COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Halvorson v. British Columbia (Medical Services Commission),*** 2008 BCCA 501

Date: 20081204
Docket: CA036426

Between:

James Peter Halvorson, as representative petitioner

Appellant
(Petitioner)

And

Medical Services Commission of British Columbia and the Minister of Health as represented by the Attorney General of British Columbia

Respondents
(Respondents)

- and –

Docket: CA036427

Between:

James Peter Halvorson, as representative plaintiff

Appellant
(Plaintiff)

And:

Medical Services Commission of British Columbia and Her Majesty the Queen in Right of British Columbia and the Minister of Health, represented by the Attorney General of British Columbia

Respondents
(Defendants)

Before: The Honourable Madam Justice D. Smith
(In Chambers)

A.M. Grant S.J. Kovacs	Counsel for the Appellant
J.G.Penner	Counsel for the Respondents, Appeal No. CA036426
T.H. MacLachlan, Q.C.	Counsel for the Respondents, Appeal No. CA036427
Place and Date of Hearing:	Vancouver, British Columbia November 18, 2008
Place and Date of Judgment:	Vancouver, British Columbia December 4, 2008

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[1] The applicant, Dr. James Peter Halvorson, applies for leave to appeal the August 7, 2008 interlocutory order of a case management judge that requires him to provide particulars of his claim under the *Class Proceedings Act,* R.S.B.C. 1996 c. 50 (*CPA*).

[2] The action, which was commenced on October 21, 2008, involves claims for unjust enrichment and breach of statutory duty relating to certain decisions of the Minister of Health, as represented by the Attorney General of British Columbia (the "AGBC"), and the British Columbian Medical Services Plan (the "BCMSP"), a premium-based provincial health care plan in which physicians enrol in order to be paid for providing medical services to B.C. residents ("beneficiaries"). I will refer to the BCMSP and the AGBC, collectively, as the defendants.

[3] Dr. Halvorson (the "plaintiff") is a physician who has worked as a fee-for-service emergency physician under the BCMSP. His claims date back to 1992.

[4] There is a related petition, which Dr. Halverson commenced on October 23, 2008 pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (*JRPA*), which seeks judicial review of the same impugned decisions.

[5] Throughout the proceedings before the British Columbia Supreme Court and this Court, the action and the related petition have been heard together. I will refer to them, collectively, as the Claim.

[6] In this application, Dr. Halvorson seeks leave to appeal the order of August 7, 2008, as it relates to both the Claim generally, or alternatively, in relation to the specific grounds of appeal outlined below.

Leave to Appeal From Interlocutory Orders

[7] The test for granting leave to appeal an interlocutory order was set out by Saunders J.A. in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326:

> [10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp*. (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.

Background

[8] In the Claim, the plaintiff seeks to challenge two policy decisions of the BCMSP. Prior to May 1, 1996, the defendants would not pay an enrolled physician for providing medical services to beneficiaries who had not paid their premiums for three months or more. After May 1, 1996, the defendants cancelled the enrolment of beneficiaries who had had no contact with BCMSP for 12 months or more, deeming them no longer residents of British Columbia. Contact with the BCSMP was defined as including correspondence, payment of premiums, or the submission of a claim for payment by a health care provider. The plaintiff's claims are based on

his request for payment of fees for services rendered by him to beneficiaries that were refused coverage by the defendants, typically for lack of contact with the BCMSP.

[9] On April 26, 2001, the plaintiff's application to certify these proceedings as class proceedings under the *CPA* was dismissed.

[10] On May 7, 2003, this Court allowed the plaintiff's appeal from the dismissal of his class proceedings certification: 2003 BCCA 264. The Court concluded that the chambers judge had erred in finding that there was no threshold cause of action under s. 4(2)(a) of the *CPA* and that a class proceeding would not be the preferable procedure under s. 4(2)(d) of the *CPA*. The Court remitted the matter to the British Columbia Supreme Court "to define the class and common issues, and to determine other aspects of the certification orders".

[11] Five years, and countless case management conferences later, the litigation has advanced only marginally. The impediment to moving forward appears to be a lack of agreement over the effect of the May 7, 2003 order of this Court; the division hearing the appeal declined to revisit the matter on May 18, 2005.

[12] On February 24, 2006, the case management judge granted an application by the plaintiff to amend the statement of claim.

[13] On July 8, 2008, the defendants applied for particulars, pursuant to R. 19 of the British Columbia Supreme Court Rules, B.C. Reg. 221/90. An order directing the

plaintiff to provide further and better particulars relating to his claims of unjust enrichment and breach of statutory duty was granted on August 7, 2008.

[14] In her reasons for judgment, the case management judge noted that, while R. 19 "does not specifically apply to a petition", s. 14 of the *JRPA* provides that a petition must set out the nature of the relief sought, and the grounds upon which it is sought. Relying on s. 14 of the *JRPA*, the case management judge determined that additional specificity, information, or "particulars" were required to understand the relief and the grounds. In particular, she directed that the plaintiff specify: (1) which of the defendants is alleged to have made the impugned decisions; (2) the nature of the impugned decisions; (3) the relevant statutory sections; (4) the principles of statutory interpretation which the plaintiff claims were ignored by the decision-maker; and (5) a number of additional facts.

Discussion

[15] An order for particulars pursuant to R. 19 is a discretionary order: see for example *Big Bay Timber Ltd. v. Arkinstall Logging Co.* (1978), 7 B.C.L.R. 69 (C.A.). Leave to appeal will rarely be granted for discretionary orders. As explained by Madam Justice Rowles (in Chambers) in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog.*, [1998] B.C.J. No. 2298 (C.A.):

> [12] The usual rule followed by appellate courts in relation to discretionary orders was succinctly stated by Madam Justice McLachlin in *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 (C.A.) at 11:

> Generally speaking, barring error in the decision below, a justice will be reluctant to grant leave where the decision constitutes the exercise of a discretion conferred on the chambers judge. The party seeking leave to appeal bears the onus of establishing that the conditions for leave have been met.

[16] Generally speaking, leave to appeal a discretionary order will only be granted where the order is clearly wrong, where serious injustice will occur or where discretion was not exercised judiciously or was exercised on a wrong principle: *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286, 152 B.C.A.C. 174 (Proudfoot J.A. in Chambers) at para. 6; *Yang v. Yang*, 2000 BCCA 486, (Saunders J.A. in Chambers) at para. 3.

[17] More significant to this application, this Court will be reluctant to interfere with the exercise of judicial discretion on the part of a case management judge in the context of complex litigation: *G.W.L. Properties Ltd .v. W.R. Grace & Co. of Canada Ltd.* (1992), 75 B.C.L.R. (2d) 31 at para. 9, *Godkin v. B.C.*, 2002 BCCA 69, 164 B.C.A.C 89 at para. 57, *Sienema v. British Columbia Insurance Company*, 2001 BCCA 440, 161 B.C.A.C. 154 at para. 14, *Tsilhquot'in Nation v. Canada (Attorney General)*, 2002 BCCA 434, 3 B.C.L.R. (4th) 231, and *Maclean v. Telus Corp.*, 2005 BCCA 338, 26 C.P.C. (6th) 32.

[18] However, in light of the unique circumstances of this case, I am persuaded that leave to appeal the order must be granted. In my view, there are *prima facie* meritorious issues to be addressed. First, there is an issue as to the effect of an order for particulars subsequent to a finding that s. 4(1)(a) and s. 4(1)(d) of the *CPA* have been established, and subsequent to the granting of an amendment to the

pleadings. Further, there is an issue with regards to the timing of an application for particulars prior to a determination of the common issues and the completion of discovery procedures. There is also an issue regarding the potential impact of the interplay between an action and a related petition on the granting of such an order. Finally, there is a broader issue as to whether the 2003 decision of this Court, whatever its effect, continues to be binding on the litigants in light of the order allowing the plaintiff to amend his pleadings. If that is the case, the requirement in s. 4(1)(a) of the *CPA* has not been established, and the ordering of particulars is raised in a different context.

[19] These procedural issues are clearly significant to the Claim, which has been stalled for over five years. They are also, in my view, significant to the practice of class actions in order to avoid similar quagmires in the future. Lastly, it cannot be suggested that this appeal would unduly delay the progress of the action when little, if any, progress has been made since the class proceeding was commenced in 1998.

[20] Leave to appeal is granted, generally, from the order of August 7, 2008.

"The Honourable Madam Justice D. Smith"