

Citation: Cannon v. Funds for Canada Foundation, 2010 ONSC 146
COURT FILE NO.: CV-08-362807CP
DATE: 20100107

ONTARIO SUPERIOR COURT OF JUSTICE

RE: **Michael Cannon**, Plaintiff/Moving Party
Funds for Canada Foundation, et al., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Samuel S. Marr*, for the Plaintiff
John P. Brown & Meighan Leon, for the Defendants Parkland Financial et al.
John F. Rook, Q.C., for the Defendants Patterson Law and Edwin Harris
Paul Dineen, for the Defendant Kenneth Spurling
Deborah Berlach, for the Defendants Funds for Canada Foundation, Sam Albanesc, Ken Ford, Riyad Mohammed, David Raby and Greg Wade

DATE HEARD: By teleconference and written submissions

ENDORSEMENT

(Scheduling of Directors' Rule 21 Motion)

[1] Some of the defendants (Sam Albanesc, Ken Ford, Riyad Mohammed, David Raby and Greg Wade, collectively, the "Directors") have requested directions on the scheduling of a motion they propose to bring under Rules 21.01(1)(b) and 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, striking the portions of the statement of claim that relate to them.

[2] The background of this matter is set out in my endorsement dated November 20, 2009: *Cannon v. Funds for Canada Foundation*, [2009] O.J. No. 4986. Briefly, the plaintiff was an investor in a tax shelter called the Donations Canada Charitable Donation program (the "Program"). He claims, on his own behalf and on behalf of a putative class of investors, that they suffered losses when Revenue Canada disallowed tax credits that they had claimed. The plaintiff claims that the primary purpose of the Program was to benefit the defendants and that most of

Page: 2

the money paid by members of the proposed class was received by the defendants, rather than by the charities.

[3] The plaintiff sued a number of defendants. These included:

- (a) Funds for Canada Foundation, a registered charity;
- (b) Donations Canada Financial Trust, a private charitable trust;
- (c) Parklane Financial Group Limited, Trafalgar Trading Limited, Trafalgar Associates Limited, Trafalgar Securities Limited, Trafalgar Research (Bermuda) Limited and TCL Trafalgar, B.V., corporations that allegedly marketed, administered and sold the Program;
- (d) a law firm, Patterson Law, and Edwin Harris, a partner in that firm, who allegedly provided a "comfort letter" in connection with Program; and
- (e) certain individuals, including the Directors, who allegedly created, controlled, marketed and sold the Program.

[4] An agreement was reached between the plaintiff and some of the defendants, as a result of which the action has been dismissed against the defendants Trafalgar Research (Bermuda) Limited, Trafalgar Securities Limited, TCL Trafalgar B.V., Zych, Kindbom, Robertson, Ronald G. Olsthoorn, Furtak and Spurling.

[5] The Directors are alleged to have controlled and managed some or all of the corporations that created, marketed, administered, operated, participated in and sold the Program to the public. The claims against the Directors appear to be based in negligent misrepresentation. The grounds set out in the draft notice of motion include:

- (a) that the pleading fails to disclose a reasonable cause of action;
- (b) that there is no pleading of material facts giving rise to personal liability of the Directors; and
- (c) that the pleading lacks particulars.

[6] To put matters in context, some of the events giving rise to this action are alleged to have occurred in 2005. This action was commenced in September, 2008. An initial case conference was held on April 14, 2009. A timetable has been set and a motion for certification is scheduled in May, 2010.

[7] The general principle in class actions is that certification should be the first procedural motion to be heard: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319, 158 A.C.W.S (3d) 193 (S.C.J.) at para. 2; *Moyes v. Fortune Financial Corp.*, [2001] O.J. No. 4455, 13 C.P.C. (5th) 147 (S.C.J.); *Attis v. Canada (Minister of Health)* (2005), 75 O.R. (3d) 302, [2005] O.J. No. 1337 (S.C.J.) at para. 7.

[8] In opposing the motion, the plaintiff relies in particular on the decision of Cullity J. in *Stewart v. General Motors of Canada Ltd.*, above, at paras. 2 and 3, adopting the observations of Nordheimer J. in *Moyes v. Fortune Financial Corp.*, above:

Although essentially procedural, motions to certify proceedings will ordinarily be given priority over other motions and steps in the litigation. As Nordheimer J. stated in *Moyes v. Fortune Financial Corp.*, [2001] O.J. No. 4455 (S.C.J.):

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 that reality detracts from the intent to be drawn from the section.

The rationale for having the certification motion determined first is that it fulfils the objective of having an early determination of whether the action is going to move forward as a class proceeding, with the consequent binding effect on the members of the class, or whether the action will constitute and determine only the claim of the named plaintiff.

As a practical matter, the effect of a denial of certification will often terminate the proceeding.

[9] There is ample authority, however, for the proposition that motions under Rule 21, motions under Rule 20 for summary judgment, and motions to determine evidentiary issues can be brought before certification in appropriate cases: *Attis v. Canada (Minister of Health)*, above, at para. 8; *Fanshawe College of Applied Arts and Technology v. LG Philips LCD Co.*, [2009] O.J. No. 5002 (S.C.J.) at paras. 12-15; *Punit v. Wawanesa Mutual Insurance Co.*, [2006] O.J. No. 3685, 46 C.C.L.I. (4th) 109 (S.C.J.) at para. 14.

[10] Counsel for the Directors refers to the decision of the Court of Appeal in *Hughes v. Sunbeam* (2002), 61 O.R. (3d) 433, [2002] O.J. No. 3457 at paras. 15 and 16:

Section 35 of the *Class Proceedings Act* provides that "the rules of court apply to class proceedings". Thus, even before certification, a defendant may bring a motion under rule 21.01(1)(b) to strike a representative plaintiff's claim on the ground that it discloses no reasonable cause of action. See *Stone v. Wellington County Board of Education* (1999), 29 C.P.C. (4th) 320 (Ont. C.A.). And, if the representative plaintiff does not have a cause of action against a named defendant, the claim against that defendant will be struck out. Put differently, as Nordheimer J. said in *Boulanger v. Johnson & Johnson*, [2002] O.J. No. 1075 (Ont. S.C.J.): "for each defendant who is named in a class action there must be a

representative plaintiff who has a valid cause of action against that defendant."

Here, as the motions judge said, Hughes cannot claim to have a reasonable cause of action against the defendant manufacturers who did not manufacture the smoke alarm he purchased. He cannot resist a rule 21.01(1)(b) motion by alleging that some as yet unknown members of a proposed class may have a cause of action against these other manufacturers if the class action is certified. See also *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (Ont. S.C.J.) per Cumming J.

[11] The possibility of bringing a motion under Rule 21 prior to certification was specifically identified by Nordheimer J. in *Moyes v. Fortune Financial Corp.*, above, at para. 12:

... I do not wish to be seen as attempting to lay down any general rule that does not allow of exceptions. I recognize that there are some preliminary motions which may necessarily need to be determined in advance of a certification motion. *The most obvious is a motion under Rule 21 for a determination that the claim does not disclose a reasonable cause of action.* While the existence of a reasonable cause of action is a consideration on the certification motion, the practical reality is that, if the defendant can establish there is no reasonable cause of action revealed by the statement of claim *at all*, there would be a strong argument in favour of determining that discreet issue before all of the costs attendant on a certification motion were incurred by the parties. There may also be situations where motions must be brought regarding the proper evidence to be put before the court on the certification motion. With those exceptions, however, I am of the general view that the first order of business in a proposed class proceeding ought, in the normal course, to be the hearing and determination of the certification motion. [emphasis added]

[12] It seems to me that in using the words "no reasonable cause of action revealed by the statement of claim *at all*", Nordheimer J. was referring to a situation in which the motion under Rule 21 would result in a dismissal of the entire proceeding.

[13] Counsel for the plaintiff submits that the Directors' real complaint in this case is that the statement of claim does not give adequate particulars and that these issues can be addressed, if necessary, on the certification motion.

[14] A scheduling issue of this nature is a matter that falls within the court's discretionary jurisdiction under s. 12 of the *Class Proceedings Act, 2002*, S.O. 1992, c. 6 ("C.P.A."):

The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to

Page: 5

ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[15] Without being exhaustive, some of the factors that I consider relevant to the exercise of my discretion include:

- (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
- (b) the likelihood of delays and costs associated with the motion;
- (c) whether the outcome of the motion will promote settlement;
- (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
- (e) the interests of economy and judicial efficiency; and
- (f) generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding (s. 12).

[16] In this case, it is my view that the motion should be brought at the same time as the certification motion, for the following reasons.

[17] First, the test on the motion under Rule 21.01(1)(b) is the same as, and can most conveniently be dealt with, under the "reasonable cause of action" test in section 5(1)(a) of the *C.P.A.* Dealing with the matter at one time, for all parties, at the certification hearing will promote efficiency and judicial economy.


[18] Second, the proposed motion will not finally dispose of the proceeding. If successful, it will only affect some of the defendants. To the extent that the motion asserts lack of particulars, its outcome may not even result in the dismissal of the action against the Directors.

[19] Third, I am concerned that the motion will result in delays, inefficiencies and additional costs. If the motion is brought before certification, the unsuccessful party may well appeal. This could result in delays that could delay the certification motion which is scheduled to be heard almost 18 months after the commencement of the action. It seems to me that it is preferable that the certification motion and the Rule 21 motion should be heard at the same time so that, if there are appeals, they can be heard together.

[20] Fourth, there is no particular prejudice to the Directors in having the motion heard at the same time as the certification motion. They are represented by the same counsel who represents Cannon, which will have to incur the costs of the certification motion in any event. If the motion succeeds, and the action is not certified against the Directors, they can be compensated in costs, if appropriate.

Page: 6

[21] I therefore order that the Directors may bring their proposed motion at the same time as the hearing of the Certification motion.


G.R. Strathy J.

DATE: January 7, 2010