IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rorison v. Insurance Corporation of British Columbia,*
2020 BCSC 1965

Date: 20201106
Docket: S202406
Registry: Vancouver

Between:

Robert Rorison and Brayden Methot

Plaintiffs

And

Insurance Corporation of British Columbia and Her Majesty the Queen in right of the Province of British Columbia

Defendants

Before: The Honourable Mr. Justice N. Smith

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiffs:	G. van Ert J.S. Stanley
Counsel for Defendant ICBC:	G.P. Brown, Q.C. J.A. Morris
Counsel for Defendant HMTQ:	G. Morley K. Millar
Place and Date of Trial/Hearing:	Vancouver, B.C. November 3, 2020
Place and Date of Judgment:	Vancouver, B.C. November 6, 2020

[1] **THE COURT:** The issue before me is the sequencing of applications in a proposed class proceeding. Specifically, the defendants, Insurance Corporation of British Columbia ("ICBC") and the Crown in right of British Columbia, seek leave to argue preliminary applications to strike part of the plaintiffs' claim before the court hears the plaintiffs' application to certify the class proceeding.

[2] Because this is merely a sequencing decision, I propose to say as little as possible about the substance or possible merits of either the preliminary applications or the certification application.

[3] ICBC is a Crown corporation that operates a plan of universal compulsory motor vehicle insurance. The Province of British Columbia provides publicly funded universal health care through the Medical Services Plan ("MSP").

[4] To perhaps oversimplify the issue at the heart of this action, it is whether the cost of basic medical care provided to people injured in motor vehicle accidents should be borne by all taxpayers through MSP or only by motor vehicle owners through their ICBC insurance premiums.

[5] The plaintiffs allege that ICBC has for many years illegally made payments to the Province of British Columbia in order to reimburse MSP for those costs. This practice is alleged to have caused damage to two distinct classes. One proposed class, referred to as the accident victim class, consists of individuals who have been seriously or catastrophically injured in motor vehicle accidents. They received accident benefits under Part 7 of the regulations to the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, but those benefits are subject to a maximum total amount set out in the regulations. The plaintiffs allege that payments made by ICBC to MSP for basic medical services have been improperly included in the maximum total, reducing the amount class members could receive for other accident benefits.

[6] The defendants oppose certification of the action for the accident victim class, but agree the matter should proceed directly to a certification hearing. Their proposed preliminary applications relate only to the second proposed class, referred

to as the ratepayer class. The ratepayer class potentially consists of all persons who have purchased automobile insurance from ICBC since the corporation was formed in 1973. The allegation is that the costs incurred by ICBC to reimburse MSP for medical care provided to accident victims has improperly increased the cost of insurance. The plaintiffs challenge the legality of the agreements under which those payments have been made.

[7] Each defendant seeks leave to bring application prior to the certification hearing to strike the claim for the ratepayer class pursuant to Rule 9-5(1), alleging that it discloses no cause of action or is an abuse of process. Alternatively, they ask the court to decline jurisdiction pursuant to Rule 21-8, arguing that the matter is within the exclusive jurisdiction of the British Columbia Utilities Commission.

[8] The defendants say the expenditures that the plaintiffs complain of have been included in rates that the Utilities Commission has approved under its regulatory jurisdiction since 2003. Prior to that, the rates were approved by the Lieutenant Governor In Council. The defendants say the claim of the rate payer class is a collateral attack on those regulatory decisions.

[9] The plaintiffs say their challenge is not to the regulatory decisions but to the contract between ICBC and the Province of British Columbia under which ICBC took responsibility for the impugned costs. They also say that these amounts added to insurance premiums amounted to an illegal tax, raising a constitutional issue over which the Utilities Commission has no jurisdiction.

[10] Section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, sets out the requirements for certification of a class proceeding. They include s. 4(1)(a), whether the pleadings disclose a cause of action, and s. 4(1)(d), whether a class proceeding would be the preferable procedure.

[11] Section 4(2) sets out a number of considerations to be applied in making the preferrable procedure determination under s. 4(1)(d). Those include s. 4(2)(c), whether the class proceeding would involve claims that have been the subject of

other proceedings, and s. 4(2)(d), whether other means of resolving the claims would be less practical or less efficient.

[12] The plaintiffs say all of the issues the defendants seek to raise in their preliminary applications are properly part of what the court must consider under s. 4(1)(a) and consideration of them should not be hived off from other issues going to certification.

[13] The defendants say that if they are successful on their preliminary applications, the certification hearings will be much simpler because it will be limited to the claim of the accident victim class. Even if they are unsuccessful, they say the certification hearing will still be simpler because the issues under s. 4(1)(a) will have been decided in favour of the ratepayer class. Although it was given less attention in argument, it appears to me that the defendants' position relating to the Utilities Commission may also raise issues under s. 4(1)(d) in regard to the issues identified by ss. 4(2)(c) and (d).

[14] The law relating to the sequencing of applications in a class proceeding was recently summarized by Justice Branch in *Kett v. Mitsubishi Materials Corporation*, 2019 BCSC 2373. The appropriate sequencing of motions is within the discretion of the case management judge, but there is a general presumption in favour of the certification motion being the first item of business in a proposed class action. A party seeking to depart from that general rule must show a compelling reason or exceptional circumstances: *Kett* at paras. 11 and 16.

[15] A frequently cited list of factors to be considered in found in *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 at para. 15. They are:

> 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;
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> 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 proceedings.

[16] In *Kett* at para. 12, Justice Branch referred to some additional factors arising from the British Columbia case law:

a) the strength of the defendant's arguments;

b) any delay by the plaintiff in advancing certification;

c) whether the defendant agrees not to pursue costs or otherwise agrees to facilitate the timely pursuit of the action;

d) whether the defendant agrees to treat the motion as determinative of the s. 4(1)(a) aspect of the certification motion; and

e) whether there is likely to be an overlap in the issues raised on certification and the issues the court will consider on a motion to strike.

[17] The defendants rely particularly on *Hartney v. ICBC*, unreported, January 19, 2016, Vancouver Registry, S157080. That case concerned ICBC's claim-related discount system and the difference between the discount available to new British Columbia residents and the larger discount available to long-term residents. ICBC was seeking to strike the claim and dismiss the action on grounds that the matter was entirely within the jurisdiction of the Utilities Commission. Justice Young allowed ICBC's application to be heard first, describing the point raised as a discrete legal issue capable of summary determination that could resolve the entire case.

[18] Without commenting on the merits of either side's position, I do not find the issue raised here to be quite as straightforward, discrete or potentially dispositive as the issue in *Hartney*. The plaintiffs say the issue is not the Utilities Commission's approval of rates, but the underlying contract between ICBC and the Crown and the constitutional issue of the allegedly illegal tax. The proposed applications also cannot dispose entirely of the action because the issue of the accident victim class will remain.

[19] The defendants say that hearing their applications first will shorten and simply the certification hearing, but I find that whatever time is saved in the certification hearing would likely have been used in hearing and deciding the preliminary

applications. The effective result will be, as the plaintiffs suggest, a bifurcated certification hearing that delays the ultimate decision on certification. In that regard I note that the parties have reserved two days before me in late April 2021. The plaintiffs hope to use that time for a certification hearing. If the defendants are given leave to argue their applications first, those dates will likely be the earliest ones on which they can be argued, thus delaying the certification hearing.

[20] The defendants say if they are unsuccessful on their preliminary applications, they will agree to hold any appeal from that decision in abeyance until after the certification hearing in order to avoid further delays. The plaintiffs do not and perhaps cannot make any similar commitment if they are the ones who must appeal a preliminary decision.

[21] If the defendants are successful on their preliminary applications, a certification hearing could proceed in relation to the accident victim class, but a further certification hearing would then become necessary for the ratepayer class if the plaintiffs are successful on any appeal.

[22] Applying the factors set out in *Cannon* and *Kett* to the facts of this case, I place particular weight on the issues of potential delay, potential interlocutory appeals, potentially overlapping issues, and judicial efficiency. Most important is what I consider to be the basic general consideration of whether hearing the applications in advance would promote the fair and efficient determination of the proceeding. I am not satisfied that it would.

[23] I find the defendants have not met the onus of establishing a compelling reason or exceptional circumstances that would justify a departure from the general rule that the certification application should be heard first.

[24] The matter will, therefore, proceed to the scheduled certification hearing in April. If counsel believe that, as a result of my decision today or for any other reason, the time reserved for that hearing is no longer sufficient, they may make the

appropriate inquiries with Supreme Court scheduling about the possibility of adding a day or days to that hearing. Thank you, counsel.

N. Smith J.