Citation: Thompson et al v Minister of Justice of Manitoba et al; Meeches et al v The Attorney General of Canada, 2017 MBCA 71

Date: 20170721
Docket: AI16-30-08675

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

PRISCILLA MEECHES and STEWART GARNETT	)	
(Plaintiffs) Respondents	)	***S. N. Rosenbaum*** *and* ***A. Tibbs***
- and -	)	*for the Appellants*
THE ATTORNEY GENERAL OF CANADA	)	***K. M. Baert*** *and* ***C. B. Poltak***
(Defendant) Respondent	)	*for the Respondents P. Meeches and S. Garnett*
- and -	)	***No appearance***
B E T W E E N :	)	*for the Respondent the Attorney General of Canada*
LYNN THOMPSON, DAVID CHARTRAND and LAURIE-ANNE O'CHEEK	)	***D. G. Guénette*** *and* ***J. R. Koch***
(Plaintiffs) Appellants	)	*for the Respondents Her Majesty the Queen in Right of Manitoba and Her Majesty the Queen in Right of Canada*
- and -	)	
HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA, AS REPRESENTED BY THE MINISTER OF JUSTICE OF MANITOBA and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AND NORTHERN AFFAIRS OF CANADA	)	*Appeal heard:* ***January 23, 2017***
	)	*Judgment delivered:* ***July 21, 2017***
(Defendants) Respondents	)	

On appeal from 2016 MBQB 169

LEMAISTRE JA

Introduction

[1] A practice commonly known as "the 60's scoop" involved removing Aboriginal children from their families and placing them with non-Aboriginal parents. These "children" now wish to claim for damages arising from that practice by way of a class action.

[2] This case is about who should have carriage of the proposed class action. The appellants appeal the decision of the motion judge to stay their action (the Thompson action) in favour of another proposed class proceeding (the Meeches action).

Background

[3] On April 20, 2009, Lynn Thompson, David Chartrand and Laurie-Anne O'Cheek, the plaintiffs in the Thompson action, commenced an action seeking damages from Her Majesty the Queen in Right of Manitoba, as Represented by the Minister of Justice of Manitoba (Manitoba) and Her Majesty the Queen in Right of Canada, as Represented by the Minister of Indian and Northern Affairs of Canada (Canada). They proposed a class proceeding pursuant to *The Class Proceedings Act*, CCSM c C130 (*CPA*) to compensate the putative class members for loss of identity, family, community and culture and for abuse, denigration and humiliation.

[4] On February 4, 2011, they filed an amended claim and on March 13, 2015, they commenced a second action which they called a

replacement claim to correct an issue with service on the defendants. The action commenced in 2009 was eventually discontinued.

[5] The proposed class definition in the Thompson action is as follows:

> All Aboriginal persons . . . who were removed by the Defendants from their families or communities as children, and suffered injuries due to the Defendants' breach of fiduciary obligations, duty of care and cultural genocide, and their dependants and family members, any other subclasses that this Court finds appropriate.

[6] The named defendants in the Thompson action are Manitoba and Canada, and the causes of action include breach of fiduciary duty, negligence and cultural genocide.

[7] A case management conference was scheduled for April 27, 2016, with the consent of the parties to the Thompson action.

[8] On April 20, 2016, Priscilla Meeches and Stewart Garnett, the plaintiffs in the Meeches action, filed a separate claim against the Attorney General of Canada (AG) seeking damages for similar losses. They obtained permission to participate in the case management conference.

[9] The proposed class definition in the Meeches action is as follows:

> [A]ll Indian, non-status Indian, and/or Metis children who were taken from (a) their homes on reserves lying within the boundaries of the [Children's Aid Societies] in Manitoba, or (b) resided within the boundaries of the [Children's Aid Societies] and had not established residence in a place other than a reserve in Manitoba, at or after September 2, 1966, and were placed in the care of non-Aboriginal foster or adoptive parents who did not

> raise the children in accordance with the Aboriginal person's customs, traditions, and practices.

[10] The only named defendant in the Meeches action is the AG, and the causes of action are breach of fiduciary duty and negligence.

[11] At the case management conference, all parties to both actions agreed that the first step in the process towards certification of a class action ought to be a motion to determine which plaintiffs and corresponding law firms should have carriage of the proposed class proceedings (the carriage motion).

[12] Notwithstanding that agreement, the plaintiffs in the Thompson action filed a motion seeking leave to proceed to certification in order to determine whether one or more class actions could be certified as a class action and, in the alternative, a stay of the Meeches action. The plaintiffs in the Meeches action filed a motion seeking an order appointing their lawyers as counsel for the proposed class action, a stay of the Thompson action and a declaration that no other similar class action may be commenced in Manitoba without leave of the court. These motions were heard together at the carriage motion.

[13] At the carriage motion, the motion judge considered a number of factors and ultimately concluded that the Meeches action would "best serve the interests of the putative class and the policy objectives of the *CPA*" (at para 60). Accordingly, the motion judge ordered:

1. that the Meeches action shall proceed with its counsel, Koskie Minsky LLP and Troniak Law, as the lead counsel in the proposed class proceedings;

2. that the Thompson action is stayed as a proposed class proceeding;

3. that no other class action may be commenced in Manitoba in respect of the facts pleaded in the Meeches action without leave of the court;

4. that leave is granted generally to amend the Meeches statement of claim to address the issue that the proposed members of the class ought to include as many Aboriginal persons affected by the 60's scoop as possible, including the members of the Thompson action; and

5. that there shall be no order of costs on these motions.

[14] The plaintiffs in the Thompson action seek to set aside the motion judge's order and seek an order for carriage in their favour or, alternatively, an order permitting both proposed class actions to proceed. Their grounds of appeal are that the motion judge erred:

1. by adjudicating carriage on the basis of pleadings as they could be amended, rather than on the basis of the record;

2. by undertaking a merit-based assessment of which causes of action would be more likely to succeed at certification or trial and by concluding that, "a more narrowly construed claim against fewer defendants will increase the likelihood of certification" (at para 40);

3. by staying the Thompson action when some of the putative

class members will be excluded as class members in the Meeches action;

4. by relying solely on the pleadings to establish the suitability of the representative plaintiffs in the Meeches action;

5. by taking fairness to the defendants into account;

6. by weighing certification criteria on the carriage motion after finding that these criteria were only to be considered at the certification hearing; and

7. by determining carriage prior to the certification hearing.

[15] Leave to appeal is required to appeal an order certifying, or refusing to certify, a proceeding as a class proceeding (see section 36(4) of the *CPA*). The *CPA* is silent about carriage motions, which are interlocutory motions. The plaintiffs in the Meeches action filed a motion to quash the appeal on the basis that the order under appeal is interlocutory in nature and does not meet the test for leave. This motion was, in my view, properly withdrawn at the hearing. Leave to appeal an interlocutory motion is not required in Manitoba. This appeal is governed by section 89 of *The Court of Queen's Bench Act*, CCSM c C280 (*QBA*) which permits this Court to set aside or vary an order made by the Court of Queen's Bench unless prohibited by statute.

[16] For the reasons that follow, I would dismiss the appeal.

Carriage Motions

[17] The factors to be considered by a judge on a carriage motion were

not disputed. This Court has previously considered class proceedings, but has never considered a carriage motion.

Background

[18] Class action legislation is procedural in nature and allows mass claims to be tried efficiently without creating new substantive rights. See, for instance, *Bisaillon v Concordia University*, 2006 SCC 19 at paras 17-22; *Hollick v Toronto (City)*, 2001 SCC 68 at paras 14-15; and *Hislop v Canada (Attorney General)*, 2009 ONCA 354 at para 57, leave to appeal to SCC refused, 2009 CarswellOnt 6639.

[19] In *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46; *Hollick*; and *Rumley v British Columbia*, 2001 SCC 69, McLachlin CJC reviewed the history and purpose of class proceedings and reiterated the three objectives previously articulated by the Ontario Law Reform Commission: judicial economy, increased access to the courts and modification of the behaviour of actual or potential wrongdoers. See Ontario Law Reform Commission, *Report on Class Actions*, vol 1 (Toronto: Ministry of the Attorney General, 1982) at 117.

Carriage before Certification

[20] Interestingly, the *CPA* is silent on the matter of carriage motions. Section 1 defines a class proceeding as a proceeding that has already been certified. Nevertheless, courts in Manitoba, British Columbia and Ontario have found that class proceedings legislation applies to carriage motions which proceed prior to certification. The courts in Manitoba and British Columbia have agreed that, while technically the legislation does not confer jurisdiction to stay an action pre-certification, it does not remove the

inherent jurisdiction of the court to control its own process. See *Setterington v Merck Frosst Canada Ltd*, 2006 CarswellOnt 506 (Sup Ct J); *Grasby et al v Merck Frosst Canada Ltd et al*; *Hamilton et al v Merck Frosst Canada Ltd et al*; *Rogers et al v Merck Frosst Canada Ltd et al*, 2007 MBQB 97; *Nelson v Merck*; *Harry et al v Merck*, 2006 BCSC 1549; *Joel v Menu Foods Genpar Limited*, 2007 BCSC 1248; and *Whiting v Menu Foods Operating Ltd*, 2007 CarswellOnt 6726 (Sup Ct J).

Applicability of the CPA to Carriage Motions

[21] Courts have also found that sections 12 and 13 of the *CPA*, in addition to court rules and inherent jurisdiction, provide authority for the court to decide carriage motions before an action has been certified as a class proceeding:

> **Court may determine conduct of proceeding**
> **12** The court may at any time make any order that it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.
>
> **Court may stay proceeding**
> **13** The court may at any time stay or sever a proceeding related to the class proceeding on terms the court considers appropriate.

[22] In *Grasby*, for instance, McKelvey J found that, "while the *CPA* does not specifically deal with the issue of pre-certification proceedings, the reason behind the legislation nonetheless lends itself to its applicability to such motions" (at para 16). She agreed that, "[t]he goal of the *CPA* is one of judicial economy and access to justice and should result in cases being handled in the most just, expeditious and inexpensive means possible"

(*ibid*), and she held that these goals encompass pre-certification matters. See also *Briones v National Money Mart Company et al*, 2016 MBQB 213 at para 7.

[23] Notwithstanding that the principles and objectives of the *CPA* support such proceedings, the Court in *Grasby* also cited sections 38 and 94 of the *QBA*, as well as rr 1.04(1) and 6.01 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, in addition to the Court's inherent jurisdiction, as providing jurisdiction to order a carriage motion to proceed prior to certification (see paras 21-24). See also *Nelson*; *Murray v Alberta (Calgary Health Region)*, 2007 ABQB 231; and *VitaPharm Canada Ltd v F Hoffmann-LaRoche Ltd*, 2000 CarswellOnt 4681 (Sup Ct J), wherein similarly worded legislation was interpreted in the same fashion.

Carriage Factors

[24] The parties agreed that *VitaPharm* is the leading case regarding factors to be considered on a carriage motion. The Court in *VitaPharm* held that it is important to be mindful of the policy objectives of class proceedings legislation when considering carriage and that the "main criterion" for determining carriage is "what resolution is in the best interests of all putative class members while at the same time fair to the defendants" (at para 48). Drawing largely upon American jurisprudence and Herbert B Newberg & Alba Conte, *Newberg on Class Actions*, 3rd ed (Shepard's/McGraw-Hill, 1992), the Court enumerated the following factors to be considered in determining carriage (at para 49):

> (i) the nature and scope of the causes of action advanced;
>
> (ii) the theories advanced by counsel;

> (iii) the state of each class action, including preparation;
>
> (iv) the number, size and extent of involvement of the proposed representative plaintiffs;
>
> (v) the relative priority of commencing the class action (i.e. filing date); and
>
> (vi) the resources and experience of counsel.

[25] Courts in Ontario have consistently followed the *VitaPharm* factors. See *Gorecki v Canada (Attorney General)*, 2004 CarswellOnt 1266 (Sup Ct J); *Genier v CCI Capital Canada Ltd*, 2005 CarswellOnt 1141 (Sup Ct J); and *Locking v Armtec Infrastructure*, 2013 ONSC 331.

[26] In *Mancinelli v Barrick Gold Corporation*, 2016 ONCA 571, Strathy CJO, writing for the Court, recently affirmed *VitaPharm* as the seminal carriage decision and reiterated the main criteria for determination: the policy objectives of the *CPA* (access to justice, judicial economy and behaviour modification of defendants), the best interests of all putative class members and fairness to the defendants (see para 13). He confirmed the six factors from *VitaPharm* as being factors for consideration, but described the list as non-exhaustive and found that other factors may be relevant depending on the circumstances (see para 17).

[27] Courts in Ontario have considered additional factors deemed relevant to the circumstances: funding, the definition of class membership, the definition of class period, joinder of defendants, the plaintiff and defendant correlation, the prospect of certification, the prospect of success against the defendants and the inter-relationship of class actions in more than one jurisdiction. See *Smith v Sino-Forest Corporation*, 2012 ONSC 24; and *Kowalyshyn v Valeant Pharmaceuticals International, Inc*, 2016 ONSC

3819. Recently, there has been a trend of downplaying the factors relating to counsel and of focussing more on the nature and scope of the causes of action. See *Sharma v Timminco Ltd*, 2009 CarswellOnt 6583 (Sup Ct J) and *Smith*.

[28] The *VitaPharm* factors have been applied in carriage decisions in Saskatchewan, Manitoba and British Columbia. See *Grasby* and *Richard v British Columbia*; *AW and DW (Litigation Guardian of) v British Columbia*, 2004 BCCA 337, where the British Columbia Court of Appeal accepted the *VitaPharm* factors as "useful considerations" (at para 21). Saskatchewan has also commented favourably on the additional factors referred to in *Kowalyshyn*. The courts in Newfoundland and Labrador have adjudicated carriage motion disputes on a factor-based approach but have not yet explicitly endorsed the *VitaPharm* factors. See, for example, *Pardy et al v Bayer Inc-Class Actions Act*, 2003 NLSCTD 109 at paras 12-13.

[29] I would endorse the *VitaPharm* approach, as expanded in *Smith* and explained in *Setterington*, *Locking* and *Joel* which, in my view, best serves the policy objectives of the *CPA*.

The Motion Judge's Decision

[30] The motion judge considered the overriding principles (the policy objectives of the *CPA*, the best interests of all putative class members and fairness to the defendants) and the *VitaPharm* factors to determine who should have carriage of the proposed class proceedings. He considered the differences in the proposed class definitions between the two actions and found that the proposed class in the Meeches action was not "fundamentally flawed" (at para 37), as argued by the plaintiffs in the Thompson action, nor

did it intentionally exclude others with a potential claim regarding "the 60's scoop". The motion judge was aware that proposed members of the Thompson class could potentially be excluded from the proposed class proceedings because the definition of the proposed class members in the Meeches action is narrower. However, he examined the requirements for certification in section 4 of the *CPA*, and he noted that the issue of class definition will be considered more carefully at the certification hearing.

[31] The motion judge also considered the differences in the causes of action and the defendants named in the two claims. He found that the Thompson action includes a number of causes of action, some of which were "novel and potentially problematic" and which would "not serve to secure the just, most expeditious and least expensive determination of the proposed class proceeding" (at para 30). The motion judge preferred the theory of the Meeches claim because of its narrower focus and its fewer defendants. The motion judge was of the view that the prospects for certification of the Meeches action were greater than the Thompson action because of its narrower focus and because it was based on an action which had already been certified in Ontario. After conducting a qualitative analysis, the motion judge determined that, "the best interests of the putative class members while ensuring fairness to the defendants favours the approach adopted in the Meeches action" (at para 34).

[32] The motion judge addressed the suitability of the proposed representative plaintiffs in both actions and found this to be a neutral factor in his analysis. He also considered the work done in each of the two actions and determined that both actions were at relatively the same state of preparation. However, the motion judge expressed concern about the

seven-year delay from the time the first Thompson action was filed in 2009 until the request for a case management conference was made in 2016. He found that there was no reasonable explanation for the delay and that the delay was "not in the best interests of the putative class members and [was] inconsistent with the requirements of the *CPA*" (at para 46).

[33] The motion judge gave little, if any, weight to the fact that the Thompson action was filed before the Meeches action, particularly in light of the failure to advance the Thompson action in a timely manner. Finally, he found that, "the knowledge, expertise, experience and resources of [counsel for the Meeches action] tips the balance slightly in their favour" (at para 56).

Positions of the Parties

Position of the Plaintiffs in the Thompson Action

[34] The plaintiffs in the Thompson action argue that the motion judge determined that the class definition in the Meeches action was deficient (as evidenced by the order granting leave to amend the statement of claim to include as many persons as possible) and that he erred by considering how the pleadings could be amended to broaden the class, rather than on the basis of the record. They also argue that the class definition in the Meeches action is too narrow and that it is incapable of being expanded to include all of the members of the putative class in the Thompson action.

[35] They assert that the motion judge went too far in assessing the merits of each cause of action and that a "simpler and leaner" claim is not a basis to prefer the Meeches action.

[36] Finally, the plaintiffs in the Thompson action submit that the motion judge improperly relied on the statement of claim in the absence of any evidence regarding the suitability of the plaintiffs in the Meeches action as representative plaintiffs when deciding the motion; that he should not have determined carriage prior to the certification hearing; and that he erred by taking fairness to the defendants into account and by weighing criteria relevant to certification on the carriage motion.

Position of the Plaintiffs in the Meeches Action

[37] The plaintiffs in the Meeches action argue that the decision of the motion judge is a highly discretionary decision in the case management context and that it is entitled to considerable deference, particularly in this case where the law and the factors governing a carriage motion were not in dispute. They argue that the motion judge properly applied the two over-arching considerations of the best interests of the class and fairness to the defendants and ultimately decided the carriage motion on the basis of the key factors relevant to these proceedings.

Positions of Canada and Manitoba

[38] Canada did not submit argument at the appeal.

[39] Manitoba argues that the motion judge did not commit palpable and overriding error in determining the issue of carriage prior to certification.

Standard of Review

[40] The decision of the motion judge granting carriage of the action to

the plaintiffs in the Thompson action involved a weighing and balancing of factors and the management of the proceedings and is, therefore, a discretionary decision. Such a discretionary decision is entitled to deference unless the motion judge erred in principle by misdirecting himself on the law or the facts or his decision was so clearly wrong as to amount to an injustice. See *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 22-28; and *Soldier v Canada (Attorney General)*, 2009 MBCA 12 at paras 24-25.

[41] The parties agree that the motion judge considered the correct law. The issue on appeal is whether the motion judge committed palpable and overriding error in the application of the law to the facts, in weighing the applicable factors, or whether the decision was so clearly wrong as to amount to an injustice.

Analysis

[42] The motion judge reviewed both proposed class proceedings including the class definitions, the causes of action and the remedies sought. He considered the applicable legislation and case law and found that determining the carriage motion prior to certification was in the best interests of the putative class, fair to the defendants and consistent with the policy objectives of the *CPA* of access to justice and judicial economy.

[43] The motion judge relied on the *VitaPharm* factors, as expanded in *Smith* and explained in *Setterington*, *Locking* and *Joel*. He found that the nature and scope of the causes of action, the case theories, the state of each action including the seven-year delay in the Thompson action, the resources and experience of counsel and the prospects of certification, when considered in the context of the overriding principle of determining what is

in the best interests of the putative class members having regard to the policy objectives of the *CPA* and fairness to the defendants, favoured granting carriage to the Meeches action (see paras 20, 28, 34, 38, 56). He also found that allowing both actions to proceed to a certification hearing would "unnecessarily complicate the process . . . and would not be in the best interests of the putative class" (at para 61).

[44] In reaching these conclusions, the motion judge considered the Ontario Superior Court decision in *Brown v Canada (Attorney General)*, 2013 ONSC 5637, where a more focussed claim, similar to the Meeches claim, was certified and the certification order was upheld on appeal. See *Brown v Canada (Attorney General)*, 2014 ONSC 6967.

[45] While the plaintiffs in the Thompson action allege that the motion judge erred, in my view, they have not demonstrated any error in principle or palpable and overriding error that would allow this Court to intervene, nor have they demonstrated that the order is unjust. There are, however, three grounds of appeal which warrant further comment.

1. Exclusion of Class Members

[46] The primary focus of the argument of the plaintiffs in the Thompson action was protection of the class. The motion judge's order prevents the plaintiffs in the Thompson action from advancing a class proceeding on the facts pled in the Meeches action without leave. The plaintiffs in the Thompson action argue that the class in the Meeches action is too narrow because it focusses only on children who were apprehended pursuant to the Canada-Manitoba Child Welfare Agreement dated September 2, 1966 (Agreement) and that there were children who were

apprehended outside of that Agreement. They argue that the motion judge improperly minimized "the single most important distinction between Meeches and Thompson" and that the motion judge ought to have preferred the Thompson action based on class definition.

[47] Even though certification of the Meeches claim, with the existing class definition, will result in the exclusion of individuals who fall within the class definition in the Thompson action, they will not be deprived of access to justice, but they will be required to advance individual claims. The motion judge was cognizant of this issue and, while it is regrettable that there may be individuals who are not included in the putative class proceeding, the motion judge's weighing of this factor is entitled to deference.

2. Manitoba as a Defendant

[48] As noted previously, the Thompson claim includes Manitoba as a defendant whereas the Meeches claim does not. While this may be surprising in the sense that Manitoba was a party to the agreement that forms the basis of the Meeches action, and it was Manitoba Children's Aid Societies which actually removed children from their homes and placed them with families "who did not raise the children in accordance with the Aboriginal person's customs, traditions, and practices", this argument was also considered by the motion judge. On this point, the motion judge said (at para 38):

> However, the possible cause of action based on the manner in which Manitoba implemented the placement of Aboriginal children during the relevant time is difficult to discern on a review of the statement of claim in the Thompson action. Although I am not making a determination on the issue at this

> stage, I have concern that the possible cause of action alleged against Manitoba based on an alleged fiduciary duty owed by Manitoba and an alleged breach of that duty are vague and not clearly pled.

[49] In reaching his decision that, "a more narrowly construed claim against fewer defendants will increase the likelihood of certification and facilitate the expeditious prosecution of the claims of the proposed class members" (at para 40), the motion judge relied on the *Setterington* decision where the Court said that, "The mere inclusion of a multitude of defendants is not sufficient to provide a basis for the preference of one action over another" (at para 18).

[50] The plaintiffs in the Meeches action relied on the pleadings in a similar class action in Ontario. The representative plaintiff in *Brown v Canada (Attorney General)*, 2017 ONSC 251, named the AG as the sole defendant in its action and recently succeeded on a motion for summary judgment. The Court found the AG liable for breaching a common-law duty of care owed to the class members (see para 86). In finding that the AG breached the Canada-Ontario Welfare Services Agreement, the Court said, "One could argue that it was Ontario that breached sections 2(1) and (2) of the Agreement because it proceeded to extend the named provincial programs to the reserves even though Canada had not consulted any Indian Band" (at para 38). However, the Court made no finding in terms of Ontario's liability.

[51] In my view, the motion judge was alive to the differences between the two actions regarding the defendants. The plaintiffs in the Thompson action have not demonstrated that he erred in this regard and his decision is entitled to deference.

3. Suitability of the Proposed Representative Plaintiffs

[52] The motion judge found that the proposed representative plaintiffs in both actions may be suitable representative plaintiffs in the proceeding and that, "there is nothing to indicate that the plaintiffs in the Meeches action would do anything other than fairly and adequately represent the interests of the proposed class" (at para 51). The plaintiffs in the Thompson action argue that the motion judge improperly made his decision on the basis of the pleadings rather than evidence. While there were no affidavits from the proposed representative plaintiffs in the Meeches action (as there were for the Thompson action and as one might expect), the motion judge did consider an affidavit from a lawyer from the law firm representing the plaintiffs in the Meeches action in addition to the statement of claim. While minimal and of a hearsay nature, the affidavit did provide some evidence of the suitability of Meeches and Garnett as representative plaintiffs and this ground of appeal does not require appellate intervention.

Costs

[53] The plaintiffs in the Meeches action seek costs in the amount of $25,000 against the law firm representing the plaintiffs in the Thompson action on the basis that section 37(2) of the *CPA* provides that the court has limited discretion to award costs regarding an appeal arising from a class proceeding. They argue that the appeal was unnecessary because the motion judge did not extinguish the ability of the plaintiffs in the Thompson action to proceed with their own claims, that the appeal has increased the costs to the parties and that the appeal has further delayed the proceedings. They also argue that an order for costs ought to serve as a disincentive to future appeals of carriage decisions. The plaintiffs in the Thompson action argue

in response that costs in these circumstances would be punitive and would have a chilling effect on access to justice.

[54] In my view, section 37 of the *CPA* informs the issue of costs in this case, even though the proceeding has not yet been certified, because this is essentially an "appeal arising from a class proceeding". As has already been explained, a carriage motion is a "stage of a class proceeding" to which class proceedings legislation applies.

[55] I am not persuaded that costs should be awarded to the plaintiffs in the Meeches action. Sections 37(1) and 37(2) make it clear that costs should not be awarded absent vexatious, frivolous or abusive conduct, an improper purpose or exceptional circumstances, none of which, in my view, were demonstrated in this case.

Conclusion

[56] In reaching his decision, the motion judge considered the arguments before him and weighed the appropriate factors. The issue is whether the motion judge erred in principle, committed palpable and overriding error in applying and weighing the relevant factors or whether the decision is unjust. In my view, the motion judge committed no error in principle and his decision is certainly not so clearly wrong as to amount to an injustice. I would therefore dismiss the appeal without costs.

leMaistre JA

I agree: Hamilton JA

I agree: Burnett JA

APPENDIX "A"

The Class Proceedings Act, CCSM c C130

PART 1
INTRODUCTORY PROVISIONS

Definitions

1 In this Act,

"certification order" means an order certifying a proceeding as a class proceeding;

"class proceeding" means a proceeding certified as a class proceeding under Part 2;

"common issues" means

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"court", except in sections 36 and 37, means the Court of Queen's Bench;

"defendant" includes a respondent;

"party" means a representative plaintiff or a defendant but does not include individual members of a class or of a subclass;

"plaintiff" includes an applicant;

"representative plaintiff" means a person appointed as a representative plaintiff under section 2, 3 or 6.

PART 2
CERTIFICATION

Member of class may commence proceeding

2(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of that class.

Motion for certification by plaintiff

2(2) A person who commences a proceeding under subsection (1) must make a motion to the court for an order

(a) certifying the proceeding as a class proceeding; and

(b) appointing a representative plaintiff.

Timing of motion
2(3) A motion under subsection (2) must be made

(a) within 90 days after the close of pleadings or the noting of a defendant in default; or

(b) with leave of the court, at any other time.

Representative plaintiff not from class
2(4) The court may appoint a person who is not a member of the class as the representative plaintiff only if it is necessary to do so in order to avoid a substantial injustice to the class.

Certification of class proceeding
4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if

(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 a common issue, whether or not the common issue predominates 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; and

(e) there is a person who is prepared to act as the representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

(iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

Court may determine conduct of proceeding
12 The court may at any time make any order that it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

Court may stay proceeding
13 The court may at any time stay or sever a proceeding related to the class proceeding on terms the court considers appropriate.

Appeals
36(1) A representative plaintiff or defendant may appeal without leave to The Court of Appeal from

(a) a judgment on common issues; or

(b) an order under Division 2 of this Part, other than an order that determines individual claims made by class or subclass members.

Leave to appeal
36(2) With leave of a justice of The Court of Appeal, a representative plaintiff or a defendant may appeal to that court from any order

(a) determining an individual claim made by a class or subclass member; or

(b) dismissing an individual claim for monetary relief made by a class or subclass member.

Appeal by class member
36(3) With leave of a justice of The Court of Appeal, a class or subclass member may appeal to that court from any order

(a) determining an individual claim made by that class or subclass member; or

(b) dismissing an individual claim for monetary relief made by that class or subclass member.

Appeal of certification decision
36(4) With leave of a justice of The Court of Appeal, a representative plaintiff or defendant may appeal to The Court of Appeal from

(a) an order certifying or refusing to certify a proceeding as a class proceeding; or

(b) an order decertifying a proceeding.

Right of class member to appeal
36(5) If a representative plaintiff does not appeal or seek leave to appeal as permitted by subsection (1) or (4) within the time limit for bringing an appeal set

under the *Court of Appeal Rules*, or if a representative plaintiff abandons an appeal under subsection (1) or (4), any member of the class or subclass for which the representative plaintiff had been appointed may make a motion to a justice of The Court of Appeal for leave to act as the representative plaintiff for the purpose of subsection (1) or (4).

Deadline for class member
36(6) A motion by a class or subclass member for leave to act as the representative plaintiff under subsection (5) must be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the justice may order.

Extension of time limit to appeal
36(7) If leave has been granted to a member of a class or subclass under subsection (5), the time limit for that person to appeal or seek leave to appeal is extended for 30 days after the date leave is extended by The Court of Appeal.

PART 5
COSTS, FEES AND DISBURSEMENTS

Costs
37(1) Subject to this section, no costs may be awarded against any party with respect to any stage of a class proceeding, including a motion for certification under subsection 2(2) or section 3, or any appeal arising from a class proceeding.

Considerations re costs
37(2) The Court of Queen's Bench or The Court of Appeal may only award costs to a party in respect of a motion for certification or in respect of all or any part of a class proceeding or an appeal arising from a class proceeding if

(a) the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party;

(b) the court considers that an improper or unnecessary motion or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or

(c) the court considers that there are exceptional circumstances that make it unjust to deprive another party of costs.

Assessment of costs
37(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

Class members not liable for costs
37(4) Class members, other than a person appointed as a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

The Court of Queen's Bench Act, CCSM c C280

Stay of proceedings
38 The court, on its own initiative or on motion by a person, whether or not a party, may stay a proceeding on such terms as are considered just.

Appeal to Court of Appeal
89 Unless otherwise provided by statute,

(a) an order made by the court may be set aside in whole or in part or varied; and

(b) a verdict of a jury may be set aside in whole or in part

on appeal to the Court of Appeal.

Multiplicity of proceedings
94 As far as possible, a multiplicity of proceedings shall be avoided.

Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88

General principle
1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Order
6.01(1) Where two or more proceedings are pending in which,

(a) there is a question of law or fact in common;

(b) the relief claimed arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule;

the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

Directions
6.01(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay.