

Case Name:

Cannon v. Funds for Canada Foundation

**RE: Michael Cannon, Plaintiff/Respondent, and
Funds for Canada Foundation, et al., Defendants/Moving Parties**

[2011] O.J. No. 2424

2010 ONSC 2960

Court File No. CV-08-362807CP

Ontario Ontario Superior Court of Justice

G.R. Strathy J.

Heard: May 9, 2011.

Judgment: May 16, 2011.

(20 paras.)

Counsel:

Samuel S. Marr & M. Waddell, for the Plaintiff/Respondent.

John F. Rook, Q.C., & Mark Smyth, for the Defendants/Moving Parties, *Edwin C. Harris, Q.C., Patterson Palmer et al.*

ENDORSEMENT

(Motion to Strike the Krishna Affidavit)

1 G.R. STRATHY J.:-- The defendants Edwin C. Harris, Q.C. ("Harris"), Patterson Palmer, also known as Patterson Palmer Law, Patterson Kitz (Halifax), Patterson Kitz (Truro) and McInnes Cooper (collectively, including Harris, the "Lawyers") move to exclude the affidavit of Vern Krishna CM, Q.C., sworn February 1, 2011 (the "Krishna Affidavit"), filed by the plaintiff, from the evidence that will be before this Court on the plaintiff's motion for certification and the defendants' motion for summary judgment. Alternatively, the defendants seek to exclude certain portions of the Krishna Affidavit from the record.

2 The nature of this action is set out in my endorsement dated November 20, 2009: *Cannon v. Funds for Canada Foundation*, [2009] O.J. No. 4986. The plaintiff was an investor in the Donations Canada Charitable Donation program (the "Program"), a tax shelter. He claims that he and other investors suffered losses when the Canada Revenue Agency ("C.R.A.") disallowed tax credits that they had claimed. He claims that the primary purpose of the Program was to benefit some of the defendants (other than Harris) and that most of the money paid by members of the proposed class was received by those defendants, rather than by the charities.

3 The plaintiff pleads that in 2004, 2005 and 2006 Harris issued opinion letters to the defendant Parklane with the intention that they would be included, directly or indirectly, in the promotional materials for the Program. He also pleads that Harris issued "comfort letters", with respect to the Program and that class members were intended recipients of both the opinion letters and the comfort letters as part of the promotion materials for the Program. It is alleged that the opinion letters concluded that the contributions made by class members under the Program would be accepted as charitable tax donations by the C.R.A. It is alleged that the deductions claimed by class members were disallowed and that the Lawyers, among other things:

- (a) issued the opinion letters and comfort letters without due care and attention and were negligent in the preparation of those letters;
- (b) failed to properly investigate the Program;
- (c) failed to disclose the risks associated with the Program; and
- (d) failed to withdraw their opinions and comfort letters when they knew or ought to have known that they were inaccurate.

4 The motion for certification is scheduled for August 22-25, 2011. At the same time, the Lawyers and certain other defendants are bringing motions for summary judgment.

5 On February 9, 2011, the plaintiff delivered a "Second Supplementary Motion Record", which contains the Krishna Affidavit. Mr. Krishna is a tax specialist. Mr. Krishna reviewed the Program, the tax legislation and the case law, and expressed the following opinions:

- (a) Harris did not meet the standard of care of a senior tax lawyer in issuing his opinions;
- (b) assuming that Harris knew that his comfort letters would be included in the promotional material for the Program, he failed to meet the standard of care reasonably expected of a senior tax lawyer in issuing those letters; and
- (c) pending tax appeals by participants in the Program have "minimal" or "close to zero" prospect of success.

6 The Lawyers submit that the Krishna Affidavit should be struck for the following reasons:

- (a) it represents inappropriate case splitting and is not proper responding or reply evidence;

- (b) it is not responsive to the matters at issue on the summary judgment motion - the Lawyers do not address the standard of care or the breach of the standard of care on their summary judgment motion - they simply say that the Lawyers owed no duty of care to the plaintiff and to other members of the proposed class - an issue which Mr. Krishna assumes and on which he expresses no opinion;
- (c) it is not responsive to any of the issues that will be before the court on certification because evidence addressing the merits of the claim is irrelevant; and
- (d) Mr. Krishna is not qualified to provide an opinion on the prospect of successful appeals of the tax assessments, because he is in no better position than a judge of the Superior Court to predict the outcome of a pending trial or appeal.

7 Without deciding points (b), (c) and (d), I have decided that it is appropriate to defer a consideration of these arguments to the certification and summary judgment motions. In this regard, I am particularly persuaded by the observations of Cullity J. in *Anderson v. St. Jude Medical Inc.*, [2002] O.J. No. 4478, 29 C.P.C. (5th) 234, at paras. 10 - 11.

8 In his subsequent decision on certification, Justice Cullity commented, in retrospect, on the wisdom of not "pruning" the affidavits prior to the certification motion: *Anderson v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136, 38 C.P.C. (5th) 122, at para. 4:

In support of the motion for certification, the plaintiffs filed a number of affidavits that they tendered as expert evidence of the adverse effects of the Silzone valves. In September 2002, the defendants moved to challenge the relevance, and therefore the admissibility, of much of this evidence as well as the qualifications of the deponents to provide opinions on various issues. The challenge to the relevance of the evidence was largely on the ground that it went to the merits of the action and not to the issues that would arise on a motion for certification. After hearing the submissions of counsel, I decided that the challenge to the admissibility of the evidence should properly be deferred to the hearing of the motion to certify when the critical issues on that motion would be more clearly in focus. While it now appears that the issues on which, in my judgment, certification should depend are quite narrow, I found the evidence tendered on behalf of the plaintiffs - as well as the affidavits delivered on behalf of the defendants - to be helpful in providing me with an understanding of the medical and scientific background and the overall context in which the issue should be viewed. As I indicated in my reasons for deferring the questions of admissibility, evidence that is relevant to the merits may also be relevant to the issues relating to certification. To an appreciable extent - although not entirely - I believe this turned out to be the case - particularly in connection with the questions of causation at which the submissions on behalf of the defendants were very largely directed. I will comment further on the questions of admissibility at the end of these reasons.

And at para. 78:

I am satisfied that my decision that it was not appropriate to make rulings on admissibility in advance of the hearing of the certification motion was justified. Mr. McKee was, of course, correct in taking the position that only evidence that was relevant to the issues on the certification motion was admissible and, in particular, that evidence that was relevant only to the merits was not. Much of the evidence on which each side relied was relevant to the merits of the claims. However, virtually all of the evidence that was relevant to the questions of commonality, the nature of the individual issues and their significance relative to the individual issues was relevant in varying degrees - and, very often, directly relevant - to the merits. In addition, a great deal of evidence was required to inform the court of the medical and scientific context in which the issues arose, the nature of the problems that implantation of Silzone devices was intended to address, the procedures for implantation, and the nature of the complications that could develop as a result, or independently, of the use of the devices. The voluminous evidence was, I think, most useful for this purpose. Where the expert evidence - on each side - was most clearly, and directly, relevant to the merits, it was of assistance in identifying, and explaining the nature of, the issues of causation at which so much of defendants' counsels' submissions were directed. In addition, the plaintiffs were required to establish some "evidential basis" for their submissions that each of the requirements of section 5(1) - other than that in section 5(1)(a) - had been satisfied. Again, virtually all of this evidence had relevance to the merits of the action. I am satisfied that it would have been a mistake to make formal rulings on the questions of relevance - and to prune the affidavits of the plaintiffs' witnesses - in advance of the certification hearing.

9 In this particular case, it is arguable that the Krishna Affidavit goes only to the merits of the proceeding, and does not address issues that are relevant to certification. On the other hand, if Mr. Krishna's opinion as to the likelihood of success on the tax appeals is admissible, it could be relevant to the issue of "preferable procedure" under section 5(1)(d) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

10 There is also the added complication that in this case the plaintiff is facing a motion for summary judgment. Although the Lawyers' summary judgment motion does not address the standard of care or the breach of the standard, they do not concede these issues. I see no reason why the plaintiff, in responding to the motion, should be fettered in how he puts his best foot forward. The opinions of Harris, and his comfort letters, will be before the Court on the motion and there is no reason why the plaintiff should be precluded from adducing evidence on the validity of those opinions.

11 The relevance of the Krishna Affidavit to the issues on certification, and whether those issues are matters on which expertise is required, are questions best addressed, in my view, in the context of the full evidentiary record, and arguments, on the certification motion. The same is true with respect to the relevance of the Krishna Affidavit to the summary judgment motion. If I find that some portions of the affidavit are inadmissible for the

purposes of one or both motions, I can ignore those portions and the Lawyers will not be prejudiced.

12 On the point referred to in para. 6(a), above, case splitting, I am concerned that the delivery of the Krishna Affidavit was not contemplated by the schedules for delivery of materials that were agreed upon by the parties and approved by me as case management judge.

13 In *Pollack v. Advanced Medical Optics Inc.* 2011 ONSC 850 and *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63, [2011] O.J. No. 17, I discussed the unfairness created by case splitting in the context of a certification motion. It bears noting that in the *Schick* case the defendant did not object to certification and the only issue was the scope of the common issues. In the *Pollack* case, I decided that the affidavit being tendered was inadmissible in any event, so I did not need to determine whether leave should be given to deliver it, subject to appropriate terms.

14 Counsel for the plaintiff referred me to *Canadian Triton International, Ltd. (Assignees of) v. National Iranian Oil Co.*, [2005] O.J. No. 949, in which Lane J., sitting as a judge of the Divisional Court, dismissed a motion for leave to appeal from a decision of Hoy J., who had ruled that the rule against case-splitting should not be applied to motions where a "different dynamic is at play than in the case of a trial". Lane J. stated, at para. 11:

In my view Hoy J. was correct in this statement. It is not appropriate to import the rules governing the conduct of a trial into the context, not of the actual argument of this motion, but to the period in which the parties are accumulating the evidence on which they will ultimately argue it. However orderly it might be to restrict the delivery of affidavits in this fashion, the real world of motion preparation is not orderly. Matters arise and must be dealt with; new information comes to hand; new arguments and lines of inquiry appear and need to be followed.

15 Plaintiff's counsel notes, as well, that *Allcock Laight & Westwood Ltd. v. Patten and others*, [1967] 1 O.R. 18, [1966] O.J. No. 1067 (C.A.), to which I referred in *Singer and Pollack*, was a trial decision and not a decision about case-splitting in the context of a motion.

16 The point is a fair one. The rule against case-splitting, in the trial context, is designed to prevent unfairness to the opposite party who has no chance to reply to the "surprise" evidence. In the motions context, the unfairness can be mitigated by giving the disadvantaged party an opportunity to respond, possibly with appropriate time extensions or costs consequences.

17 That being said, class proceedings are case managed and important motions like certification or summary judgment are invariably subject to a timetable that requires each party to think carefully about the evidence it will produce. It can be unfair, inefficient and expensive for one party - whether through inadvertence, lack of foresight or deliberate tactics - to introduce new and unanticipated evidence at a late stage in the proceedings.

18 Ultimately, it is a balancing exercise, with the goal of ensuring that each party has a fair opportunity to present its case and to respond to the case put forward by the other party.

19 In this case, I will permit the plaintiff to deliver the Krishna Affidavit but I will defer my ruling on its admissibility until after hearing the argument on the certification and summary judgment motions. If the Lawyers find it necessary to deliver further evidence in response to the Krishna Affidavit, they will have leave to do so. In that event, the parties should discuss appropriate adjustments to the schedule to ensure that the motions proceed as agreed on August 21, 2011.

20 It would, in my view, be appropriate to defer a consideration of the costs of this motion until after the certification motion has been heard. If either party takes a contrary view, written submissions may be made.

G.R. STRATHY J.

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