



Federal Court



Cour fédérale

Date: 20250124

Docket: T-319-24

Citation: 2025 FC 148

Ottawa, Ontario, January 24, 2025

PRESENT: Associate Judge Trent Horne

PROPOSED CLASS PROCEEDING

BETWEEN:

**ERIC SABBAG, DANNY ROSSNER,
DANIEL BOYER AND CATHERINE ANDERSON**

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] The defendant has brought a sequencing motion for an order that a motion to strike be heard and determined before the certification motion in this proposed class proceeding.

[2] I am not satisfied that the defendant has demonstrated exceptional circumstances, or that scheduling a motion to strike before the certification motion would promote the efficient determination of the proceeding. The defendant's motion is dismissed.

II. Background

[3] This proposed class proceeding arises out of the design, implementation, and maintenance of the "ArriveCAN" application.

[4] In very general terms, the plaintiffs allege that there were widespread technical failures with the application, including errors that incorrectly ordered travellers to quarantine, even when they were exempt from having to do so having otherwise followed the proper entry protocols.

[5] The proposed class definition is:

All persons that travelled to Canada between November 21, 2020 and October 1, 2022 and either used or attempted to use the ArriveCAN application and that were wrongly instructed to isolate themselves and monitor for signs and symptoms of COVID-19 despite being otherwise quarantine exempt where they submitted or attempted to submit the required documentation to Canada Border Services Agency.

[6] Three causes of action are proposed to be advanced: negligence; infringement of rights guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* ("*Charter*"), and infringement of rights guaranteed by section 9 of the *Charter*. Compensatory and punitive damages are claimed.

[7] The proceeding has moved slowly. The statement of claim was issued on February 19, 2024. On consent, an order was made on March 18, 2024 extending the deadline to serve and file a statement of defence until after the certification motion.

[8] The matter was placed in case management by order of the Chief Justice dated February 26, 2024. The first case management conference was held on July 10, 2024. During that case management conference, the plaintiffs indicated an intention to amend the statement of claim. The defendant advised that a motion to strike was being considered.

[9] A direction was issued on July 11, 2024. Among other things, the direction set a September 30, 2024 deadline for the parties to write to the Court with a status update, particularly in respect of whether amendments to the statement of claim would be opposed or not, and if the defendant was contemplating a motion to strike.

[10] The defendant wrote to the Court on September 27, 2024 advising that the amendments to the statement of claim were on consent, and requested an extension of time to November 15, 2024 to advise whether a motion to strike would be brought. By letter to the Court dated November 15, 2024, the defendant advised that a motion to strike would be brought, as well as a sequencing motion seeking an order that the motion to strike be determined before the certification motion.

III. Analysis

[11] The Court retains the discretion to hear a motion to strike prior to certification. However, this relief should be granted only in exceptional circumstances. Relevant factors to consider include:

- a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
- b) the likelihood of delays and costs associated with the motion;
- c) whether the outcome of the motion will promote settlement;
- d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
- e) the interests of economy and judicial efficiency; and
- f) generally, whether scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding.

(Berenguer v WOW Air ehf, 2019 FC 407 (“Berenguer”) at para 20; see also Gottfriedson v Canada, 2013 FC 1213 at para 43)

[12] I am not satisfied that the defendant has demonstrated exceptional circumstances to justify scheduling a motion to strike before the certification motion.

[13] I agree with the defendant that a sequencing motion is not the forum to determine the merits of the motion to strike, but at the same time, the defendant bears the burden of

demonstrating exceptional circumstances, and must show why the Court should deviate from its usual practice, and prioritize a motion to strike.

[14] The defendant's motion record includes a draft notice of motion for the motion to strike.

[15] The notice of motion generally relies on Rule 221 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), but does not state whether only subrule 221(1)(a) will be relied on, or other subrules as well. This is an important distinction because no evidence is admissible on a motion under subrule 221(1)(a), but evidence is admissible on a motion under subrules 221(1)(b) to (f).

[16] The draft notice of motion states that it will be supported by an affidavit of Tara-Lee Fraser, but there is no explanation as to who this person is, or the nature and extent of the evidence that will be presented.

[17] Rule 363 states that affidavits on motions are to contain any facts to be relied on by that party that do not appear on the Court file. Pleadings do not need to be proven by affidavit. If the defendant's motion to strike will involve contested evidence and require the Court to engage in any kind of fact-finding, that weighs against hearing the motion to strike before the certification motion. Without knowing what facts may be in dispute for the motion to strike, I cannot conclude that scheduling the motion to strike in advance of the certification motion is the most efficient way to proceed.

[18] If the defendant's motion to strike is based on the amended statement of claim alone, it is not clear how it could, as the defendant argues, potentially dispose of the entire action.

[19] The defendant submits that the plaintiffs have failed to plead any material facts to support their claims in negligence and *Charter* breaches. Even if there is a good argument that the amended statement of claim is insufficiently particularized, that does not mean that the amended statement of claim will be struck without leave to amend.

[20] Striking a pleading without leave to amend is a power that must be exercised with caution. If a statement of claim shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment (*Al Omani v Canada*, 2017 FC 786 at paras 32-35). The defendant does not argue that the lack of material facts in the amended statement of claim are incapable of being cured by an amendment.

[21] The defendant also asserts that the claims advanced by the plaintiffs Sabbag and Rossner are statute barred pursuant to section 106 of the *Customs Act*, RSC 1985, c 1 (2nd Supp). The plaintiffs dispute the applicability of this limitation period. Even if I was to assume that the defendant is correct in this respect, the limitation defence is not advanced in respect of all plaintiffs, and would not bring the whole proceeding to an end if the motion was granted in this respect. The applicability of this limitation period can be efficiently considered at the certification motion.

[22] Having the motion to strike heard before the certification motion introduces the possibility of appeals. This proceeding has been before the Court for nearly a year, with almost no forward progress. While the defendant points to the plaintiffs' delay in bringing the certification motion, the Crown waited until November 2024 to commit to bringing a motion to strike, and I am not satisfied that there is a reasonable explanation as to why either a motion to strike or a sequencing motion was not brought earlier. In my view, all stakeholders would be better served by having the certification motion adjudicated in a timely way, and not have the proceeding further delayed by appeals related to a motion to strike. Even if the motion to strike would result in narrowing the issues for the certification motion, those advantages are outweighed by the delays and inefficiencies that would arise from hearing the motion to strike first.

[23] The defendant's motion is dismissed. The parties are ordered to submit a proposed timetable for the certification motion. It is expected that the timetable will move the matter forward with alacrity.

IV. Costs

[24] The defendant requested costs in the event the motion was opposed. The defendant submits that the "no costs" rule in subrule 334.39(1) is engaged as soon as the parties to the action are made parties to a certification motion, and since no certification motion has been served, subrule 334.39(1) is not applicable.

[25] The Court has determined that a motion to strike a statement of claim, brought before the action had been certified, does not engage the class action rules and, in particular, Rule 334.39 (*Paradis Honey Ltd v Canada (Attorney General)*, 2014 FC 215 at para 122 and *Pearson v Canada*, 2008 FC 1367 at para 52). I see no reason to treat a sequencing motion differently. Costs are awarded to the plaintiffs in any event of the cause.

ORDER in T-319-24

THIS COURT ORDERS that:

1. The defendant's motion is dismissed.
2. Within 10 (ten) days of the date of this order, the parties shall write to the Court, preferably jointly, with a proposed timetable for the certification motion, together with mutually available dates for a case management conference.
3. Costs are awarded to the plaintiffs in any event of the cause.

"Trent Horne"

Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-319-24

STYLE OF CAUSE: ERIC SABBAG ET AL v THE ATTORNEY GENERAL
OF CANADA

**MATTER CONSIDERED IN WRITING, WITHOUT THE PERSONAL APPEARANCE
OF THE PARTIES**

ORDER AND REASONS: HORNE A.J.

DATED: JANUARY 24, 2025

WRITTEN SUBMISSIONS BY:

Me Andrea Grass FOR THE PLAINTIFFS

Me Mariève Sirois-Vaillancourt FOR THE DEFENDANT
Me Sarom Bahk
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