IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Halvorson v. Medical Services Commission of British Columbia,* 2011 BCSC 1855

Date: 20110914
Docket: C985385
Registry: Vancouver

Between:

James Peter Halvorson, as representative plaintiff

Plaintiff

And:

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

Defendants

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

In Chambers
September 14, 2011

Counsel for the Plaintiff	A.M. Grant S. Kovacs
Counsel for the Defendants	T.H. MacLachlan, Q.C.
Place of Hearing:	Vancouver, B.C.
Place and Date of Judgment:	Vancouver, B.C. September 14, 2011

[1] **THE COURT:** I am granting the plaintiff leave to amend the notice of civil claim in the form attached to the notice of application filed May 31, 2011, with some small corrections. In para. 2 of the proposed amended claim where it says, "*Medical Services and Healthcare Act*," that should be the "*Medical and Health Care Services Act*," and then the abbreviation, accordingly, is the *MHCSA*. Then in para. 39(b), instead of a reference to para. 5(a), it should be a reference to para. 39(a). In para. 39(c)(ii), instead of a reference to para. 5(c)(i), it should be a reference to para. 39(c)(i).

[2] Second, this order will constitute a determination of the cause of action issue under s. 4(1)(a) of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

[3] Third, I am directing the parties to set a schedule for the hearing the balance of the certification application, specifically the issues under s. 4(1)(b), (c), and (e) (identifiable class and class description, common issues to be certified, and suitability of the proposed representative plaintiff and the case plan).

[4] Fourth, the schedule, I think, should include the filing of a response by the defendants, who had earlier filed a statement of defence. We can come back to that as we discuss the case plan after I complete my ruling.

[5] Finally, the orders made by Madam Justice Humphries requiring delivery of particulars are set aside, and the application for particulars is dismissed at this time. That is in accordance with Mr. Justice Smith's reasons for judgment in ***Halvorson v. British Columbia (Medical Services Commission)***, 2010 BCCA 267, at para. 43.

[6] I will briefly explain my reasons.

[7] A description of the claims being advanced by the plaintiff and the procedural background for this action are set out at length in the reasons of the Court of Appeal indexed at 2003 BCCA 264 (***Halvorson v. British Columbia (Medical Services Commission)***, which is the judgment of Mr. Justice Mackenzie, and 2010 BCCA 267, which is the judgment of Mr. Justice Smith. The claims were summarized by Mr. Justice Mackenzie at paras. 5, 7 and 27 of his reasons and by Mr. Justice Smith

and paras. 26 to 28 of his reasons for judgment. They are unjust enrichment and breach of statutory duty.

[8] Mr. Justice Mackenzie concluded (at para. 28 of his reasons) that the proceedings satisfied the test under s. 4(1)(a) of the ***Class Proceedings Act***. However (referring to para. 32 of Mr. Justice Smith's reasons), the pleadings needed to be amended to eliminate facts pleaded initially that became immaterial in light of the revised claims presented in the 2003 appeal, and also to add facts material to the revised claims that were not initially pleaded. As well, the claim needed to be amended to support an additional issue that came to the plaintiff's attention as a result of comments made during the hearing of the 2003 appeal.

[9] The task given to the parties and the case management judge by Mr. Justice Smith (para. 33 of his reasons) was:

> . . . to define the specific common issues arising out of the broad issues identified in paragraphs 5 and 6 of the reasons given by Mr. Justice Mackenzie in the first appeal and to meld those issues with the appellant's pleadings, making such amendments as are necessary to raise them.

The pleadings and the common issues were to be shaped to fit the plaintiff's reformulated case and were to be viewed as "mutually dependent parts to be synthesized to produce a common issues trial." Dr. Halvorson was given leave by Mr. Justice Smith to withdraw the existing pleadings and "to substitute proper documents honed through the case management process to provide a foundation for the common issues trial envisaged by" the Court of Appeal in the 2003 appeal: see para. 43 of the judgment of K. Smith J.A.

[10] Following the reasons issued on the 2010 appeal, the first case management conference was held on February 23, 2011. At that time, I gave directions, including the preparation of what I called a concordance showing the correspondence between the proposed amended pleadings and the relevant passages in the Court of Appeal's judgments. I also directed that counsel for the defendants and respondents at that time receive a draft of both to review and consider.

[11] On April 19, the second case management conference was held. By that time, detailed concordances had been prepared. There was a discussion of the proposed draft amended notice of claim and, to a lesser extent, the draft amended petition. I gave directions at that time for the plaintiff, and the petitioner as well, to make a formal application to amend.

[12] The formal applications came on for hearing at a case planning conference on June 13 in both proceedings. Mr. Grant had updated the concordances to reflect the further amendments made to the draft pleadings since April 19. After discussion, I made an order staying the proceedings brought by way of petition under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, and it was, therefore, unnecessary to consider the proposed amended petition any further.

[13] The defendants delivered written submissions dated June 9, 2011, opposing the application to amend the notice of claim. At the hearing, counsel for the defendants requested additional time to make submissions on the legal sufficiency of the draft notice of claim. As a result, I received additional written submissions on behalf of the defendants, and on behalf of the plaintiff, in July.

[14] At the beginning of August, I received a letter from counsel for the defendants bringing to my attention the decision of the Supreme Court of Canada in ***R. v. Imperial Tobacco of Canada***, 2011 SCC 42 released on July 29, 2011. That case, beginning at para. 17, reviews the legal test for striking out claims as disclosing no reasonable cause of action and the purpose and application of the test. That test is also relevant to the test applied on an application to amend pleadings: see ***Victoria Grey Metro Trust Company v. Fort Gary Trust Company*** (1982), 30 B.C.L.R. (2d) 45 (S.C.).

[15] In their submissions, the defendants continue to complain that there are problems with the proposed amended notice of claim. For example, they complain about a complete lack of pleading of what they call truly material facts that would support the constituent elements of an unjust enrichment claim and/or quantum meruit. However, the elements of the cause of action, as described in ***Garland v.***

Consumer Gas Co., 2004 SCC 25, at para. 30, have been pleaded. The defendants complain that no facts are pleaded relating to the plaintiff's own claim. However, there are facts pleaded (although quite concisely) relating to Dr. Halvorson's personal claim.

[16] The defendants complain that there is an ambiguity about the use of the term "beneficiary." The treatment of this term is different in the proposed amended notice of claim as compared with the second further amended statement of claim. However, as I read the proposed pleadings (specifically paras. 7 and 11), the use of the term is consistent with how it was described by Mr. Justice Mackenzie in para. 5 of his reasons, and, in the context of the proposed amended notice of claim as a whole and in view of the task described by Mr. Justice Smith, it is sufficiently clear, in my view.

[17] The defendants complain about a failure to allege that none of the beneficiaries were billed directly by proposed class members. However, the defendants do not explain how or why such an allegation is a material fact necessary to state a complete cause of action.

[18] The defendants complain that, in the absence of further material facts being pleaded, they are currently not able to discern the issues of law and fact with clarity and precision to give fair notice of the plaintiff's claims. In the circumstances, I do not accept this. In my view, the defendants, after 12 or so years, are sufficiently informed by the proposed amended notice of claim about the nature of the claims, so that the parties and the court can proceed to deal with the balance of the certification application.

[19] The defendants acknowledge that if the amendments are granted, then it will be necessary for the court to consider whether the requirements of s. 4 of the ***Class Proceedings Act*** are met. Some of the issues they raise (such as the proposed class definition) are more properly addressed at that stage, as the defendants also acknowledge.

[20] Is the proposed amended notice of claim a model pleading? It may or may not be. However, it does not need to be perfect to be adequate. On my review of the proposed amended claim, it sufficiently pleads the material facts to raise the common issues identified by Mr. Justice Mackenzie. In my view, the causes of action as contemplated by Mr. Justice Mackenzie, and in the light of Mr. Justice Smith's comments at paras. 28 and 34, and concerning the necessity for proper pleadings, are sufficiently pleaded in the proposed amended claim so as to permit the parties and the court to move on to the next stage: consideration of the questions of class definition and identifiable class, the common issues, and the suitability of Dr. Halvorson as a representative plaintiff.

[21] It may be that, if and when common issues are settled for certification, further amendments to the notice of claim may be necessary or appropriate. This approach is consistent with the observations made by Mr. Justice Smith at para. 31:

> . . . It is readily apparent that, when a plaintiff recasts a claim to make it suitable for certification, it may be necessary to amend the statement of claim to support the reformulated claim. This follows from the general principle that all necessary amendments should be made to enable the real issues between the parties to be determined in order to facilitate the "just, speedy, and inexpensive determination of every proceeding on the merits" [citation omitted].

In my view, the approach is also consistent with Mr. Justice Smith's description (in paras. 33 and 34 of his reasons) of the task at hand.

[22] In making my rulings this morning, I am also mindful of Mr. Justice Iacobucci's comments in ***Garland***, at para. 90 concerning "litigation by instalments" in class actions, which he considered ought to be avoided:

> On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:
>
> > In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

[23] The plaintiff's notice of claim – here, the amended claim – is necessarily connected with proposed common issues that might eventually be certified. Mr. Justice Smith identified "broad issues" at para. 28 of this judgment, and I have concluded that there is sufficient correspondence between those issues and the allegations in the proposed amended claim that leave to amend should be granted. However, final identification of common issues (along with the other remaining requirements for certification) is still to be argued.

[24] Thus, the ruling this morning is not intended as a final instalment, but rather as a ruling as part of case management to allow the parties and the court to move ahead to the next related stage: determination of the balance of the certification application including the determination and settlement of common issues. Unless the plaintiff can satisfy all of the requirements under s. 4(1) of the ***Class Proceedings Act***, the action cannot be certified.

[25] That concludes my reasons.

"Adair J."