Federal Court  Cour fédérale

Date: 20101129

Docket: T-332-07

Citation: 2010 FC 1205

Vancouver, British Columbia, November 29, 2010

PRESENT: Roger R. Lafrenière, Esquire
Case Management Judge

BETWEEN:

CHIEF NORMAN YAHEY, MARVIN YAHEY, SHERRI DEMENIC and JOE APSASSIN, the elected Chief and Councillors of the Blueberry River Indian Band suing on their own behalf and on behalf of all the other members of the Blueberry River Indian Band

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendants

REASONS FOR ORDER AND ORDER

[1] The Plaintiffs, the elected Chief and Councillors of the Blueberry River Indian Band (Blueberry Band), move for an order approving the discontinuance of the underlying proceeding brought on their own behalf and on behalf of all the other members of the Blueberry Band. They also seek an order fixing the costs payable to the Defendants upon discontinuance of the proceeding.

[2] The motion is not contested. The parties have agreed on the amount of costs to be paid by the Plaintiffs for discontinuing their action. In addition, the Defendants take no position regarding the Plaintiffs' request for the Court's approval of the discontinuance of the representative proceeding pursuant to Rule 114(4) of the *Federal Courts Rules*.

[3] Although the Plaintiffs who started this litigation wish to bring it to an end and are prepared to pay costs, the Court has a responsibility to ensure that the interests of the members that the Plaintiffs claim to represent will not be prejudiced by the discontinuance. In the absence of any evidence that members of the Band were given notice of the Plaintiffs' intention to discontinue the proceeding, and have voiced no objection, I decline to grant the relief requested.

Background

[4] The following facts can be gleaned from a review of the Court file. The Plaintiffs commenced the present action on February 21, 2007. The Statement of Claim states that the Blueberry Band is made up of two distinct ethnic and cultural groups, the Beaver or Dunne-za Indians (Beaver) who speak the Dunne-za language, and the Cree Indians (Cree) who speak the Cree language. Prior to 1962, the Plaintiffs were known as the Fort St. John Beaver Band.

[5] The Plaintiffs allege that, in or about 1977, the Defendant, Her Majesty the Queen in Right of Canada (Crown), purported to exercise her discretion and power pursuant to section 17 of the *Indian Act* to effect the process of dividing the Fort St. John Beaver Band into two separate bands, the Blueberry Band and the Doig River Band (Doig Band). The stated purpose of the band division

process was to remedy the problems arising from ethnic, cultural and linguistic conflict within the Fort St. John Beaver Band.

[6] The Plaintiffs further allege that the Crown breached her fiduciary, equitable and other obligations owed to the Plaintiffs and abused her discretion and power over band constitution and division. In particular, they claim that the Crown failed to: (a) identify the separating groups on the basis of ethnic, cultural and linguistic differences, as specifically requested by the Plaintiffs; (b) consider or allow for input of the Beaver in determining the criteria for band division; (c) complete the band division process in a timely manner; and (d) adequately and conclusively allocate Fort St. John Beaver Band property between the Doig Band and the Beaver Band. In their prayer for relief, the Plaintiffs seek a declaration that the band division process remains incomplete, as well as damages for breach of fiduciary duty.

Earlier Action

[7] An action in virtually the same terms as the present action was commenced in this Court in 2001 bearing Court File No. T-1725-01. The earlier action proceeded to close of pleadings with a defence filed on behalf of the Defendants. Instructions with respect to the action were received from the Chief and council of the Blueberry Band who were in office at the time.

[8] By December 2001, as a result of biennial elections there was a change in the elected Chief and council. The prior Chief and council had represented the Beaver elements of the Band whereas the new Chief and council elected in December 2001 represented the Cree elements of the Band.

[9] By the spring of 2002, counsel for the Plaintiffs was instructed to discontinue the proceedings by then current Chief and council. That discontinuance was filed in April 2002.

Present Action

[10] In December 2006, Chief Norman Yahey, who was Chief when the action was commenced in 2001, was re-elected as Chief with a predominantly Beaver council. Chief Yahey made enquiries in 2007 as to the status of the 2001 proceeding. When he learned that the earlier action had been discontinued on instructions from the previous Chief and council, he gave instructions to commence a new action – the present proceeding.

[11] After the Defendants sought particulars of the Plaintiffs' claim pursuant to Rule 181 of the *Federal Courts Rules*, the action was ordered to continue as a specially managed proceeding. Over the next two years, the parties completed documentary production and scheduled oral discoveries.

[12] On March 17, 2010 the Plaintiffs sent a letter to the Defendants indicating that they would discontinue their action against the Defendants provided costs were waived. Counsel for the Defendants responded that the Defendants would be willing to waive costs if a consent judgment, as opposed to a discontinuance, was obtained. She also alerted the Plaintiffs to the requirement under Rule 114(4) for court approval to terminate this representative proceeding.

[13] Rule 114(4) provides that the discontinuance of a representative proceeding is not effective unless it is approved by the Court:

(4) The discontinuance or settlement of a representative	(4) Le désistement ou le règlement de l'instance par

proceeding is not effective unless it is approved by the Court.	représentation ne prend effet que s'il est approuvé par la Cour.

[14] The Plaintiffs did not reply to the Defendants' proposal and instead proceeded to file a Notice of Discontinuance on June 18, 2010.

[15] Counsel for the Defendants subsequently corresponded with the Plaintiffs on numerous occasions in an attempt to get the Plaintiffs to comply with Rule 114(4). The Defendants wanted to ensure that the discontinuance of the representative proceeding was effective.

[16] Once again, the Plaintiffs did not respond to the correspondence from the Defendants or seek approval of the Court to discontinue, as required under Rule 114(4).

[17] The Defendants advised the Plaintiffs by letter dated June 9, 2010 that the Defendants intended to seek their costs. The Defendants sent the Plaintiffs a draft Bill of Costs and proposed to have it set down for assessment by the Case Management Judge at the same time as the motion seeking the Court's approval of the discontinuance.

[18] In the absence of any response from the Plaintiffs, the Defendants brought a motion in writing for directions pursuant to Rule 54 of the *Federal Courts Rules* concerning the appropriate procedure to follow to obtain the Court's approval of the discontinuance of this representative proceeding. By Order dated September 30, 2010, the Plaintiffs were directed to serve and file a motion in writing for the Court's approval of the discontinuance and to fix the costs payable to the Defendants.

[19] The Plaintiffs brought the present motion on October 22, 2010. In support of their motion, the Plaintiffs rely on a short affidavit of Ms. Lesley Thomson, a legal assistant employed by Plaintiffs' counsel, which only addresses the issue of costs.

Analysis

[20] The motion for leave to discontinue raises two issues: first, whether approval should be granted; and second, whether terms should be imposed on any order approving leave to discontinue.

[21] To resolve these two issues, it is necessary to understand the nature of a discontinuance. A discontinuance brings an action against a defendant to an end, but would not bar a subsequent claim based on the same cause or causes of action: *Simanic v. Ross* (2004), 71 O.R. (3d) 161 (S.C.J.).

[22] In an ordinary action, a plaintiff is free to discontinue at any time, subject to cost consequences as provided in Rule 402. However, as a result of recent amendments to the *Federal Courts Rules* in December 2007, a plaintiff in a representative proceeding no longer has the same flexibility. The purpose of the amendments was to reinstate former Rule 114, which provided for representative proceedings in this Court. Former Rule 114 was repealed in 2002 by amendments which brought into force an expanded class actions proceedings.

[23] Rule 114(4) now provides that the Court's approval is required in order for the discontinuance of a representative proceeding to be considered effective. The same wording is used in Rule 334.3 for class actions. In exercising its discretion, the Court must ensure that the interests

of the members that the Plaintiffs purport to represent will not be prejudiced by a discontinuance should approval be granted or refused: see *Campbell v. Canada*, 2009 FC 30. The requirement to seek leave before a discontinuance is deemed effective provides fairness to a party affected by the termination of proceeding, without interfering with the efficiency of what is a simpler procedure for resolving a collective dispute.

[24] Absent special circumstances, leave to discontinue should generally be granted upon the payment of costs. However this is not a usual case taking into account the earlier proceeding and an apparent conflict between factions in the Blueberry Band.

[25] A plaintiff who starts a representative action has duties to all members of the group. In order to give approval of a discontinuance, the court must be satisfied that the interests of the group will not be prejudiced. In the case at bar, an adverse effect of the discontinuance may be that limitation periods will resume running. As a result, members of the group who relied on the representative proceeding as their means for obtaining access to justice may find their actions statute-barred.

[26] An order bringing to an end a representative proceeding is binding on all those persons whom the Plaintiffs claim to represent. Accordingly, approval to discontinue will only be granted once the Court is satisfied, based on proper evidence, that appropriate notice has been given to the members of the Blackberry Band.

ORDER

THIS COURT ORDERS that the motion is adjourned to January 17, 2011 to allow the Plaintiffs to file supplementary affidavit evidence in support of the motion.

"Roger R. Lafrenière"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-332-07
STYLE OF CAUSE:	Chief Norman Yahey et al. v. Her Majesty the Queen in Right of Canada et al.

MOTION IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ORDER AND ORDER:	LAFRENIÈRE P.
DATED:	November 29, 2010

WRITTEN REPRESENTATIONS:

Mr. Murray A. Clemens	FOR THE PLAINTIFFS
Ms. Kathy Ring	FOR THE DEFENDANTS

SOLICITOR OF RECORD:

Nathanson Schachter & Thompson LLP Vancouver, BC	FOR THE PLAINTIFFS
Department of Justice Vancouver, BC	FOR THE DEFENDANTS