His Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, By His Legal Guardian Elizabeth Lee and Elizabeth Lee

Plaintiffs/Respondents

and

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the Province of Nova Scotia at the relevant time and the Executive Director of Continuing Care for the Province of Nova Scotia

Defendants/Applicants

LIBRARY HEADING

Judge: The Honourable Justice David MacAdam

Heard: June 24, 2009, in Halifax, Nova Scotia

Written Decision: June 26, 2009

Subject: Civil Practice and Procedure – Class Proceedings – Pre-certification Applications.

Summary: The defendants seek further and better particulars from the plaintiffs, of their claims against the defendants, prior to the certification hearing. The plaintiffs respond that the certification hearing is procedural only. The Application of the defendants should be stayed until it is determined whether the plaintiff's Application for certification is granted.

Result: The Application by the defendants is stayed. Unless the Application would dispose of the proceeding, party or parties, or an issue or issues, it is more appropriately made following a determination whether certification is granted.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Morrison Estate v. Nova Scotia (Health), 2009 NSSC 198

Date: 20090626
Docket: Hfx. No. 230887
Registry: Halifax

Between:

The Estate of Elmer Stanislaus Morrison, By His Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, By His Legal Guardian Elizabeth Lee and Elizabeth Lee

Plaintiffs/Respondents

and

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the Province of Nova Scotia at the relevant time and the Executive Director of Continuing Care for the Province of Nova Scotia

Defendants/Applicants

Judge: Justice A. David MacAdam

Heard: June 24, 2009, in Halifax, Nova Scotia

Written Decision: June 26, 2009

Counsel: Michael Dull, Raymond F. Wagner, Dale Dunlop for the Plaintiffs
Aleta Cromwell, for the Defendants

By the Court:

[1] This is an Application by the Attorney General of Nova Scotia for an order requiring the plaintiffs to provide further and better particulars in response to a second demand for particulars.

[2] On January 16, 2009, the Attorney General of Nova Scotia forwarded to the plaintiffs a demand for particulars and received an answer dated January 30, 2009. On February 24, 2009, Counsel sent a second demand for particulars to the plaintiffs. The Attorney General now seeks an order requiring the plaintiffs to respond with " further and better" particulars.

Background

[3] The plaintiffs allege that in February 2002, it was decided Mr. Morrison required long-term care on account of age and infirmity. In accordance with the policy of the Nova Scotia Department of Health, he and Ms. Morrison submitted to a mandatory financial assessment by the Department to facilitate his admission to a long-term care facility. It was determined that they had sufficient income and assets that Mr. Morrison could only be admitted to a long-term care facility on "a

private pay basis". As a consequence Mr. Morrison was required to use his income and assets to pay for his long-term health care.

[4] The Statement of Claim alleges that the Attorney General of Nova Scotia, in failing to provide for the cost of the medically necessary health treatment for Mr. Morrison, as well as for members of the proposed class in similar situations, "has violated a number of statutes, all of which are designed to ensure that Nova Scotians and other Canadians have access to healthcare services as required without reference to an individual's ability to pay for such services." Among the statutes alleged to have been violated by the defendants are the *Health Services and Insurance Act*, R.S.N.S., c. 197, the *Homes for Special Care Act,* R.S.N.S., c. 203, the *Canada Health Act,* R.S.C. C-6., the *Canadian Charter of Rights and Freedoms, Constitution Act,* 1982 Schedule B to *Canada Act 1982 (U.K.*) 1982 c. 11, the *Social Assistance Act*, R.S.N.S., c. 432, the *Matrimonial Property Act*, R.S.N.S., c. 275 and the *Survival of Actions Act,* R.S.N.S., c.543.

[5] In 2007 the plaintiffs amended the Originating Notice (Action) and Statement of Claim. By Consent Order, a further Amended Statement of Claim, entitled Fresh Amended Originating Notice (Action) (herein "New Statement of

Claim"), was filed. By this New Statement of Claim the parties to the proceeding were amended by the addition of the remaining named plaintiffs and by identifying the Department of Health, (herein "DOH"), and the addition of named individual defendants.

[6] The plaintiffs allege the DOH was the party that determined whether seniors requiring public funding were eligible for admission to subsidized care in nursing homes. The individual defendants were identified as the Minister of Health, at the time the alleged "wrongful decisions and actions identified in this Action were first undertaken by the DOH" and "the Executive Director of the Continuing Care Branch of DOH with executive responsibility for long-term care programs and services for seniors, including care in nursing homes."

[7] In the New Statement of Claim the plaintiffs assert that unlike under Medicare, under the *Health Services and Insurance Act*, R.S.N.S. 1989, c.197, where funding is provided from the general revenues of the province and without cost to the recipient, prior to 2001 the provision of long-term care facilities for seniors, including nursing homes, operated under a two-tier system, as follows:

> Until February l, 2001, admission to nursing homes and the payment for the care of seniors in nursing homes operated under a two-tier system with the following essential characteristics:
>
> (a) persons who had the financial capacity to pay the full per diem rate approved by the DOH and charged by the nursing home were obliged to do so on a private pay basis and retained the right to contract directly with a nursing home of their choice to be admitted and cared for without submitting to any financial or other assessment by the DOH; and
>
> (b) persons who did not have the financial capacity to pay for nursing home care could apply to have the DOH pay all or part of the per diem charges subject to a functional and financial assessment and would be placed on one or more waiting lists until a bed became available.

[8] The New Statement of Claim traces the history of the provision of long–term facilities for seniors until, in 2000, the responsibility was transferred from the Department of Community Services to the defendant, DOH. Effective February 1, 2001, the DOH decided to implement a single coordinated placement list, including residents who paid privately as well as those who required public financial assistance. The plaintiffs state that, as a result, seniors with significant financial resources were no longer permitted to contract directly with nursing homes for admission and care; rather, they were forced into the government-controlled waiting list and were compelled to submit "to an intrusive and psychologically stressful financial disclosure".

[9] The New Statement of Claim contains a review of the impact on the plaintiffs of these new requirements, including an assertion that the plaintiff, the late Mr. Morrison, ". . . could only be admitted to a nursing home on 'a private pay basis'". Also, contained in the New Statement of Claim, is the assertion that the plaintiff, Mr. Lee, was also required to submit to a mandatory assessment in order to facilitate his admission to a nursing home. In the New Statement of Claim it is asserted that Mr. Lee and Ms. Lee were required to use both their income and assets to pay for his nursing care until both assets were depleted.

[10] The New Statement of Claim alleges various bases on which liability should rest with one or more of the defendants.

[11] By consent order dated December 23, 2009, the plaintiffs filed a "Second Fresh as Amended Statement of Claim". The Second Fresh as Amended Statement of Claim incorporated a number of amendments and was recited, in the order, as being "easy and convenient to read". Also, at this time, the title of this proceeding was amended to delete the names of the named defendants. Counsel confirm that the amendments incorporated in the Second Fresh as Amended Statement of Claim are not relevant to this application.

[12] Counsel further agree that the sought – after particulars can be summarized as follows:

1. The particulars of what “health care costs” the Defendant wrongfully paid.

2. The specifics of the injuries and damages suffered by the class.

3. The particulars of the breach of fiduciary duty claim.

4. The particulars justifying the *Charter* breach.

5. The particulars of the remedies sought.

The Positions

The Applicant

[13] Although referencing Nova Scotia Civil Procedure Rules relating to demands for particulars and the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, the focus of the oral representation was on the application of the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c.360, and in particular section 17 (1):

> 17(1) In proceedings against the Crown, the Crown, before taking any step in the proceedings, may require the claimant to provide the Crown with such information as the Crown may reasonably require as to the circumstances in

> which it is alleged that the liability of the Crown has arisen and as to the departments and officers of the Crown concerned.

[14] In support of the submission that this Act expands the entitlement of the Crown to information concerning the particulars of any claims being advanced against the Crown, counsel references the comments of Chief Justice Glube in *M. A. Hanna Co. v. Nova Scotia (Premier)*, [1990] N.S.J. No. 143, at paras. 29 & 30:

> 29. I agree with the applicants submission that to ensure that s. 17(1) has some meaning, it is appropriate to assume that it is not merely a duplication of Civil Procedure Rule 14.
>
> 30. It appears to be a reasonable inference to draw that one reason why this section is included in the legislation is to provide the Crown with specific information so that they may investigate a claim properly. Considering the number of persons who might be involved with the Crown, either as employees or agents or contractors, more information than normal may be required to ensure that the Crown knows what the claim is about and who is involved. This opinion is reinforced by the fact that the section starts off by saying that the Crown may have this information 'before taking any step in the proceedings' ...

[15] Although also referenced in his written submission, counsel for the Crown acknowledged that the *Constitutional Questions Act, supra*., is not directly applicable, since the Crown is a party to this proceeding.

The Respondent

[16] Counsel for the plaintiffs acknowledges that in the event it is successful at the certification hearing, there are particulars for which the defendants are entitled to further and better answers. Counsel says, however, that the Application is premature and should be stayed, pending a determination of its application for certification as a class preceding pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28.

[17] The plaintiffs, in respect to its request for a stay, cite several authorities as to the jurisdiction of the Court to grant such relief. Counsel's submission refers to the *Judicature Act*, R.S.N.S. 1989, c. 240, Civil Procedure Rule 1.01 and section 16 of the *Class Proceedings Act*, supra. The latter reads:

> 16. The court may at any time stay or sever any proceeding related to the class proceeding on the terms or conditions the court considers appropriate.

[18] Clearly Civil Procedure Rule 1.01, which provides that the Rules are for the "just, speedy, and inexpensive determination of every proceeding," and section 41(e) of the *Judicature Act*, *supra.*, which specifically directs that nothing in the

Act "shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit" or "so far as is necessary for the purposes of justice," together with section 16 of the *Class Proceedings Act,* authorize the court to grant the relief sought by the respondent. Counsel also submits that the "Court has an inherent jurisdiction so as to ensure the appropriate administration of justice." In fact, on this Application, neither in its written nor oral submissions, does the applicant question the authority of the Court to grant a stay.

[19] The plaintiffs suggest the question of certification is strictly a procedural one and that the stated goals of Class Proceedings, of judicial economy and access to justice are best served by limiting the scope of the inquiry at the certification stage to procedural questions. Since the particulars sought by the Applicant relate to the substantive issues, the particulars are premature at this stage of the proceeding.

The Law and Argument

[20] The nature of the certification hearing, including the issues before the Court, are outlined in section 7 (1) and (2) of the *Class Proceedings Act*, *supra*. The statutory provisions read as follows:

> 7(1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
> >
> > (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

(c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and

(f) any other matter the court considers relevant.

[21] Also relevant on this application are sections 4(6), 8(1) and 8(2), which read:

4(6) A defence to a class preceding does not need to be filed until forty-five days after a certification order is issued in respect to the proceeding.

8(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

8(2) An order certifying a proceeding as a class preceding is not a determination of the merits of the proceeding.

[22] The nature of the certification hearing was outlined by Justice L. D. Barry in *Ring v. Canada (Attorney General)*, 2007 NLTD 146, at para 72. Referencing the evidentiary threshold under the Newfoundland *Class Actions Act*, S.N.L. 2001, c.

C-18.1, similar although not identical to the Nova Scotia Act, Justice Barry commented:

> This test establishes a ‘low threshold’ for class certification: . . . Courts should avoid imposing excessive technical requirements on plaintiffs and should give class proceedings legislation a large and liberal interpretation to ensure that policy goals are realized: . . . Class certification is not a trial or a summary judgment motion but rather a procedural motion which concerns the form of an action, not its merits. Contentious factual and legal issues between the parties cannot be resolved on a class certification motion. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action:. (Authorities and citations referenced omitted)

[23] Although the threshold may be low, the plaintiffs are, of course, required to show that the pleadings, or the notice of application, discloses a cause of action and meets the other requirements of section 7. In doing so, the court is not determining whether the plaintiffs have a cause of action but merely whether, on the face of the pleadings, or the notice, elements of a claim have been outlined. The lack of technicality contemplated by the *Class Proceedings Act*, *supra*, is evident from section 8(1), which permits an adjournment to correct any deficiencies by amendment of the pleadings and/or the introduction of further evidence.

[24] In *Anderson v. Canada (Attorney General)*, [2008] N.J. No. 302, R. A. Fowler J. considered whether certain defense motions, including an application for particulars, should be heard and determined prior to or following a certification hearing. At paragraphs 30 – 31, 38 and 39, he observes:

> 30. ... In any event, without commenting on the merits of the Defendant Canada's Demand for Further Particulars, I find that the Statement of Claim is sufficiently stated to inform the Defendant of the case to be met and permit the Defendant to proceed on at least this Application for Certification. If further particulars are necessary to move the matter forward an application can be made following the Certification Hearing in the normal course of the trial. I can see no prejudice to the Defendant Canada's case to proceed in this manner. The Defendant Canada will retain the opportunity to have its position stated and determined on this issue following the Certification Hearing.
>
> 31. In relation to these two issues; that is, the Defendant's Demand for Particulars; and the Defendant's demand to compel the Plaintiffs to add further defendants, I am convinced that the hearing of these preliminary applications would do nothing to advance a fair and expeditious determination of the certification hearing. On the contrary, lengthy preliminary proceedings with their inevitable delays for the serving of notices especially in relation to potential new defendants will almost certainly de-rail the certification hearing and render the *Class Actions Act* ineffective.
>
> .....
>
> 38. I agree with the position that where a preliminary application has the potential to dispose of the litigation or more efficiently address the objectives of the *Class Actions Act,* then it should be heard prior to the certification hearing.
>
> 39. That is not the case in the present matter and I am convinced that to permit these two applications to proceed prior to the certification hearing will cause this

> certification hearing stage of the intended class action to spiral down a timeless rabbit hole wherein one particular application begets another....

[25] Like Justice Fowler, I am satisfied that the application for further and better particulars is not likely to "dispose of the litigation or more efficiently address the objectives of the *Class Proceedings Act",* such that it should be heard and determined prior to the certification hearing.

[26] To similar effect are the comments of Justice Winkler in *Baxter v. Canada (Attorney General)*, [2005] O. J. No. 2165:

> 9. Although the CPA does not expressly require the certification motion to be the first order of business, the 90 day time-frame imposed by section 2(3) provides a clear indication that the certification motion should be heard promptly and normally be given priority over other motions. In another case involving the scheduling of motions in a class proceeding, Attis v. Canada (Minister of Health), [2005] O.J. No. 1337 (S.C.), this court held at para. 7 that 'as a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined.'
>
> 10. Similarly, in Moyes, Nordheimer J. stated at para. 8:
>
>> The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that the reality detracts from the intent to be drawn from the section.

> Nordheimer J. ultimately determined that the defendant's motion for summary judgment could not be heard until after the determination of the certification motion. (See also: Ward-Price v. Mariners Haven Inc., [2002] O.J. No. 4260 (S.C.), supra, at para 36).
>
> 11. Prior to certification, an action commenced under the CPA is nothing more than an intended class proceeding: Logan v. Canada (Minister of Health) (2003), 36 C.P.C. (5th) 176 (S.C.) at para. 23, aff'd 71 O.R. (3d) 451 (C.A.) (See also: Boulanger v. Johnson & Johnson Corp. (2003), 64 O.R. (3d) 208 (Div. Ct); *Attis, supra* at para 14.) In the pre-certification period it is not clear whether a proceeding will ultimately be certified. Further there is an element of fluidity in respect of the class definitions and the common issues. Accordingly, motions brought prior to certification may turn out to have been unnecessary, over-complicated or incomplete.
>
> 12. Moreover, courts will not always have sufficient information to adequately determine motions at the pre-certification stage....

[27] Although the timeline in Nova Scotia is 120 days, the comments of Justice Winkler are no less applicable.

[28] In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S. C. R. 534, at paras. 27-29, Chief Justice McLachlin, in the judgment of the Court, observed:

> 27. Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation

> both for plaintiffs (who can share the litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times....
>
> 28. Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied....
>
> 29. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation...

[29] Although made in the absence of comprehensive legislation governing class proceedings, the observations by Chief Justice McLachlan are no less applicable in Nova Scotia at this time. The goals of access to justice, judicial economy, and behavior modification, will not be met if intended class proceedings are permitted, prior to even the certification hearing, "to spiral down a timeless rabbit hole wherein one particular application begets another."

[30] The application for "further and better particulars" is stayed pending the certification hearing. The Attorney General's request for "further and better

particulars" under the *Proceedings Against the Crown Act, supra*., and/or the *Civil Procedure Rules*, may, if then required, be pursued.

J.