

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

Citation: *Piercey Estate v. Atlantic Lottery Corporation Inc.,-
Société des Loteries de L'Atlantique* 2010 NLTD 83

Date: 20100423

Docket: 200901T0732CP

BETWEEN:

**THE ESTATE OF SUSAN PIERCEY,
AS REPRESENTED BY KEITH PIERCEY**

PLAINTIFF

AND:

**ATLANTIC LOTTERY CORPORATION INC.-
SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE**

DEFENDANT

Before: The Honourable Mr. Justice Wayne G. Dymond

Place of Hearing:

St. John's, Newfoundland and Labrador

Held:

Application to strike Statement of Claim and application to amend Statement of Claim mesh with issues relevant at the Certification Hearing stage and should be heard at the same time as the Certification Hearing. Defendant's application dismissed.

Appearances:

Mr. Chesley F. Crosbie, Q.C.

Ms. Jessica Dellow

Counsel for the Plaintiffs

Mr. Daniel W. Simmons

Counsel for the Defendant

Authorities Cited:

CASES CONSIDERED: *Piercey Estate v. Atlantic Lottery Corporation* 2008 NLTD 202; *Baxter v. Canada (Attorney General)* [2005] O.T.C. 391; *Anderson v. Canada (Attorney General)* 2008 NLTD 166; *Lieberman v. Business Development Bank of Canada*, 2005 BCSC 389; *Bellows v Quick Cash Ltd.* 2004 NLSC (T.D.) 191; *Sparkes v Imperial Tobacco Canada Ltd.*, 2008 NLTD 207.

STATUTES CONSIDERED: *Trade Practices Act*, R.S.N.L. 1990, c. T-7; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11; *Competition Act*, R.S.C. 1985, c. C-34; *Criminal Code*, R.S.C. 1985, c. C-46, s.; *Statute of Anne*, 1710, 9 Ann. c. 14 § 1 (Eng.); *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Survival of Actions Act*, R.S.N.L. 1990, c. S-32.

RULES CONSIDERED: *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 14.24, r. 38.

REASONS FOR JUDGMENT

DYMOND, J.:

INTRODUCTION

[1] This is the second run at the grounding of a Class Action Lawsuit against the Defendant, Atlantic Lottery Corporation Inc.-Société Des Lotteries De L'Atlantique. The first action did not get to the certification stage, as a motion to strike under the *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 38, to dismiss an action based solely on the *Trade Practices Act*, R.S.N.L. 1990, c. T-7,

as the only cause of action pleaded, ref. **Piercey Estate v. Atlantic Lottery Corporation** 2008 NLTD 202.

[2] In the *Rule 38* application, the result was that it had the effect of dismissing the whole class action. Under those circumstances, I agreed that it was an appropriate application to be heard prior to certification, as coming within an exception to the test set down in **Baxter v. Canada (Attorney General)** [2005] O.T.C. 391.

[3] As a general rule, the certification hearing is to be the first procedural matter to be heard and determined. In the **Piercey Estate** case, the exception was granted in that it closed down the whole class action lawsuit. The ruling was that the Crown agent was not bound to a violation of the *Trade Practices Act* as worded in the Newfoundland legislation, pursuant to proper statutory interpretation.

[4] The present action is a new Statement of Claim by the same **Piercey Estate** and the same Defendant, Atlantic Lottery Corporation Inc. The Defendants have again filed application to have the Statement of Claim, as amended, struck prior to the certification hearing.

ISSUES TO BE RESOLVED

[5] On February 13, 2009, the Plaintiff issued a Statement of Claim with several different alleged causes of action. That Statement of Claim was amended on December 4, 2009. As a result of the amendments, various causes of action relating to the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, strict liability and breaches of fiduciary duty were removed.

[6] The Amended Statement of Claim alleges breaches of the *Competition Act*, the *Criminal Code*, R.S.C. 1985, c. C-46, and the *Statute of Anne*, 1710, 9 Ann. c. 14 § 1 (Eng.). The Plaintiff also alleges negligence under the doctrine of waiver of tort.

[7] The Plaintiff's application, filed December 11, 2009, is for certification. To date, the application has not been heard.

[8] At a case management meeting on January 18, 2010, the Defendants gave notice of intent to file application pursuant to *Rule 14.24* of the *Rules of the*

Supreme Court, to have the Statement of Claim struck in whole or in part, for determination of issues of law and fact under *Rule 38* and for dismissal of the Plaintiff's action.

[9] On March 30, 2010, there was a hearing to determine whether the application of the Defendant should be heard before the certification hearing. The Plaintiff argues that any application of the Defendant should be heard after certification or, in the alternative, at the certification hearing.

[10] Since the Defendant filed its *Rule 38* application, the Plaintiff has filed an application for leave to further amend the Statement of Claim. Should that application be successful, which has yet to be set down, it would add a living representative Plaintiff.

[11] At present, only the Piercey Estate is named as a representative Plaintiff. The Defendant has challenged the right of an Estate to be a representative Plaintiff, citing s. 41(b)(c) of the *Class Actions Act*, S.N.L. 2001, c. C-18.1.

[12] S. 41 of the *Class Actions Act* states:

This Act does not apply to

- (b) an action required by law to be brought in a representative capacity; and
- (c) an action that may be brought in a representative capacity under another Act.

[13] The Plaintiff has also applied to have Keith Piercey added as the representative of the Estate of Susan Piercey under s. 7 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32. The Defendant argues that the *Class Actions Act* has no application to such claims. This is hotly disputed by the Plaintiff.

[14] As has been observed by Justice Fowler of this Court in the case of **Anderson v. Canada (Attorney General)** 2008 NLTD 166, para. 38, after a review of the case law, he states:

I agree with the position that where a preliminary application has the potential to dispose of the litigation or more efficiently address the objectives of the *Class Actions Act*, then it should be heard prior to the certification hearing.

[15] In that case, Justice Fowler was dealing with two applications dealing with particulars and third parties. After considering the type of applications, he was satisfied that there was no discernable advantage to proceeding on those applications prior to the certification hearing.

ANALYSIS

[16] Without deciding whether I agree with Fowler, J., on the second portion of whether an application, prior to certification, would more efficiently address the objectives of the *Act* is or is not the proper test, I am satisfied that an application which would shut down the class action is a proper vehicle if it is based on law or fact and law which is not in dispute.

[17] The wording, “applications which efficiently address the objections of the *Act*”, is a broad statement which could apply to a variety of applications, which in some cases may not have the effect of moving the class action forward. As Fowler, J., stated at paragraph 39 of the **Anderson** decision:

That is not the case in the present matter and I am convinced that to permit these two applications to proceed prior to the certification hearing will cause this certification hearing stage of the intended class action to spiral down a timeless rabbit hole wherein one particular application begets another...

[18] In the present case, the Defendant’s application to strike has resulted in a further application by the Plaintiff to amend, just once again, to add parties. This is similar to the **Anderson** decision in that we are dealing with pleadings.

[19] Should I agree to hear the Defendant's application prior to certification, I ponder whether I should hear the Plaintiff's application to amend, which if successful, would partially block the Defendant's application to dismiss and around and around we go into the rabbit hole. *Alice in Wonderland* this is not; these various applications are expensive in time and judicial resources. As I stated in **Piercey**, an application which has the potential to end a lawsuit is the exception to the ratio in **Baxter v. Canada (Attorney General)**.

[20] An application which cripples the action, hemorrhages the lawsuit or has the result of putting it on life support, may, in rare circumstances, be allowed, even if it does not kill the lawsuit. This is not the case here.

[21] I am satisfied that the application to amend should be heard at the same time as the certification hearing.

[22] I believe that the Defendant's application to strike should be heard at the same time as the certification hearing. Issues relating to class or class representation may mesh with the Plaintiff's application to amend, and the

Defendant's application to strike and the certification application, ref. **Lieberman v. Business Development Bank of Canada**, 2005 BCSC 389.

[23] I also refer to **Bellows v. Quick Cash Ltd.**, 2004 NLSC (T.D.) 191, where Goulding, J., of this Court held that it would be more practical and efficient to determine whether pleadings disclose a reasonable cause of action against any or all of the defendants. Adams, J., reached the same conclusion in the case of **Sparkes v Imperial Tobacco Canada Ltd.**, 2008 NLTD 207.

[24] Based on all of the above, I am satisfied that the Amended Statement of Claim application and the Application to Strike should be heard at the same time as the certification hearing. The parties are available for further case management should issues arise.

WAYNE G. DYMOND
Justice