May. 2. 2014 9:19AM ATTORNEY GENERAL LONDON COUTHOUS No. 2859 P. 2/13

CITATION: Belle River District Minor Hockey Assoc. Inc. v. Tecumseh, 2014 ONSC 2676
DIVISIONAL COURT FILE NO.: DC-14-2049 & DC-14-2050
DATE: 2014/05/01

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KENT, CONLAN AND VARPIO, JJ.

B E T W E E N:	
Belle River Minor Hockey Association Inc. and Essex County Dancers Incorporated	Peter W. Kryworuk, for the Plaintiff/Respondent
Plaintiffs/Respondents	John A. Nicholson, for the Plaintiff/Respondent
– and –	
The Corporation of the Town of Tecumseh	
Defendant/Appellant	Brendan Van Niejenhuis, for the Defendant/Appellant
	Scott Hutchison, for the Defendant/Appellant

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	
Amyotrophic Lateral Sclerosis Society of Essex County	Peter W. Kryworuk, for the Plaintiff/Respondent
Plaintiff/Respondent	John A. Nicholson, for the Plaintiff/Respondent
- and -	

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The Corporation of the City of Windsor Defendant/Appellant	) Brendan Van Niejenhuis, for the) Defendant/Appellant)) Scott Hutchison, for the) Defendant/Appellant))) **HEARD:** April 28, 2014

INTRODUCTION

[1] This matter is, at its heart, a class proceeding whereby charities paid licensing monies to the City of Windsor or the Town of Tecumseh in order to run charitable fundraising operations. The plaintiffs allege that a difference existed between the amount paid by the charities and the municipalities' operating costs. Said difference is, according to the plaintiffs, an *ultra vires* tax imposed by the municipalities.

[2] The appellants appeal two distinct orders of Patterson J. of the Superior Court of Justice made on December 31, 2012, whereby as motions judge he certified the above two actions as class proceedings under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. While the two cases are factually distinct, all parties have agreed that they can be dealt with together for certification purposes.

[3] The actions commenced in 2008, with Patterson J. as case management judge. On January 20, 2011, Patterson J. decided to certify a class of plaintiffs pursuant to the *Class Proceedings Act*. That class included only those claims that were not outside the time limits purportedly set by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. That decision was appealed to this Court, which found that Patterson J. relied upon an incorrect subsection of the *Class Proceedings Act*. This Court remitted the decision back to Patterson J. to decide whether to certify the Class Action based upon other subsections of the *Class Proceedings Act*. On December 31, 2012, Patterson J. certified a class of plaintiffs as being those plaintiffs who paid licensing monies to the municipalities going back to January 1, 1990, which is a broader class of claims than those originally certified by the motion judge.

[4] The Appellant municipalities were granted to leave to appeal this latter decision (which gave rise to two orders) on the basis that Patterson J. erred in deciding that the class of plaintiffs ought to include those claims that apparently – according to the plaintiffs – run afoul of the *Limitations Act* (the "historical claims"). Upon review of all the material, we find that Patterson J. was entitled to include the historical claims in the class and, as such, we dismiss the appeal. Our reasons follow.

THE LAW

[5] The relevant portions of the *Class Proceedings Act* read as follows:

Certification

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5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings 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 the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

[6] Sections 4 and 5 of the *Limitations Act* read in relevant parts as follows:

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

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Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. ...

[7] The appellants did not make explicit submissions in their materials on the applicable standard of review. The respondents asserted that the decision of a certification judge is entitled to substantial deference on appeal: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949.

[8] As this is an appeal of a judicial order, pure questions of law are reviewed on a correctness standard, pure questions of fact will not be interfered with unless the trial judge made a "palpable and overriding error", while questions of mixed fact and law fall on a spectrum. If the questions of fact and law cannot be separated from one another, the "palpable and overriding error" standard applies unless it is clear that the trial judge made an error of law or principle that can be identified independently, in which case the standard of correctness is applicable: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[9] As regards certification orders in particular, the Supreme Court of Canada recently stated the following in *AIC* at para. 65:

> I recognize that a decision by a certification judge is entitled to substantial deference: see e.g. Pearson, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, "[t]he decision as to preferable procedure is ... entitled to special deference

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> because it involves weighing and balancing a number of factors": *Pearson*, at para. 43. However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here: see e.g. *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] S.C.C.A. No. 15, [2008] 1 S.C.R. xiv; *Markson*, at para. 33; *Cloud*, at para. 39.

[10] This court recently stated the following in *Turner v. York University*, 2012 ONSC 4272, 298 O.A.C. 174 (Div. Ct.), at para. 15:

> Moreover, numerous cases have established that substantial deference is owed to a motion judge on appeal of a certification motion. See e.g. *Cassano v. The Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23; *Anderson et al. v. Wilson et al.* (1999), 44 O.R. (3d) 673 (C.A.), at para. 12; and *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33, leave to appeal refused at [2007] S.C.C.A. No. 346.

[11] In *Cassano*, Winkler C.J.O. explained this rationale at para. 23:

> The motion judge is an experienced class action judge. His decision is entitled to substantial deference: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 at para. 33 (C.A.), leave to appeal to S.C.C. requested, [2007] S.C.C.A. No. 346. The intervention of this court should be limited to matters of general principle: see *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 at para. 39 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50. However, legal errors by the motion judge on matters central to a proper application of s. 5 of the *CPA* displace the deference usually owed to the certification motion decision: see *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 at para. 6 (Ont. C.A.).

[12] Lastly, in *2038724 Ontario Ltd v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252 (Div. Ct.), aff'd 2010 ONCA 466, this court stated the following at para. 27:

> Such deference does not depend upon the personal experience of the judge (see *Olar v. Laurentian University* (2004), 6 C.P.C. (6th) 276 (Div. Ct.) at para. 49).

[13] As stated by the Ontario Court of Appeal in *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, 261 D.L.R. (4th) 629 (C.A.), at para. 43; leave to appeal to the S.C.C. denied [2006] S.C.C.A. No. 1, the decision of the motions judge on a certification motion with respect to the preferable procedure requirement is entitled to "special deference because it involves weighing and balancing a number of factors."

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[14] Accordingly, Patterson J.'s decision is to be accorded substantial deference unless it can be determined that he made an error of law or principle, in which case the standard of review is one of correctness.

ANALYSIS

[15] We will deal, in turn, with the each of the primary submissions made by the Appellants, whether contained in their joint Factum, or made orally by counsel on the hearing date.

Sufficiency of Reasons and Analysis

[16] Generally, the Appellants argue that the Motions Judge "kicked the can down the road". In other words, the analysis performed by Patterson J. was inadequate and/or incomplete.

[17] We disagree.

[18] First, the reasons of the Motions Judge are undoubtedly sufficient for appellate review. They tell us and the parties why the Motions were decided the way that they were. They deal specifically with the factors outlined in subsection 5(1) of the *Class Proceedings Act*: the necessity of a cause of action; the requirement for an identifiable class; the need for common issues; and the requirement for a suitable representative plaintiff.

[19] The fact that Patterson J. did not deal specifically with subsection 5(2) of the *Class Proceedings Act* is not surprising. The Motions Judge found that the proposed representative plaintiffs would adequately represent the class (paragraphs 7 and 8 of the Reasons dated December 31, 2012). Having made that finding, there was no need to address subsection 5(2) dealing with subclass. It was conceded by Appellants' counsel that it is not legally necessary to address subsection 5(2) if the Court is satisfied that the representative plaintiffs are suitable.

[20] It is true that Patterson J. referred, at paragraph 22 of the Reasons for example, to the possibility of a more detailed "merits based analysis" in the future on issues of discoverability and concealment as related to the alleged subclass (the historical claims by virtue of the applicable limitation period). We disagree with the characterization of that as being a sort-of improper "kicking of the can down the road". That leads us to a discussion of the next point.

Were the Historical Claims Certain to Fail?

[21] The Appellants submit that the Motions Judge "kicked the can down the road" because, rather than refer to future possibilities of discovery and a motion for summary judgment (paragraph 22 of the Reasons), Patterson J. ought to have excluded the historical claims from the class on the basis that it was plain and obvious that those older claims could not possibly succeed given the limitation period defence.

[22] We disagree.

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[23] It was not plain and obvious to Patterson J. that the historical claims could not possibly succeed. Nowhere in the December 31, 2012 Reasons, does the Motions Judge so conclude. In fact, at paragraph 26 of the Reasons, His Honour expressly states that the older claims ought to be heard.

[24] It should be noted that an earlier and differently-constituted panel of this Court, in deciding the appeal of the earlier decision of Patterson J., also was not convinced that the historical claims were "doomed to fail", to borrow the expression used before us by Appellants' counsel. At paragraph 8 of its Reasons delivered orally on April 25, 2012, this Court noted that the pleadings raised distinct issues of discoverability and concealment. This Court, rather than review the record and decide those distinct issues, referred the case back to Patterson J.

[25] It is clear from the subsequent Reasons of Patterson J. that His Honour did not find that it was plain and obvious that the historical claims were certain to fail. We see no error in that regard.

[26] At the request of Appellants' counsel, we have reviewed the Affidavit of class counsel, Mr. Nicholson, included in the Joint Appeal Book (tab 18), in particular those excerpts that we were directed to during oral argument (pages 169 and 170 of the Appeal Book).

[27] We agree that, given the public nature of the documents referred to therein regarding the fees charged by the Municipalities, and given the decision of the Supreme Court of Canada in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 61, depending upon the evidence of the claimants at discoveries, it may be difficult for some of the historical claimants to withstand a limitation period defence.

[28] On the record before us, however, we are not prepared to conclude that the historical claims are, plainly and obviously, doomed to fail. It follows that we do not find fault on the part of Patterson J. for declining to so find.

[29] It is not surprising that Appellants' counsel were able to point us to other decisions from the Ontario Superior Court of Justice and the British Columbia Court of Appeal where the proposed class was restricted to claims that were not presumptively time-barred. That is simply a recognition of the principle of discretion. Further, the facts in those cases were different. The Courts in those cases must have concluded that the older claims could not possibly succeed. Nothing in those decisions suggests that it was an error for Patterson J. to decline to come to the same conclusion on the facts and the evidence before His Honour.

[30] The Appellants cannot have it both ways. If it is so plain and obvious that the historical claims cannot succeed because of the limitation period defence, an issue of law, then there is no reason why the Appellants could not bring a motion to dismiss those claims under Rule 21 of the *Rules of Civil Procedure*, without having to wait until after discoveries and without having to expend a great deal of resources.

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[31] The Appellants argue that they could not do so because they would be met with a *res judicata* argument on the basis that Patterson J. already decided the issue. We see nothing in the first set of Reasons of the Motions Judge, dated January 20, 2011, to support that argument.

Manageability

[32] The Appellants argue that the class certified by Patterson J. is simply too broad and cumbersome. It is submitted that it is not fair, just or efficient to have some claimants wait around to see what happens with the historical claims.

[33] This is not a hearing *de novo*. It is not for us to substitute our views for those of the Motions Judge on determinations that are entitled to substantial deference.

[34] Justice Patterson's Reasons are replete with references to this exact same argument that was made before His Honour – the alleged unmanageability of the proposed class. At paragraph 27, for example, the Motions Judge expressly rejects that argument and finds that the class action as certified is manageable.

[35] In our view, that conclusion was open to Patterson J. We see no error in that regard.

Suitable Representative Plaintiffs

[36] The Appellants submit that these representative plaintiffs cannot properly act for the historical claimants because there is a conflict of interest in that the older claims will take longer and be more complex to adjudicate.

[37] Again, this is not a fresh hearing.

[38] Justice Patterson expressly rejected this same argument and found that the representative plaintiffs were indeed suitable (paragraphs 7 and 8 of the Reasons).

[39] In our view, that conclusion was open to Patterson J. We see no error in that regard.

[40] We find it odd that these plaintiffs, notwithstanding any admissions that they have already made that may damage their own historical claims, would not want to have the older claims succeed for purely selfish reasons. In that sense, the personal interests of the representative plaintiffs are consistent with, and therefore not in conflict with, those of the older claimants.

Would the Historical Claimants be Denied Their Day in Court?

[41] Considerable time was spent by Appellants' counsel in oral submissions on the allegation that Patterson J. erred in law in assuming that, if the class action was not certified as sought by the plaintiffs, the historical claims would all be dismissed.

[42] We disagree.

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[43] Undoubtedly, the Motions Judge used language in his Reasons, in the last sentence at paragraph 23 for example, which is capable of being interpreted as argued by the Appellants.

[44] Nonetheless, we do not accept that the Motions Judge so found. This is an experienced class proceedings certification Justice. His Honour is presumed to know the basic law. It is difficult to accept that, without any request before His Honour, he would have thought that he was dismissing the historical claims on a final basis if he did not do as requested by the plaintiffs. If the historical claims were not included, it would have been open to the claimants to commence a separate class action or pursue their claims individually. To attribute a blatant misunderstanding of basic law to the Motions Judge is unrealistic.

[45] In addition, the Reasons must be read as a whole. At paragraph 29, the Motions Judge specifically alludes to the possibility of "individual issues and trials" having to be determined after a motion for summary judgment is brought to dismiss the historical claims, including adjudication of the issues of discovery and concealment. The latter issues could only be relevant to the historical claims, thus, it is clear that Patterson J. was aware of the potential for certain historical claims to be dealt with differently than others. Such an awareness on the part of the Motions Judge is inconsistent with the submission made by the Appellants.

The Jurisprudence

[46] The Appellants argue that Patterson J. did not deal with the relevant case law. They point to the Reasons of Nolan J., dated October 30, 2013, in granting leave to appeal, as support for that argument.

[47] We disagree.

[48] Justice Patterson expressly referred to the legal principles that the Appellants contend were ignored or inadequately considered. For example, at paragraph 24 of the Reasons, His Honour refers to the decision in *Cloud v. Canada*, [2001] O.J. No. 4163 (S.C.) and how that impacts on the determination of whether the proposed class action is the preferable procedure to decide the common issues. As another example, at paragraph 25 of the Reasons, His Honour refers to the decision of the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 and the objectives of judicial economy, access to justice and behaviour modification.

[49] This is not an exercise in deciding whether Patterson J.'s Reasons are perfect or amount to an all-encompassing treatise on the topic of certifying class actions.

[50] Justice Patterson dealt with the leading case law. His Honour stated the law correctly, as acknowledged by Appellants' counsel before us. We see no error.

Arbitrariness

[51] The Appellants argue that Patterson J. erred in fixing the class to those with claims not arising before January 1, 1990.

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[52] We would not give effect to that submission. We find no error.

[53] Although we agree that the date is somewhat arbitrary, as acknowledged by the Motions Judge, we think that it is inconsistent for the Appellants to argue, on the one hand, that the class is too broad and unwieldy and yet complain, at the same time, that any date (other than by reference to the limitation period) was specified.

[54] Surely, having no date at all would only serve to exacerbate the manageability problem alleged by the Appellants.

[55] Once discoveries have been held and the parties have a better handle on the historical claims, the date can be revisited at that time.

[56] On these facts, we conclude that the arbitrariness of the date is, by itself, insufficient cause for us to interfere on appeal.

Commonality, Preferred Procedure and Suitability

[57] One thrust of the Appellants' submissions before us was that the Motions Judge erred in His Honour's assessment of commonality, especially between historical claimants and those not presumptively time-barred, preferred procedure (whether the class action as certified is the most preferable approach to resolve these claims) and suitability (of the proposed representative plaintiffs).

[58] We disagree. We see no error on any of those issues.

[59] It was open to Patterson J. to find that there were common issues among all of the class members, including the alternate proposed common issue on discoverability and concealment as suggested by the plaintiffs (paragraph 20 of the Reasons).

[60] It was open to Patterson J. to find that this was the preferable approach to fairly, efficiently and manageably advance the proceedings while achieving the key objectives of judicial economy, access to justice and behaviour modification (paragraphs 24 and 25 of the Reasons).

[61] As indicated above under a prior heading, it was open to Patterson J. to find that these representative plaintiffs were suitable and did not have any conflict of interest (paragraphs 7 and 8 of the Reasons).

CONCLUSION

[62] The majority if not all of the submissions made by the Appellants appear to be virtually identical to those made before the Motions Judge. This is an appeal, not a hearing *de novo*.

[63] Justice Patterson made discretionary decisions that are entitled to substantial deference from this Court. We see no error in law. We see no palpable and overriding error in fact.

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[64] For the foregoing reasons, the Appeals are dismissed.

COSTS

[65] We will accept written submissions on costs, delivered to the Trial Coordinator in London, within 15 days of May 1, 2014 from the successful Respondents (plaintiffs), and within 10 days thereafter from the Appellants (defendants). No reply.

[66] We will assume that costs have been resolved between the parties if the above deadlines are not complied with.

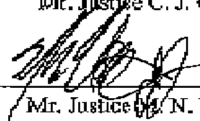
[67] The written submissions may include costs of the motion for leave to appeal decided by Nolan J.

[68] The written submissions, excluding attachments such as Offers to Settle and Bills of Costs, shall not exceed three pages.

[69] Thank you to all counsel for a well-presented appeal.

Mr. Justice J. C. Kent

Mr. Justice C. J. Conlan



Mr. Justice M. N. Varpio

Released: May 1, 2014

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