CITATION: Richard v. The Attorney General of Canada, 2022 ONSC 6847
COURT FILE NO.: CV-22-00681184-00CP
DATE: 20221205

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: TYRON RICHARD and ALEXIS GARCIA PAEZ, Plaintiffs

AND:

THE ATTORNEY GENERAL OF CANADA, Defendant

BEFORE: Justice Glustein

COUNSEL: *Subodh S. Bharati, W. Cory Wanless, Tina Q. Yang, Jonathan J. Foreman and Annie Legate-Wolfe,* for the plaintiffs

David Tyndale, Sharon Stewart Guthrie, Amina Riaz, Rishma Bhimji and Jazmeen Fix, for the defendants

HEARD: In-writing

REASONS FOR DECISION

Nature of the motion and overview

[1] The defendant, The Attorney General of Canada ("AGC"), brings this motion for an order deferring the filing of its statement of defence until after the certification motion in this proposed class proceeding is decided.

[2] For the reasons that follow, I dismiss the motion.

[3] In brief, I follow the line of case law in Ontario and other provinces that presumptively requires the defendant in a class proceeding to file a statement of defence before certification, unless the defendant can establish special circumstances justifying a deferral.

[4] In the present case, I do not accept the AGC's position that (i) this litigation is so complex that a deferral is necessary; (ii) substantial resources, time and effort would be required to properly prepare the statement of defence which could be "wasted", or (iii) the statement of defence is unlikely to be useful or necessary to the certification motion.

[5] To the contrary, I find that the legal issues in the litigation are well-defined; they address (i) the alleged breach by the AGC of specified rights under the *Canadian Charter of Rights and Freedoms*, and (ii) the alleged negligence and breach of fiduciary duty by the AGC. All legal issues in the litigation arise from the detention of non-citizens immigrants in provincial correctional facilities ("Immigration Detention"). These issues are clearly set out in the claim and

can be addressed in a straightforward manner by the statement of defence. While extensive documentary production might be required if the action is certified, it is not required for the AGC to prepare a statement of defence. Consequently, none of the AGC's objections apply on the evidence before me.

Facts

[6] The plaintiffs allege that Canada detained non-citizens in provincial correctional facilities for punitive and non-administrative purposes. They allege that this practice of Immigration Detention violates ss. 7, 9, 12 and 15 of the *Charter*, and also constitutes a breach of Canada's duty of care and fiduciary duty allegedly owed to the proposed class.

[7] The plaintiffs also seek to certify a subclass of additional claims on behalf of non-citizens with mental health conditions.

[8] On behalf of the proposed class and subclass, the plaintiffs seek damages and other declaratory relief restraining Canada's alleged unlawful behaviour.

[9] The action was commenced on May 16, 2022. The AGC delivered a demand for particulars on October 14, 2022. The plaintiffs delivered a response to the demand for particulars on October 28, 2022.

[10] In support of its motion, the AGC filed an affidavit of Lakhbir Paul ("Paul"), the Director of the Case Management Division in the Intelligence and Enforcement Branch of the Canada Border Services Agency ("CBSA") in the National Headquarters. Her evidence was that "the Attorney General of Canada will require significant time and resources in order to respond to the Statement of Claim" because:

(i) "Due to the national scope and the complexity of the issues raised in the claim, CBSA will need to gather information from a number of different sectors and divisions within the CBSA" including sectors responsible for "detention programs", "detention transformation", "hearings", "investigations", "stakeholder engagement", "quality assurance", "contracted services", "agency comptroller", "planning and resource management", "integrated case tracking and prioritization", "statistics and performance metrics", and "strategic policy branch", with the information from all of these departments being required for "[e]ach of the CBSA's seven regions";

(ii) "The CBSA will also need to consult with and gather information from the following sources outside the agency: a. Non-governmental organizations that monitor conditions of detention; b. Provincial correctional partners; and c. Territorial correctional partners"; and

(iii) "The CBSA may also need to consult with Correctional Services Canada, the Royal Canadian Mounted Police and municipal police forces".

[11] On this basis, Paul's evidence was that "significant efforts and coordination will be required" to review "records", "policies, guidelines and practices", "provincial and territorial correctional institutional data", along with "extensive consultation with CBSA's various sectors and provincial and territorial correctional partners regarding the information arising from the above efforts … before the Attorney General is in a position to respond to the allegations in the Statement of Claim".

Analysis

[12] I first review the applicable law and then apply it to the facts of the present case.

The applicable law

[13] Section 35 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") provides that: "The rules of court apply to proceedings under this Act". Rule 18.01(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, requires the delivery of a statement of defence within 20 days after service of the statement of claim, with an additional ten days provided if a defendant serves a notice of intent to defend (r. 18.02(2)).

[14] A practice arose in the early years of class action litigation in Ontario whereby the parties agreed that a defence need not be filed until after the certification motion. That practice was reviewed by Perell J. in *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 1924, 110 O.R. (3d) 173, at para. 45:

> The convention in class actions, which existed from 1996 to 2011, was that a defendant not be required to deliver a statement of defence pre-certification because of the likelihood that the statement of claim would be reformulated as a result of the certification decision and based on the view that the statement of defence had little utility before certification.

[15] That practice was expressly rejected by the court in *Sino-Forest*, in which Perell J. followed his earlier decision in *Pennyfeather v. Timminco Limited*, 2011 ONSC 4257, 107 O.R. (3d) 201, in which he found that the convention should be revisited. In *Pennyfeather*, the court held that as a general rule, it is preferable that pleadings be closed before the action moves to a certification motion. Perell J. discussed the "major advantages" to the court and the parties of closing the pleadings prior to certification at paras. 86-92:

(i) Delivering a statement of defence will call out the defendant to make its challenges to the Statement of Claim and, thus, challenges to the statement of claim might be removed as an issue;

(ii) The requirement of the s. 5(1)(a) criterion for certification might be decided, resolved or at least narrowed or confined before the certification motion; and

(iii) The analysis of the other four certification criteria would be facilitated by a completed set of pleadings: for example, the statement of defence would provide

> useful information for analyzing the preferable procedure criterion and the plaintiff's litigation plan, or it may emerge that there are issues worthy of certification in the defendant's statement of defence.

[16] In *Sino-Forest*, Perell J. expanded on his reasoning from *Pennyfeather*. He held, at paras. 49, and 51-54:

> Generally speaking, it is desirable to normalize class actions with the procedure under the Rules of Civil Procedure. The Rules are the norm for a fair procedure, and the norm of civil procedure is that both sides must disclose the case that their opponent must meet. Defendants are not like an accused in a criminal proceeding with a right to remain silent. It is not regarded as unfair or abnormal to compel a defendant to plead a statement of defence in response to a statement of claim.
>
> …
>
> In other words, in contemporary times the defendants' concern that they will have wasted time and effort pleading to a statement of claim that may be different after certification will not be borne out. In any event, the complaint of a wasted effort [page186] is overblown. Unless pleadings are to be regarded as a work of fictional literature, claims and defences are based on the material facts that existed, and competent counsel will take instructions about all the possible claims and defences that emerge from those set of facts before the certification motion.
>
> I find it hard to believe that the accomplished lawyers in the case at bar are waiting for the outcome of the leave motion and the certification motion before investigating the material facts and researching the applicable law and advising the defendants about what defences are available to them. The truth of the matter is that the defendants and their lawyers are not concerned about wasted time and effort, but rather they do not wish to plead because they believe it is tactically better to avoid the disclosure of their case that the Rules of Civil Procedure would normally mandate.
>
> I see no unfairness of denying defendants a tactical maneuver that may be inconsistent with general principle of rule 1.04 that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".
>
> I also see no unfairness in denying defendants the tactical maneuver of not delivering a statement of defence before certification when the exchange of pleadings may be tactically and substantively beneficial to defendants. The defendants arguments that class membership is overinclusive or under-inclusive, that the proposed common issues want for commonality, that the action is not manageable as a class action, that a class proceeding is not the preferable procedure, and that the litigation plan is deficient are best made when the defendants shows the colour of his or her eyes by pleading a defence and these

> arguments will be stronger than the "is! -- is not! -- is too!" sandbox arguments of many a certification motion. For whatever it is worth, my own observation from recent certification motions where defendants have pleaded before certification is that both sides and the administration of justice are better for it.

[17] Courts in other provinces have adopted the same approach, imposing the onus on the defendant to show good reason why the defence should not be filed pre-certification: see *Shaver v. Mallinckrodt Canada ULC*, 2021 BCSC 404, at paras. 28-30, 37; *Langevin v. Aurora Cannabis Inc.*, 2021 ABQB 887, at para. 14; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74, at paras. 31-34; *British Columbia v. Apotex Inc.*, 2020 BCSC 412, at para. 90; and *Gay v. New Brunswick (Regional Health Authority 7*), 2014 NBCA 10, 421 N.B.R. (2d) 1, at para. 25.

[18] The courts in the above cases apply the presumption that the statement of defence will be useful to determine the issues to be addressed at the certification motion: *Shaver*, at para. 37.

[19] The defence fills out the competing positions on the pleadings for the s. 5(1)(a) analysis, and the remainder of the certification test. It will provide important legal and factual context for the certification motion. It will define, in a formal way, the defendant's positions and the material issues in dispute. As a result, litigation by ambush and boundless free-ranging debates and commission-type inquiries stand to be avoided: see *Gay*, at para. 25.

[20] There is a line of cases (many decided before some of the above cases or in the Federal Court) which hold that it is not essential for a statement of defence to be filed before certification, or refer to the filing of a defence after certification as the "usual practice": see *Always Travel Inc. v. Air Canada*, 2003 FCT 212, at para. 4; *Maclean v. Telus Corp.*, 2005 BCCA 338, 214 B.C.A.C. 301, at para. 12; *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 120, 227 Sask. R. 63, at paras. 23-28; *Field v. Glaxosmithkline Inc.*, 2013 SKQB 113, 416 Sask. R. 238, at para. 45; *Horseman v. The Attorney General of Canada*, Docket T-1784-12; Order and Endorsement dated December 3, 2012; *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223, 38 Alta. L.R. (6th) 224, at para. 105; and *Poundmaker Cree Nation v. Canada*, 2017 FC 447, at paras. 19-32.

[21] I adopt the settled line of cases in Ontario (as followed elsewhere), as set out at paras. 15-19 above, that hold that it should be presumed that the *Rules* apply and that the defence should be filed before certification. I rely on the same policy reasons discussed above.

[22] However, the applicable test is not determinative, as the evidence in the present case does not support deferring the defence until after certification. I review the evidence below.

Application of the law to the present case

[23] Regardless of whether a presumption of pre-certification filing applies or whether the court should simply consider relevant factors when the defendant brings a motion (as set out in *Poundmaker Cree Nation*), the evidence in this case does not support filing the defence after certification.

[24] Throughout the Paul affidavit, the AGC conflates pleading preparation with trial or discovery preparation.

[25] The claim itself is straightforward in its factual and legal approach. The plaintiffs are non-residents who have been detained in provincial correctional facilities. They seek damages arising from their detention for alleged breaches by the AGC of the plaintiffs' *Charter* rights and an alleged breach of a duty of care and fiduciary duties owed to the class.

[26] The AGC knows the claim against it. The AGC can respond to the claim and deny any alleged breaches and any damages. Further, the AGC can set out its defence to (i) the plaintiffs' factual allegations, which are straightforward (*i.e.* they were detained in provincial correctional facilities and suffered harm which they would not have incurred if housed in immigration detention centres); and (ii) the causes of action raised in the claim.

[27] Trial or discovery preparation may require many of the steps suggested in the Paul affidavit. However, a statement of defence can be drafted without the need to obtain thousands of documents from dozens of sources across the country. The AGC can make its position clear in the defence without all the steps that would be required for discovery or trial preparation.

[28] A full and fair assessment of the issues at the certification motion is an additional factor in favour of pre-certification filing of the statement of defence. The court should assess all s. 5(1) issues with the benefit of the AGC's position, *i.e.* the cause of action, identifiable class, common issues, preferable procedure, or representative plaintiffs factors (including the litigation plan). It would create a more fair and efficient process to have the defence before the court.

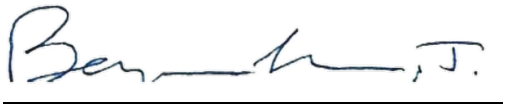
[29] As Perell J. noted in *Sino-Forest*, at paras. 52-54, the "accomplished lawyers" at the AGC cannot be said to be "waiting for the outcome of the leave motion and the certification motion before investigating the material facts and researching the applicable law and advising the defendants about what defences are available to them".

[30] It cannot be said that every fact must be investigated and every document reviewed before a defence is filed. The *Rules* expressly militate against such a result by requiring the defence be filed within 20 to 30 days after service of the statement of claim, well before production of documents or discovery. The AGC's attempt to conflate preparation of a pleading with preparation for discovery or trial is unsupported by the case law.

Order and costs

[31] For the above reasons, I dismiss the motion. The AGC did not seek costs in its notice of motion and the plaintiffs did not request costs in their factum. As this motion proceeded in writing, the court cannot determine whether the lack of a request for costs is intentional, or whether the plaintiffs seek costs.

[32] If the plaintiffs are seeking costs, and if the parties cannot agree on costs, they should schedule a case conference before me to review the process to have that determination resolved. No costs will be ordered unless the parties agree or a case conference to address the process for determining costs is held before me by January 13, 2023.



GLUSTEIN J.

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Released: December 5, 2022