

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK  
TRIAL DIVISION  
JUDICIAL DISTRICT OF MIRAMICHI

Citation: 2009 NBQB 101 File No.: N/C/41/08

- and -

Regional Health Authority 7,  
Defendant

**Before:** Justice Jean-Paul Ouellette

Date of hearing: February 9, 2009

Date of decision: April 17, 2009

Appearances:

Raymond F. Wagner and  
Wesley F. Crosbie, Q.C. - for the Plaintiff  
David T. Hashey Q.C.  
and Catherine Bowlin - for the Defendant



Ouellette, J.

#### INTRODUCTION

[1] The plaintiff Albert John Gay filed a Statement of Claim with the intention of proceeding under the **Class Proceedings Act**. The defendant, Regional Health Authority filed its defence and a motion seeking an order that Gay either add Dr.Rajgopal Menon as a party defendant or amend its pleadings to restrict its claim against the Health Authority.

[2] Subsequently, Gay filed a motion for certification of his class action and another to adjourn the motion presented by the Health Authority to add a party pending the hearing of its motion for certification.

#### ISSUE

[3] The issue before this Court is whether or not the motion of the Health Authority seeking an order to add Dr. Menon or to restrict its damages be heard and determined

prior to, or following the certification hearing of a class action.

## BACKGROUND

[4] On July 22<sup>nd</sup>, 2008, Albert John Gay filed a Statement of Claim with the intention of proceeding under the **Class Proceedings Act S.N.B.** [2006] C.5.15. The Regional Health Authority 7 filed a Statement of Defence on August 28<sup>th</sup>, 2008 and on August 29<sup>th</sup>, 2008, it filed a motion seeking an order that Gay either add Dr. Rajgopal Menon as a party defendant or amend its statement of claim to restrict its damages against the Health Authority. In the alternative that the Health Authority be authorized to add Dr. Menon as a party defendant prior to the plaintiff's certification motion hearing. On December 5, 2008, Gay filed a motion for certification of its class action.

[5] On February 3<sup>rd</sup>, 2009, Gay filed another motion to adjourn the Health Authority's motion dated August 29<sup>th</sup>, 2008, pending the hearing of Gay's motion for certification as a class proceeding. This is the motion that this Court has to address in this decision.

**ANALYSIS AND DECISIONS**

[6] The Class Proceedings Act states at Section 3 the following:

"3(1) One member of a class of persons who are resident in New Brunswick may commence a proceeding in the court on behalf of the members of that class.

3(2) In a proceeding referred to in subsection (1), the originating process shall indicate that the proceeding is brought under this Act.

3(3) The person who commences a proceeding under subsection (1) shall make a motion to the court for an order certifying the proceeding as a class proceeding and, subject to subsection (5), appointing the person as representative plaintiff for the class.

3(4) A motion under subsection (3) shall be made

(a) in the case of a proceeding commenced by Notice of Action, within 90 days after the later of:

(i) the date on which the Statement of Defence was served or the date on which the time prescribed by the Rules of Court for service of the Statement of Defence expires without its being served, and

(ii) the date a Reply was served or the date on which the time prescribed by the Rule of Court for service of a Reply expires without its being served,"

[7] Section 6 of the Class Proceedings Act makes it mandatory to certify an action as a class action when the criteria's therein set have been established. Section 6 of the Act reads as follows:

"Certification of class proceedings

6(1) The Court shall certify a proceeding as a class proceeding on a motion under section 3 or 4 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 2 or more persons,

(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 preferable procedure for the fair and efficient resolution of the dispute, and

(e) there is a person seeking to be appointed as representative plaintiff for the class 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."

[8] Section 14 of the **Class Proceedings Act** provides for the Court to grant an order respecting the conduct of a class proceeding to ensure its fair and expeditious determination. It is clear that a Court must be sensitive to time expenditures when moving these matters through the certification process.

[9] The Supreme Court of Canada in **Hollick v. Toronto City** [2001] 3 S.C.R. 158 has set out the advantages of a proceeding by way of class action. Madam Chief Justice McLachlin set three important advantages of a class action which could be enunciated as follows:

- i) to serve judicial economy avoiding unnecessary duplication in fact findings and legal analysis,

ii) to grant access to justice by spreading amongst a large number of class members the litigation costs that could not be supported by one class member, and

iii) to serve efficiency and justice by imposing on a wrongdoer a behaviour modification to take full account for the harm caused to the public. The Court must consider the degree to which each would be advanced by certification.

[10] The Court must therefore be satisfied that a procedure that tends to defeat the objective of fairness and efficiencies of a class action procedure or does not advance the fact findings and expeditious determination should be discouraged.

[11] The Health Authority in this case has served Gay with a motion to add another party, Dr. Menon, on the basis of judicial economy and fairness to all concerned. It is the Health Authority's position that we should hear this motion prior to the certification hearing.

[12] Gay's position in this instance is that the preliminary motion such as the one filed by the Health Authority should only be heard after the certification hearing and it is not at this stage a matter of determining the merits of that motion.

[13] By reading the **Class Proceedings Act**, it seems that the first order of business in any class action proceeding is to deal with the certification of the action. By setting the 90 day time-frame in Section 3(4) above stated, it is an indication that the certification motion should be heard promptly and normally in priority to other motions.

[14] Certification is a procedural application which is concerned by the form the action will proceed. Contentious factual and legal issues between the various parties cannot therefore be resolved on a certification application (see *Ring v. the Queen*, [2007] NTTD 146).

[15] The **Class Proceedings Act** provides at section 7(2) that a certification process as a class action is not to determine the merits of the proceeding. In *Anderson v.*

Canada (Attorney General) [2008] NLTD 166 Fowler J. has interpreted identical terms in the Newfoundland's legislature as in our act. At paragraph 15, Fowler J. wrote this section to mean "not to consider the merits of any preliminary applications that would impact on the merits of the class itself other than the effect such application would have on administering the certification itself."

[16] In Attis v. Canada (Minister of Health) [2005] O.J. No.1337, Justice R.S. Winkler of the Ontario Superior Court as he then was held that "as a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined".

[17] In Baxter v. Canada (Attorney-General) [2005] O.J. No.2165 Justice Winkler added at paragraph 14 as follows:

"14 Admittedly, there are instances where, as indicated in both Attis and Moyes, there can be exceptions to the rule that the certification motion ought to be first procedural matter to be heard and determined. It may be appropriate to make an exception where the determination of a

preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly."

[18] It is clear from these decisions that only in exceptional circumstances a preliminary motion could be heard prior to certification if it would benefit the parties or further the objectives of the **Class Action Procedure** as set by the Supreme Court of Canada in **Hollick**.

[19] Counsel for the Health Authority submitted that there was nothing in the **Class Proceedings Act** which requires that the class certification process necessarily be determined prior to other determination of any other procedural issue, particularly one so fundamental as to who are the proper defendants in relation to this action

stating that Dr. Menon is essential to this action. They advance that their motion is not to make any determination of the merits, and should be heard and determined in priority to the certification motion.

[20] The Health Authority further advanced that Gay's failure to name Dr. Menon as a party defendant in an artifice intended to create an appearance of communalitiy when the issues in litigation relate.

[21] Counsel for Gay submitted that the Health Authority's motion requires the Court to enter into a merits debate prior to certification. In there submissions, they argued that the certification motion is a quarter of procedure, and their request for certification of this action is to enjoy the important benefits that the class action procedures is intended to provide: access to justice, judicial economy and behavioural modification.

[22] In this matter, Gay has decided and identified the Regional Health Authority 7 and none other as the defendant. The Health Authority is claiming that there may be other defendants who should be included, which is only a suggestion or a speculation at this stage. It is generally

the plaintiff to choose who it intends to sue unless it can be determined that there is no existence of a cause of action, or unless the defendant is claiming that the wrong party is named rather than adding another defendant. The choice of Gay should not be interfered with. Furthermore, there are other venues open to the Health Authority under our Rules of Court, which apply to a class proceeding to the extent that those rules are not in conflict with the **Class Proceedings Act**, (see Section 42 of **Class Proceedings Act**), and could third party these potential defendants. The Health Authority in this case decided to proceed by another route, but wanted its motion decided prior to the certification hearing.

[23] Counsel for the Health Authority, in support of their position, referred to **Sorotski v. CNH Global N.V.** [2005] S.J. No 174, a decision of the Saskatchewan Court of Queen's Bench, wherein the defendant wanted to add Good Year Tire as a party for the purpose of responding to the certification application brought by the plaintiff. This Court would defer from that decision. In deciding in that fashion, the application's Judge had to consider the arguments on the merits of that application prior to consideration to be given for certification. It was in my

opinion clearly premature. This tends to go against all other decisions that were rendered by the Courts across the country in class action proceedings, and **Sorotski** was never considered. I would also add that it is easy to slip into an analysis of adding a defendant especially when the respective position of the parties tends to go that way.

This is not the case at bar.

[24] In **Hollick v. Toronto** (Supra) it was for the Supreme Court of Canada its first opportunity to enunciate the interpretation approach to be applied to the **Class Proceedings Act** in general and its certification provision in particular. McLachlin C.J.C. made it clear that the **Class Procedure Act** should be construed generously, and it is essential in her view that Courts not take an overly restrictive approach to the legislation, and should interpret the **Act** in a way that gives effect to the benefits foreseen by the drafters. Furthermore, she added that at the certification stage, the Court should not be concerned with the merit at the preliminary stage but focus on its form. As she said, at the preliminary stage, the question is not whether the claim is likely to succeed but whether the suit is appropriately prosecuted as a class action.

[25] As previously discussed, in considering the proper sequence of events in a class action, there is not any provision in the **Class Proceedings Act** which prevents a Court to hear a motion prior to the certification if so requested, and Section 14 of the **Class Proceedings Act** confers to the Court a discretion to determine the conduct of class proceedings with objective of ensuring its fair and expeditious determinations.

[26] I am of the view that asking the Court to consider the merits of a preliminary motion that would impact on the merits of the class action itself prior to the certification hearing, is not proper, and would have an effect on the administration of the certification process itself.

[27] I agree with the position that where a preliminary motion has the potential to dispose of litigation or more efficiently address the objectives of the **Class Proceedings Act** then it should be heard prior to the certification process.

[28] I have come to the conclusion that to hear the Health Authority's motion prior to the certification hearing would not improve access to justice nor ensure judicial efficiency and economy. There is no reason for the Court to intervene and decide on the merits of adding or not a defendant in the proposed class action filed by Gay at this stage.

[29] It is not for the Court to decide prior to the certification hearing the relevancy and its role, if any the proposed addition of a defendant has or should have. For certification purposes, it is not a prerequisite in this instance to decide as to the merits of having or not an additional party. In any event, after certification, the Court may, under Section 15 of the **Class Proceedings Act**, stay or sever any proceeding to the Class Proceeding and

under Section 12(1) of the **Class Proceedings Act** may amend the Certification order or decertify the proceedings if the conditions set in Section 6 or Sub-Section 8(1) are not satisfied. Any unfairness that may result from the stay of the Health Authority's motion could be rectified.

[30] For these reasons, the motion of Gay is granted and the stay of the hearing of the Health Authority's motion shall be granted and shall be heard following the determination of the Certification hearing.

A handwritten signature in black ink, appearing to read "Jean-Paul Ouellette". The signature is fluid and cursive, with "Jean-Paul" on top and "Ouellette" on the bottom, both underlined.

Jean-Paul Ouellette, J.C.Q.B.