

CANADA / JUDGMENT

Monaco v. City of Coquitlam

2014 BCSC 2090

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Supreme Court of British Columbia

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2014 BCSC 2090 Monaco v. City of Coquitlam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Monaco v. City of Coquitlam,

2014 BCSC 2090

Date: 20141106

Docket: S-083289

Registry: Vancouver

Between:

Nicola Monaco and Tammy Marie Joseph

Plaintiffs

And

City of Coquitlam and

the Minister of Justice (British Columbia)

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

September 17, 2014

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2014

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I: INTRODUCTION

- [1] The British Columbia Civil Liberties Association (the "BCCLA") applies for intervenor status at the certification stage of this class action proceeding that concerns inspections conducted without a warrant of homes in the City of Coquitlam ("Coquitlam") between March 22, 2007 and June 29, 2013 pursuant to the City of Coquitlam, by-law No. 3833, Controlled Substance Property Bylaw (19 March 2007) (the "Bylaw").
- [2] The Bylaw was designed to respond to a perceived increase in criminal activity in the form of marijuana grow operations.

- [3] After the enactment of the Bylaw, warrantless inspections were conducted by Public Safety Inspection Teams that included uniformed RCMP officers.
- [4] The warrantless inspections purportedly authorized by the Bylaw were modeled on similar inspections conducted by the City of Surrey ("Surrey").
- [5] In *Arkininstall v. City of Surrey*, 2010 BCCA 250, Chief Justice Finch for a unanimous five justice division of the British Columbia Court of Appeal found that warrantless inspections of residential premises for the regulatory purpose of inspecting electrical systems for safety risks that may be related to grow-operations conducted by Surrey were unlawful. In particular, the Court of Appeal concluded that those inspections breached section 8 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 (the "Charter").
- [6] On July 19, 2013, the plaintiffs filed their application for certification of this action as a class proceeding (the "Certification Application").
- [7] Pursuant to an agreed-upon schedule, the parties delivered their written submissions on the Certification Application which was scheduled for hearing on June 23-25, 2014. All parties were prepared to proceed but the hearing was adjourned when the BCCLA made known its intention to apply for intervenor status.
- [8] On July 2, 2014, the BCCLA filed this application for intervenor status with the application being heard on September 14, 2014.
- [9] Of note is that this application is brought at the certification stage of the proceeding and not after certification has been granted and when the terms of certification are known.
- [10] The plaintiffs support the BCCLA's application which is opposed by the defendants.
- [11] For the reasons that follow, I conclude the application should be dismissed with liberty to reapply if certification is granted.

II: THE APPLICABLE PRINCIPLES

- [12] The BCCLA and the parties are in general agreement as to the applicable principles.
- [13] Prior to summarizing the principles that apply to an application for intervenor status, I shall briefly review those that pertain to a certification application brought pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the "CPA"). I do so such that the BCCLA's application for intervenor status at this stage of the proceeding can be placed in its proper context.
- [14] The court must certify an action as a class proceeding if the requirements in section 4(1) of the CPA are met, being:
 - (a) The pleadings disclose a cause of action;
 - (b) There is an identifiable class of two or more persons;

- (c) The claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) There is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[15] Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2009 BCCA 503, leave to appeal to the S.C.C. refused, [2010] SCCA No. 32, sets out the approach to be taken by the court hearing a certification application:

[64] The provisions of the CPA should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15.

[65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one - it requires only a "minimum evidentiary basis": *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50,

[O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[Emphasis added].

- [16] The role of evidence at the certification hearing is confined to a burden on the plaintiff to adduce "some basis in fact" evidence in support of each of the requirements of certification under section 4 of the CPA except s. 4 (1)(a): *Watson v. Bank of America Corporation*, 2014 BCSC 532 ("Watson") at paras. 61-71.
- [17] At the certification stage, the concern is form and whether the action can properly proceed as a class action. It is not meant to be a test of the merits of the action: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para 99.
- [18] This low burden reflects the fact that certification is a pre-discovery motion that is intended to be the first step in the litigation. It produces a procedural order that is interlocutory, and may be amended, varied, or set aside at any time: CPA at ss. 5(7), 10(1), (2).
- [19] I will now turn to the principles that pertain to when the court, in the exercise of its inherent jurisdiction, should allow intervenors to participate in an action.
- [20] They are summarized in *International Forest Products v. Kern*, 2000 BCSC 1087 at para. 20, leave to appeal to the British Columbia Court of Appeal refused, 2000 BCCA 501 ("Kern"):
1. The court has inherent jurisdiction to appoint intervenors in appropriate cases and to fix such terms of intervention as the court deems necessary: *Canadian Labour Congress v. Bhindi* at page 96.
 2. The decision to grant intervenor status will be affected by the nature of the applicant seeking intervention status, the directness of the applicant's interest in the matter, and the nature of the issue in the case: *Guadagni v. Workers' Compensation Board of British Columbia* at page 261.
 3. Intervenor status should not be granted where the applicant has a direct interest in the outcome of a specific action between particular parties. A person with such an interest should be added as a party: *Canadian Labour Congress v. Bhindi* at page 94.
 4. Intervenor status will be considered where an applicant shows that it has a substantial interest in the proceeding different from the interest of the parties and that its interests will be affected by the outcome of the litigation: *Canadian Labour Congress v. Bhindi* at pages 97 and 100.
 5. The fact that a public or private interest group may bring a different perspective to the issue before the court may overcome the absence of a direct interest in the outcome of the case and favour intervention: *MacMillan Bloedel Ltd. v. Mullin* at page 210.
 6. Intervention is more likely to be permitted in proceedings concerned with issues of public law rather than private law: *MacMillan Bloedel Ltd. v. Mullin* at page 210 and *Guadagni v. B.C. (W.C.B. of B.C.)* at page 263.

7. The fact that the addition of an intervenor will add to the length and complexity of the trial, and consequently result in additional expense, should not deter the exercise of the court's discretion to permit intervention in otherwise appropriate circumstances: *Canadian Labour Congress v. Bhindi* at page 98.
8. The submissions of intervenors should not be directed to the *lis inter partes* but should be confined to the public law issues arising in the case: *MacMillan Bloedel Ltd. v. Mullin* at page 210.
- [21] In each case, the court must consider the nature of the issue and the degree of likelihood that the intervenor will be able to make a useful contribution to the resolution of the issue, without injustice to the immediate parties: see: Kern at paras. 20, 24; *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396 at paras. 7, 13; *West Moberly First Nations v. British Columbia*, 2013 BCSC 2059 at paras. 6-9, *aff'd* 2014 BCCA 283 at para. 13; *Vancouver Rape Relief Society v. Nixon*, 2004 BCCA 516 at para. 7.

III: THE POSITIONS OF THE BCCLA AND THE PARTIES

- [22] The BCCLA's position is succinctly summarized at paragraphs 13 to 16 of its notice of application:
13. There are no factors which weigh against allowing the intervention of the BCCLA. The following factors weigh in favour of allowing the BCCLA to intervene:
 - (a) the case raises important issues of public law regarding the extent to which a municipality may conduct warrantless searches of homes and the appropriate remedy for unlawful searches;
 - (b) the BCCLA has demonstrated a longstanding, genuine, and continuing concern with civil liberties in general and the specific issues of unreasonable searches and Charter damages;
 - (c) the BCCLA has intervened in numerous actions before, including several dealing with very similar issues to the case at bar;
 - (d) the BCCLA will bring a useful perspective to the case with respect to the purposes of the s. 8 protection from unreasonable searches and the importance of class actions to ensure that Charter rights are protected.
14. With respect to the third factor, the perspective the BCCLA will bring to the case is narrower in one sense, and broader in another, than that of the plaintiffs.
15. The BCCLA's perspective is narrower in that the BCCLA's submissions will be focused on two issues:
 - (a) the balancing of the municipal interest in safety with the reasonable expectation of privacy of citizens;

- (b) the suitability of class actions to pursue damages for violations of Charter rights and the impact of not allowing class actions to proceed.
16. The BCCLA's perspective is broader in that its goal is not to win a case, but to intervene to guide the development of the law in a manner consistent with the organization's philosophical commitment to civil liberties and human rights. As such, the BCCLA's submissions will centre around the historical and philosophical foundations of s. 8 and how the law should develop in a manner consistent with these foundations:
- (a) the relevant purpose of s. 8 is to ensure that all citizens - not just those subject to criminal investigation - do not have their privacy unreasonably violated;
- (b) class actions are a necessary procedural device to ensure that citizens not facing criminal charges have the means to bring Charter issues before the courts and be awarded Charter damages;
- (c) class actions will serve as efficient deterrents to state actors that may otherwise overreach and breach Charter rights in the pursuit of valid goals.

[23] Coquitlam and the BC Minister of Justice's position includes:

- a grant of intervenor status at the certification stage would be extraordinary. The BCCLA has provided no examples of any other cases involving the BCCLA or any other proposed intervenor where this status was granted at the certification stage;
- while the BCCLA's application materials may address this interest as being a potentially useful contribution on the plaintiffs' substantive claim (that is with regard to the legality of the warrantless searches), it is "virtually silent" on the contribution the BCCLA perspective would offer on the points in issue on the certification application. In fact, the bulk of the BCCLA's application material is geared towards addressing its mandate with regard to civil liberties and prior interventions in cases involving warrantless searches;
- the lawfulness of the inspections at issue in this proceeding will not be determined or even argued at the certification hearing. That is because the certification application is not meant to be a test of the merits of the action;
- the BCCLA provides no basis upon which the court could conclude that the BCCLA would be well-placed to make submissions on the certification application or bring a unique perspective to it; and
- it is clear from the plaintiffs' certification submission that they have carefully considered whether class actions should be used as a means of ensuring access to justice. In fact, the point is not controversial and it is not clear what the BCCLA proposes to add or contribute on this issue.

IV: DISCUSSION

- [24] I was not referred to any authority regarding the granting of intervenor status at the certification stage of a class action proceeding nor have I found any myself. Viewed from this limited perspective, the application may be, to use the expression of Coquitlam and the Minister of Justice, "extraordinary". But the novelty of the application is not necessarily an important factor to be considered, let alone determinative. In my view, the application can only be considered on its merits taking into account the principles to which I have referred.
- [25] The BCCLA submits that it will bring a unique perspective to the issues at the certification stage in particular access to justice as being a goal of class action proceedings.
- [26] It says its perspective will be "broader" than the plaintiffs' in that its goal is not to win the case but to "guide the development of the law in a manner consistent with the organization's philosophical commitment to civil liberties and human rights". Its perspective will also be narrower since it will be focused on two issues, being (i) the boundaries of the legitimate exercise of search powers and privacy rights, and (ii) the availability of class actions to provide access to justice for citizens whose Charter rights may have been infringed.
- [27] Insofar as the access to justice issue is concerned, it relies on *AIC Limited v. Fischer*, 2013 SCC 69 ("Fischer") at paras. 24-25 in support of its submission that intervenor status should be granted at this stage of the proceeding. There, Mr. Justice Cromwell stated:

24 There is no doubt that access to justice is an important goal of class proceedings. But what is access to justice in this context? It has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance -- the results to be obtained -- and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. They are interconnected because in many cases defects of process will raise doubts as to the substantive outcome and defects of substance may point to concerns with the process. As the Honourable Frank Iacobucci put it, "access to justice must contain both a procedural and a substantive component. I find it difficult to accept that providing injured parties with a process to pursue their claims can be divorced from ensuring that the ultimate remedy arising from the process provides substantive justice where warranted": "What Is Access to Justice in the Context of Class Actions?", in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17, at p. 20. While it may be analytically convenient to look at process and substance considerations separately, this must not be done at the expense of an overall assessment of the access to justice implications of the proposed class action.

25 The Divisional Court focused its access to justice analysis on substance, relying heavily on its conclusion that there was some basis in fact to believe that the investors were entitled to significantly more than they had received from the OSC proceedings (paras. 4 and 8). The Court of Appeal, on the other hand, focused mainly on process, relying heavily on considerations such as participation rights and remedial jurisdiction. The correct approach, however, must include both substantive and procedural aspects in assessing whether a class action is the preferable

procedure. The focus cannot be exclusively on process: a process may be fair but nonetheless not offer a real opportunity to recover compensation for all of the losses suffered. In other words, in some cases even if the process is fair, there will remain significant obstacles to recovery. In addition, an absence of a fair process may also heighten concerns about whether substantive justice has or will be done. Of course, as we shall see, consideration of these aspects must respect the limited scope of the certification process.

- [28] In *Fischer*, the access to justice issue was considered by the Supreme Court of Canada without the benefit of submissions from an intervenor. I agree with counsel for Coquitlam and the Minister that the plaintiffs have already given considerable thought to this issue.
- [29] In addition, as counsel for Coquitlam and the Minister have noted, the concluding sentence in paragraph 25 of *Fischer* refers to "the limited scope of the certification process".
- [30] The boundaries of legitimate exercises of search powers, and in particular the lawfulness of the inspections at issue in this action, will not be determined at the certification stage.
- [31] Accordingly, notwithstanding the BCCLA's "long-standing, genuine and continuing concern with the rights of citizens of British Columbia and Canada to liberty and freedom", I am not satisfied that it will bring a unique perspective to the issues before the court at the certification application.
- [32] If certification is granted and when the issues upon which the action will proceed are known, it may be that the BCCLA will have a unique perspective to present to the court. But in my view that should occur when the merits of the action will be considered.

VI: CONCLUSION

- [33] The application is dismissed with leave to reapply if certification is granted.
- [34] This application was heard in conjunction with the plaintiffs' application to further amend their pleadings. There were also no reported authorities dealing with this issue.
- [35] Under the circumstances there will be no order as to costs.

"Abrioux J."

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