WeirFoulds LLP

Case Law Update: Taylor v Canada (Attorney General)

March 30, 2011

2011 ONCA 181 (Released March 4, 2011)

Civil Procedure Class Proceedings Regulatory Negligence Proximity

The plaintiff was a representative of a class of persons who claimed to have suffered injury as a result of the implantation of temporomandibular joints in their jaws. The claim was brought against the Attorney General of Canada for the alleged negligence of Health Canada in the exercise of its regulatory duties, statutory powers and responsibilities.

In 2007, the class action was certified by Mr. Justice Cullity, who found that there was sufficient proximity between the parties for a finding of regulatory negligence. In doing so, Cullity J. relied on *Sauer v Canada (Attorney General)*, [2007] OJ No 2443 (CA). In *Sauer*, the court found that government regulators of cattle feed owed a *prima facie* duty of care to commercial cattle farmers.

However, in 2008 the Court of Appeal dismissed appeals in *Drady v Canada (Minister of Health)* (2008), 300 DLR (4th) 443 (Ont CA), and *Attis v Canada (Minister of Health)* (2008), 93 OR (3d) 35 (CA). In dismissing the appeals, the court found that there was no proximity between the parties. It distinguished *Sauer* as having found proximity on the basis of many public representations by the defendant. It found that where there are no such public representations, there is no proximity between the parties. Leave to appeal both decisions was refused by the Supreme Court of Canada.

In light of the decisions in *Drady* and *Attis*, the defendant in *Taylor* moved for a reconsideration of Cullity J.'s certification of the class proceeding. On reconsideration, the plaintiff's statement of claim was struck with leave to amend. A motion to amend the statement of claim was later granted.

To further complicate matters, after the dismissal of the appeals in *Drady* and *Attis*, but prior to the striking of the statement of claim in *Taylor*, the British Columbia Court of Appeal upheld a pleading against the federal crown for negligent misrepresentation and negligent development of tobacco strains for mild and light cigarettes in *Knight v Imperial Tobacco Canada Ltd* (2009), 313 DLR (4th) 695 (BCCA), and in doing so, relied on Cullity J.'s finding that proximity had been established in *Taylor*.

In *Taylor*, rather than appeal the decision allowing the amendments to the plaintiff's statement of claim to the Divisional Court, the parties chose to bring a joint motion to the Court of Appeal to request that the issue be settled as a "special case" pursuant to Rules 22.01 and 22.03 of the *Rules of Civil Procedure*.

Mr. Justice Armstrong of the Court of Appeal cautioned that it will be a "rare case" where the Court of Appeal will allow parties to leapfrog the Divisional Court. However, he agreed with the parties that the case before him was in fact one of the rare cases in which it was appropriate to do so. He found that the increased cost and delay of moving the case through the Divisional Court, and the inevitability that it would end up before the Court of Appeal in any event, favoured the exercise of the court's discretion to allow the motion. Justice Armstrong was also persuaded by the importance of the legal issue involved, and the fact that the motion was on

consent of both parties. The motion was allowed.

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