Federal Court of Appeal  Cour d'appel fédérale

Date: 20160923

Docket: A-455-15

Citation: 2016 FCA 238

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
GLEASON J.A.

BETWEEN:

CHIEF RICHARD HORSEMAN AND THE HORSE LAKE FIRST NATION

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on September 20, 2016.

Judgment delivered at Ottawa, Ontario, on September 23, 2016.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: STRATAS J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Chief Horseman and the Horse Lake First Nation appeal from the decision of the Federal Court (2015 FC 1149) declining to certify the Appellants' proposed class action on the basis that they failed to meet all the criteria set out in Rule 334.16 of the *Federal Court Rules*, SOR/98-106. More particularly, the Federal Court concluded that the claims of the class members did not

raise a common question of law or fact pursuant to Rule 334.16(1)(*c*) and the representative plaintiffs did not meet the requirements of Rule 334.16(1)(*e*).

[2] In their amended Notice of Appeal, the Appellants state that:

> 1. The [Federal Court] erred in law in concluding that the issue, of whether the annuity provision of each of the Numbered Treaties 1 to 11 provides for the right to receive an annuity payment that is adjusted annually to account for inflation and changes in purchasing power, was not an issue that was common to all members of the proposed class, as this conclusion is contrary to the principles of commonality in class proceedings set out by the Supreme Court of Canada in *Vivendi Canada Inc., v. Dell'Aniello*, 2014 SCC 1; and
>
> 2. The [Federal Court] erred in law concluding that the appellant Chief Eugene Horseman was not an adequate representative plaintiff because the [Federal Court] imposed a standard of knowledge for a representative plaintiff about the law and a class proceeding that is not required for a person to act as a representative plaintiff.

[3] Although in their memorandum the Appellants made brief arguments in respect of the other three common issues they had initially proposed to the Federal Court, they rightly did not pursue them before us.

[4] Absent an extricable question of law, the issue of whether the claims raise a common question and the issue of the suitability of a representative plaintiff (Rule 334.16(*e*)) are questions of mixed fact and law involving an appreciation of the evidence on the motion and a certain field-sensitivity in trial management on which deference is to be accorded. These are reviewable on the standard of the palpable and overriding error: *Canada v. John Doe*, 2016 FCA 191 at paras. 29, 31; *Condon v. Canada*, 2015 FCA 159 at para. 7, 474 N.R. 300; *Hospira*

Healthcare Corporation v. Kennedy Institute of Rheumatology, 2016 FCA 215 at paras. 69, 72, 78-79, 83.

[5] On the common question issue, the Appellants argued that there is an extricable error of law. They say that if the Federal Court had applied the proper principles, it could not have reached the conclusion that it did in respect of the first proposed common issue described in paragraph 2 above.

[6] I have not been persuaded that the Federal Court made any error of law, extricable or otherwise, on this issue. It properly identified all the principles and the applicable authorities, in particular all the Supreme Court of Canada teachings the Appellants put to it, including the *Vivendi* case mentioned in the amended Notice of Appeal.

[7] The Federal Court rightly notes, in my view, that what the Appellants seek goes beyond the nuanced approach confirmed in *Vivendi* (and developed earlier in *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184). The Federal Court further notes that in *Vivendi* the Supreme Court focused on the effects of the answer(s) to the common question for each member of the class. It is evident that the Federal Court knew that the answers discussed in *Vivendi* could be different for different subgroups as *Vivendi* so clearly stated this. In any event, the concept of subgroups is expressly set out in Rule 334.16 and the Federal Court is presumed to be familiar with its own rules of procedure. Thus, I am not prepared to infer that the Federal Court misconstrued the law merely because on the facts before it, it came to a different conclusion from *Vivendi.* I agree with the Respondent that the factual matrix in *Vivendi* is clearly

distinguishable. In that case, which involved a class proceeding instituted in Quebec (which is a province known for its very broad provisions dealing with class proceedings), only one contract (a pension plan) was in play. Here, the Federal Court mentions that even if the question proposed by the Appellants is one that could be common for the signatories of each of the individual Numbered Treaties (which in my view could also involve subgroups), it does not mean that it is a common question to all members involved in a class proceeding of the scope proposed because it involves different "contracts". The Federal Court questions the commonality of the question itself. It was not a reviewable error for the Federal Court to do so especially when one considers that this case turns on whether there is an implied term in each of the individual Numbered Treaties.

[8] This is not only because of the two-step approach that must be adopted when one construes a Treaty, but because the proposed question necessarily involves, among other things, a highly factual determination of the mutual intention of the parties, the purposes for which they each entered into their individual Treaty and issues relating to the historical, cultural and economic context surrounding each Treaty (*R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 82-83, 177 D.L.R. (4th) 513). Overall, the Federal Court found that the differences among the Treaties were such that the broad common issue proposed in an attempt to connect them all would be inappropriate for certification. I substantially agree with the analysis of the Federal Court.

[9] As noted by the Federal Court, these problems would likely have been avoided if the scope of the class proceeding was limited to a particular Numbered Treaty, as was done in earlier proceedings relating to this matter in the Specific Claims Branch of the Department of Indian

Affairs and Northern Development. However, this is not the case before us. I conclude that the Appellants have not established any palpable and overriding error that would justify interfering with the Federal Court's finding that the Appellants have not met the mandatory requirement of Rule 334.16(1)(*c*).

[10] On the issue of whether the individual representative plaintiff met the requirements of Rule 334.16(1)(*e*), the Federal Court set out in its reasons the relevant test to be applied. It was clearly well aware that the threshold was low and included a specific reference to the governing authority of *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 at paras. 54-57. The Federal Court found that the Respondent established through cross-examination on affidavit that the proposed representative plaintiff had no understanding of his role and responsibilities. This finding is grounded in the evidence that was before the Federal Court. In and of itself, it is sufficient to justify its conclusion even in the face of the arguably overbroad characterization of the knowledge of the details of the action that the Federal Court might seem to have required the representative plaintiff to possess. Thus, I am not satisfied that the Federal Court made a palpable and overriding error that would justify our intervention. I add that, in any event, my conclusion that the Federal Court did not make a reviewable error in concluding that the Appellants had not met the requirement of Rule 344.16(1)(*c*) is sufficient to dispose of this appeal.

[11] In the circumstances, there is no need for this Court to discuss the comments the Federal Court made in *obiter* concerning what would be the preferable procedure for this case within the meaning of Rule 334.16(1)(*d*).

[12] In light of the foregoing and despite the very able arguments of the Appellants' counsel, I would dismiss this appeal.

"Johanne Gauthier"

J.A.

"I agree
David Stratas J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-455-15
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE ZINN OF THE FEDERAL COURT, DATED OCTOBER 7, 2015, DOCKET NUMBER T-1784-12)	
STYLE OF CAUSE:	CHIEF RICHARD HORSEMAN AND THE HORSE LAKE FIRST NATION v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	SEPTEMBER 20, 2016
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	STRATAS J.A. GLEASON J.A.
DATED:	SEPTEMBER 23, 2016

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